UNITED STATES COMMISSION ON CIVIL RIGHTS

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I am submitting this comment as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.

Processes for Adjudicating Claims of Sex Discrimination

My comments regarding procedures for adjudicating claims of sex discrimination are directed only toward cases at the college and university level. There likely are good arguments for having different procedures at the elementary and secondary school level.

Eleven years ago, the Office for Civil Rights at the Department of Education issued a Dear Colleague Letter in which it repeated a claim that "about 1 in 5 women are victims of completed or attempted sexual assault while in college."[1] Subsequent research has cast doubt on that claim.[2] The 2011 Dear Colleague Letter "explains schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence."[3]

In 2014, the Office for Civil Rights at the Department of Education issued another guidance document that explained how it expected schools to handle allegations of sexual harassment and sexual assault.[4] This document provided the framework for how schools investigated and sanctioned students and employees for alleged sexual harassment or sexual assault from 2014 until at least 2017, when the guidance document was withdrawn. The proposed regulations would largely restore the provisions of the 2014 guidance. We have thus had ample time to evaluate the effects of the 2014 guidance. A number of cases challenging universities' application of the Title IX process have worked their way through the federal court system. These cases suggest that the 2014 guidance was deeply flawed and has greatly contributed to biased investigations that reach erroneous outcomes. Therefore, the Department should withdraw these proposed regulations.

In the preamble, the Department states that it predicted the 2020 regulations would lead to local education agencies (LEAs) conducting 1.29 fewer Title IX investigations per year and institutions of higher education (IHEs) conducting 2.84 fewer Title IX investigations.[5] The

[1] Russlyn Ali, Assistant Secretary for Civil Rights, "Dear Colleague Letter," Office for Civil Rights, Department of Education, Apr. 4, 2011, at 2, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[2] Sofi Sinozich and Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013,* Bureau of Justice Statistics, December 2014, https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf.
[3] Russlyn Ali, Assistant Secretary for Civil Rights, "Dear Colleague Letter," Office for Civil Rights, Department of Education, Apr. 4, 2011, at 2, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[4] Catherine E. Lhamon, Assistant Secretary for Civil Rights, "Questions and Answers on Title IX and Sexual Violence," Office for Civil Rights, Department of Education, Apr. 29, 2014, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[5] 87 FR 41549.

Department predicts that approximately 90 percent of LEAs and 50 percent of IHEs will see an increase in the number of investigations under the proposed rules.[6] Even those IHEs that do not see an increase in the number of investigations (because the Department believes that IHEs re-routed many complaints that did not meet the standards for a Title IX complaint under the 2020 regulations to other disciplinary proceedings) can expect to incur additional recordkeeping requirements.[7]

There are two points to be made here. First, the Department's goal with the proposed regulations is apparently to increase the number of Title IX complaints that are made. It is likely that the Department understates the increase in the number of investigations regulated entities are likely to receive. The Department is not only making it easier for people to submit complaints, but it is also lowering the standard for a finding of sex discrimination. The 2020 regulations allowed schools to choose whether to apply the preponderance of the evidence standard or the clear and convincing evidence standard when determining whether sex discrimination occurred.[8] Under the proposed regulations, schools may apply the clear and convincing evidence standard only if the school also uses that standard in all other comparable proceedings.[9] The combination of a system that makes it easier to file complaints combined with a lower standard of proof will encourage individuals to file more claims, including claims that are frivolous or involve First Amendment protected speech.

This is not a small matter. Being investigated for alleged sex discrimination is an ordeal, regardless of whether sex discrimination was committed or not, and regardless of whether the individual is found responsible for having committed sex discrimination or not. To be found

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The Department is not attempting to estimate the degree of sex discrimination at recipient institutions. Rather, the Department is attempting to estimate the number of times recipients will be required to engage in particular activities, such as conducting investigations or providing supportive measures. For instance, in the preamble, to the 2020 amendments, the Department estimated that approximately 90 percent of LEAs and 50 percent of IHEs would reduce the number of investigations conducted each year. The Department estimated that, on average, these LEAs would conduct 1.29 fewer investigations per year under the 2020 amendments. The Department also estimated that the annual average reduction in investigations would be -2.84 for those IHEs that reduced their number of investigations. Since making those assumptions in the 2020 amendments, OCR has received feedback from variety of stakeholders, through the June 2021 Title IX Public Hearing, in listening sessions, and meetings held in 2022 under Executive Order 12866, that the actual reduction may have been higher due to the deterrent effect of the perceived burden associated with the current sexual harassment grievance procedure requirements on a complainant's willingness to report sexual harassment or participate in a process to resolve a formal complaint of sexual harassment. Further, based on anecdotal reports, the Department understands that many recipients that experienced a reduction in the number of sexual harassment complaints filed at their respective institutions subsequent to the 2020 amendments shifted their resolution processes away from what would have been a proceeding under current § 106.45 to an alternative disciplinary process, such as a general student conduct process outside of the scope of Title IX.

[6] 87 FR 51550.

[7] 87 FR 41549-41550.

[8] 87 FR 41484.

[9] 87 FR 41484.

guilty of having committed sex discrimination can ruin a student or faculty member's life. There may be more lasting repercussions from being adjudged guilty of sex discrimination in a proceeding that is not even in the judicial system than from being found criminally liable for drug possession or driving under the influence.[10] Title IX investigations are not immune to erroneous or biased outcomes.[11] They are almost certainly more prone to biased processes and erroneous outcomes than judicial proceedings, in large part due to the actions of this Department. As Judge José A. Cabranes wrote in a recent concurrence:

> I pause briefly to comment, in my own name, that, as alleged, this case describes deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX and other closely related statutes. In many instances, these procedures signal a retreat from the foundational principle of due process, the erosion of which has been accompanied – to no one's surprise – by a decline in modern universities' protection of the open inquiry and academic freedom that has accounted for the vitality and success of American higher education.
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> This growing "law" of university disciplinary procedures, often promulgated in response to the regulatory diktats of government, is controversial and thus far largely beyond the reach of the courts because of, among other things, the presumed absence of "state action" by so-called private universities. Thus insulated from review, it is no wonder that, in some cases, these procedures have been compared unfavorably to those of the infamous English Star Chamber.[12]

Furthermore, the 2014 Dear Colleague Letter (which these new regulations propose to substantially reimplement) arguably contributed to biased Title IX proceedings on university campuses. The Ninth Circuit recently wrote:

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[10] *See, e.g.*, Doe v. Miami, 882 F.3d 579, 587-588 (6th Cir. 2018)("The panel sanctioned John by suspending him for three terms – fall, winter, and spring – until May 2015. . . . John appealed . . . Brownell affirmed the University Appeals Board's decision to uphold the hearing panel's finding of responsibility, but reduced his suspension period such that it ended on January 23, 2015."); Doe v. Regents of University of California, 23 F.4th 930, 931 (9th Cir. 2022)("Based on a former student's bare allegations of misconduct, and before beginning a formal Title IX investigation, the University of California, Los Angeles [] issued an immediate interim suspension of John Doe, a Chinese national graduate student just months away from completing his Ph.D. in chemistry/biochemistry. Over five months later, the University suspended Doe for two years after finding he violated the University's dating violence policy by placing Jane Roe "in fear of bodily injury," just one of the thirteen charges the University brought against him. As a result, Doe lost his housing, his job as a teaching assistant on campus, his ability to complete his Ph.D., and his student visa.").

[11] Doe v. Miami, 882 F.3d 579, 594 (6th Cir. 2018)("Considering all of these factual allegations relating to Miami University's pattern of activity respecting sexual-assault matters and the asserted pressures placed on the University, John has pleaded sufficient specific facts to support a reasonable inference of gender discrimination.").

[12] Vengalatorre v. Cornell University, 36 F.4th 87, 114 (2nd Cir. 2022)(Cabranes, J., concurring).

> The FAC alleges several facts which Doe argues point to external pressures impacting how the University handled sexual misconduct complaints around the time of Roe's complaint against him. Specifically he points to: (1) the April 2011, "Dear Colleague" letter (the "DCL") from DOE directing schools to take "immediate action" to eliminate sexual harassment . . . (4) an April 29, 2014 guidance document from DOE regarding sexual misconduct policies in which it noted that the due process rights of the respondent should not "unnecessarily delay the protections provided by Title IX to the complainant;" and (5) an April 2014 White House report and the June 2014 Senate testimony by then-Assistant Secretary of Education Catherine Lhamon, both warning that schools violating Title IX could lose federal funding. . . .
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> When taken alongside Doe's other allegations discussed below, it is plausible that such pressure would affect how the University treated respondents in disciplinary proceedings on the basis of sex, even in 2017.[13]

Yet despite these concerns from multiple appellate courts, the Department has doubled down on this interpretation of Title IX. The Department admits in the preamble that it is essentially codifying the 2011 and 2014 guidance.[14] I will provide a non-exhaustive list of provisions in these regulations that are misguided and should be removed or changed.

The proposed grievance procedures allow the same person to both investigate and rule on claims of sex discrimination. The 2020 regulations required the investigator and decisionmaker to be different people. Proposed § 106.45(b)(2) states, "The decisionmaker may be the same person as the Title IX Coordinator or investigator".[15] The Department attempts to justify this return to pre-2020 practice by stating that this will provide regulated entities with greater flexibility. There is an inherent danger in having a single person both investigate alleged misconduct and determine whether any misconduct occurred. Although the draft regulation cautions that any investigator or decisionmaker must "not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent", it is only human nature to find one person more sympathetic than another, or to be unconsciously swayed by the first version of events you hear. It is important to have a check on any unconscious bias by having a second person as the decisionmaker, who can come to the record cold and without having any involvement in one direction or another.

Furthermore, a person who spends time investigating an alleged misdeed will often be reluctant to conclude that their investigation turned up nothing. Doing so is tantamount to admitting they

[13] Doe v. Regents of University of California, 23 F.4th 930, 937 (9th Cir. 2022).
[14] 87 FR 41561-41562.
[15] 87 FR 41575.

wasted their time. This is another reason to have a second person designated as the decisionmaker.

This is particularly important because the proposed regulations assume that most complaints of sex discrimination are valid. In proposed §106.45(d)(iv), one basis for dismissing a complaint is:

> The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.[16]

In the world of actual litigation, cases are routinely dismissed for failure to state a claim. "[R]easonable efforts to clarify the allegations with the complainant" is an opportunity for the investigator (who, let us remember, will also often be the decisionmaker under these new regulations) to reshape the complaint into something that might violate Title IX. When judges are dismissing a case for failure to state a claim, they don't first go to the plaintiff and ask, "I don't suppose you might have meant to say that X actually happened instead?" Requiring schools to take an extra step before dismissing the complaint gives the complainant a second bite at the apple.

The proposed regulations discourage schools from using the clear and convincing evidence standard in adjudicating claims of sex discrimination. The 2020 regulations were neutral as to whether schools should use the preponderance of the evidence standard or the clear and convincing evidence standard. The proposed regulations only allow schools to use the "clear and convincing evidence" standard if "the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints" (§ 106.45(h)(1)).[17]

As discussed above, being found responsible for sex discrimination can have very serious consequences. A person found responsible will almost certainly suffer significant reputational harm. Depending on what he is alleged to have done, he may also be suspended, expelled, be fired, or lose future positions. These consequences fall somewhere between losing a civil case and being convicted of a crime. The person has not lost his liberty, but he may have lost the ability to pursue his education at his chosen school (perhaps at any school, if other schools refuse to admit him with this disciplinary record), perhaps to pursue his preferred profession.[18] Therefore, it's important to be very sure that the alleged conduct occurred. "Preponderance of

[16] 87 FR 41576.
[17] 87 FR 41576.
[18] Doe v. Purdue, 928 F.3d 652 (7th Cir. 2019)(student expelled from Purdue University and dismissed from Navy ROTC program after being found guilty of Title IX violation).

the evidence" is merely fifty percent plus one. That is a very low bar for possibly ruining someone's life. Although the Department may not wish to require that schools use the clear and convincing evidence standard, it should at least be neutral as between the two standards.

The proposed regulations do not require that a decisionmaker conduct a live hearing. Rather, the decisionmaker may choose either to conduct a live hearing or to meet with the parties individually to ask questions. The proposed regulations also do not require that the parties be permitted to have their own advisors question opposing parties, but rather permit the decisionmaker to question the parties. The proposed regulations also require that any questions to be posed to the parties during the grievance process must be preapproved by the decisionmaker.[19]

All these procedures give institutions leeway to make it difficult for accused students to mount a vigorous defense. There is a world of difference between an attorney cross-examining a complainant on behalf of her client and a school administrator asking prescreened questions one-on-one in the comfort of an office. Other considerations aside, the parties' representatives need to be able to pursue lines of questioning. This is impossible if all questions must be approved by the decisionmaker or if the decisionmaker is the person asking the questions.

The Department may respond that its goal is to protect complainants from additional trauma. But that is one of the fundamental problems with these regulations. Despite repeatedly stating it is important to avoid being biased toward either complainants or respondents, the regulations assume that complainants are traumatized and in need of protection.

The problem is that the respondent also has something important to lose in these proceedings. If the decisionmaker determines that sex discrimination did not occur, the regulations strongly imply that the decisionmaker should not punish the complaining student for filing a false complaint. On the other hand, if the respondent is found responsible for having committed sex discrimination, the consequences may be dire. And there are certainly cases that have been heard by federal courts where it appears that the complainant was lying or was herself unclear as to what had happened.[20]

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[19] § 106.46(f), 87 FR 41577-41578.

[20] Doe v. Regents of the University of California, 23 F.4th 930, 933 (9th Cir. 2022)("Roe also reported as part of her Title IX complaint that she had suffered a rib fracture from her encounter with Doe on February 13. The University ultimately found this to be untrue."); *see also* Doe v. Purdue University, 928 F.3d 652, 656 (7th Cir. 2019)("Jane's behavior became increasingly erratic over the course of that semester, and she told John that she felt hopeless, hated her life, and was contemplating running away. In December, Jane attempted suicide in front of John, and after that incident, they stopped having sex. . . . During the first ten days of April, five students reported sexual assault to the university. Jane was one of them . . . John submitted a written response denying all of Jane's allegations. . . . He aksi provided details suggesting that Jane was troubled and emotionally unstable, which he thought might explain her false accusations.").

This brings me to a final point regarding the sections of the proposed regulations that concern grievance procedures. Schools should not be in the business of adjudicating cases of rape or attempted rape. When a rape or sexual assault has occurred, it is a matter for law enforcement. Rapists should be in prison. Insofar as these regulations encourage students and educational institutions to pursue an internal procedure to deal with cases of rape or sexual assault – either because students do not want to testify about the sexual assault they experienced or because universities don't want the notoriety associated with a student's criminal prosecution – they are doing a disservice to the students and to other women who are at risk when a criminal is free.

But that is not what is happening in many of these cases. Many cases that end up in court are sordid, but they are not criminal. It is unlikely they would meet the legal standard for sexual assault or rape. Some of them were sexual experiences that the complainant later regretted – and indeed had cause to regret, but that could have been avoided with foresight.[21] Many of the respondents likely also regret their behavior (which in some cases could have been avoided by limiting alcohol), or at least the consequences of their behavior.[22] This is some of the behavior the Department is trying to target with these regulations – behavior that is not criminal, but that previously came in for social and moral censure. In this amoral yet legalistic age, the Department is trying to enforce morality by using the magic words "sex discrimination". Universities will not say this behavior is immoral, dishonorable, ungentlemanly or unladylike, but they would still like to minimize it. So instead of erecting some barriers to reduce these incidents' occurrence, universities and the Department come around after the damage is done.

Sexual Orientation and Gender Identity

Proposed § 106.10 provides:

> Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.[23]

The preamble claims that Supreme Court's decision in *Bostock v. Clayton County* requires that "sex discrimination" include sexual orientation discrimination and gender identity discrimination.[24] The Department also claims that the proposed rule is prompted in part by "the recent enactment of State laws restricting transgender students from participating in school consistent with their gender identity".[25]

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[21] Doe v. Miami University, 882 F.3d 579 (6th Cir. 2018).
[22] *Id.*
[23] 87 FR 41571.
[24] 87 FR 41392.
[25] 87 FR 41396.

The Department is being disingenuous. No state, to my knowledge, has enacted legislation prohibiting a female student from attending class dressed in "boys' clothes," or a male student from attending class dressed in "girls' clothes". States have enacted legislation pertaining to gender identity in two areas: bathroom and locker room access and athletics. *Bostock* does not require restrooms, locker rooms, and other intimate facilities to be separated by gender identity rather than biological sex. It takes chutzpah for the Department to claim this policy decision is mandated by *Bostock* when the Department issued guidance decreeing that biological boys must be able to access girls' bathrooms (and vice versa) years before the Supreme Court even granted certiorari in that case. This Department would have issued regulations requiring schools to allow students to use intimate facilities in accord with their gender identity rather than biological sex even if the Supreme Court's decision in *Bostock* had come out the other way.

To my knowledge, two states have enacted legislation requiring students to use the bathroom associated with their biological sex.[26] The Department claims that requiring schools to allow students to use bathrooms in accord with their gender identity rather than their biological sex is consistent with *Bostock*.[27] This is untrue. Justice Gorsuch's majority opinion specifically stated that its view that Title VII's ban on sex discrimination encompassed sexual orientation discrimination and gender identity did not necessarily extend to other statutes.[28] Furthermore, the majority opinion explicitly did not take a position on sex-segregated bathrooms even under Title VII.[29]

Parents of transgender students naturally feel protective of their children and are passionate about furthering what they see as in the best interests of their children. Nevertheless, other students and their parents also have interests that should be protected.

Students, male and female, may feel uncomfortable sharing a bathroom or locker room with a student of the opposite sex. Society has always followed a tradition of separating intimate facilities by biological sex.[30] Some courts claim that there is no difference between having a student of the opposite sex disrobe in the school locker room and having a student of the same sex disrobe in the school locker room.[31] If officials at the Department of Education truly believe that, I invite them all to henceforth use the changing facilities at their local gym that are designated for members of the opposite biological sex.

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[26] Ala. Code 1975 § 16-1-54; Tenn. Code Ann. § 49-2-801 *et seq.*
[27] 87 FR 41395.
[28] Bostock v. Clayton C'ty, Ga., 140 S.Ct. 1753 (2020).
[29] *Id.*
[30] Grimm v. Gloucester C'ty Sch. Bd, 972 F.3d 586, 634 (4th Cir. 2020)(Niemeyer, J., dissenting)("In light of the privacy interests that arise from the physical differences between the sexes, it has been commonplace and universally accepted – across societies and throughout history – to separate on the basis of sex those public restrooms, locker rooms, and shower facilities that are designed to be used by multiple people at a time.").
[31] Doe v. Boyerton Area Sch. Dist., 897 F.3d 518, 532 (3d Cir. 2018).

Parents of students who must share intimate facilities with transgender students are better positioned to represent their children's interests than is this Department. For example, the Fourth Circuit characterized Gavin Grimm's initial use of the boys' bathroom as "[occurring] without incident" and a "smooth transition".[32] Yet, the Fourth Circuit intoned, "adults in the community caught wind of the arrangement and began to complain."[33] How did the Fourth Circuit imagine that these unidentified adults heard of Grimm's use of the boys' bathroom? Most likely, at least some of these adults were parents who heard about it from their children.[34] The Fourth Circuit noted that "Only one student personally complained to Principal Collins".[35] I am surprised that even one student personally complained to the principal. Teenagers are likely to be embarrassed about discussing bathroom arrangements, and even more embarrassed by the prospect of discussing these arrangements with authority figures. It is more likely that they will share their discomfort with their parents privately. Yet multiple courts have dismissed students' discomfort at having members of the opposite sex in their bathrooms and locker rooms, even when their parents have sued on their behalf.[36] Courts have explicitly stated that biological girls' and boys' discomfort at seeing or being seen unclothed by members of the opposite sex is of much less concern than the discomfort of transgender students.[37]

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[32] Grimm v. Gloucester C'ty Sch. Bd., 972 F.3d 586, 598 (4th Cir. 2020).
[33] *Id.*
[34] *Id.* at 593 ("once word got out, the Gloucester County School Board [] faced intense backlash from parents").
[35] *Id.* at 598.
[36] Doe v. Boyerton Area Sch. Dist., 276 F.Supp.3d 324, 332 (E.D. Pa. 2017).
Joel Doe alleges that he was a junior at the Boyerton Area Senior High School on or about October 31, 2016, and was changing in the boys' locker room for his mandatory physical education course. While standing in his underwear and about to put on his gym clothes, he observed a "member of the opposite sex" changing with him in the locker room. This "member of the opposite sex" was "wearing nothing but shorts and a bra."
Due to Joel Doe's "immediate confusion, embarrassment, humiliation, and loss of dignity," he "quickly put his clothes on and left the locker room." Joel Doe, along with other classmates, then went to Dr. Foley, the assistant principal of the Boyerton Area Senior High School, to let him know what had happened. When Joel Doe informed Dr. Foley that there had been a girl in the locker room, Dr. Foley indicated that although the legality of this was up in the air, students who mentally identified themselves with the opposite sex could choose the locker room and bathroom to use because their physical sex did not matter. Dr. Foley also told Joel Doe there was nothing he could do to protect him from this situation and that he needed to "'tolerate' it and make it as 'natural' as he possibly [could]." [citations omitted]
See also Parents for Privacy v. Dallas C'ty Sch. Dist. No. 2, 326 F.Supp.3d 1075, 1084(D.Ore. 2018).
Other male students, including Student Plaintiffs, have used school facilities at the same time as Student A. Specifically, Student A has used the boys' locker room and showers and has changed clothes while male students were present. Plaintiffs allege that male students at Dallas High school experience "embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress produced by using the restroom with members of the opposite sex[.]").
[37] Doe v. Boyerton Area Sch. Dist., 897 F.3d 518, 523 (3d Cir. 2018)("for reasons we discuss below, we do not view the level of stress that cisgender students may experience because of appellees' bathroom and locker room policy as comparable to the plight of transgender students who are not allowed to use facilities consistent with their gender identity."); see also Parents for Privacy v. Dallas C'ty Sch. Dist. No. 2, 326 F.Supp.3d 1075, 1100 (D.Ore. 2018, *quoting* Doe v. Boyerton Area Sch. Dist., 893 F.3d 179, 185 (3d Cir. 2018)).

Note that I do not say that Title IX *requires* students to use the intimate facilities associated with their biological sex. But in every case of which I am aware, transgender students were *not* required to use the intimate facilities associated with their biological sex. Schools made single-occupant restrooms available to transgender students. This accommodation was apparently unacceptable to many transgender students. But permitting transgender students to use the facilities associated with their gender identity violates the privacy of a much greater number of people.

As things currently stand, if a school decides to allow students to use the intimate facilities associated with their gender identity rather than their biological sex, nothing except the will of the local voters prevents them from doing so. But in many cases, local voters will prevent them from doing so – which is one reason the Department is issuing these regulations.[38]

The Department may say, "Exactly. The courts agree with us. Transgender students must be allowed to use the bathroom that suits their gender identity, not their biological sex." I disagree. The Department is wrong. It is wrong on the law and wrong as to who should make the decision.

Several states have enacted legislation requiring sports teams to be separated by biological sex.[39] The Department claims in the preamble that it is not determining in this rulemaking whether sports teams should be separated by biological sex. Yet nowhere in the text of the proposed regulations does it state that athletics are exempted from this new interpretation of "sex discrimination." Furthermore, the fact that it specifically invokes state laws involving transgender students as a motivating factor for this rulemaking strongly suggests that it will enforce this rule to require schools to allow students to participate in athletics based on their gender identity rather than their biological sex.

It is ironic that the Department released these proposed rules on the 50th anniversary of Title IX. In the accompanying press release, the Department states that Title IX "has opened doors for generations of women and girls".[40] The proposed regulations undermine the goals of Title IX by elevating the interests of biological boys over the interests of biological girls.

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[38] Evancho v. Pine-Richland Sch. Dist., 237 F.Supp.3d 267, 277 (W.D. Pa. 2017)("Throughout the summer of 2016, there were a number of discussions about the restroom topic at the District's regular public Board meetings and at publicly-held Board Committee meetings convened specifically as to these matters. . . . Members of the public spoke at the meetings on these topics. Many, but not all, spoke in favor of the position ultimately enacted in what has been denominated School Board Resolution 2." [which required students to use "either unisex bathrooms or the school bathrooms of their 'biological sex.'" *Id.* at 278]).

[39] *See, e.g.*, W.V. Code § 18-2-25d; F.S.A. § 1006.205; S.D.C.L. § 13-67-1; I.C. § 20-33-13-4; S.C. Stat. § 59-1-500; KY ST § 164.2813.

[40] "The Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment," June 23, 2022, https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

Pregnancy Discrimination

One particular provision in the proposed regulations warrants mention simply because it is stupid. Proposed § 106.40(b)(6) provides:

A recipient may not require a student who is pregnant or has related conditions to provide certification from a physician or other licensed healthcare provider that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:

(i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
(ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
(iii) The information obtained is not used as a basis for discrimination prohibited by this part.[41]

Current § 106.40(b)(2), which the Department views as too permissive, provides:

> A recipient may require such student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.[42]

Discrimination is only prohibited if it treats similarly situated individuals differently. Pregnant women are not similarly situated to non-pregnant women in all situations. Pregnant women and non-pregnant women are similarly situated for attending an English literature class. They may not be similarly situated if they are participating in a hot yoga class or on the equestrian team.[43]

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[41] 87 FR 41572.
[42] 34 C.F.R. § 106.40(b)(2).
[43] "Exercise During Pregnancy: Frequently Asked Questions," The American College of Obstetricians and Gynecologists, https://www.acog.org/womens-health/faqs/exercise-during-pregnancy.
Women with the following conditions should not exercise during pregnancy:

- Certain types of heart and lung disease
- Cerclage
- Being pregnant with twins or triplets (or more) with risk factors for preterm labor
- Placenta previa after 26 weeks of pregnancy
- Preterm labor during the pregnancy or ruptured membranes (your water has broken)
- Preeclampsia or pregnancy-induced high blood pressure
- Severe anemia

What exercises should I avoid during pregnancy?

- Contact sports and sports that put you at risk at being hit in the abdomen, including ice hockey, boxing, soccer, and basketball

The existing regulations compare pregnant women to similarly situated individuals – other students who are also receiving medical attention for a physical or emotional condition. This is a sensible approach that is supported by the Supreme Court's decision in *Young v. UPS*. Although Young involved interpretation of the Pregnancy Discrimination Act, it is accepted that Title VII and Title IX are often interpreted in similar ways.

In *Young*, the Supreme Court stated that in order to allege pregnancy discrimination, a plaintiff would have to show that "that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[44] The Court did not say that the appropriate comparator was an individual who had no limitations.

A particular course requirement (such as lifting heavy objects) might be reasonable for a person who is healthy and has no limitations. Requiring a pregnant woman to perform the same requirements might be negligent – or at least might be sufficient for a plaintiff to plead negligence. A woman is generally able to recover damages if a party's negligence leads to the death of her unborn child.[45] Schools are therefore exposed to potential liability.

Forbidding schools from requiring pregnant students to provide a physician's approval for physical activity unless all students are required to do so is a triumph of ideology over common sense. It would be discriminatory to require pregnant students, but not students with other medical conditions, to provide such approval. It is not discriminatory to require all students who have medical conditions to provide such approval.

It may be reasonable to amend the existing regulation to specify that schools may only require students to provide a physician's certification for courses or activities that include a physical component. It may also be reasonable to remove the word "emotional," although there could be courses or practical work experience where a university believes it is vital to receive approval from the student's physician regarding her emotional stability (for example, if a student is beginning a counseling internship but is herself suffering from major depressive disorder, whether caused by pregnancy or not).

- Skydiving
- Activities that may result in a fall, such as downhill snow skiing, water skiing, surfing, off-road cycling, gymnastics, and horseback riding
- "Hot yoga" or "hot Pilates," which may cause you to become overheated
- Scuba diving
- Activities performed above 6,000 feet (if you do not already live at a high altitude)

[44] Young v. United Parcel Service, 575 U.S. 206, 228 (2015).

[45] Smith v. Borello, 804 A.2d 1151, 1160 (Ct. App. Md. 2002)("Most, if not all, of the courts that have considered the issue have recognized that, at least where there is evidence of some independent physical injury to the mother, she may recover, in her own negligence action, for emotional distress arising from a miscarriage or stillbirth attributable to the defendant's conduct."); 66 Fed. Credit Union v. Tucker, 853 So.2d 104 (Miss. 2002).

A pregnant student is more likely to have a medical emergency than is a non-pregnant student who is not under a doctor's care for a medical condition. Teachers and coaches should not be in a position where they are blindsided by a medical emergency that could have been avoided had the student not participated in this activity, whether that emergency is due to a pregnancy-related condition or another condition. Likewise, every student should not be required to obtain a doctor's note to engage in a physical activity so schools can require pregnant students to obtain a doctor's note.

Sincerely,

Peter Kirsanow
Commissioner