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Submitted via http://www.regulations.gov

Hon. Catherine Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW, 4th Floor
Washington, D.C. 20202

Re: Comment regarding 87 FR 41390,[1] pp. 41390-41579 (190 pages),
34 CFR Part 106, Docket ID ED-2021-OCR-0166
RIN: 1870-AA16
Document No.: 2022-13734

Dear Assistant Secretary Lhamon:

We write to express our opposition to the above-referenced proposed changes to regulations implementing Title IX of the Education Amendments of 1972 (Title IX). In particular, we oppose the Department's (a) efforts to gut due process protections for persons accused of sexual harassment, (b) threats to free speech posed by dramatic expansion of its definition of harassment, and (c) imposition of gender identity ideology into Title IX, in a way that would undermine the statute's language, purpose, and goals of providing equal opportunities to women.

a. <u>The Department's Proposed Changes Violate Due Process</u>.

On pain of losing federal funding, the proposed changes would pressure schools (including postsecondary institutions) to eviscerate constitutional due process protections in schools' handling of sexual assault allegations. Proposed changes include:

[1] Available at https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf.

(a) *Undercutting confrontation rights* by:[2]

i. Eliminating the current requirement that a school must provide for a live hearing with cross-examination.

ii. Letting the judge (*i.e.*, the "decisionmaker") consider hearsay statements.

iii. Requiring that the judge pre-screen all questions.

iv. Letting schools employ an inquisitorial system in which the accused's representative is not allowed to ask any questions of the witnesses against or for the accused; instead, the judge asks the questions.

(b) *Undercutting the judge's independence and objectivity*. In the proposed system, the judge can be the Title IX coordinator, despite that person's likely institutional bias for complainants and against the accused. Essentially, a college bureaucrat paid to advocate for Title IX would be able to serve as judge and jury against people accused of violating Title IX. As the current notice observes: "In 2020, the Department said it was concerned that combining the investigative and adjudicative functions in a single entity raised an unnecessary risk of bias that unjustly impacts one or both parties in Title IX grievance procedures. 85 FR 30367–69."[3] That prior reasoning was sound. Combining the roles is a bad idea that invites systemic bias against the accused.

(c) *Weakening the proof standard*. With some exceptions,[4] the proposed new rules require schools to use a preponderance of evidence standard in adjudicating what are essentially criminal charges, with high stakes for the accused such as potentially being branded a rapist and expelled from college.

Individually, courts may occasionally allow one or the other of the proposed changes. The cumulative effect of all them would be to convert schools' administrative proceedings into kangaroo courts. Public schools are required to afford adequate due process protections to the accused. The proposed new system would not do so.

b. <u>The Department's Dramatic Expansion of the Definition of Harassment Poses a Serious Threat to Free Speech</u>.

The Department's attempt to expand the scope of sexual harassment by renaming it "sex-based" harassment is so broad that it threatens free speech. The proposal itself recognizes its expansive goal:

[2] 87 FR 41502.
[3] 87 FR 41466.
[4] Schools may use a clear and convincing standard if they use a higher standard for other alleged misconduct. 87 FR 41483.

> … the scope of sex-based harassment includes bases that were not expressly covered under the term ‘‘sexual harassment’’ in current § 106.30(a), including harassment based on **sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity**.
>
> The proposed definition would also include revisions to the scope of conduct described in its second category, which addresses unwelcome conduct on the basis of sex. These proposed revisions would provide factors to consider when determining whether unwelcome sex-based conduct creates a hostile environment in a recipient's education program or activity.[5]
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> The existing regulations ban, among other things:
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> (2) unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity;[6]
>
> The proposed regulations would expand that definition to include:
>
> (2) unwelcome **sex-based** conduct **that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively**, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment);[7]

In a similar vein, an attorney rule of professional conduct seeking to prohibit attorneys from 'harassing' others was stricken as violating the First Amendment, for (among other things) viewpoint discrimination. In enjoining the rule, the court held:

> "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]hat is viewpoint discrimination: Giving offense is a viewpoint." *Matal* [*v. Tam*], 137 S. Ct. at 1763. The Supreme Court has "said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id*. (*quoting Street v. New York*, 394 U.S. 576, 592 (1969)) (*additional citations omitted*)…
>
> Similarly, Rule 8.4(g) states that it is professional misconduct for a lawyer, "in the practice of law, by words or conduct, to knowingly manifest bias or prejudice…." Pa. R.P.C. 8.4(g)

[5] 87 FR 41410 (*emphasis added*).
[6] 87 FR 41410 (*citing* 34 CFR § 106.30(a)).
[7] 87 FR 41410 (*emphasis added*).

> (*emphasis added*). While Rule 8.4(g) restricts Pennsylvania attorneys' ability to express bias or prejudice "based upon race, sex, gender identity or expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socioeconomic status," it allows Pennsylvania attorneys to express tolerance or respect based on these same statuses. *Id*. Defendants have "singled out a subset of message," those words that manifest bias or prejudice, "for disfavor based on the views expressed." *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring) (*citation omitted*).

Greenberg v. Haggerty, 491 F. Supp.3d 12, 30-31 (E.D. Pa. 2020).

The proposed rulemaking's excessively broad expansion of "training" also suggests viewpoint discrimination. Current regulations mandate how-to guidance for those directly involved in overseeing Title IX (*i.e.*, Title IX coordinators, investigators, and decision-makers) on the definition of sexual harassment in § 106.30, as well as in how to conduct an investigation, grievance process, and other basics.[8] The proposed regulations try to leverage "training" into a "require[ment] that **all employees** be trained on the recipient's **obligation to address sex discrimination** in its education program or activity, [and] the **scope of conduct that constitutes sex discrimination**, including the **proposed definition of ''sex-based harassment."** The language suggests that the Department's actual goal is to impose its own ideology of what it deems proper sexual relationships and sexual conduct on schools.[9]

Our organization, Legal Insurrection Foundation, regularly tracks speech suppression at American universities, as well is in primary and secondary schools. Much of it is premised on the idea that there is only one acceptable opinion about matters, such as gender identity, and that even voicing a different opinion qualifies as "harassment" or creates a "hostile environment." Notwithstanding the proposed rulemaking's assertion that the proposed revision is consistent with the First Amendment,[10] the Biden Administration's decision to extend Title IX regulation to matters of opinion, and to expand its analysis to include **subjective** evaluation, exponentially increase the danger that speech protected by the First Amendment will be suppressed.

c. <u>The Department's Demand to Recognize Gender Identity Contrary to Physiological Sex Exceeds Statutory Authority and Violates Rights of Women</u>.

It is far outside the scope of the U.S. Department of Education's mandate to force the current administration's ideological viewpoint about "gender identity" on schools, in the absence of legislative authority and, frankly, in contradiction to the principles of Title IX itself. Nevertheless, the current proposal tries to do just that. It demands that schools treat persons claiming to "identify" as a boy/man or girl/woman regardless of physiology, based on how they claim to "feel":

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[8] 34 CFR § 106.45(b)(1)(iii).
[9] 87 FR 41428; 34 CFR § 106.8(d)(1) (*emphasis added*). *See also* R. Shep Melnick, The Strange Evolution of Title IX, *National Affairs* (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix.
[10] 87 FR 41414-15.

> a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from **participating in an education program or activity consistent with their gender identity**;[11]

Title IX is credited with forcing schools to create opportunities for women to compete in sports. To effectuate Title IX's mandate, schools created separate teams for women.

The well-publicized case of Lia Thomas, formerly known as Will Thomas, demonstrates the soundness of this policy. Thomas has the body of a man, even the body of a male athlete who went through puberty as a man and competed on a men's college swim team. The additional size and muscle mass give Thomas an unfair advantage in competing against biological women.[12] Title IX no more requires the University of Pennsylvania to permit Thomas to compete on its women's swim team than it would require the school to let any male student compete on any of its women's teams.

Congress may in the future explore expanding Title IX to require separate opportunities for transgender individuals, or to require schools to provide separate bathrooms for them. That would be expensive and burdensome, and in our view would not be appropriate for DOE to order without Congressional authorization, under the major question doctrine.[13]

Conclusion

For the reasons stated above, we urge the Department not to move forward with its proposed revisions to Title IX regulations.

Respectfully,

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President

Johanna E. Markind, Esq.
Research Editor and Counsel

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[11] 87 FR 41391 (*emphasis added*).
[12] Eric Spitznagel, Trans women athletes have unfair advantage over those born female: testosterone, *New York Post*, (July 10, 2021), https://nypost.com/2021/07/10/trans-women-athletes-have-unfair-advantage-over-those-born-female/; Dana Kennedy, Moms fight for female athletes amid Lia Thomas controversy, *New York Post* (April 2, 2022), https://nypost.com/2022/04/02/moms-fight-for-female-athletes-amid-lia-thomas-controversy/.
[13] *West Virginia v. EPA*, 597 U.S. __, 142 S. Ct. 2587 (2022).