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Subject: Written Comment: Title IX Public Hearing and Application of Executive Orders 13988 and 14021

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Written Comment: Title IX Public Hearing and application of Executive Orders 13988 and 14021

As the U.S. Department of Education's Office for Civil Rights (OCR) considers its responsibility to implement President Biden's "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" ([E.O. 13988](#)) and "Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity" ([E.O. 14021](#)), **I urge you to provide guidance affirming the permissibility of sex-based classification in certain narrowly drawn circumstances** described in [Title IX of the Education Amendments of 1972](#) (20 U.S.C. § 1681) and its implementing regulations.

As a lesbian, I support the extension of Title IX's protections to claims of discrimination on the basis of sexual orientation and transgender status. I also agree, as eloquently stated in E.O. 14021:

[A]ll students should be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity.

[Bostock v. Clayton County](#) (140 S.Ct. 1731 (2020)), the primary legal authority for E.O. 13988, clearly demonstrates how transgender people can be protected from discrimination without disturbing single sex classifications whose application and enforcement do *not* constitute discriminatory actions under existing law.

Gender identity is not equivalent to nor a substitute for sex

Bostock relies explicitly on biological sex for its expansion of protection to LGBT persons. The Supreme Court was careful not to conflate sexual orientation or transgender status with sex, stating: "We agree that homosexuality and transgender status are distinct concepts from sex" (140 S.Ct. at 1746-47). According to *Bostock*, then, neither transgender status nor sexual orientation may operate as legal substitutes for the concept of sex as "biological distinctions between male and female" (140 S.Ct. at 1739).

It is therefore perfectly consistent to protect students from discrimination on the basis of transgender status or gender identity and sexual orientation while simultaneously recognizing biological sex where sex is important.

Indeed, Title IX and its implementing regulations stipulate that **sometimes sex matters**. Existing statutory and regulatory provisions therefore permit schools to maintain single-sex admissions policies ([20 U.S.C. § 1681\(a\)\(1\)](#)), single sex housing ([34 C.F.R. § 106.32\(b\)](#)), athletic scholarships ([34 C.F.R. § 106.37\(c\)](#)), gym and health classes ([34 C.F.R. § 106.34\(b\)](#)), sports teams ([34 C.F.R. § 106.41\(b\)](#)), and locker rooms and bathrooms ([34 C.F.R. § 106.33](#)).

Transgender students and sex-based classification

The extension of *Bostock's* reasoning to Title IX, via E.O. 13988, means that transgender and gender non-conforming students are entitled to legal protection from harmful sex-based discrimination in all educational environments and opportunities. This protection should not and *does not* require denial of biological sex or the displacement of sex as a valid means of classification in contexts where sex matters.

Single sex classification is sometimes reasonably necessary to ensure fairness, privacy, equality, safety, and/or dignity. **Girls and women have valid legal interests in the continued legal permissibility of Title IX's sex-based classifications in educational settings including sports teams,ⁱⁱⁱ locker rooms, bathrooms, and student housing.**

Transgender and non-binary identifying students must be given equal educational access *on the same basis as their peers*. Where educational opportunities are separated by sex to protect legitimate rights of fairness, privacy, or equality, transgender students must *not* be assessed by a different yardstick: gender identity. Individuals operating or speaking as if gender identity can *actually* change sex is one thing, but institutionally moving these goal posts for the benefit of some students is not fair to the remaining students as it predictably deprives them of both opportunities and legal rights.

Female students and sex-based classification

Much of athletic competition makes the importance of sex, the “biological distinctions between male and female,” undeniable. As highlighted in ongoing litigation such as *Soule v. Connecticut Association of Schools*, misinterpretation of *sex-separated* sporting competition as *gender-identity-separated* competition has caused the unfair displacement of female athletes by male transgender athletes from titled rankings in the female sports category. This is the inevitable result of insufficiently mitigating testosterone advantage in the male body.ⁱⁱⁱ

These losses are not about mere bragging rights or personal validation; there is a direct relationship between athletic accomplishment and access to both educational opportunity and scholarship funding. The existing discrimination gap between male and female athletic scholarship awards is estimated at a shocking \$1 billion per year, according to Champion Women's 2020 analysis.ⁱⁱⁱⁱ The cost of displacing sex with the concept of gender identity in Title IX's implementing regulations is also the displacement of women and girls from opportunities that are already more readily available to male students. It's simply not fair.

Female students are the intended beneficiaries of Title IX

Title IX was originally passed with the express purpose of providing women and girls with educational opportunities previously denied to them and offered only to male people. Legislative intent to equalize opportunities between male and female people remains an unrealized dream. **As OCR considers changes to and new interpretations of Title IX's regulations, female people must be remembered as the designated beneficiaries of the legislation.**

Historic inequities between male and female students continue today

Sexual assault of female students by male students in educational environments is ubiquitous across the nation.^{iv} Gender-balancing has been devised to artificially cap female enrollments in college programs.^v As discussed above, women's athletic teams and opportunities remain underfunded compared to male athletic teams and opportunities.^{vi} None of this can be resolved, and may even be exacerbated, by failing to distinguish between sex and gender identity in official interpretations of Title IX's regulations.

Protecting all students requires fairness for *all* students

Female students and athletes cannot access Title IX's guarantee of fairness, equality, and safety if the loss of our long-established interests in sex-based classification is trivialized as a mere

“discomfort.”^[viii] Yet this is exactly how the 2016 *Dear Colleague Letter: Transgender Students* characterized and preemptively dismissed other students’ and parents’ predictable objections to its new policy:

A school’s Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access [by gender identity] to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns. As is consistently recognized in civil rights cases, the desire to accommodate others’ discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

This guidance required all educational institutions to recognize gender identity as synonymous with, and even as a replacement for, sex, while failing to account for circumstances where sex matters. This inflexible and unyielding instruction, should it be reinstated, would clearly be an overreach of *Bostock’s* holding and at odds with current Title IX regulations.

In summary

The Department of Education’s implementation of E.O. 13988 and E.O. 14021 to Title IX must extend *Bostock’s* holding consistent with its recognition that sometimes sex matters. In doing so, the Department must also remember that female students are the intended beneficiaries of Title IX’s legal protections. ***Bostock’s* groundbreaking guarantee of equal rights to gay, lesbian, and transgender students includes responsibly balancing the interests of all impacted parties and honoring existing single sex classifications.** This can be fairly accomplished by providing guidance that prohibits discrimination on the basis of transgender status and sexual orientation while affirming the legitimacy of single sex classifications in Title IX where sex matters.

Thank you,
Elizabeth Hungerford

^[i] Doriane Lambelet Coleman et al., Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule, 27 *Duke Journal of Gender Law & Policy* 69-134 (2020)

Available at: <https://scholarship.law.duke.edu/djglp/vol27/iss1/7>

^[ii] See: Hilton, Emma & Lundberg, Tommy. (2021). Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage. *Sports Medicine*. 51. 1-16. 10.1007/s40279-020-01389-3. See also: Roberts TA, Smalley J, Ahrendt D. (2021). Effect of gender affirming hormones on athletic performance in transwomen and transmen: implications for sporting organisations and legislators. *British Journal of Sports Medicine*; 55:577-583.

^[iii] See Champion Women’s full data set here: https://docs.google.com/spreadsheets/d/1uBAh6ZVSelfXC-WCZi18MUIWhsFEpkMm7iL_VXcD8pg/edit?hl=en&hl=en&ui=2&chrome=false&rm=demo#gid=137472081.

Champion Women’s findings summarized here: <https://titleixschools.com/wp-content/uploads/2020/06/For-Athletes-1.pdf>

^[iv] National Women’s Law Center, Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 3 (2017). See: <https://nwlc.org/resources/stopping-schoolpushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

^[v] Shayna Medley, Note, “Gender Balancing” as Sex Discrimination in College Admissions, 51 *HARV. C.R.-C.L. L. REV.* 537, 542–43 (2016).

^[vi] Women’s Sports Foundation, Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women (2020), See: https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-andopportunities-in-sports-for-girls-and-women. See also: <https://msmagazine.com/2021/01/28/title-ix-college-students-lawsuits-fight-sex-discrimination-women-sports/>

^[vii] The Department of Justice’s Civil Rights Division and the Department of Education’s Office for Civil Rights’ *Dear Colleague Letter on Transgender Students*, 2016, now rescinded. See: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>