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To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing

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My name is Julie and I am a citizen of (b)(6). I am writing today because I am a woman (a human female) and I have concerns with the considerations to replace the category of biological sex with "gender identity," as this would affect many things in my life and the lives of all women and girls in my family, particularly for girls in school. I would like for my female cousins to be able to enjoy and participate in fair sports, and to have guaranteed privacy from male peers in the locker rooms and showers. 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.

I support the extension of Title IX's protections to claims of discrimination on the basis of sexual orientation and transgender status. I agree, as 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 a substitute for or equivalent to 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](#)).

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,^[i] 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.

Biological differences between males and females are undeniable. 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, as evidenced by current litigation such as Soule v. Connecticut Association of Schools. This is the inevitable result of insufficiently mitigating testosterone advantage in the male body.^[ii]

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 \$1 billion per year, according to Champion Women’s 2020 analysis.^[iii] 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 easily available to male students**. It’s simply not fair, and a continuation of the discrimination against women and girls that Title IX was intended to redress.

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.**

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] **This historic and continued inequality between men and women cannot be redressed by ignoring the basis of that inequality.**

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."^[vii] 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 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, at odds with current Title IX regulations. It goes both ways- the desire to accommodate trans students' discomfort cannot justify a policy that disadvantages a particular class of students (females).

To summarize, 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.

[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](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>