From: Kyle Burkhart
Sent: Fri, 11 Jun 2021 20:52:37 +0000
To: T9PublicHearing
Cc: Anthony Picarello;Dan Balserak
Subject: Written Comments: Title IX Public Hearing (Ordinary Meaning of "Sex"; Religious Exemption)
Attachments: USCCB Written Comments - Title IX Public Hearing (Ordinary Meaning of "Sex"; Religious Exemption).pdf

Dear Sir or Madam:

Please see the attached comments on behalf of the **U.S. Conference of Catholic Bishops**.

Thank you,
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Submitted by E-mail

June 11, 2021

Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Subj: Title IX Public Hearing: Ordinary Meaning of "Sex"; Religious Exemption

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), we submit the following comments in response to the U.S. Department of Education's request for information, pursuant to Executive Orders 13988 and 14021, for the purposes of improving enforcement of Title IX of the Education Amendments of 1972.

Our comments are limited to two aspects of the Department's regulations implementing Title IX: the meaning of "sex," and the exemption for religious institutions. In short, the Department should not depart from its correct conclusion on January 8, 2021, that "sex" in Title IX refers to biological sex, male or female; and any revisions to or applications of the Department's Title IX regulations must not narrow the regulations' existing exemption for religious institutions, which is mandated by statute.

1. *The Supreme Court's decision in* Bostock *did not change the meaning of "sex" in Title IX.*

In a January 8, 2021, memo from the Department's Office of General Counsel (OGC) to the Acting Assistant Secretary for the Office for Civil Rights regarding the application of *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731 (2020), to Title IX, OGC concluded that "we must give effect to the ordinary public meaning at the time of enactment and construe the term 'sex' in Title IX to mean biological sex, male or female." For its part, the *Bostock* Court itself assumed such a meaning in Title VII. *Bostock*, 140 S. Ct. at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female"). Further, while OGC found that, under *Bostock*, "[d]epending on the facts, complaints involving discrimination on the basis of transgender status or homosexuality might fall within the scope of Title IX's nondiscrimination mandate because they allege sex discrimination," OGC "emphasize[d] that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person's biological sex, male or female" (emphasis in original).

Subsequently, in a January 17, 2021, memo to the Department of Justice's Civil Rights Division, Acting Assistant Attorney General Daukas came to a similar conclusion: "the *Bostock* reasoning may carry over [to Title IX] in some respects," but "where the physiological differences of the sexes *are* relevant to education programs or activities, sex may be taken into account" (emphasis in original). By this reasoning, finding that discrimination on the basis of sexual orientation or transgender status may be discrimination on the basis of sex would not then mean that such discrimination would be unlawful in the programs or activities under Title IX, where distinctions based on biological sex are both lawful and required.

We disagree with the conclusion that *Bostock*'s reasoning carries over to Title IX at all. The express allowances in Title IX and its implementing regulations for covered entities to draw distinctions based on sex provide sufficient indication that Title IX is different – too different to presume it is governed by the logic of a decision that disavowed any intent to "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Bostock,* 140 S. Ct. at 1753. The Department should not interpret Title IX to permit claims of discrimination on the basis of sexual orientation or transgender status to be regarded as sex discrimination, regardless of the facts of the case. But in no event should the Department go further than the boundaries of the January 8 and January 17 memos, which appropriately recognize that there are real and meaningful distinctions between men and women. To do otherwise would exceed *Bostock* itself, which, for example, explicitly did not address single-sex spaces, *see id.*, and would potentially effect sex discrimination, such as through reducing opportunities for females in women's athletic scholarships by introducing competition from males based on transgender status.

2. *Any changes to the Department's Title IX regulations must maintain their religious exemption in full.*

The Department should retain the current regulations implementing Title IX's religious exemption, with respect to both their procedural and substantive aspects.

A) *Procedure for claiming and asserting the religious exemption*

Although under existing regulations "eligible institutions may 'claim the exemption' in advance by 'submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions . . . [that] conflict with a specific tenet of the religious organization,' 34 CFR § 106.12(b), they are not required to do so to have the benefit of it." 82 Fed. Reg. at 49,679. "No part of the statute requires that recipients receive an assurance letter from OCR, and no part of the statute suggests that a recipient must be publicly on the record as a religious institution claiming a religious exemption before it may invoke a religious exemption in the context of Title IX." 86 Fed. Reg. at 30,475. The Department should not seek to impose any procedural hurdle that would operate to limit the protections that Congress provided for religious institutions in the Title IX statute.

B) *Substantive protections secured by the religious exemption*

The Supreme Court in *Bostock* expressly observed that its ruling did not reach the question of how the newly found nondiscrimination requirements in Title VII would interact

with existing religious liberty protections like the Religious Freedom Restoration Act. *Bostock*, 140 S. Ct. at 1753–54. The January 8 OGC memo noted this aspect of the *Bostock* decision, stating that "[t]he holding in *Bostock* does not affect the statutory exemption from Title IX, 20 U.S.C. § 1681(a)(3), and its implementing regulations, 34 C.F.R. § 106.12, for an educational institution controlled by a religious organization." The Department of Justice's January 17 memo likewise noted the continued applicability of Title IX's religious exemption. There is no basis in *Bostock* or any other authority for narrowing the scope of the Title IX statute's exemption for religious educational institutions, in general or as applied to claims of discrimination on the basis of sexual orientation or transgender status.

The claims advanced in *Hunter v. U.S. Department of Education* that the Title IX religious exemption violates the Constitution are meritless. *See* Intervenors' Proposed Mot. to Dismiss, *Hunter v. U.S. Dept. of Education*, No. 6:21-cv-00474-AA (D. Or. May 13, 2021) (citing, *inter alia*, *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971)). The Department should decline any invitation to exclude claims of discrimination on the basis of sexual orientation or transgender status from the scope of the exemption.

The Department should also consider how weakening the religious exemption would harm students who attend religious schools. Reinterpreting the Title IX regulations to prohibit discrimination on the basis of sexual orientation and transgender status while weakening the Title IX religious exemption would not only coerce Catholic schools that are deemed to receive federal funding to violate their sincerely held religious beliefs on marriage and human sexuality, but would also hurt students in need who benefit from that public funding. For instance, without the protection of the religious exemption, a Catholic university that wishes to remain faithful to its beliefs could be forced to decline admission to applicants who receive Pell Grants. But Catholic education is not meant only for the affluent – for centuries, the Church has lived out its call to provide poor and underserved communities with quality education. Protections for religious freedom like the Title IX religious exemption allow Catholic schools to fulfill their mission without violating their beliefs on sexuality and marriage. Limiting the Title IX exemption could force Catholic schools to choose one or the other and could deprive disadvantaged students of educational opportunities.

Thank you for the opportunity to comment.

Sincerely,

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Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel