

**Before the UNITED STATES DEPARTMENT OF EDUCATION**

Petition for Rulemaking of:

WOMEN’S LIBERATION FRONT,  
  
Petitioner.

Submitted via Regulations.gov  
Docket No. ED-2020-OGC-0163

**PETITION FOR RULEMAKING  
TO PROTECT THE TITLE IX RIGHTS OF WOMEN AND GIRLS**

Lauren R. Adams  
WOMEN’S LIBERATION FRONT  
455 Massachusetts Ave. NW #190  
Washington, DC 20001-2621  
(540) 918-0186  
legal@womensliberationfront.org

*Counsel for Petitioner*

February 8, 2021

## TABLE OF CONTENTS

INTRODUCTION.....	1
NATURE OF REQUEST.....	2
THE PETITIONER’S INTEREST.....	4
JUSTIFICATION FOR THE RULE REQUESTED IN THIS PETITION.....	7
I. The Term “Sex” In Title IX Refers To Biological Distinctions Between Male And Female And The Civil Rights Of Women And Girls Depend On Retaining This Interpretation. ....	7
II. Many Title IX Statutory And Regulatory Provisions That Permit Or Require Distinctions Based On Sex Are Crucial For The Equal Opportunities Of Women And Girls, And Title IX Must Continue To Permit These Single-Sex Spaces.....	13
III. Protection of Free Speech Requires Express Acknowledgment That Merely Identifying A Person’s Sex, Stating Facts About Human Sexual Dimorphism, Or Expressing Opinions Critical Of Gender Identity, Does Not Constitute Actionable Discrimination Or Harassment Under Title IX.....	22
CONCLUSION.....	26

## INTRODUCTION

This Petition requests that the U.S. Department of Education (the “Department”) initiate rulemaking to issue and amend Title IX regulations, to ensure that the rights of girls and women to equal opportunities in education programs and activities are not sacrificed in the Department’s efforts to comply with the letter and spirit of one of the Executive Orders issued on the first day of the Biden Administration: Executive Order 13998 “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation” (Jan. 20, 2021) (“Exec. Ord. 13998”). Section 2 of Exec. Ord. 13998 directs the Department to, *inter alia*, “develop . . . a plan” to carry out identified regulatory and other actions relating to laws that prohibit sex discrimination in a manner consistent with the policy expressed in Section 1 of Exec. Ord. 13998, which policy (as relevant to this Petition) states that executive branch agencies must “combat discrimination on the basis of gender identity[.]”

Complying with the policy of Exec. Ord. 13998 necessitates extending legal protections – under laws that protect people based on sex – to people who identify as “transgender,” “non-binary,” or otherwise adopt a personal belief about “gender identity” in contradiction of the scientific fact that a person’s sex is biologically, immutably, and binarily determined as female or male. It further necessitates denial of the legal and social consequences (most of which tend to disadvantage females as compared to males) flowing from the material reality that human beings are a sexually dimorphic species, and that in certain contexts the biological differences between females and males advise or even require differentiating between the two sexes in order to achieve equality based on sex.

The Department must issue and amend Title IX regulations in order to comply with Exec. Ord. 13998 while preserving the legal permissibility of factually, objectively identifying people as

males (boys and men) or females (girls and women) and, where legally appropriate, continuing to distinguish between individuals on the basis of sex when such distinctions are important for ensuring equal opportunities for women and girls to flourish in education programs and activities. Amendments to Title IX regulations, as requested in this Petition, must codify the meaning of “sex” as biological, immutable, and binary and must explain the ways in which existing Title IX statutory and regulatory provisions permit or require various education programs and activities to include single-sex spaces. Failure to issue such regulations will eliminate the legal ability of girls and women to exercise critical rights under Title IX and erase the progress toward sex equality in education that Title IX has achieved over the past five decades.

The Department has already set forth legal reasoning that ensures the continued recognition and protection of equal opportunities for members of each sex under Title IX and avoids pitting one group (i.e., females) against another (e.g., persons who identify as a “gender” incongruent with their biological sex). *See* U.S. Dep’t of Educ., Office of the General Counsel, *Memorandum For Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights* (Jan. 8, 2021) (“OGC Memo”) (attached hereto as Exhibit 1 and incorporated into this Petition by reference); U.S. Dep’t of Educ., Office for Civil Rights, *Revised Letter of Impending Enforcement Action* (to Connecticut Interscholastic Athletic Conference *et al.*, Aug. 31, 2020) (“CIAC Letter”) (attached hereto as Exhibit 2 and incorporated into this Petition by reference). However, the Department must enshrine that reasoning in legally binding regulations so that further actions by the Department intended to eliminate unfair treatment of persons who identify with a “gender” different from their sex do not eliminate, override, or conflict with the Title IX sex-based rights of women and girls.

## **NATURE OF REQUEST**

Congress enacted Title IX of the Education Amendments of 1972, establishing a general non-discrimination mandate – as well as many exceptions to that general mandate – to ensure that

Federal funds do not support sex-discriminatory practices and to give individuals redress against sex-discriminatory practices, in education programs or activities that receive Federal financial assistance.<sup>1</sup> The Department's Title IX implementing regulations are found at 34 C.F.R. Part 106. The rule at issue in this Petition consists of the Department's existing Title IX regulations, and amendments to those regulations proposed below.

For the reasons described throughout this Petition, Petitioner requests that the Department issue a rule, promulgated in compliance with the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, ("APA") amending the Department's Title IX implementing regulations (Part 106 of Title 34 of the Code of Federal Regulations), consisting of the following specific substantive provisions:

Provision (1): Acknowledge that humans are an anisogamous mammalian species. A person's sex refers to whether the person is male, or female. Classification of a person as male or female is immutably, biologically determined based on whether the person's sexual reproductive system is developed to support large gametes (female) or small gametes (male). A person's sex is not determined or changed by the person's thoughts or beliefs, or by steps taken to emulate the physiology of the opposite sex. The term "*sex*" as used in the Title IX statute and regulations *refers to whether a person is male or female person*, that the terms "*women*" and "*girls*" refer to human females who are adults or minors, respectively, and that the terms "*men*" and "*boys*" refer to human males who are adults or minors, respectively.

Provision (2): Codify a coherent statement of what "gender identity" means (such as, *a person's belief that one has an internal sense of self-identification as male, female, both, or neither, that is incongruent with one's sex*) and explain that *discrimination based on "gender identity" may be protected under Title IX's sex discrimination prohibition because a person's "gender identity" is a belief about one's sex* (where "sex" is

---

<sup>1</sup> 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

understood, per Provision (1) above, to mean biological sex).

Provision (3): State that *as to Title IX statutory and regulatory provisions that permit or require distinctions based on sex, such distinctions must be made based on sex rather than on characteristics or beliefs that are intertwined with sex (such as “gender identity”),* such that single-sex spaces authorized by the Title IX statute and regulations remain valid.<sup>2</sup> (Again, “sex” is understood, per Provision (1) above, to mean biological sex.)

Provision (4): Affirm that *any of the following conduct does not constitute actionable or unlawful discrimination or harassment on the basis of sex: (i) identifying or acknowledging a person’s sex (including by use of a sex-based pronoun that corresponds with the person’s sex without regard for the person’s preferred pronoun); (ii) stating the fact that humans are a sexually dimorphic species, that sex is an immutable biological characteristic, or similar factual statements; (iii) expressing opinions, beliefs, or viewpoints critical or skeptical of the concept of “gender identity,” including the viewpoint that “gender identity” is a spiritual or metaphysical concept.*

Petitioner requests that all four of the above proposed regulatory provisions apply to the entirety of 34 C.F.R. Part 106, clarifying the foundational issue of how the terms “sex” and “gender identity” are used with respect to enforcement of Title IX.

### **THE PETITIONER’S INTEREST**

Petitioner, Women’s Liberation Front (“WoLF”) is an interested and affected party with regard to the issues addressed and requests made in this Petition. WoLF is a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving female-only spaces, and abolishing sex discrimination as well as discrimination based on gender (when “gender,” to the extent not used synonymously with “sex,” is understood to

---

<sup>2</sup> For reasons set forth throughout this Petition, Provision 3 of the rule requested by this Petition should specifically address application of the meaning of the term “sex” under Title IX (per Provision 1) with regard to: employment (under 34 C.F.R. §§ 106.55, 106.59, 106.61); sexual harassment (under 34 C.F.R. §§ 106.8, 106.44, 106.45, 106.71); sports (under 34 C.F.R. § 106.41); intimate facilities (under 34 C.F.R. § 106.33); housing (under 20 U.S.C. § 1686); physical education and human sexuality classes (under 34 C.F.R. §§ 106.34(a)(1), 106.34(a)(3)).

refer to stereotypical roles or expectations imposed on members of each sex). WoLF has over 800 members who live, work, attend school, and participate in education programs and activities across the United States.

WoLF's interest in the subject matter and request contained in this Petition stems from its mission to empower women and girls by defending and promoting the safety, privacy, and equal opportunities of women and girls, and recognition of females as a legally protected class under sex-based civil rights laws, regulations, and policies. WoLF and its members recognize the grave threat to this mission posed by trends in law toward embracing a vague concept of "gender identity" in a manner that overrides constitutional and statutory protections that are explicitly based on "sex." If, as a matter of law, "sex" is not acknowledged to be an immutable biological characteristic, and instead the characteristic of "sex" is replaced with or overridden by a subjective, self-declared, mutable personal belief in one's "identity" – then the law will have abandoned a century-long effort to affirm the rights of women and girls to dignity, autonomy, and opportunities equal to those of men and boys.

For much of history, regressive stereotypes about women and men have resulted in social and legal burdens on women and girls by reason of their membership in the female sex class. Equality for women and girls, in many circumstances, necessitates treating all persons the same – as individuals regardless of their sex (that is, making no distinction between people based on sex). However, due not to sexist stereotypes but to biological, genetically-determined, immutable differences between the male and female members of the human species, some critical circumstances advise or even require differentiating between women and men, because in such circumstances treating males and females "the same" necessarily disadvantages women and girls depriving them of the dignity, autonomy, and opportunities enjoyed by men and boys. For example, and as discussed *infra*, due to the biologically-driven physical differences between males and females, often the only way to ensure equal opportunity for women and girls in competitive or contact sports is to provide single-sex sports teams and

competitions. Similarly, physical, biological differences between males and females counsel that the safety and dignity of women and girls is not adequately protected without providing single-sex, comparable intimate facilities for members of each sex. Conversely, and as also discussed *infra*, unless a particular job requires bona fide occupational qualifications based on sex, selection and termination of employees should occur without regard to a person's sex in order to ensure that women have employment opportunities equal to those of men.

WoLF's ability to pursue its organizational mission depends upon recognition of women and girls as a discrete, definable category of persons entitled to and deserving of civil rights protections. If the Department attempts to comply with Exec. Ord. 13998 by taking actions to combat unfair treatment of people in a category based on a person's subjective "gender identity" without concurrently affirming and clarifying that women and girls remain in an objective sex-based category, then women and girls will be left without recourse under the very civil rights laws (such as Title IX) originally designed, intended, and for nearly fifty years applied, to protect them from sex-based discrimination, ensure their equal access to education, and promote equal opportunities for them to succeed. For example, with respect to competitive sports in educational institutions, if women and girls are deprived of single-sex athletic teams and competitions then fewer women and girls will participate and succeed in sports.

WoLF further recognizes, in this era of "cancel culture," that statements of fact, as well as expressions of opinion, belief, and viewpoint traditionally protected as free speech under the U.S. Constitution, are often improperly deemed to constitute "discrimination" or "harassment" based on "gender identity," often resulting in public shaming, loss of employment, administrative and legal complaints, and similar serious negative consequences to the speaker. Unless a concept of unlawful discrimination based on "gender identity" is carefully and precisely defined alongside clear reinforcement of sex-based rights, WoLF and its members risk accusations of engaging in



discriminatory conduct for doing nothing more than stating facts or exercising constitutionally protected rights.

For reasons described throughout this Petition, WoLF urges the Department to engage in rulemaking to promulgate amended Title IX regulations consisting of the substantive provisions set forth under “NATURE OF REQUEST” *supra*.

## **JUSTIFICATION FOR THE RULE REQUESTED IN THIS PETITION**

### **I. The Term “Sex” In Title IX Refers To Biological Distinctions Between Male And Female And The Civil Rights Of Women And Girls Depend On Retaining This Interpretation.**

Construction of the term “sex” in Title IX to mean biological sex, male or female, “is the only construction consistent with the ordinary public meaning of ‘sex’ at the time of Title IX’s enactment. OGC Memo. at 1. In June 2020, the U.S. Supreme Court issued a decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that discrimination against an employee based on the employee’s “transgender status” is discrimination “because of . . . sex” under Title VII of the Civil Rights Act of 1964. The Department recently analyzed the *Bostock* decision and its potential application to Title IX, and noted that “the Court expressly declined to decide questions about how its interpretation of Title VII would affect other statutes[.]” CIAC Letter at 33, *citing* *Bostock*, 140 S. Ct. at 1753 (“The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. . . . But none of these other laws are before us . . . and we do not prejudice any such question today.”).

While the Supreme Court specifically refused to extend its holding to Title IX and other statutes outside Title VII, *Bostock*, 140 S. Ct. at 1753, “Title VII and Title IX both use the term ‘sex’” with respect to prohibited discrimination “and it is here that *Bostock* may have salience.” OGC Memo. at 1. As the Department acknowledged, “*Bostock* compels us to interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment.” *Id.* (citing *Bostock*, 140 S.

Ct. at 1738). The *Bostock* Court assumed “that the ordinary public meaning of the term ‘sex’ in Title VII means biological distinctions between male and female” and that assumption “drove the reasoning” of *Bostock*’s holding. OGC Memo. at 2, n. 1 (citing *Bostock*, 140 S. Ct. at 1738-39. The *Bostock* majority reasoned that when an employer “intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth” then the employer is discriminating, at least in part, based on the employee’s biological sex. *Bostock*, 140 S. Ct. at 1741. “In other words, a male employee who identifies as female nonetheless remains a biological male” and *Bostock* “uses a ‘but-for’ analysis to determine whether an employee’s . . . transgender status is covered by Title VII’s bar on sex discrimination.” OGC Memo. at 2, n. 1. Protection against discrimination based on “transgender” status, under a law that prohibits *sex* discrimination, therefore necessarily requires acknowledgement that “sex” refers to the biological, immutable status of a person as a male or female. In fact, it is not possible to formulate a coherent definition of “gender identity” without reference to biological sex. Whatever else “gender identity” means, it is a concept distinct from biological sex, and both concepts must be cogently described in legally binding regulations in order to enforce Title IX rights consistent with the purpose and text of Title IX.

As the Department set forth in the OGC Memo. at 2-3, “statutory and regulatory text and structure, contemporaneous Supreme Court authorities, and the Department’s historic practice demonstrate that the ordinary public meaning of the term ‘sex’ at the time of Title IX’s enactment could *only* have been, as Justice Gorsuch put it, ‘biological distinctions between male and female.’” (Emphasis in original; citing 20 U.S.C. §§ 1681(a), 1686; *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”); 34 CFR §§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61; *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (“discrimination based on a woman’s pregnancy is, on its face, discrimination because of

her sex’); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 146, 149 (1976) (Brennan, J. and Marshall, J., dissenting) (“*Geduldig* itself obliges the Court to determine whether the exclusion of a sex-linked disability from the universe of compensable disabilities was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women’s role in the labor force. . . . [T]he Court simply disregards a history of General Electric practices that have served *to undercut the employment opportunities of women who become pregnant while employed.*”) (citations and footnotes omitted). As noted by the Department, “*Gilbert* and *Newport News* are Title VII cases. *Frontiero* is a due process case. However, all are roughly contemporaneous with the enactment of Title IX and the promulgation of the Department’s regulations, and all suggest the ordinary public meaning of ‘sex’ at the time of Title IX’s enactment was biological sex, male or female, not transgender status[.]” OGC Memo. at 3, n. 2.

The Department further noted, OGC Memo. at 3, that it promulgated amended Title IX regulations in a rule published on May 19, 2020, and in the Preamble to that rule the Department stated:

Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department’s current regulations . . . reflect this presupposition. For example, 20 U.S.C. 1681(a)(2), which concerns educational institutions commencing planned changes in admissions, refers to “an institution which admits only students of one sex to being an institution which admits students of both sexes.” Similarly, 20 U.S.C. 1681(a)(6)(B) refers to “men’s” and “women’s” associations as well as organizations for “boys” and “girls” in the context of organizations “the membership of which has traditionally been limited to persons of one sex.” Likewise, 20 U.S.C. 1681(a)(7)(A) refers to “boys” and “girls” conferences. Title IX does not prohibit an educational institution “from maintaining separate living facilities for the different sexes” pursuant to 20 U.S.C. 1686.

...

In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department’s justification for not allowing schools to use “a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex” was that “if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more

women than men because of the difference in strength between average persons of each sex.

U.S. Dep't of Educ., Office for Civil Rights, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020) (herein, "Sexual Harassment Final Rule"). As the Department noted, OGC Memo. at 4, the 1975 Title IX regulations discussed in the Sexual Harassment Final Rule:

became effective only after direct and extensive Congressional review, including six days of House hearings to determine whether the regulations were "consistent with the law and with the intent of the Congress in enacting the law." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531-33 (internal quotation marks omitted). Accordingly, they carry extra weight and interpretative authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 468 U.S. 837, 842-45 (1984).

...

Consequently, based on controlling authorities, 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. *See also* CIAC Letter at 34-35 (discussing the significance of the congressional review and approval of the athletics regulation originally promulgated by the Department's predecessor agency and currently located at 34 C.F.R. § 106.41 and the judicial deference that has been granted to the Department as to its Title IX sports regulation).

The Department also stated, OGC Memo. at 3-4, that "Additional evidence that the term 'sex' and human biology are inextricably linked under Title IX may be found in the Department's regulations expressly prohibiting discrimination related to a student or employee's pregnancy. 34 C.F.R. § 106.40(b)(1). These regulations are valid only because they effectuate Title IX's prohibition against sex discrimination. *See* 20 U.S.C. § 1682. Courts have recognized, quite correctly in our view, that discrimination on the basis of pregnancy constitutes discrimination on the basis of female physiology and is therefore prohibited under Title IX. *Conley v. Nw. Fla. State College*, 145 F. Supp. 3d 1073, 1077 (N.D. Fl. 2015). Biological males, regardless of transgender status or surgical intervention, are incapable of bearing children."

The Department's observation regarding why pregnancy discrimination constitutes sex discrimination implicitly rests upon an accurate scientific understanding of the nature of human

sexual reproductive function. Humans are an anisogamous mammalian species. A mammal's "sex" refers to nothing more or less than whether the mammal is classified as a male or female of its species – that is, to which of two reproductive sex classes any individual belongs. Classification of the male and female of a mammalian species (including the human species) is determined based on whether the individual's sexual reproductive system is organized around the production of large gametes (in which case the individual is female) or small gametes (in which case the individual is male).<sup>3</sup> There is no individual in the human species who is both male and female, or neither male nor female, regardless of random variations in various sex characteristics or chromosomal or hormonal combinations.<sup>4</sup> By scientific definition, only the female of the human species can produce

---

<sup>3</sup> The sex class of a mammal (that is, whether an individual mammal is male or female) is determined in utero, when one or the other reproductive developmental pathway is selected for, and the other is suppressed. *See, e.g.*, Paradox Institute, "Why Sex Is Binary," <https://www.youtube.com/watch?v=XN2-YEGUMg0> (including the "Sources" listed in the description of the video). Regardless of a person's personal thoughts or beliefs about his or her status as a male or female, and regardless of whether a person takes steps (such as hormonal or surgical interventions) to emulate the physiology of the opposite sex, no belief or intervention can unwind the fact that either a male, or female, reproductive developmental pathway was selected while the person was in utero, making the person immutably male or female. *See id.*; *see also* Paradox Institute, "Sex vs Gender," <https://www.youtube.com/watch?v=g7mMgykM5Us> (including the "Sources" listed the description of the video). Further, a person's classification as male or female does not depend on whether the person's sexual reproductive system actually or actively produces the large gametes (ova) or small gametes (sperm) that determine the person's sex class; in other words, an infertile woman is immutably female, and an infertile male is immutably male, because the person's reproductive system developed in utero to be organized around the production of either large or small gametes. *See id.*; *see also* "From Asparagus to Humans: Females are Females," <https://www.youtube.com/watch?v=28uNFcju7A&t=252s> (including the "Sources" listed in the description of the video). Whether an individual develops as male or female has genetic consequences that lead to a plethora of differences between males and females affecting a myriad of aspects of human life (such as how males, versus females, respond to medication or are susceptible to diseases); in humans, around 6,500 genes are expressed differently based on sex. *See, e.g.*, Weizmann Institute of Science, "Researchers identify 6,500 genes that are expressed differently in men and women: Genes that are mostly active in one sex or the other may play a crucial role in our evolution, health," ScienceDaily (May 4, 2017), <https://www.sciencedaily.com/releases/2017/05/170504104342.htm>.

<sup>4</sup> Approximately 0.018% of human beings have differences of sexual development ("DSDs"), an umbrella term for dozens of congenital, medical conditions that involve variation in an individual's chromosomes, hormones, and/or primary sex characteristics. *See, e.g.*, Sax, Leonard, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, THE JOURNAL OF SEX RESEARCH, Vol. 39, Iss. 3 (2002), <https://www.tandfonline.com/doi/abs/10.1080/00224490209552139>; *see also* note 3 *supra*; *see also* Paradox Institute, "Biology of DSDs: An Introduction," [https://www.youtube.com/watch?v=n0ysQvrbg\\_0](https://www.youtube.com/watch?v=n0ysQvrbg_0) (including the "Sources" listed in the description of the video). A person with a DSD (sometimes called an "intersex" condition), is not a member of a "third sex," is not both male and female, and is not neither male nor female – such a person is either male, or female, with a congenital, medical condition producing differences in how that person's maleness or femaleness develops and

large gametes as part of a sexual reproductive system developed to support the bearing of offspring – in other words, while not all females become pregnant, only females become pregnant. Protections against pregnancy discrimination are legitimate corollaries of anti-sex discrimination laws only because “sex” refers to whether a person is biologically male or female. Civil rights laws and constitutional equal protection based on sex were (and still are) needed precisely because women and girls face legal and social disadvantages due to their *status* as females, regardless of any individual girl or woman’s personal belief about “identifying” as female.

Thus, the legally appropriate interpretation of the term “sex” under Title IX must be biological sex, male or female, and the terms “women,” “girls,” “men,” and “boys” must be understood to refer to human females (adult and minor) and human males (adult and minor), respectively. The Department should amend its Title IX regulations to codify this interpretation of the statutory term “sex,” consistent with the substantive Provision (1) proposed by Petitioner *supra*, so that “gender identity” remains legally distinct from “sex.”

This foundational interpretation will allow the Department to enforce Title IX in a manner that protects the sex-based rights of women and girls, while also enforcing Title IX against “gender identity” discrimination (because “gender identity” is a belief at least in part about one’s biological sex) where the alleged discrimination occurs in a context in which distinctions on the basis of sex are not permitted. For example, because Title IX expressly allows schools to provide separate, comparable housing for members of each sex (*see* 20 U.S.C. § 1686), assigning a male person to the housing provided for males is not actionable gender identity discrimination even if the male person self-identifies as a woman. Conversely, if a school excludes a male person from access to co-ed or

---

presents compared with how most people’s maleness or femaleness develops and presents. While some species (for example, clownfish) are hermaphroditic (sequential or otherwise), no mammalian species, including humans, is hermaphroditic (or sexless). *See, e.g., “Gender-bending fish,” Understanding Evolution, [https://evolution.berkeley.edu/evolibrary/article/fishtree\\_07](https://evolution.berkeley.edu/evolibrary/article/fishtree_07)* (including the “Sources” listed in the article); *see also* “From Asparagus to Humans: Females are Females,” <https://www.youtube.com/watch?v=28uNfcjju7A&t=252s> (including the “Sources” listed in the description of the video).

male single-sex housing because of the person's gender identity (self-identification as a woman), such an action may be actionable gender identity discrimination under Title IX because denying a benefit based on gender identity necessarily implicates the person's sex and may constitute sex discrimination. This approach to explaining how Title IX may cover "transgender status" discrimination, while also protecting the rights of women and girls to legally permissible single-sex spaces, was endorsed by the Department, OGC Memo. at 4:

Although *Bostock* expressly does not decide issues arising under Title IX or other differently drafted laws, the logic of *Bostock* may, in some cases, be useful in guiding OCR's understanding as to whether the alleged discrimination on the basis of a person's transgender status . . . necessarily takes into account the person's biological sex and, thus, constitutes discrimination on the basis of sex. . . . See *Bostock*, 140 S. Ct. at 1741, 1737 ("Sex plays a necessary and undisguisable role in the decision" to fire an employee because of the employee's . . . transgender status).

However, we emphasize that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person's biological sex, male or female. 20 U.S.C. §§ 1681(a), 1686; 34 C.F.R. §§ 106.32(b), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61. Consequently, we believe a recipient generally would not violate Title IX by, for example, recording a student's biological sex in school records, or referring to a student using sex-based pronouns that correspond to the student's biological sex, or refusing to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status[.]

Consistent with Provision (2) proposed by Petitioner *supra*, the Department should build upon this interpretation by providing a coherent regulatory statement of the meaning of the term "gender identity" (such as, a person's belief that one has an internal sense of self-identification as male, female, both, or neither, that is incongruent with one's sex) and explaining that discrimination based on gender identity may fall under Title IX's prohibition against sex discrimination because gender identity is a belief about a person's biological sex.

## **II. Many Title IX Statutory And Regulatory Provisions That Permit Or Require Distinctions Based On Sex Are Crucial For The Equal Opportunities Of Women And Girls, And Title IX Must Continue To Permit These Single-Sex Spaces.**

In addition to codifying a legally appropriate interpretation of the term "sex" under Title IX,

and a coherent statement of what “gender identity” means, and acknowledging that the two categories are distinct yet intertwined, the Department should further issue regulations clarifying application of these foundational concepts to the variety of existing Title IX statutory and regulatory provisions that create exceptions or exemptions from Title IX’s general mandate to avoid treating people differently based on sex. The purposes intended and served by these exceptions further important objectives, inure to the benefit of women and girls, and should continue to be given full force and effect by the Department. To accomplish that, in light of any uncertainty created by the Supreme Court’s *Bostock* decision and the Department’s obligations under Exec. Ord. 13998 to combat “gender identity” discrimination, it is crucial for the Department to issue a rule clarifying the continued validity of the single-sex exceptions provided for under Title IX.

As set forth *supra* under “NATURE OF REQUEST,” Petitioner proposes Provision (3), the substance of which states that where Title IX allows or requires sex-based distinctions, such distinctions must be made on the basis of sex and not on characteristics or beliefs related to sex, such as gender identity. Petitioner further requests that this proposed new provision specifically address application of this new provision to the following existing statutory and regulatory provisions:

- Employment (*see* 34 C.F.R. §§ 106.55, 106.59, 106.61)
- Sexual Harassment (*see* 34 C.F.R. §§ 106.8, 106.44, 106.45, 106.71)
- Sports (*see* 34 C.F.R. § 106.41)
- Intimate Facilities (*see* 34 C.F.R. § 106.33)
- Housing (*see* 20 U.S.C. § 1686)
- Physical Education and Human Sexuality Classes (*see* 34 C.F.R. §§ 106.34(a)(1), 106.34(a)(3))

The important policies served by reinforcing the continued validity of these statutory and regulatory



provisions and clarifying how these provisions interact with the concept of “gender identity” discrimination, are described below.

### **A. Employment and Sexual Harassment**

As acknowledged by the Department, OGC Memo. at 5-6, the logic of the Supreme Court’s *Bostock* decision suggests that the Department should interpret and enforce its existing Title IX regulations concerning employment and sexual harassment by acknowledging that (1) “sex” refers to biological sex, (2) gender identity implicates sex, (3) generally, an individual’s sex is not relevant to employment actions<sup>5</sup> and therefore gender identity must also be irrelevant to employment actions, (4) conduct on the basis of gender identity is at least in part “conduct on the basis of sex” and therefore unwelcome conduct on the basis of gender identity may meet the regulatory definition of “sexual harassment” in 34 C.F.R. § 106.30(a).

The foregoing approach to employment and sexual harassment under Title IX underscores an important point that must underpin analysis of whether gender identity discrimination may be prohibited under a sex discrimination law without negating the sex-based rights of women and girls: *Where sex is not relevant to how people are treated, then gender identity is also irrelevant*, and the end result is extending legal protections based on gender identity while also retaining full legal protections based on sex. Conversely, *when sex is relevant to ensuring equality for women and girls* (such as with competitive sports), *the only relevant characteristic is sex (not gender identity)* because in such a circumstance consideration of gender identity will necessarily replace and override consideration of sex, resulting in legal protections based on gender identity *but only at the expense of sex-based rights and protections*.<sup>6</sup>

---

<sup>5</sup> As noted by the Department, OGC Memo. at 5, narrow exceptions to the general rule that sex is irrelevant to employment actions – such as the existing regulatory provision allowing for sex-based bona fide occupational qualifications – also remain valid. *See also* 34 C.F.R. § 106.61.

<sup>6</sup> “A critical difference between the provisions of Title VII at issue in *Bostock* and the provisions of Title IX at issue” when considering whether males who identify as female must be allowed to play on single-sex female athletic teams is that “extending protection on the basis of ‘gender identity’ in *Bostock* did not violate another employee’s rights under Title VII.” Brief of Amicus Curiae Women’s Liberation Front in Support of Appellants and Reversal in *Hecox v. Little*,

Single-sex spaces (e.g., sports, intimate facilities, housing) are by definition “single-sex spaces” only if sex, not gender identity, remains the sole relevant characteristic. If a space ostensibly dedicated to being single-sex is also separated based on gender identity, the space ceases to be single-*sex* (because, by definition, gender identity involves a person’s belief that they have a subjective identity as male, female, both, or neither in a way that is incongruent with the person’s sex). Because the purpose underlying single-sex spaces is to promote the safety, dignity, and equal opportunity of women and girls, it follows that eliminating single-sex spaces will cause great harm to women and girls. Put differently, if the Department eliminated all statutorily and regulatorily authorized single-sex spaces *for any reason*, elimination of legally permissible single-sex spaces would devastate the interests of women and girls. That harm to women and girls is not avoided just because the effective elimination of single-sex spaces results from separating spaces based on gender identity.

## **B. Sports**

The Department has analyzed the validity and interpretation of existing Title IX athletics regulations in light of the *Bostock* decision and has concluded:

We believe the ordinary public meaning of controlling statutory and regulatory text requires a recipient providing separate athletic teams to separate participants solely based on their biological sex, male or female, and not based on transgender status . . . to comply with Title IX.

Under Title IX and its regulations, a person’s biological sex *is* relevant for the considerations involving athletics, and distinctions based thereon are permissible and may be required because the sexes are not similarly situated. 34 C.F.R. § 106.41. Biological females and biological males are different in ways that are relevant to athletics because of physiological differences between males and females. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical

---

Nos. 20-35813, 20-35815, U.S. Court of Appeals for the Ninth Circuit (filed November 19, 2020) at 30 (“WoLF Amicus Brief”) (attached hereto as Exhibit 3; the arguments, positions, citations and references contained therein are incorporated into this Petition by reference). *See also id.*, citing several “transgender” discrimination cases under the Equal Protection Clause and civil rights law wherein extending protection to a person who identifies as transgender did not violate the rights of others or deprive anyone else of rights under the same constitutional provision or civil rights law. “But Title IX is different. Congress enacted Title IX as a remedial statute for the benefit of women. Granting Title IX rights to men who self-identify as women necessarily violates the rights Congress gave women in this law” at least with respect to circumstances under which a single-sex space is authorized by Title IX. *See id.* at 41.

differences between men and women, however, are enduring.”); *Frontiero*, 411 U.S. at 686 (plurality opinion) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”). Accordingly, schools must consider students’ biological sex when determining whether male and female student athletes have equal opportunities to participate. See *McCormick*, 370 F.3d at 287 (“[I]dentical scheduling for boys and girls is not required. Rather, compliance is assessed by first determining whether a difference in scheduling has a negative impact on one sex, and then determining whether that disparity is substantial enough to deny members of that sex equality of athletic opportunity.”); *Clark v. Ariz. Interscholastic Ass’n*, 886 F.2d 1191, 1192 (9th Cir. 1989) (quoting *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (“The record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished”)).

*Bostock* does not diminish the relevance of biological sex in athletics, and does not address the validity of the Department’s historic measures to ensure biological females (girls and women) have equal opportunities to participate in athletics because males and females are not similarly situated with respect to athletic competition. Unlike Title VII, one of Title IX’s crucial purposes is protecting women’s and girls’ athletic opportunities. Indeed, Title IX was enacted, and its regulations promulgated, to prohibit discrimination on the basis of sex in education programs and activities and to protect equal athletic opportunities for students who are biological females, including by providing for sex-segregated athletics.

...

34 C.F.R. § 106.41 prohibits a recipient from discriminating on the basis of sex with respect to providing athletic programs or activities, permits a recipient to provide sex-segregated teams for competitive activities or contact sports, and obligates a recipient to provide equal athletic opportunity for members of both sexes. As it has for over forty years, the Department must interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams “for members of *each sex*,” and 34 C.F.R. § 106.41(c), regarding equal athletic opportunity for “members of *both sexes*” (emphasis added), to mean operation of teams and equal opportunity for biological males, and for biological females. Based on statutory text and regulatory history, it seems clear that if a recipient chooses to provide “separate teams for members of each sex” under 34 C.F.R. § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status . . . to comply with Title IX.

OGC Memo. at 7-8. See also CIAC Letter at 32-36 and *id.* at 36 (“For all of these reasons, the Department continues to interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams ‘for members of *each sex*’ (emphasis added), to mean operation of teams for biological males, and for

biological females, and does not interpret Title IX to authorize separate teams based on each person's transgender status, or for members of each gender identity.”); CIAC Letter at 36-37 (finding, *inter alia*, in administrative enforcement action, that the Connecticut Interscholastic Athletic Conference, “by purporting to provide sex-segregated teams under 34 C.F.R. § 106.41(b) yet permitting the participation of biologically male students in girls’ interscholastic track in the State of Connecticut, . . . denied female student-athletes benefits and opportunities, including to advance to finals in events; to advance to higher level competitions . . . ; to win individual and team state championships, along with the benefit of receiving medals for the events; to place higher in any of the above events; to receive awards and other recognition; and possibly to obtain greater visibility to college and other benefits. For these same reasons, OCR also determined that the CIAC treated students differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes, including the opportunity to compete on and against teams comprised of members of one sex.”).

Codifying the foregoing interpretation of Title IX sports regulations by issuing a rule consistent with the substantive provisions proposed by Petitioner *supra* will ensure continuation of the tremendous benefits of sports programs for women and girls.<sup>7</sup> Conversely, failing to clarify the validity of single-sex sports programs will effectively reverse the decades of progress under Title IX toward equal athletic opportunities for women and girls. It is not possible to both retain single-sex sports, and eliminate single-sex sports. Once a purportedly single-sex female team is required to admit male participants, that team is no longer single-sex but is, in fact, mixed-sex; the benefits to women and girls of participating in single-sex sports programs are erased, and one of the primary purposes (and successes) of Title IX is abandoned to the detriment of women and girls.

---

<sup>7</sup> See, e.g., Amy Flory, “The Benefits of Sports for Girls,” <https://www.activekids.com/sports/articles/the-benefits-of-sports-for-girls> (outlining the health, psychological, social, and long-term benefits of sports for girls and emphasizing how important Title IX has been in increasing those benefits).

“Sex is a permissible basis by which most sports can be segregated, because the substantial, enduring physical differences in male and female physiology (and attendant competitive advantage conferred on males) means that the sexes ‘are not similarly situated in certain circumstances.’ *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996). Conversely, if there were no innate competitive advantages associated with male physiology, then all sex-segregation in sports would be legally questionable.” Brief of Amicus Curiae Women’s Liberation Front in Support of Appellants and Reversal in *Hecox v. Little*, Nos. 20-35813, 20-35815, U.S. Court of Appeals for the Ninth Circuit (filed November 19, 2020) at 30 (“WoLF Amicus Brief”) (attached hereto as Exhibit 3; the arguments, positions, citations and references contained therein are incorporated into this Petition by reference). The only reason why single-sex sports programs and activities exist is because the biological, immutable differences between males and females give males physical performance advantages, such that competitive activities will always be dominated by males and physical contact between males and females will always present substantially greater risks of physical injury for females than for males.<sup>8</sup> Fair play and equal opportunity for women and girls to participate and succeed in sports depends on the continued existence of female-only sports categories.

“Even in the U.S., despite ostensible legal equality between the sexes, there are still significant disadvantages to being born female, including many barriers to women’s participation in sports.” WoLF Amicus Brief at 26. In addition to possessing immutable physical advantages by virtue of being born male, male athletes simply do not face the same vulnerabilities and disadvantages that

---

<sup>8</sup> See, e.g., Paradox Institute, “Testosterone and Beyond: The Male Advantage in Sports,” <https://www.youtube.com/watch?v=Ntjo67kjBrA> (including the “Sources” listed in the description of the video). The male performance advantage is measurable and substantial, such that without female-only sports categories most sports would be dominated by males depriving females of equal athletic opportunity. See *id.* Importantly, the male performance advantage cannot be eliminated by, for instance, puberty blockers or testosterone suppression. *Id.* See also World Rugby, “Summary of Transgender Biology and Performance Research,” [https://resources.world.rugby/worldrugby/document/2020/10/09/a67e3cc3-7dea-4f1e-b523-2cba1073729d/Transgender-Research-Summary-of-data\\_ENGLISH-09.10.2020.pdf](https://resources.world.rugby/worldrugby/document/2020/10/09/a67e3cc3-7dea-4f1e-b523-2cba1073729d/Transgender-Research-Summary-of-data_ENGLISH-09.10.2020.pdf).

flow from being born female and “thus enjoy a significant competitive advantage over female athletes.” *Id.* at 28. Importantly, “a male athlete’s self-identification as female does not subject him to this same myriad of obstacles female athletes face, so he retains an innate competitive advantage regardless of his subjective identity” and “a female athlete does not escape any of these obstacles, nor does she gain any competitive advantage, by self-identifying as male.” *Id.* at 29.

The material realities attendant to the differences between male and female biology and physiology compel acknowledgment that if competitive and contact sports are required to be mixed-sex, physical safety and fair play for girls and women will fall by the wayside while males (whether or not they self-identify as female) will continue to enjoy sports participation and all the benefits thereof without the heightened physical safety risks and futility of competitive success that females will endure.

### **C. Intimate Facilities**

In OGC Memo. at 9-11 the Department examined 34 C.F.R. § 106.33, which permits schools to provide separate bathrooms, locker rooms, and showers on the basis of sex as long as the school provides comparable facilities for each sex. Applying the same interpretation and application of the *Bostock* decision to this Title IX regulation as to the Title IX athletic regulation, the Department concluded, “Therefore, we believe the plain ordinary public meaning of the controlling statutory and regulatory text requires a recipient providing” separate intimate facilities on the basis of sex “to regulate access based on biological sex.” OGC Memo. at 9. The Department acknowledged contrary decisions in the Fourth Circuit and Eleventh Circuit, where courts held that denying students access to school bathrooms in accordance with the student’s gender identity rather than biological sex violated Title IX despite the permissive regulation (34 C.F.R. § 106.33) that allows schools to provide single-sex intimate facilities. OGC Memo. at 9-10. But the Department remained “unpersuaded by the Title IX analysis in both *Adams* and *Grimm*” because, *inter alia*, those

court decisions “failed to rigorously analyze Title IX’s plain text . . . or to fairly address the legal consequences of the Department’s unique implementing regulations[.]”

Because the term “sex” refers to biological sex and not to gender identity (a proposition supported by *Bostock*, 140 S. Ct. at 1738-39), the Title IX regulation permitting single-sex intimate facilities authorizes separate, comparable facilities on the basis of *sex* but does not authorize provision of facilities on the basis of *gender identity*. If a facility is purportedly provided for females, but males with a female gender identity are permitted access, then the facility is no longer single-sex. Thus, an interpretation of Title IX that would force a school desiring to provide single-sex facilities to grant access based on gender identity would effectively eliminate the discretion of schools to lawfully provide single-sex facilities. Instead, the Department should reinforce the validity of 34 C.F.R. § 106.33 (which is already a permissive, not mandatory, regulation). Facilities for using toilets, changing clothing, or showering inherently involve vulnerability and implicate dignity and privacy interests. Providing single-sex intimate facilities (comparable for each sex) has traditionally been a valuable way to ensure that women and girls feel safe enough to participate fully in public life. For this reason, constitutional equal protection challenges to single-sex facilities have been largely unsuccessful.<sup>9</sup> Single-sex intimate facilities should remain a legally permissible option for schools to provide, particularly for the benefit of women and girls.

#### **D. Other Single-Sex Activities**

Title IX and its implementing regulations contain other exceptions to the general rule that distinctions cannot lawfully be made regarding provision of education programs or activities. Some

---

<sup>9</sup> See, e.g., *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (“The point is illustrated by society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.”); see also *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 2012) (“[t]he right to bodily privacy is fundamental” and “common sense” and “decency” protect a parolee’s right not to be observed by an officer of the opposite sex while producing a urine sample); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) (“The desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”).

of these exceptions rest on the same rationale as for single-sex sports – that is, biological differences between the sexes mean that males and females are not similarly situated, and equal opportunity for each sex may be best served by providing single-sex activities. *See, e.g.*, 34 C.F.R. § 106.34(a)(1) (recipients may separate students on the basis of sex in physical education classes involving contact sports). Others rest on the same rationale as for single-sex intimate facilities – that is, biological differences between males and females mean that with respect to activities inherently involving sleeping, showering, changing clothes, or discussion of human sexuality, the dignity, privacy, and safety of each sex is best served by providing such activities in single-sex spaces. *See, e.g.*, 20 U.S.C. § 1686 (a recipient may provide single-sex, comparable housing for members of each sex); 34 C.F.R. § 106.34(a)(3) (recipients may conduct separate human sexuality classes for students of each sex). The sex-based civil rights of women and girls can only remain robust by validating the continued permissibility of providing these kinds of single-sex spaces.

### **III. Protection of Free Speech Requires Express Acknowledgment That Merely Identifying A Person’s Sex, Stating Facts About Human Sexual Dimorphism, Or Expressing Opinions Critical Of Gender Identity, Does Not Constitute Actionable Discrimination Or Harassment Under Title IX.**

In issuing new Title IX regulations in 2020 addressing sex discrimination in the form of sexual harassment, the Department for the first time in legally binding regulations defined “sexual harassment”<sup>10</sup> and, throughout the Preamble to that Sexual Harassment Final Rule, explained the

---

<sup>10</sup> *See* 34 C.F.R. § 106.30(a) defining “sexual harassment” as conduct on the basis of sex that is either (1) a quid pro quo proposition by a school employee; (2) *unwelcome conduct determined by a reasonable person to be severe, pervasive, and objectively offensive*, or (3) sexual assault, dating violence, domestic violence, or stalking. Assuming *arguendo* that the logic of *Bostock* (decided by the Supreme Court after the Department had published its Sexual Harassment Final Rule) now applies to the Department’s Title IX regulations, a sexual harassment allegation could be based on, for instance, verbal statements critical of gender identity ideology, or comments about a person’s gender identity, that someone finds subjectively unwelcome. (This is because the logic of *Bostock* is that a person’s gender identity is intertwined with the person’s biological sex, and 34 C.F.R. § 106.30(a) defines sexual harassment as any type of conduct – without excluding purely verbal conduct – “on the basis of sex.”) Regulatory direction is necessary to ensure that while such verbal comments may be “unwelcome,” they should not rise to the level of what a reasonable person would find to be “severe, pervasive, and objectively offensive” if such comments merely identify a person’s sex, state scientific facts about human sexual dimorphism, or express opinions or beliefs critical of gender identity.



importance of defining actionable harassment (which can consist of verbal conduct) in a manner that fully respects and protects freedom of speech and academic freedom in an educational environment. For example, the Department stated:

The First Amendment plays a crucial role in ensuring that the American government remains responsive to the will of the people and effects peaceful change by fostering free, robust exchange of ideas,<sup>11</sup> including those relating to sex-based equality and dignity.<sup>12</sup> There is no doubt that words can wound, and speech can feel like an “assault, seriously harm[ing] a private individual” with effects that often linger.<sup>13</sup> Nonetheless, serious risks attach to soliciting the coercive power of government to enforce even laudable social norms such as respect and civility.<sup>14</sup> Even low-value speech warrants constitutional protection, in part because government should not be the arbiter of valuable versus worthless expression.<sup>15</sup> This principle holds true for elementary and secondary

---

<sup>11</sup> See *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (“The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”) (internal citations omitted).

<sup>12</sup> Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 JOURNAL OF COLL. & UNIV. L. 385, 397 (2009) (“In drafting and applying their harassment policies, colleges and universities frequently target protected speech merely because the expression in question is alleged to be sexist, prejudicial, or demeaning. . . . This approach ignores the fact that even explicitly sexist or racist speech is entitled to protection, and all the more so where it espouses views on important issues of social policy. Few people would disagree, for example, that the subjects of relations between the sexes, women’s rights, and the pursuit of economic and social equality are all important matters of public concern and debate. Therefore, speech relating to such topics, regardless of whether it takes a favorable or negative view of women, is highly germane to the debate of public matters and social policy. In the marketplace of ideas, these expressions should not be suppressed merely to avoid offense or discomfort.”) (citing *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding invalid under the First Amendment a statute that prohibited pornography depicting the subordination of women because the statute was a content-based restriction – that is, it applied not to all sexual depictions but to depictions of women in a disfavored manner)).

<sup>13</sup> *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (Breyer, J., concurring); see also *Davis*, 526 U.S. at 651-52 (acknowledging that gender-based banter, insults, and teasing can be upsetting to those on the receiving end).

<sup>14</sup> Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 744 (2017) (“Recently, students have been in the vanguard, demanding that offensive speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal. They seek the coercive power of authority to enforce laudable social norms – respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.”).

<sup>15</sup> *Id.* at 749-50 (2017) (“Many people question whether rude epithets, crude jokes, and disparaging statements are the kind of expression that merits First Amendment protection. The Supreme Court has long held the Constitution protects the right to speak ‘foolishly and without moderation.’ You might maintain that racist, misogynist and other vile speech

schools as well as postsecondary institutions.<sup>16</sup> Schools, colleges, and universities, and their students and employees, who find speech offensive, have numerous avenues to confront offensive speech without “the means of imposing unique limitations upon speakers who (however benignly) disagree.”<sup>17</sup>

The Department believes that the tension between student and faculty freedom of speech, and regulation of speech to prohibit sexual harassment, is best addressed through rules that prohibit harassing and assaultive physical conduct, while ensuring that harassment in the form of speech and expression is evaluated for severity, pervasiveness, objective offensiveness, and denial of equal access to education. This is the approach taken in the § 106.30 definition of sexual harassment, under which *quid pro quo* harassment and Clery

---

makes no contribution at all to the exchange of ideas – but the Speech Clause protects even so-called low-worth expression, in large part because no public authority can be trusted to distinguish valuable from worthless expression. The government cannot ban hateful expression, no matter how hurtful.”) (citing *Cohen v. California*, 403 U.S. 15, 25-26 (1971)). Furthermore, permitting censorship of speech in an effort to be on the right side of history with respect to racial or sexual equality ignores the role that commitment to the First Amendment has played in achieving milestones for racial and sexual equality. See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L. J. 484, 536-37 (1990) (“History demonstrates that if the freedom of speech is weakened for one person, group, or message, then it is no longer there for others. The free speech victories that civil libertarians have won in the context of defending the right to express racist and other anti-civil libertarian messages have been used to protect speech proclaiming anti-racist and pro-civil libertarian messages. For example, in 1949, the ACLU defended the right of Father Terminiello, a suspended Catholic priest, to give a racist speech in Chicago. The Supreme Court agreed with that position in a decision that became a landmark in free speech history. Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights demonstrators by relying on the *Terminiello* decision [*Terminiello v. City of Chicago*, 337 U.S. 1 (1949)].”) (internal citations omitted); see also Anthony D. Romero, *Equality, Justice and the First Amendment*, AMERICAN CIVIL LIBERTIES UNION (ACLU) (Aug. 15, 2017), <https://www.aclu.org/blog/free-speech/equality-justice-and-first-amendment> (explaining that the ACLU’s nearly century-long history defending freedom of speech “including speech we abhor” is due to belief that “our democracy will be better and stronger for engaging and hearing divergent views. Racism and bigotry will not be eradicated if we merely force them underground. Equality and justice will only be achieved if society looks such bigotry squarely in the eyes and renounces it. . . . There is another reason that we have defended the free speech rights of Nazis and the Ku Klux Klan. . . . We simply never want government to be in a position to favor or disfavor particular viewpoints.”).

<sup>16</sup> See Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 754-55 (2017) (“Constitutional doctrine asks our youngest students to use the traditional constitutional responses to vile speech: Walk away, don’t listen, or respond with ‘more and better speech.’ These general First Amendment principles apply with at least as much vigor to college campuses, where most students are adults, not schoolchildren, the guiding ethos of higher education supplements constitutional mandates, and students are not compelled to attend. Looking at what the Constitution requires in grades K-12 reveals a lot about what we should expect the adults enrolled in college to have the capacity to withstand. Since our constitutional framework expects this degree of coping from children beginning in elementary school, it is not asking too much of college students to handle offensive sentiments by using the standard First Amendment tools: Walk away, throw the pamphlet in the trash, get off the screen or, even better, tackle objectionable speech with more and better speech.”) (discussing and citing *Nuxoll v. Indian Prairie Sch. Dist.* # 204, 523 F.3d 668, 672 (7th Cir. 2008); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202 (3d Cir. 2001); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005)).

<sup>17</sup> *R.A.V.*, 505 U.S. at 395-96. As a commenter observed, recipients retain the ability and discretion to respond to offensive speech by a student (or employee) by providing the complainant with supportive measures, responding to the offensive speech with institutional speech, or offering programming designed to foster a welcoming campus climate more generally.

Act/VAWA offenses receive *per se* treatment as actionable sexual harassment, while other forms of harassment must meet the *Davis* standard. This approach balances the “often competing demands of the First Amendment’s express guarantee of free speech and the Fourteenth Amendment’s implicit promise of dignity and equality.”<sup>18</sup>

Sexual Harassment Final Rule, 85 Fed. Reg. 30,163-164 (footnotes 7-14 correspond to footnotes 730-737 in original).

While a definition of actionable sexual harassment protective of First Amendment guarantees and principles of free speech is important, the Department must issue further regulations, consistent with Provision (4) proposed by Petitioner *supra*, in order to ensure that discrimination or harassment alleged to be based on “gender identity” – which may fall under Title IX as potential sex discrimination, per Provision (2) proposed by Petitioner *supra* – is *not* actionable when the alleged conduct merely consists of (i) identifying or acknowledging a person’s sex (including by use of a sex-based pronoun that corresponds with the person’s sex without regard for the person’s preferred pronoun), or (ii) stating the fact that humans are a sexually dimorphic species, that sex is an immutable biological characteristic, or similar factual statements, or (iii) expressing opinions, beliefs, or viewpoints critical or skeptical of the concept of gender identity, including the viewpoint that “gender identity” is a spiritual or metaphysical concept. This proposed regulatory provision would ensure protection of freedom of speech and academic freedom in educational environments, while acknowledging (per Provision (2) and Provision (3) proposed by Petitioner *supra*) that discrimination, or sexual harassment as defined under 34 C.F.R. § 106.30(a), arising from conduct

---

<sup>18</sup> Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 JOURNAL OF LEGAL EDUC. 739, 739 (2017) (“Campuses are rocked by racially and sexually offensive speech and counter speech. Offensive speech and counter speech, including demonstrations and calls for policies that shield the vulnerable and repercussions for offenders, are both protected by the Constitution. Yet some college administrations regulate this protected speech. Expression on both sides of a cultural and political divide brings to the fore a conflict that has been simmering in legal commentary for about two decades: the tension between the often competing demands of the First Amendment’s express guarantee of free speech and the Fourteenth Amendment’s implicit promise of dignity and equality. This clash between two fundamental principles seems to have been exacerbated recently by a renewed focus on identity politics both on campus and in national and international affairs.”).

based on a person's gender identity may be actionable under Title IX.

Without such a regulatory provision, any person who does not subscribe to specific beliefs about gender identity is vulnerable to accusations, investigations, and punitive “cancellation” actions – results that have befallen scores of people (mostly women) who in recent years have stated facts or expressed viewpoints critical or skeptical of the concept (and impact on women) of gender identity. Any administrative enforcement of gender identity discrimination must proceed against the backdrop of respect for every person's constitutional right to freedom of speech and expression. *See, e.g., Peterson v. City of Greenville*, 373 U.S. 244 (1963) (holding that a city government could not compel a private business to act in a manner that would violate the Constitution).

## CONCLUSION

In circumstances where taking into account a person's sex is relevant to ensuring equal dignity, autonomy, and opportunity for women and girls, civil rights laws must continue to recognize *sex*-based rights, including rights to comparable single-*sex* spaces. The Department should initiate rulemaking compliant with the APA to promulgate a rule issuing and amending the Title IX implementing regulations located in 34 C.F.R. Part 106, setting forth the specific substantive provisions proposed by Petitioner *supra* in “NATURE OF REQUEST.” Doing so will clarify and crystallize Title IX rights and protections crucial to the equal educational opportunities of women and girls in a climate of efforts to combat unfair treatment of people who believe they have a gender identity different from their sex.

The Department must resolve this petition “within a reasonable time,” 5 U.S.C. § 555(b), which is “typically counted in weeks or months, not years,” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004). In this case, because Exec. Order 13998 directs the Department to take action within 100 days on the same subject matter raised by this Petition, a “reasonable time” to resolve this Petition cannot be longer than 100 days. Furthermore, the Department is legally

obligated to act on this Petition within “60 calendar days of the Department’s receipt of the petition,” by way of OCR either recommending that the Department proceed with consideration of rulemaking as this Petition requests, or by OCR denying this Petition in whole or in part. 34 C.F.R. § 9.9(c)(3). The Department must notify Petitioner of “of any action on the petition” and if OCR denies the Petition then the Department “must provide an appropriately reasoned statement of the grounds for denial.” 34 C.F.R. § 9.9(c)(4).

This Petition is submitted via Regulations.gov, Docket No. ED-2020-OGC-0163, per the “Instructions for Submitting a Petition for Rulemaking” described in document ED-2020-OGC-0163-002 (“Instructions”) in conformity with 34 C.F.R. § 9.9(c)(2)(i) (“A petition must – (i) Be submitted to the Department through its docket designated for petitions on regulations.gov[.]”). Per the Instructions, “Once the Department decides how to respond to the petition, it will notify the petitioner of this decision and post its decision within the appropriate docket on [www.regulations.gov](http://www.regulations.gov).” Because the subject matter of this Petition concerns the rights and interests of students, employees, and participants in every education program or activity receiving Federal financial assistance, Petitioner urges the Department to open this Petition for public comment (as is the practice of other Federal agencies such as the Securities and Exchange Commission).

Petitioner, and the women and girls whose Title IX rights Petitioner seeks to protect, await the Department’s prompt, thorough response to this Petition.

Dated: February 8, 2021

Respectfully submitted,

*/s/ Lauren R. Adams*

---

Lauren R. Adams  
WOMEN’S LIBERATION FRONT  
455 Massachusetts Ave. NW #190  
Washington, DC 20001-2621  
(540) 918-0186  
[legal@womensliberationfront.org](mailto:legal@womensliberationfront.org)  
*Counsel for Petitioner*

# Exhibit 1



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF THE GENERAL COUNSEL

Date: January 8, 2021

**MEMORANDUM FOR KIMBERLY M. RICHEY  
ACTING ASSISTANT SECRETARY  
OF THE OFFICE FOR CIVIL RIGHTS**

*Re: Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)*

The U.S. Department of Education's (Department) Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681, *et seq.*, and its implementing regulations at 34 C.F.R. Part 106, prohibiting discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. You have asked the Office of the General Counsel a series of questions regarding the effect of the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), with respect to Title IX. Our answers are presented below.

**Question 1: Does the *Bostock* decision construe Title IX?**

**Answer:** No. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) construes the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Title VII). The Court decided the case narrowly, specifically refusing to extend its holding to Title IX and other differently drafted statutes. *Id.* at 1753. The Department does not have authority to enforce Title VII. Our understanding is OCR occasionally receives cases alleging discrimination filed by employees. OCR's [Case Processing Manual](#) describes OCR's views on its jurisdiction over employment-related complaints.

Title IX, which the Department does have authority to enforce, prohibits sex discrimination in education programs or activities receiving Federal financial assistance. But Title IX text is very different from Title VII text in many important respects. Title IX, for example, contains numerous exceptions authorizing or allowing sex-separate activities and intimate facilities to be provided separately on the basis of biological sex or for members of each biological sex. *Compare* 42 U.S.C. §§ 2000e-1, 2000e-2 *with* 20 U.S.C. §§ 1681(a), 1686. However, Title VII and Title IX both use the term "sex", and it is here *Bostock* may have salience. *Bostock* compels us to interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment. *Bostock*, 140 S. Ct. at 1738 (citations omitted). And as explained below, specifically in the answer to Question 2, the Department's longstanding construction of the term "sex" in Title IX to mean biological sex, male or female, is the only construction consistent with the ordinary public meaning of "sex" at the time of Title IX's enactment.

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100  
[www.ed.gov](http://www.ed.gov)

**Question 2: Does *Bostock* affect the meaning of “sex” as that term is used in Title IX?**

**Answer:** No. *Bostock* does not affect the meaning of “sex” as that term is used in Title IX for at least two reasons. First, as we pointed out in response to Question 1, *Bostock* does not construe Title IX. However, it is worth noting the Court’s assumption that the ordinary public meaning of the term “sex” in Title VII means biological distinctions between male and female. *See Bostock*, 140 S. Ct. at 1738–39; *see also* 1784–91 (Appendix A) (Alito, J. dissenting).<sup>1</sup> This is consistent with and further supports the Department’s long-standing construction of the term “sex” in Title IX to mean biological sex, male or female.

Second, statutory and regulatory text and structure, contemporaneous Supreme Court authorities, and the Department’s historic practice demonstrate that the ordinary public meaning of the term “sex” at the time of Title IX’s enactment could *only* have been, as Justice Gorsuch put it, “biological distinctions between male and female.” *See* 20 U.S.C. §§ 1681(a), 1686; *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”); 34 CFR §§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61; *see also Bostock*, 140 S. Ct. at 1739, 1784–91 (Appendix A) (Alito, J. dissenting); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (“discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 146, 149 (1976) (Brennan, J. and Marshall, J. dissenting) (“*Geduldig* itself obliges the Court to determine whether the exclusion of a sex-linked disability from the universe of compensable disabilities was actually the product of neutral, persuasive actuarial considerations, or rather stemmed from a policy that purposefully downgraded women’s role in the labor force. . . . [T]he Court simply disregards a history of General Electric practices that have served to *undercut the*

---

<sup>1</sup>The Court’s assumption that “sex” as used in Title VII means the biological distinctions between male and female drove the reasoning.

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified *as male at birth* for traits or actions that it tolerates in an employee identified *as female at birth*.”

140 S. Ct. at 1741 (emphasis added). In other words, a male employee who identifies as female nonetheless remains a biological male. Therefore, when an employer discriminates against such a person for certain “traits or actions” otherwise tolerated in a biological female, *Bostock* holds the employer violated Title VII.

*Bostock* uses a “but for” analysis to determine whether an employee’s homosexuality or transgender status is covered by Title VII’s bar on sex discrimination. *See Bostock* at 1742. We believe the same “but for” analysis would logically extend to individuals who allege discrimination on the basis that they are heterosexual or non-transgender. Nevertheless, we note no reason to believe the Court’s logic necessarily leads to the conclusion that all forms of sexual orientation are covered by Title VII.



*employment opportunities of women who become pregnant while employed.”)* (citations and footnote omitted).<sup>2</sup>

As stated in the Preamble to the Title IX Final Rule published on May 19, 2020:

Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department’s current regulations . . . reflect this presupposition. For example, 20 U.S.C. 1681(a)(2), which concerns educational institutions commencing planned changes in admissions, refers to “an institution which admits only students of one sex to being an institution which admits students of both sexes.” Similarly, 20 U.S.C. 1681(a)(6)(B) refers to “men’s” and “women’s” associations as well as organizations for “boys” and “girls” in the context of organizations “the membership of which has traditionally been limited to persons of one sex.” Likewise, 20 U.S.C. 1681(a)(7)(A) refers to “boys” and “girls” conferences. Title IX does not prohibit an educational institution “from maintaining separate living facilities for the different sexes” pursuant to 20 U.S.C. 1686.

. . . .

In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department’s justification for not allowing schools to use “a single standard of measuring skill or progress in physical education classes . . . [if doing so] has an adverse effect on members of one sex” was that “if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex.”

U.S. Dep’t of Educ., Office for Civil Rights, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule, 85 Fed. Reg. 30,178 (May 19, 2020).

Additional evidence that the term “sex” and human biology are inextricably linked under Title IX may be found in the Department’s regulations expressly prohibiting discrimination related to a student or employee’s pregnancy. 34 C.F.R. § 106.40(b)(1). These regulations are valid only because they effectuate Title IX’s prohibition against sex discrimination. *See* 20 U.S.C. § 1682. Courts have recognized, quite correctly in our view, that discrimination on the basis of pregnancy constitutes discrimination on the basis of female physiology and is therefore prohibited under Title

---

<sup>2</sup> *Gilbert* and *Newport News* are Title VII cases. *Frontiero* is a due process case. However, all are roughly contemporaneous with the enactment of Title IX and the promulgation of the Department’s regulations, and all suggest the ordinary public meaning of “sex” at the time of Title IX’s enactment was biological sex, male or female, not transgender status or homosexuality.

IX. *Conley v. Nw. Fla. State College*, 145 F. Supp. 3d 1073, 1077 (N.D. Fl. 2015). Biological males, regardless of transgender status or surgical interventions, are incapable of bearing children.

The Title IX regulations became effective only after direct and extensive Congressional review, including six days of House hearings to determine whether the regulations were “consistent with the law and with the intent of the Congress in enacting the law.” *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531–33 (internal quotation marks omitted). Accordingly, they carry extra weight and interpretative authority. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 468 U.S. 837, 842–45 (1984). Additionally, the Title IX statute has been amended repeatedly since the Title IX regulations were adopted, see, e.g., *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286–87 (2d Cir. 2004) (discussing amendments made by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28–29 (1988)), and although the matter has been the subject of some debate within Congress, Congress has not disturbed these regulations. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531–35 (1982) (“Where an agency’s statutory construction has been ‘fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.’”) (citations and internal quotation marks omitted).

Consequently, based on controlling authorities, 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. Congress has the authority to rewrite Title IX and redefine its terms at any time. To date, however, Congress has chosen not to do so.

**Question 3: How should OCR view allegations that a recipient targets individuals for discriminatory treatment on the basis of a person’s transgender status or homosexuality?**

**Answer:** Although *Bostock* expressly does not decide issues arising under Title IX or other differently drafted laws, the logic of *Bostock* may, in some cases, be useful in guiding OCR’s understanding as to whether the alleged discrimination on the basis of a person’s transgender status or homosexuality necessarily takes into account the person’s biological sex and, thus, constitutes discrimination on the basis of sex. Depending on the facts, complaints involving discrimination on the basis of transgender status or homosexuality might fall within the scope of Title IX’s non-discrimination mandate because they allege sex discrimination. See *Bostock*, 140 S. Ct. at 1741, 1737 (“Sex plays a necessary and undisguisable role in the decision” to fire an employee because of the employee’s homosexual or transgender status).

However, we emphasize that Title IX and its implementing regulations, unlike Title VII, may *require* consideration of a person’s biological sex, male or female. 20 U.S.C. §§ 1681(a), 1686; 34 CFR §§ 106.32(b), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61. Consequently, we believe a recipient generally would not violate Title IX by, for example, recording a student’s biological sex in school records, or referring to a student using sex-based pronouns that correspond to the student’s biological sex, or refusing to permit a student to participate in a program or activity lawfully provided for members of the opposite sex, regardless of transgender status or homosexuality.

**Question 4: After *Bostock*, how should OCR view allegations of employment discrimination or sexual harassment based on an individual's transgender status or homosexuality?**

**Answer:** We address the employment and harassment aspects of this question separately below.

A. Employment

In *Bostock*, the Supreme Court considered “whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex’” under Title VII. *Bostock*, 140 S. Ct. at 1753. Assuming the term “sex” in Title VII means biological sex, male or female, the Supreme Court held: “An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” *Id.* at 1737. Title IX also prohibits termination of an employee on the basis of sex, meaning a person’s biological sex, male or female. By analogy to *Bostock*, terminating an employee on the basis of the employee’s homosexuality or transgender status implicates that employee’s sex and, thus, is at least in part discrimination on the basis of the employee’s biological sex. An individual employee’s sex is “not relevant to the selection, evaluation, or compensation of employees.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion). Even Title VII, however, recognizes that there are circumstances where an individual’s sex is relevant to employment and expressly provides that an employer may consider sex “in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C. § 2000e-2(e)(1). If a person’s sex is a bona fide occupational qualification, “such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned,” then Title IX and its implementing regulations, like Title VII, would not prohibit discrimination on the basis of sex. 34 C.F.R. § 106.61; *see also* 34 C.F.R. §§ 106.55(c), 106.59.

B. Sexual Harassment

In the Title IX Final Rule, issued on May 19, 2020, the Department for the first time recognized and defined sexual harassment as a form of sex discrimination with regulations that had the force and effect of law. 85 Fed. Reg. 30,026. Under our regulations, “sexual harassment” means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct (hereinafter referred to as “*quid pro quo* sexual harassment”);
- (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; or

- (3) “Sexual assault” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. § 12291(a)(10), “domestic violence” as defined in 34 U.S.C. § 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

34 C.F.R. § 106.30(a).

The preamble acknowledged “[a]nyone may experience sexual harassment, irrespective of gender identity or sexual orientation,” 85 Fed. Reg. 30,178, and stated the “final regulations focus on prohibited conduct, irrespective of the identity of the complainant and respondent,” 85 Fed. Reg. 30,179. Under 34 C.F.R. § 106.30(a), the Department continues to interpret “conduct on the basis of sex” as conduct on the basis of a person’s biological sex. Consistent with *Bostock*, harassment on the basis of a person’s transgender status or homosexuality may implicate that person’s biological sex and, thus, may at least in part constitute “conduct on the basis of sex.” Accordingly, unwelcome conduct on the basis of transgender status or homosexuality may, if so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity on the basis of their transgender status or homosexuality, constitute sexual harassment prohibited by Title IX. 34 C.F.R. § 106.30(a).

**Question 5: How does the Department interpret Title IX and its implementing regulations in light of *Bostock* with respect to athletics, intimate facilities, religious exemptions, and other sex-segregated programs or activities addressed under Title IX and its regulations?**

**Answer:** Our answer to this question is based on three propositions. First, *Bostock* applies only to Title VII. Compare 42 U.S.C. § 2000e, *et seq.* with 20 U.S.C. §§ 1681, *et seq.* It does not purport to construe, much less abrogate, Title IX’s statutory and regulatory text permitting or requiring biological sex to be taken into account in an educational setting.<sup>3</sup> Second, the ordinary public meaning of “sex” at the time of Title IX’s enactment was biological sex, male or female, not transgender status or sexual orientation. Third, the Department’s regulations recognizing the male/female biological binary carry extra weight and interpretative authority because they were the product of uniquely robust and direct Congressional review. *Bell*, 456 U.S. at 531–32 (describing Congressional review of regulations implementing Title IX); *see also Mead Corp.*, 533 U.S. at 226–27; *Chevron*, 468 U.S. at 842–45. Consequently, our view is that *Bostock*’s holding and reasoning, to the extent relevant, support the Department’s position that Title IX’s statutory and regulatory provisions permit, and in some cases require, biological sex, male or female, to be taken into account in an education program or activity.<sup>4</sup> See 20 U.S.C. §§ 1681(a), 1686; 34 CFR

---

<sup>3</sup>*Bostock* emphasized that general non-discrimination statutes often contain exceptions that override a general duty in some circumstances. See, e.g., 140 S. Ct. at 1754 (“As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations [in Title VII].”). Even under Title VII (concerning workplace discrimination), the *Bostock* Court expressly left open the issue of sex-segregated facilities and policies.

<sup>4</sup>This Memorandum does not presume to exhaust the ways recipients may lawfully consider sex under Title IX in their programs and activities, and there may be circumstances not addressed by this document under which a recipient’s consideration of sex does not constitute unlawful discrimination under Title IX.

§§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133; *Yates*, 574 U.S. at 537-38; *Davis*, 489 U.S. at 809.

#### A. Athletics

We believe the ordinary public meaning of controlling statutory and regulatory text requires a recipient providing separate athletic teams to separate participants solely based on their biological sex, male or female, and not based on transgender status or homosexuality, to comply with Title IX.

Under Title IX and its regulations, a person's biological sex *is* relevant for the considerations involving athletics, and distinctions based thereon are permissible and may be required because the sexes are not similarly situated. 34 CFR § 106.41. Biological females and biological males are different in ways that are relevant to athletics because of physiological differences between males and females. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women, however, are enduring.”); *Frontiero*, 411 U.S. at 686 (plurality opinion) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”). Accordingly, schools must consider students’ biological sex when determining whether male and female student athletes have equal opportunities to participate. *See McCormick*, 370 F.3d at 287 (“[I]dentical scheduling for boys and girls is not required. Rather, compliance is assessed by first determining whether a difference in scheduling has a negative impact on one sex, and then determining whether that disparity is substantial enough to deny members of that sex equality of athletic opportunity.”); *Clark v. Ariz. Interscholastic Ass’n*, 886 F.2d 1191, 1192 (9th Cir. 1989) (quoting *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (“The record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished”)).

*Bostock* does not diminish the relevance of biological sex in athletics, and does not address the validity of the Department’s historic measures to ensure biological females (girls and women) have equal opportunities to participate in athletics because males and females are not similarly situated with respect to athletic competition.<sup>5</sup> Unlike Title VII, one of Title IX’s crucial purposes is protecting women’s and girls’ athletic opportunities. Indeed, Title IX was enacted, and its regulations promulgated, to prohibit discrimination on the basis of sex in education programs and activities and to protect equal athletic opportunities for students who are biological females, including by providing for sex-segregated athletics.

The fact is, Congress specifically mandated that the Department consider promulgating regulations to address sports. After first enacting Title IX, Congress subsequently passed another

---

<sup>5</sup>Although the Department does not address Equal Protection Clause claims regarding separate athletic teams for biological females and biological males, the Department’s position on such claims is stated in its [Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal](#) in *Hecox v. Little*, Nos. 20-35813, 20-35815, U.S. Court of Appeals for the Ninth Circuit (filed Nov. 19, 2020).



statute, entitled the Javits Amendment, instructing the Secretary of Health, Education, and Welfare to publish regulations “implementing the provisions of Title IX . . . which shall include with respect to intercollegiate activities reasonable provisions considering the nature of the particular sports.” Public Law 93–380 (HR 69), § 844, 88 Stat 484, 612 (August 21, 1974). Congress reserved the right to review the regulations following publication to determine whether they were “inconsistent with the Act from which [they] derive[] [their] authority.” *Id.*

The Secretary of Health, Education, and Welfare subsequently published Title IX regulations, including regulatory text identical to the current text of the Department’s athletics regulations. *Compare* Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24,128, 21,142–43 (June 4, 1975) (promulgating § 86.41 Athletics) *with* 34 C.F.R. § 106.41. After Congressional review, including over six days of hearings, Congress allowed the regulations to go into effect. *See McCormick*, 370 F.3d at 287 (laying out the history of the Javits Amendment, and the response from Congress to the regulations promulgated thereunder). Consequently, the regulations validly and authoritatively clarify the scope of a recipient’s non-discrimination duties under Title IX in the case of sex-specific athletic teams. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (“The degree of deference [to the Department of Education] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.”).

34 C.F.R. § 106.41 prohibits a recipient from discriminating on the basis of sex with respect to providing athletic programs or activities, permits a recipient to provide sex-segregated teams for competitive activities or contact sports, and obligates a recipient to provide equal athletic opportunity for members of both sexes.<sup>6</sup> As it has for over forty years, the Department must interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams “for members of *each sex*,” and 34 C.F.R. § 106.41(c), regarding equal athletic opportunity for “members of *both sexes*” (emphasis added), to mean operation of teams and equal opportunity for biological males, and for biological females. Based on statutory text and regulatory history, it seems clear that if a recipient chooses to provide “separate teams for members of each sex” under 34 C.F.R. § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation, to comply with Title IX.<sup>7</sup>

---

<sup>6</sup> Specifically, 34 C.F.R. § 106.41(a) provides a general rule that recipients shall not provide athletics separately based on sex. However, 34 C.F.R. § 106.41(b) permits a recipient to operate or sponsor separate teams for members of each sex where selection for the teams is based on competitive skill, or the activity is a contact sport, and also provides that where a recipient operates or sponsors a team in a particular sport for members of one sex with no such team for members of the opposite sex, then members of the excluded sex must be allowed to try out for the team unless it is for a contact sport. Finally, 34 C.F.R. § 106.41(c) obligates a recipient to provide “equal athletic opportunity for members of both sexes” by taking into account specified factors in deciding what athletic programs to offer.

<sup>7</sup> Different treatment based on transgender status or homosexuality would generally constitute unlawful sex discrimination because students who do not identify as transgender or homosexual cannot generally be treated worse than students who identify as transgender or homosexual. *See*

## B. Intimate Facilities

As discussed above, the ordinary public meaning of the term “sex” at the time of Title IX’s enactment was biological sex, male or female. That too was the meaning given to the term when it was used in the Department’s implementing regulations approved by Congress. *See, e.g., Bell*, 456 U.S. at 531–32; 34 CFR §§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61. 34 C.F.R. § 106.33 permits schools to provide separate bathrooms, locker rooms, and showers “on the basis of sex,” as long as the school provides comparable facilities for “each sex.” Therefore, we believe the plain ordinary public meaning of the controlling statutory and regulatory text requires a recipient providing “separate toilet, locker room, and shower facilities on the basis of sex” to regulate access based on biological sex.

Our opinion is contrary to the holding of a divided panel of the Fourth Circuit Court of Appeals in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020). There, the court held denying a biological female who identified as a male access to intimate facilities reserved for males violated Title IX and acknowledged that “*Bostock* expressly does not answer this ‘sex-separated restroom’ question.” *Id.* at 618 (citing *Bostock* 140 S. Ct. at 1753). The court’s analysis of 34 C.F.R. § 106.33, in its entirety, was:

[T]he Board emphasizes a Department of Education implementing regulation, 34 C.F.R. § 106.33, which interprets Title IX to allow for “separate toilet, locker room, and shower facilities on the basis of sex,” so long as they are “comparable” to each other. But Grimm does not challenge sex-separated restrooms; he challenges the Board’s discriminatory exclusion of himself from the sex-separated restroom matching his gender identity. And the implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex. All it suggests is that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what “sex” means.

As explained above, Grimm consistently and persistently identified as male. He had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys restrooms as part of the appropriate treatment. Rather than contend with Grimm’s serious medical need, the Board relied on its own invented classification, “biological gender,” for which it turned to the sex on his birth certificate. And even when Grimm provided the school with his amended birth certificate, the Board *still* denied him access to the boys restrooms. For these reasons, we hold that the Board’s application of its restroom policy against Grimm violated Title IX.

*Id.* at 618–19 (citations omitted) (emphasis in original).

---

*Bostock*, 140 S. Ct. at 1747. (“But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”)

Our opinion is also contrary to a divided Eleventh Circuit panel decision, *Adams by and through Kasper v. School Board of St. Johns County*, 968 F. 3d 1286 (11th Cir. 2020). There, the court also held that denying a biological female who identified as a male access to intimate facilities reserved for males violated Title IX. Specifically:

The School Board believes 34 C.F.R. § 106.33 of the Title IX implementing regulations forecloses Mr. Adams’s discrimination claim. Section 106.33 reads:

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

The School Board argues that the use of the term “sex” in this regulation clearly means “biological sex,” or sex assigned at birth. Thus, it asserts that dividing restrooms by sex assigned at birth—requiring transgender boys to use the girls’ restroom and transgender girls to use the boys’ restroom—cannot be discriminatory under Title IX. The Board considers Mr. Adams a “biological female,” and it seeks to exclude him from the boys’ restroom on this basis. But Mr. Adams’s discrimination claim does not contradict the implementing regulations for two reasons. First, Mr. Adams is not challenging § 106.33’s provision of separate restrooms for girls and boys. He is simply seeking access to the boys’ restroom as a transgender boy. And second, the regulation does not mandate how to determine a transgender student’s “sex.” Thus, we perceive no conflict between the text of § 106.33 and Mr. Adams’s successful claim of discrimination.

*Id.* at 1308. The court reasoned that Title IX and its accompanying regulations contain no definition of the term “sex” and “the plain language of the regulation sheds no light on whether Mr. Adams’s ‘sex’ is female as assigned at his birth or whether his ‘sex’ is male as it reads on his driver’s license and his birth certificate.” *Id.* at 1310. It explicitly rejected the argument which *Bostock* relied upon, reading the term “sex” to mean “biological sex” and not transgender status. And it concluded the traditional understanding of biological sex to be “narrow” and “unworkable.” *Id.*

We are unpersuaded by the Title IX analysis in both *Adams* and *Grimm* for at least three reasons. First, as described above in response to Question 3, we believe, based on our review of the statutory text, regulatory history, and cited authorities, that the ordinary public meaning of the term “sex” at the time of Title IX’s enactment was biological sex, male or female. The notion that “because neither Title IX nor the regulation define ‘sex’ or ‘on the basis of sex,’ the statute and regulation cannot be presumed to mean ‘biological sex’” is at odds with controlling interpretative canons. *Compare Bostock*, 140 S. Ct. at 1738 *with Adams*, 968 F. 3d at 1310. And if the terms “sex” and “on the basis of sex” are truly ambiguous, then the Department’s longstanding construction, reflected in the implementing regulations and reaffirmed in the Title IX Final Rule is entitled to deference and is for now controlling.



Second, *Adams* and *Grimm* failed to rigorously analyze Title IX’s plain text, compare *Bostock*, 140 S. Ct. at 1738–1743, or to fairly address the legal consequence of the Department’s unique implementing regulations, see *Bell*, 456 U.S. at 531–32. In *Adams*, for example, the majority variously argued *Bostock* does not endorse reading the term “sex” to mean “biological sex”; Title IX and its regulations do not define “sex”; and the traditional understanding of biological sex is “narrow and unworkable.” *Adams*, 968 F. 3d at 1310. In *Grimm*, the court asserted “the implementing regulation cannot override the statutory prohibition against *discrimination* on the basis of sex,” arguing the act of creating sex-separated restrooms in and of itself is not discriminatory but relying on “discriminatory notions of what ‘sex’ means” is unlawful. *Grimm*, 972 F.3d at 618 (footnote omitted). Both panels assuredly should have engaged in the textual analysis mandated by controlling Supreme Court authorities, see *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538–39 (2019), determined the term’s ordinary public meaning at the time of enactment, and addressed the interplay of the entire statutory and regulatory text.<sup>8</sup>

Third, the Department issued its Title IX regulation on May 19, 2020 stating, “Title IX and its implementing regulations include provisions that presuppose sex as a binary classification, and provisions in the Department’s current regulations . . . reflect this presupposition.” 85 Fed. Reg. 30,178. “In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes.” *Id.* *Adams* and *Grimm* were decided more than two months after publication of the Title IX rule and its interpretative preamble. Yet neither discussed the Department’s interpretation. As *Adams* suggests, the Department’s views on the meaning of “sex” in Title IX should have been given deference, or, at a minimum, addressed in the panel decisions, particularly because the statutory and regulatory definition of “sex,” or supposed lack thereof, was purportedly critical to the outcome in both cases. See *Adams*, 968 F.3d at 1310 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019)); *Chevron*, 467 U.S. at 842–44.

---

<sup>8</sup>For example, *Grimm*’s panel reasoned:

In the Title IX context, discrimination “mean[s] treating that individual worse than others who are similarly situated.” In light of our equal protection discussion above, this should sound familiar: Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender. Unlike the other boys, he had to use either the girls restroom or a single-stall option. In that sense, he was treated worse than similarly situated students.

*Grimm*, 972 F.3d at 618. However, Grimm was not treated “worse than similarly situated students” because under the Department’s regulations the proper comparator should have been biological females not biological males.

### C. Religious Exemptions

The 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. *Maxon, et al. v. Fuller Theological Seminary*, No. 2:19-cv-09969 (C.D. Cal. Oct. 7, 2020), *appeal docketed*, No. 20-56156 (9th Cir. Nov. 4, 2020). For example, *Bostock* acknowledged the express statutory exception in Title VII for religious organizations and expressed “deep[] concern[] with preserving the promise of the free exercise of religion enshrined in our Constitution[.]” *Bostock*, 140 S. Ct. at 1753–54. Thus, the Court “recognized that the First Amendment can bar the application of employment discrimination laws[.]” *Id.* at 1754 (citing *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 188 (2012)). Accordingly, the Department’s regulations implementing Title IX do not and lawfully could not require a recipient to restrict “any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution,” including the free exercise of religion. 34 C.F.R. § 106.6(d)(1).

Additionally, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, *et seq.*, “operates as a kind of super statute, displacing the normal operation of other federal laws [] [such that] it might supersede Title VII’s commands in appropriate cases.” *Bostock*, 140 S. Ct. at 1753–54. The Department also acknowledges that RFRA operates as a super statute that might supersede Title IX’s commands in appropriate cases. Office of the General Counsel, U.S. Dep’t of Educ., Guidance Regarding Department of Education Grants and Executive Order 13798, 85 Fed. Reg. 61,736, 61,738–39 (Sept. 30, 2020) (“Congress expressly applied RFRA to all Federal law, statutory or otherwise, whether adopted before or after its enactment. RFRA therefore applies to all laws governing ED programs, including but not limited to nondiscrimination laws such as Title IX”) (footnotes omitted). Although OCR does not have jurisdiction over complaints lodged under RFRA, schools and individuals may inform the Department of a burden or potential burden under RFRA, using the process provided in the Department’s Guidance Regarding Department of Education Grants and Executive Order 13798, [here](#).

### D. Other Sex-Segregated Programs or Activities Addressed Under Title IX and its Regulations

Title IX and its implementing regulations address other circumstances under which it is permissible to provide education programs or activities based on distinctions between the two biological sexes. Examples include, but are not limited to, the following:

- The admissions policies of any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting only students of one sex. 20 U.S.C. § 1681(a)(5).
- The membership practices of certain organizations such as a social fraternity or social sorority whose members are primarily students at an institution of higher education. 20 U.S.C. § 1681(a)(6)(A).

- Organizations such as the Girl Scouts whose membership “has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.” 20 U.S.C. § 1681(a)(6)(B).
- Separate mother-daughter and father-son activities. 20 U.S.C. § 1681(a)(8).
- A school’s decision to provide separate housing for members of each sex. 20 U.S.C. § 1686.
- A recipient’s decision to provide single-sex classes, extracurricular activities, or schools subject to specific regulatory requirements on the basis of sex. 34 C.F.R. § 106.34(b)-(c).
- A recipient’s decision to separate students in physical education classes involving contact sports based on each student’s sex, or to conduct separate sessions in human sexuality classes for students of each sex. 34 C.F.R. § 106.34(a)(1), (a)(3).

For the reasons discussed in response to Questions 2, 3, 5(A), and 5(B), the term “sex” with respect to these and other similar programs or activities should be construed to mean biological sex, male or female.

Please contact us if we may be of further assistance.

U.S. DEPARTMENT OF EDUCATION  
THE OFFICE OF THE GENERAL COUNSEL

**Reed**  
**Rubinstein**

Digitally signed by  
Reed Rubinstein  
Date: 2021.01.08  
14:28:38 -05'00'

---

Reed D. Rubinstein,  
Principal Deputy General Counsel delegated  
the authority and duties of the General Counsel

# Exhibit 2



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS  
32 OLD SLIP, 26<sup>TH</sup> FLOOR  
NEW YORK, NEW YORK 10005

TIMOTHY C. J. BLANCHARD  
DIRECTOR  
NEW YORK OFFICE

August 31, 2020

*Sent via email only to:*

[MIZEL001@hartford.gov](mailto:MIZEL001@hartford.gov)

Lori Mizerak  
Assistant Corporation Counsel  
City of Hartford  
550 Main Street, Room 210  
Hartford, Connecticut 06103  
Attorney for Hartford Public Schools

[dmonastersky@HL-Law.com](mailto:dmonastersky@HL-Law.com)

David S. Monastersky, Esq.  
Howd & Ludorf, LLC  
65 Wethersfield Avenue  
Hartford, Connecticut 06114  
Attorney for Glastonbury Public Schools  
and Canton Public Schools

[pjmurphy@goodwin.com](mailto:pjmurphy@goodwin.com) &  
[lyoder@goodwin.com](mailto:lyoder@goodwin.com)

Peter J. Murphy, Esq.  
Linda L. Yoder, Esq.  
Shipman & Goodwin, LLP  
One Constitution Plaza  
Hartford, Connecticut 06103-1919  
Attorneys for Connecticut Interscholastic Athletic Conference  
and Danbury Public Schools

[izelman@fordharrison.com](mailto:izelman@fordharrison.com)

Johanna Zelman, Esq.  
Ford Harrison  
CityPlace II  
185 Asylum Street, Suite 610  
Hartford, Connecticut 06103  
Attorney for Bloomfield Public Schools  
and Cromwell Public Schools

[OCR-000120]

Re: Case No. 01-19-4025  
Connecticut Interscholastic Athletic Conference

Case No. 01-19-1252  
Glastonbury Public Schools

Case No. 01-20-1003  
Bloomfield Public Schools

Case No. 01-20-1004  
Canton Public Schools

Case No. 01-20-1005  
Cromwell Public Schools

Case No. 01-20-1006  
Danbury Public Schools

Case No. 01-20-1007  
Hartford Public Schools

Dear Attorneys Mizerak, Monastersky, Murphy, Yoder, and Zelman:

The U.S. Department of Education, Office for Civil Rights (OCR) issues this Revised Letter of Impending Enforcement Action<sup>1</sup> in the above-referenced cases. The earlier Letter of Impending Enforcement Action, dated May 15, 2020, has been updated in light of the Supreme Court's holding in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

The Complainant filed complaints against the Connecticut Interscholastic Athletic Conference (CIAC) and the Glastonbury Board of Education (Glastonbury) on behalf of three high school student-athletes and their parents. The Complainant alleged that the CIAC's policy permitting certain biologically male student-athletes to participate in interscholastic athletics (Article IX, Section B of the CIAC By-Laws, adopted May 9, 2013, and titled, "Transgender Participation" (hereinafter referred to as the Revised Transgender Participation Policy)) discriminated against female student-athletes competing in interscholastic girls' track in the state of Connecticut on the basis of their sex.<sup>2</sup> Specifically, the Complainant alleged that the Revised Transgender Participation Policy denied girls opportunities to compete, including in state and regional meets, and to receive public recognition critical to college recruiting and scholarship opportunities. The

---

<sup>1</sup> Section 305 of OCR's *Case Processing Manual* states as follows: "When following the expiration of the 10 calendar day period referenced in CPM subsection 303(g) . . . the recipient does not enter into a resolution agreement to resolve the identified areas of non-compliance, OCR will prepare a Letter of Impending Enforcement Action."

<sup>2</sup> For the purposes of this letter, the terms "male" and "female" are defined by biological sex. See *Mem. from U.S. Attorney General to U.S. Attorneys Heads of Department Components* (Oct. 4, 2017), available at <https://www.justice.gov/ag/page/file/1006981/download>; see also *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739 (2020) (leaving undisturbed the government's position, and noting that the Court proceeded "on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female.").

Complainant further alleged that implementation of the Revised Transgender Participation Policy by Glastonbury, the school attended by one of the complainant student-athletes (Student 1), denied opportunities to girls competing in interscholastic girls' track on the basis of their sex. In addition, the Complainant alleged that the CIAC retaliated against one of the complainant parents (Parent 1), after Parent 1 complained about the Revised Transgender Participation Policy; and that a Glastonbury track coach retaliated against Student 1 for her and her parent's (Parent 2's) advocacy against the Revised Transgender Participation Policy.

Pursuant to OCR's *Case Processing Manual* (the *Manual*),<sup>3</sup> Section 103, OCR also opened an investigation of Bloomfield Public Schools (Bloomfield) and Hartford Public Schools (Hartford), based on allegations that these school districts allowed a biologically male student-athlete (Student A) to participate on their girls' track teams. OCR also opened an investigation of Cromwell Public Schools (Cromwell), based on allegations that this school district allowed a biologically male student-athlete (Student B) to participate on its girls' track team. Additionally, OCR opened an investigation of Canton Public Schools (Canton) and Danbury Public Schools (Danbury), the school districts attended by the other two complainant student-athletes (Students 2 and 3, respectively), following a determination that these school districts may have been involved in alleged acts of discrimination related to the complaints filed against the CIAC and Glastonbury. OCR investigated whether these school districts denied athletic benefits and opportunities to female student-athletes competing in interscholastic girls' track through implementation of the Revised Transgender Participation Policy, or limited the eligibility or participation of any female student-athletes competing in interscholastic girls' track through implementation of the Revised Transgender Participation Policy.

### **Summary of Findings**

As detailed below, the actions of the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury resulted in the loss of athletic benefits and opportunities for female student-athletes. One complainant student-athlete explained to OCR that no matter how hard she trained, she felt that she could never be good enough to defeat Students A and B. She also stated that female student-athletes were missing out on great opportunities to succeed and felt that female student-athletes could be "completely eradicated from their own sports." Another complainant student-athlete explained to OCR that she felt that she could not fairly compete against Students A and B, because they had a physical advantage over her. In this sense, they were denied the opportunities that Connecticut male student-athletes had of being able to compete, on a level playing field, for the benefits that flow from success in competitive athletics. OCR determined that the participation of Students A and B in girls' track events resulted in lost benefits and opportunities for female student-athletes.

OCR determined that the CIAC, by permitting the participation of certain male student-athletes in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, denied female student-athletes athletic benefits and opportunities, including advancing to the finals in events, higher level competitions, awards, medals, recognition, and the possibility of greater visibility to colleges and other benefits. Accordingly, OCR determined that

---

<sup>3</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

the CIAC denied athletic benefits and opportunities to female student-athletes competing in interscholastic girls' track in the state of Connecticut through the Revised Transgender Participation Policy, in violation of the regulation implementing Title IX of the Education Amendments of 1972 (Title IX), at 34 C.F.R. § 106.41(a).

OCR determined that the participation of Glastonbury, Canton, and Danbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Students 1, 2, and 3, and other female student-athletes competing against Students A and B, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Even though Glastonbury, Canton, and Danbury purported to operate separate teams for members of each sex, Glastonbury, Canton, and Danbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student-athletes were denied the opportunity to compete in events that were exclusively female, whereas male student-athletes were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Glastonbury's, Canton's, and Danbury's obligations to comply with the regulation implementing Title IX are not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

Student A participated in girls' outdoor track during school year 2017-2018 on the Bulkeley (Hartford) team; and participated in girls' indoor and outdoor track during school year 2018-2019 on Bloomfield's team. OCR determined that the participation of Hartford and Bloomfield in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student A's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Student B participated in girls' indoor and outdoor track during school years 2017-2018 and 2018-2019 on Cromwell's team. OCR determined that the participation of Cromwell in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student B's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Hartford's, Bloomfield's, and Cromwell's obligations to comply with the regulation implementing Title IX are not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

For the aforementioned reasons, OCR also determined that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury treated student-athletes differently based on sex, by denying benefits and opportunities to female students that were available to male students.

With respect to the retaliation allegation filed against the CIAC, there was insufficient evidence to substantiate the Complainant's allegation that the CIAC retaliated against Parent 1 after Parent 1 complained about the Revised Transgender Participation Policy. With respect to the retaliation



allegation filed against Glastonbury, there was insufficient evidence to substantiate the Complainant's allegation that Glastonbury retaliated against Student 1.

Nothing in this letter should be interpreted to impute misconduct on the part of any biologically male students who participated in these competitions.

### **Investigation and Issuance of Letter of Impending Enforcement Action**

During the course of the investigation, OCR interviewed the Executive Director of the CIAC; administrators and staff from Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury; and the students and parents on whose behalf the complaint was filed. In addition, OCR reviewed documentation that the Complainant, the CIAC, the school districts, and some of the students and parents submitted. OCR also reviewed publicly available information regarding the CIAC and its member school student-athletes.

At the conclusion of the investigations, OCR informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury of its findings and determinations that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury had discriminated against female student-athletes. OCR requested that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury enter into resolution agreements to remedy the violations. Because the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury did not enter into resolution agreements, OCR issued letters of impasse to the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury on March 17, 2020, in which it advised the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that it would issue this letter if each did not reach an agreement with OCR within 10 calendar days of the date of its impasse letter.<sup>4</sup> OCR issues this Letter of Impending Enforcement Action because the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury have to date failed to voluntarily enter into resolution agreements to remedy the identified violations.

### **Jurisdiction**

OCR is responsible for enforcing Title IX, as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulations at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in education programs and activities receiving financial assistance from the U.S. Department of Education (the Department).

OCR has jurisdiction over the CIAC as follows:

- a) The CIAC is a direct recipient of Federal funding from the Department through a grant awarded by the Department's Office of Special Education Programs (OSEP) to support the Special Olympics Unified Champion Schools program administered by the CIAC.

---

<sup>4</sup> In emails dated March 27, 2020, OCR informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that in view of their COVID-19-related duties and responsibilities, OCR was extending the 10-calendar-day deadline to respond to OCR's proposed resolution agreement for a period of 30 days, to April 27, 2020.

- b) The CIAC is also an indirect recipient of Federal funding. The CIAC is governed by member school representatives who devote official time and district resources to the CIAC (e.g., determine athletic eligibility, make rules for athletic competitions, run state boys' and girls' tournaments, and control state championships). In addition, the CIAC receives revenue through the sale of tickets to tournament contests—revenue that would otherwise go to the schools—and by the assessment of entry fees on schools for participation in various tournaments. The CIAC is also an indirect recipient of Departmental financial assistance through Special Olympics of Connecticut (which receives grant money from OSEP) because several employees of Special Olympics of Connecticut provide to the CIAC technical assistance in the administration of the Special Olympics Unified Champion Schools program.
- c) The CIAC's member schools also have ceded controlling authority over Connecticut's high school athletic program to the CIAC, whose purpose is to supervise, direct, and control interscholastic athletics in Connecticut. In addition to the CIAC's governance by local school representatives (noted above), the Connecticut General Assembly's Office of Legislative Research stated that school districts have the power to organize athletic programs and decide in what sports to compete, adding, "Boards have delegated authority over the organization of interscholastic high school athletics to [the CIAC]. CIAC regulates high school sports, promulgates eligibility and safety and health rules for teams, and organizes and controls games and championships."

OCR has jurisdictional authority under Title IX to investigate Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury, because each is a recipient of financial assistance from the Department.

## **I. ATHLETIC BENEFITS AND OPPORTUNITIES**

### **Findings of Fact**

#### *The CIAC's Organizational Structure*

The CIAC is the only association governing interscholastic athletic programs for secondary schools in Connecticut.<sup>5</sup> The CIAC is a division of the Connecticut Association of Schools (CAS). Any public or parochial school accredited by the Connecticut State Department of Education, as well as any private school or academy, and any private school holding associate institutional membership in the CAS can become a member of the CIAC. The CIAC currently has 188 member schools. Member schools sign an annual Membership Agreement, pay annual dues, and agree to abide by the CAS Constitution and the CIAC By-Laws and Eligibility Rules. During school year 2018-2019, the CIAC authorized its member schools to participate in 14 boys' sports and 13 girls' sports. The CIAC By-Laws allow female athletes to participate on boys' teams, but do not permit

---

<sup>5</sup> See CIAC Handbook 2019-2020, Section 2.2 ("The CIAC is the only Association which governs interscholastic athletic programs for secondary schools in Connecticut.").

male athletes to participate on girls' teams. The CIAC administers its athletics programs by way of the CAS Constitution, by-laws, and tournament regulations.<sup>6</sup>

The CIAC has 27 committees corresponding to each of the CIAC-sanctioned sports. Each committee includes representatives from member schools, including principals, coaches, and athletic directors, as well as former coaches. These committees coordinate the activities of the sports, including game rules, playing conditions, tournament policies, and sportsmanship initiatives. The by-laws, along with the CAS constitution, are published every year as part of the CIAC Handbook, which is available on the CIAC website.<sup>7</sup> The Handbook includes detailed rules and regulations governing athletic administration, scheduling, and eligibility, among other topics. The CAS Legislative Body is authorized to make changes to the CAS Constitution and the by-laws. The principals of the CIAC member schools are the voting delegates to the Legislative Body. The CAS Constitution states that any voting member school may submit a proposed change to the by-laws/regulations through its representative. The CIAC Board of Control is the governing body for high school interscholastic sports in Connecticut and has 14 voting and 3 non-voting members; the Board of Control has representatives from large, medium, and small schools, urban and rural schools, as well as public, parochial, and technical schools.<sup>8</sup> The by-laws require that the Board of Control consider any proposed change to a by-law/regulation, act upon it, and submit any proposed by-law/regulation change to member schools for a vote at the annual meeting of the Legislative Body. The by-laws, including the rules, regulations, and policies contained therein, as well as the tournament regulations are binding on its member schools,<sup>9</sup> and the CIAC has the authority to penalize schools for violation of the by-laws.<sup>10</sup>

During interviews, district staff members confirmed that the districts regarded the by-laws, rules, and regulations, including the Revised Transgender Participation Policy, as binding. The witnesses further stated that they regarded the CIAC as the only athletic association in Connecticut

---

<sup>6</sup> The by-laws constitute the general rules and policies for athletic administration and participation in the CIAC. Specific policies, such as the Revised Transgender Participation Policy, are contained within the by-laws. Further policies regarding sport-specific tournament participation ("tournament regulations") are published each season in a sports information packet.

<sup>7</sup> [http://www.casciac.org/pdfs/ciachandbook\\_1920.pdf](http://www.casciac.org/pdfs/ciachandbook_1920.pdf) (site last visited on April 24, 2020).

<sup>8</sup> The CIAC Board of Control is elected each year by the Legislative Body at the Annual Meeting of the CAS. The CIAC Board of Control meets monthly during the school year.

<sup>9</sup> See the CIAC Handbook 2019-2020, Section 2.4 ("Each member school has the responsibility of knowing and adhering to all CIAC rules and regulations and administering its athletic programs according to those rules.").

<sup>10</sup> See the CIAC Handbook 2019-2020, Section 3.0, CIAC By-Laws, Article III, Section C ("The Board of Control shall have the power to assess and to enforce such penalties, including fines, against member schools, principals, athletic directors, coaches and/or members of the coaching staff, as it deems suitable for violations of its Bylaws, Regulations, Rules, Standards of Courtesy, Fair Play and Sportsmanship, Code of Ethics, or any other standard of conduct or any other provision of this Handbook."). Witnesses OCR interviewed, including the CIAC Executive Director and administrators of member schools, stated that, in general, member schools are responsible for ensuring their own compliance with the CIAC's rules and for self-reporting any violations of those rules. Member schools can also report other schools for potential violations. The CIAC Executive Director informed OCR that, to date, no member school has self-reported or reported another member school for a violation of the Revised Transgender Participation Policy.

that could provide sufficient competitive opportunities for their students.<sup>11</sup> Witnesses told OCR that if their schools were to withdraw from the CIAC, they likely would encounter difficulties scheduling games against other schools and would be unable to participate in statewide competitions. An Athletic Director for one of the Districts advised OCR that a CIAC member school would not benefit from playing against a nonmember school because it would not add to the school's record for purposes of qualifying for the state championship. The same Athletic Director also stated that having a state-wide association makes all of the athletics programs stronger and more consistent with set rules for play and eligibility.

*The CIAC's Adoption of its Revised Transgender Participation Policy*

The CIAC stated that its Board of Control began discussions regarding transgender participation in athletics during school year 2007-2008. During its 56<sup>th</sup> Annual Meeting, held on May 8, 2008, the CIAC membership adopted a by-law change concerning the eligibility of transgender athletes, adding new language to Article IX of the CIAC by-laws (the 2008 policy). Specifically, the 2008 policy allowed transgender student-athlete participation only in accordance with the gender stated on the student's birth certificate unless the student had undergone "sex reassignment."<sup>12</sup> The 2008 policy set forth specific requirements for post-pubescent sex reassignment, including surgery; legal recognition of the reassignment by proper governmental authorities; hormonal therapy; and a two-year waiting period post-surgical and anatomical changes.<sup>13</sup> The 2008 policy also provided that a student-athlete seeking participation as a result of a sex reassignment would be able to appeal eligibility determinations through the CIAC's eligibility appeal process. The stated rationale for the 2008 policy was that "[w]hile the eligibility of transgendered students has not yet been a 'live' issue in Connecticut, the CIAC Board felt that it should be pro-active and have a policy in place for any future eventualities."<sup>14</sup> The 2008 policy remained in effect until 2013. The CIAC advised OCR that, during that time period, the CIAC did not receive any requests for a student-athlete to participate on a team that was different from the student's "assigned gender at birth."

The CIAC stated that in 2012, after the Connecticut Legislature passed Public Act 11-55, expanding the scope of Connecticut's anti-discrimination laws to prohibit discrimination on the basis of "gender identity or expression,"<sup>15</sup> the CIAC decided to review and revise the 2008 policy.

---

<sup>11</sup> The CIAC Executive Director stated that there are private schools within Connecticut, such as Taft, Choate, and Kent, that do not belong to the CIAC. These schools belong to the Founders League, whose website describes the league as comprising "highly selective college preparatory schools." The Founders League includes ten schools from Connecticut and one school from New York. The Founders League holds its Championship in 13 boys' sports and 12 girls' sports separately, and the CIAC precludes any Founders League schools from competing in any post-season events hosted by the CIAC. Witnesses opined that they did not know if the Founders League was a feasible alternative for a public school in lieu of becoming a member of the CIAC.

<sup>12</sup> [https://www.casciac.org/pdfs/ciachandbook\\_1213.pdf](https://www.casciac.org/pdfs/ciachandbook_1213.pdf) (site last visited on April 24, 2020)

<sup>13</sup> Under the 2008 policy, a student-athlete who had undergone sex reassignment before puberty was not subject to the requirements detailed above.

<sup>14</sup> The CIAC Annual Meeting minutes. [https://www.casciac.org/pdfs/adopted\\_bylaw\\_changes\\_CIAC.pdf](https://www.casciac.org/pdfs/adopted_bylaw_changes_CIAC.pdf) (site last visited on April 24, 2020).

<sup>15</sup> P.A. 11-55, which became effective on October 1, 2011, defines "gender identity or expression" as follows:

The CIAC did so at its Annual Meeting, held on May 9, 2013, when the current Revised Transgender Participation Policy was enacted. This Policy states, in relevant part:

[T]his policy addresses eligibility determinations for students who have a gender identity that is different from the gender listed on their official birth certificates. . . . Therefore, for purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season. Accordingly, when a school district submits a roster to the CIAC it is verifying that it has determined that the students listed on a gender specific sports team are entitled to participate on that team due to their gender identity and that the school district has determined that the expression of the student's gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics. . . . The CIAC has concluded that [these] criteria [are] sufficient to preclude the likelihood that a student will claim a particular gender identity for the purpose of gaining a perceived advantage in athletic competition.<sup>16</sup>

---

"Gender identity or expression" means a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth, which gender-related identity can be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity or any other evidence that the gender-related identity is sincerely held, part of a person's core identity or not being asserted for an improper purpose.

*See Conn. Gen. Stat. § 46a-51. Specifically, with respect to the public schools, P.A. 11-55 amended § 10-15c of the Connecticut General Statutes to prohibit discrimination on the basis of gender identity or expression, among other bases. The legislative history of P.A. 11-55 indicates that the topic of athletics was briefly raised during the Connecticut House proceedings on May 19, 2011, in a discussion between Rep. Fox (the bill's proponent) and Rep. Shaban. In response to Rep. Shaban's question concerning whether, under the bill, a high school boy who wanted to play on the school's girls' basketball team could not be prohibited from doing so, Rep. Fox indicated that he believed, but was not certain, that in that context the intent of the bill was to apply only to a male athlete who had undertaken what Rep. Shaban had described as "affirmative physical changes." Conn. Gen. Assembly House Proceedings 2011, Vol. 54, Part 12 (May 19, 2011) at 4017-4022.*

<sup>16</sup> The CIAC informed OCR that the Revised Transgender Participation Policy has been in effect since its adoption on May 9, 2013. The CIAC stated to OCR that the policy contained in the revised by-law no longer required student-athletes to undergo medical treatment or sex reassignment surgery in order to participate in athletics consistent with their gender identity, nor would a student-athlete be required to seek permission from the CIAC in order to participate under the policy in accordance with the student's gender identity; rather, the policy required member schools to submit rosters that reflected the gender identities of their students. The CIAC further stated that this decision was based on "a determination that a member school is in the best position to identify and confirm that a student-athlete's gender is consistent with the student's gender identity at school and to place the student on the correct team roster." Accordingly, the Board of Control determined that students would not be required to disclose their transgender status to the CIAC.

Thus, the Revised Transgender Participation Policy eliminated any requirement that transgender student-athletes provide any medical information or documentation to the CIAC or its member schools.

The Connecticut State Department of Education (CSDE) issued a document entitled, “Guidance on Civil Rights Protections and Supports for Transgender Students – Frequently Asked Questions,” dated September 2017 (the 2017 FAQs).<sup>17</sup> The 2017 FAQs state, in relevant part:

For issues concerning participation in interscholastic competitive sports, schools and districts should consult their counsel and the Connecticut Interscholastic Athletic Association (“CIAC”).<sup>18</sup>

On October 11, 2018, the CAS Board of Directors requested that an ad hoc committee examine all the CIAC rules and regulations that relate to gender. The meeting minutes of the CIAC stated that the purpose of the review was to ensure that the regulations were in alignment with state law.<sup>19</sup> The CIAC established a Gender By-Law Subcommittee in December 2018 to review all of the by-laws relating to gender in order to confirm the current policies and practices or make recommendations for improvements. In its report to the CIAC Board of Control, dated April 4, 2019, the Subcommittee concluded that the by-laws reviewed were “in alignment with Connecticut law and the CAS-CIAC mission.”<sup>20</sup>

*The CIAC’s and School Districts’ Implementation of the Revised Transgender Participation Policy*

School district witnesses interviewed stated that none of the districts had a specific written procedure or practice in place to implement the Revised Transgender Participation Policy, but that they followed or would follow the plain language of the policy. Districts that had not had a transgender student request to participate in athletics stated that should they receive a request from a transgender student to participate in athletics, they would look at the gender identity listed in the student’s current school records and then whether the gender identity the student is expressing during the day is consistent with the gender identity listed in the student’s school records; e.g., whether the student has requested to use a name and pronouns consistent with that sex. Witnesses stated that often this process would involve the student’s parents, particularly if the student were

---

<sup>17</sup> [https://portal.ct.gov/-/media/SDE/Title-IX/transgender\\_guidance\\_faq.pdf?la=en](https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance_faq.pdf?la=en) (site last visited on April 24, 2020). This guidance indicates that the CIAC is responsible for establishing statewide policies for transgender participation in interscholastic competitive sports.

<sup>18</sup> 2017 FAQs, p. 7. See [https://portal.ct.gov/-/media/SDE/Title-IX/transgender\\_guidance\\_faq.pdf?la=en](https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance_faq.pdf?la=en) (site last visited on April 24, 2020).

<sup>19</sup> [https://portal.ct.gov/-/media/SDE/Title-IX/transgender\\_guidance.pdf?la=en](https://portal.ct.gov/-/media/SDE/Title-IX/transgender_guidance.pdf?la=en) (site last visited on April 24, 2020).

<sup>20</sup> The CAS mission statement is as follows: “The Connecticut Association of Schools provides exemplary programs and services that promote excellence in the education of all children.” The CIAC mission statement is as follows: “The CIAC believes that interscholastic athletic programs and competition are an integral part of a student’s academic, social, emotional and physical development. The CIAC promotes the academic mission of schools and honorable competition. As such, the CIAC serves as the regulatory agency for high school interscholastic athletic programs and exists to assure quality experiences that reflect high ethical standards and expectations for fairness, equity and sportsmanship for all student-athletes and coaches. The CIAC provides leadership and support for member schools through the voluntary services of dedicated school administrators, athletic directors, coaches and consultants.”

a minor and school records needed to be changed; but that once the student had established his or her gender identity, the school would place the student on the roster of the team associated with that gender. Witnesses from districts that have had transgender students request to participate in athletics detailed a similar internal process; namely, that upon a request from a transgender student, they would review the student's records, speak with the student's teachers/counselors, meet with the student's parents, and if all was consistent, thereafter, place the student on the team roster associated with the student's gender identity.

Every district confirmed to OCR that it believed that no specific documentation, medical or otherwise, was required in order for the district to comply with the policy. District administrators reported that they had not received specific training regarding implementation of the Revised Transgender Participation Policy, although some stated that they had attended workshops or presentations on the topic of transgender athletes generally. Principals and athletics directors interviewed by OCR indicated that transgender student-athlete participation had been discussed either formally or informally at annual professional development conferences, as well as during professional association meetings, and through their respective regional conferences. Witnesses from the districts stated, and the CIAC confirmed to OCR, that the CIAC has not questioned any decisions made by a member school under the policy, nor has it investigated any rosters submitted by member schools with respect to the policy. Glastonbury noted that, in the past, when it had a transgender student wish to participate in athletics, the student's parent offered to provide medical documentation to support their request under the Revised Transgender Policy; however, the CIAC advised Glastonbury that the information was not required.

Additionally, multiple district witnesses stated to OCR that, according to their understanding of the Revised Transgender Participation Policy, it is not the school's or district's role to determine a student's gender. Witnesses from Bloomfield, Danbury, Glastonbury, and Hartford stated that the student initiates the process and informs the district of the student's gender identity; and the district's role is to review the current school records, speak with school staff regarding the student's current gender expression during the school day, and then place the student on the appropriate roster. Witnesses from Bloomfield and Cromwell also stated that if a student were to initially register with the school under a gender identity that differed from the student's biological sex, the school would place the student on the roster of the gender identified in the school registration records; i.e., the district and student would not need to have a discussion or review the student's participation under the Revised Transgender Participation Policy. Both Cromwell and Bloomfield have used this process in their districts.

*Concerns Raised by Parents and Others to the CIAC Regarding the Policy and the Participation of Biologically Male Students in Track Events*

In 2019, the CIAC received several emails from parents of Connecticut high school students, in which the parents expressed concerns about the policy and specifically about the participation in female track events of biologically male students.

From January 2019 to March 2019, the CIAC received four emails from the father of a female student-athlete at Glastonbury High School (Parent 3). On January 29, 2019, Parent 3 sent an email to the CIAC stating that he and many parents of other female track athletes, as well many of

the athletes themselves, believed that the policy was unfair to female track athletes<sup>21</sup> and that the policy raised safety concerns as well, particularly with respect to sports involving physical contact.<sup>22</sup> With respect to track, he suggested that a compromise could be reached whereby a boy identifying as a girl would be able to compete but would not have the results used for purposes of conference or state records or for all-conference or all-state selection. Parent 3 requested a meeting with the CIAC officials to discuss the topic.<sup>23</sup>

On February 17, 2019, Parent 3 sent an email to the CIAC stating that the transgender policy affected the outcome of the CIAC State Open Girls Indoor Track Championship held on February 16, 2019. Specifically, he stated that the performance of a transgender athlete “with all the physiological and anatomical attributes of a male athlete” in the Championship had enabled Bloomfield High School to win the team championship over Glastonbury. Parent 3 again urged the CIAC to change the policy. On February 25, 2019, the Executive Director of the CIAC responded to Parent 3, stating that Parent 3’s correspondence would be provided to a CIAC subcommittee reviewing the policy.

On March 3, 2019, Parent 3 sent an email to the CIAC again urging the CIAC to change the policy. He further stated that at the New England Regional Indoor Track Championship, held on March 2, 2019, a biologically male athlete finished first in the 55-meter and 300-meter sprints and had helped Bloomfield win first place over Glastonbury in the girls’ 4 x 400 meter relay. On March 10, 2019, Parent 3 sent an email to the CIAC stating that the National Scholastic Athletic Foundation, an organization that hosts the New Balance National high school track and field competition, had established a policy whereby female transgender athletes are required to meet applicable rules established by the National Scholastic Athletics Foundation, USA Track & Field, and International Olympic Committee, which required such athletes to demonstrate that they had undergone hormone treatment. Parent 3 stated that when Bloomfield’s girls’ 4 x 400 team recently competed in the New Balance Nationals, it did so without the participation of its biologically male athlete, and that this resulted in a slower time than Bloomfield’s team had achieved at the New England championships, when the biologically male athlete had competed.

From February 2019 to March 2019, the CIAC received three emails from a parent (Parent 4). On February 25, 2019, Parent 4 sent an email to the CIAC expressing concerns about the fairness of the policy.<sup>24</sup> He stated “the current unfair competitive balance at the State Open has cost 7

---

<sup>21</sup> In part, Parent 3 stated as follows: “Should a boy who identifies as a girl with all of the physiological and anatomical advantages of a boy be able to compete in Connecticut Girls Indoor Track, obtain medals over other girls who have trained hard and care deeply about the results, eradicate existing girls event and state track records and push what would have been the final girl qualifier out of selection for All-Conference and All-State honors?”

<sup>22</sup> In part, Parent 3 stated as follows: “Should safety be compromised in girls high school track or other girls sports such as basketball, soccer or lacrosse to accommodate a boy who identifies as a girl with all of the physiological and anatomical advantages of a boy?”

<sup>23</sup> In addition, Parent 3 attached a copy of an email dated January 27, 2019, that he had sent to officials from the Glastonbury District. In this email, Parent 3 expressed his concerns about the policy’s fairness and safety, and he described several recent track meets in which a transgender athlete had finished ahead of other athletes. Parent 3 asked the Glastonbury officials to make efforts to have the policy changed.

<sup>24</sup> Specifically, he stated that “there are many, myself included, who cannot begin to fathom the policy of the CIAC that has allowed the competitive record of Connecticut Girls High School Track and Field Competitions to be altered



Connecticut student/athletes the opportunity to compete at the New England Championship” and “[t]his results in a significant negative impact to these cisgender girls through no fault of their own.” He also stated the policy unfairly denied these elite athletes an opportunity to gain additional exposure with college coaches and recruiters. In addition, he stated that “[a]t the heart of the competitive fairness issue regarding competition between transgender girls and cisgender girls is the abundance of testosterone present in young biological males.”

Further, Parent 4 stated that the CIAC maintains different qualifying standards for girls’ and boys’ track, which he contended was an acknowledgment that there was a measurable difference in the performance capabilities between genders. He requested that the CIAC adjust the results of the 2019 State Girls Open Competition so as not to include the results of the transgender athletes, and he requested that the policy be changed going forward. He offered several suggestions for a new policy (e.g., establishing a new competitive category for transgender athletes).

The Executive Director of the CIAC responded the same day, stating that Parent 4’s correspondence would be shared with the subcommittee reviewing the Revised Transgender Participation Policy. On March 1, 2019, Parent 4 sent an email to the CIAC, stating that he would like to arrange a meeting with the members of the subcommittee reviewing the policy. On March 5, 2019, Parent 4 sent an email to the CIAC stating that, during the New England Indoor Regional Championships on March 2, 2019, spectators from other states had expressed “surprise and concern” that Connecticut permitted transgender athletes to participate.

On June 20, 2019, the CIAC received an email from the mother of a rising female high school student in Connecticut (Parent 5). Parent 5 expressed her concern that the policy was unfair to female athletes because it would allow “genetic males (no matter how they identify themselves) to usurp genetically female athletes in competition.”

In a letter to the CIAC, dated April 11, 2017, a head track coach at a Connecticut high school stated that Student B was at a great advantage unless or until the student began taking hormone blockers. He also referred to average high school testosterone levels according to the Mayo Clinic. He then argued that Student B had gender characteristics that females cannot compete with, and that Student B was taking advantage of the CIAC’s policies and rules. He requested that the CIAC find a solution that allowed Students A and B to compete but also protected female athletes.

#### *The CIAC’s Rules for Girls’ Indoor and Outdoor Track Competition*

The CIAC is organized into various boards and committees, including one committee for each CIAC-sanctioned sport. Each year, the CIAC committee for the respective sport publishes a “Sports Packet/Information Sheet” for the season. The Sports Packet/Information Sheets for girls’ indoor and outdoor track set forth, among other things, the procedures for entering student-athletes

---

by the tabulation and classification of results that include transgender athletes that has now spread its impact to not only athletes that have competed directly in these events, but now also their teammates, especially 75 members of the Glastonbury Girls Indoor Track Team, when team records and scoring are impacted.”

in events; how many events a student-athlete may participate in;<sup>25</sup> submitting qualifying performances; entrance fees; rules regarding electronic devices; protest procedures; scrimmages; and, regular season score reporting.

The CIAC sets the rules for athletic eligibility and competition across the state. Each sport is divided into divisions/classes, based on the size of the school. The CIAC sports committees determine the tournament or championship class divisions for each sport based on the grade 9-12 enrollments of each school as of October 1 of the past school year. A school can have different classes for each of its sports, and a school's class/division can change depending on the year. The Sports Packet/Information Sheet for each sport sets forth the class/divisions for the current year. For example, during school year 2018-2019, for girls' indoor track, the CIAC had the following classes, from smallest school enrollment to largest: Class S, Class M, Class L, and Class LL. For girls' outdoor track, the CIAC had the following classes: Class S, Class M, Class MM, Class L, and Class LL.

There are eleven conferences/leagues<sup>26</sup> that are based mostly on geographic location, which can include schools from the different CIAC classes. The CIAC does not set regular season competitive schedules; these are set by the individual member schools, individually or through conferences/leagues.<sup>27</sup> However, the CIAC does mandate certain "season limitations," including when the opening day of practice occurs, the minimum number of required practice days prior to the first contest, the maximum number of games or meets played per week, and the maximum number of contests scheduled per season.<sup>28</sup>

For post-season competition, if they met qualifying standards,<sup>29</sup> participants in girls' indoor and outdoor track can participate in a conference/league championship; a class statewide championship; the State Open Championship; and the New England Regional Championship. Each of the eleven conferences/leagues holds a conference/league championship at the end of the indoor and outdoor seasons; and each class holds a class statewide championship at the end of the indoor and outdoor seasons. A student-athlete's eligibility to compete at the indoor and outdoor track State Open Championships is determined by the finish order at the respective class statewide

---

<sup>25</sup> For both girls' indoor and outdoor track, the sport packets state that a competitor shall not compete in more than three events including relays, and any athlete on the tournament roster shall not be entered in more than three events excluding relays; e.g., an athlete may be entered in the 4 x 800, 1600, 3200, and 4 x 400 events, but can only run or be a competitor in three events. A contestant becomes a competitor when the contestant reports to the clerk of course. The rules also state that a competitor who competes in three events at any of the class meets cannot enter any other event at the State Open Championship. The stated rationale is that class championship meets and the State Open are really one meet because advancing to the State Open Championship is predicated on class meet performance. Athletes listed as alternates for relay events may only run if they ran two events or fewer at the class meet; i.e., they are still limited to three events.

<sup>26</sup> [http://ciacsports.com/site/?page\\_id=131](http://ciacsports.com/site/?page_id=131) (site last visited on April 24, 2020).

<sup>27</sup> See CIAC Handbook, Section 5.0 ("The CIAC has no jurisdiction over regular season interscholastic scheduling problems except as these relate to violation of CIAC policies. Schedul[ing] of interscholastic contests within CIAC season limitations is the responsibility of individual schools and/or leagues.")

<sup>28</sup> See *id.* at page 47.

<sup>29</sup> Schools may only enter athletes who meet the minimum requirements for the event as established by the sports committee for that year, as set forth in the sports information packet.

championships as set forth in the Sports Packet/Information Sheet.<sup>30</sup> For example, for indoor track for school year 2018-2019, the top 14 finishers in all events in class statewide championships for Classes LL, L, M, and S were eligible to compete in the indoor State Open Championship. For outdoor track for school year 2018-2019, the top 5 finishers in each of the class statewide championships automatically qualified for the outdoor State Open Championship, as well as all athletes who obtained the special (automatic) standard for their event at the class statewide championship.<sup>31</sup>

The CIAC awards medals to the top 6 competitors based on the order of finish in events at the State Open Championships (both indoor and outdoor), and the top 6 competitors also qualify for the New England Regional Championships.<sup>32</sup> Thereafter, a student may go on to compete at the national championships, held by the National Scholastic Athletics Foundation (the New Balance Indoor and Outdoor Championships), based on the student's qualifying time.<sup>33</sup>

The CIAC uses a point system to award points by school to determine a school state champion for indoor and outdoor track. For indoor track, the CIAC uses team scoring based on six places (from first to sixth place, the CIAC awards 10, 8, 6, 4, 2 and 1 points, respectively) for all events. For outdoor track, the CIAC uses team scoring based on eight places (from first to eighth; 10, 8, 6, 5, 4, 3, 2 and 1 points) only when an eight lane track is used; otherwise the CIAC uses team scoring based on six places (from first to sixth; 10, 8, 6, 4, 2 and 1 points) for the event. The points earned by each school are then tallied, and the CIAC ranks schools in the order of points from highest to lowest to determine the state champion.<sup>34</sup>

---

<sup>30</sup> The Sports Packet/Information Sheet provides information about the Class/Division Championships and the State Open Championship; including qualifying distances and times for entry into the class championships, as well as eligibility to compete in the State Open Championship.

<sup>31</sup> From at least school years 2012-2013 through 2016-2017, the outdoor sports packet set a CIAC State Open Championship qualifying standard for each event. For the 100-meter dash, the qualifying standard was 12.60 for all years and for the 200-meter dash, the qualifying standard was 26.70 for all years except 2016-2017, when it was lowered to 26.14. The sports packets during those years stated that the automatic standard approximated the 8<sup>th</sup> place finish established in the prior year State Open. Starting in school year 2017-2018, and continuing in school year 2018-2019, per the Sports Packet, "The special standard will be set each year after the class meets have ended. The special standard will be determined by looking at the performance rankings for each event that includes the top five (5) qualifying performances from each of the class meets. The 12<sup>th</sup> place performance from the qualifiers will become the automatic standard for that year. All athletes who meet that standard during the current year's class championship will advance to the open."

<sup>32</sup> For outdoor track, the 7<sup>th</sup> and 8<sup>th</sup> place finishers in the final for any event will be considered as alternates.

<sup>33</sup> The National Scholastic Athletics Foundation's Transgender Participation Policy & Procedure, updated December 2019, allows for a transgender student-athlete to submit a qualified entry into a National Scholastic Athletics Foundation competition or make a written request for participation, which the National Scholastic Athletics Foundation then evaluates on a case-by-case basis, including evaluation by an Eligibility Committee comprising at least one medical professional, event director, active age-appropriate coach, and lawyer. The Eligibility Committee can request any information it believes relevant to the application, including but not limited to interviews with the athlete and/or parents/guardians and coaches, and a review of relevant medical and legal records. The policy states that a male-to-female athlete who is not taking hormone treatments related to gender transition may not compete in female competitions, but that a female-to-male athlete not taking testosterone related to gender transition may compete in male competitions.

<sup>34</sup> In the outdoor State Open Championship, seeding is done electronically based on an athlete's performance at the Class meets. An athlete's seed determines the athlete's lane assignment; the athlete with the fastest projected time based on performance at the Class meets is assigned to a middle lane (usually lane 4) and athletes are then placed in lanes in order of seed, working towards the outside lanes.

*Complainant Students and Competition Against Students A and B*

The complaint was filed on behalf of three high school female students competing in girls' track in the state of Connecticut: Student 1, attending Glastonbury High School (School 1); Student 2, attending Canton High School (School 2); and Student 3, attending Danbury High School (School 3). The Complainant specifically complained about two students who participated in girls' track in the state of Connecticut: Student A, who competed for Bulkeley High School in the Hartford School District (School A1) in the spring of school year 2017-2018, and Bloomfield High School (School A2) during school year 2018-2019 to the present; and Student B attending Cromwell High School (School B). The CIAC's list of sanctioned sports includes boys' track. Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury each maintained boys' track teams.

In order to determine the impact of the Revised Transgender Participation Policy on Students 1, 2, and 3, OCR reviewed the participation of Students 1, 2, 3, A, and B in post-season conference/league championships, class championships, State Open Championships, and the New England Regional Championships. OCR reviewed information for school years 2017-2018 and 2018-2019.

*Student 1*

OCR determined that Student 1 was enrolled at School 1 as a 10<sup>th</sup> grade student during school year 2017-2018, and as an 11<sup>th</sup> grade student during school year 2018-2019. Student 1 was a student-athlete on School 1's girls' varsity indoor and outdoor track teams. Regionally, School 1 participated in the Central Connecticut Conference (CCC). Statewide, School 1 participated in Class LL for indoor and outdoor track.

The Complainant asserted that pursuant to the Revised Transgender Participation Policy, and the resulting participation of Students A and B, the CIAC denied Student 1 opportunities to advance to the finals in an event, to advance to higher levels of competition, and/or win titles at events such as the CIAC Outdoor State Open Championship, held on June 4, 2018; the CIAC Indoor State Open Championship, held on February 16, 2019; and the Indoor New England Regional Championship, held on June 8, 2019.

During an interview with OCR, Student 1 stated that she and other female student-athletes with whom she had spoken found it very difficult to go into a race knowing that no matter what they do, they would never be good enough to win. In a video provided by the Complainant, Student 1 asserted that by permitting transgender athletes to participate in girls' track competitions, she and other athletes had lost opportunities to compete at track meets, to win titles, and to gain attention from college coaches. She further stated that women have fought hard for many years to have opportunities and a voice in sports; and that it is upsetting to realize that no matter how hard she and other female student-athletes train, they will never be good enough to compete against transgender athletes. Student 1 also stated: "I respect these transgender athletes, and I understand that they are just following CIAC policy. But at the same time, it is demoralizing and frustrating for me and for other girls."

The Athletic Director for School 1 acknowledged that some parents had complained that their children did not place at certain meets, but she stated that she was unaware of whether any female students had lost out on competitive opportunities, awards, or wins. School 1's Athletic Director denied that any of the female student-athletes on the girls' indoor or outdoor track teams were denied participation opportunities as a result of having transgender athletes participate in track events. She stated that student-athletes were eligible to participate in all meets that the District participated in if they met the requirements. School 1's Assistant Athletic Director stated that she is aware of Student 1's complaint that she was deprived of an opportunity to advance to the New England Regional Championship due to the participation of transgender athletes.

### **Student 2**

Student 2 was enrolled at School 2 as a 10<sup>th</sup> grade student during school year 2017-2018, and as an 11<sup>th</sup> grade student during school year 2018-2019. During school years 2017-2018 and 2018-2019, Student 2 was a student-athlete on School 2's varsity girls' indoor and outdoor track teams. Regionally, School 2 participated in the North Central Connecticut Conference (NCCC). Statewide, School 2 participated in Class S for indoor and outdoor track.

The Complainant asserted that, pursuant to the Revised Transgender Participation Policy and the resulting participation of Students A and B, the CIAC denied Student 2 opportunities to advance to higher levels of competition and/or win titles at events such as the 2017 Outdoor State Open Championship, held on June 6, 2017; the New England Regional Championship, held on June 10, 2017; the Class S Indoor Championship held on February 10, 2018; the Outdoor State Open Championship, held on June 4, 2018; the Class S Indoor Championship, held on February 7, 2019; the Indoor State Open Championship, held on February 16, 2019; the Class S Outdoor Championship, held on May 30, 2019; and the Outdoor State Open Championship, held on June 3, 2019.

During an interview with OCR, Student 2 stated that, in addition to the impact the participation of Students A and B had on her and other female student-athletes' ability to win titles and awards, their participation also has had an impact on her and other female student-athletes' ability to obtain recognition from media and college coaches. Student 2's mother (Parent 1) noted that some biologically female track student-athletes had lost out on media recognition because the winner of an event at the state championships gets the opportunity to be interviewed by reporters, while the second and third place finishers do not. Specifically, Parent 1 stated that at the state championships there is a bank of reporters waiting to interview the winners and the winners' names are put in the local papers, and that student-athletes typically do not receive any media recognition when they come in second. Further, Student 2 stated that the participation of Student A, in particular, had an impact on her ability to set class records for the CIAC Class S 100-meter and 200-meter races.

School 2's principal stated that no student-athletes were prohibited from participating; student-athletes went to every meet that the school participated in, and all student-athletes who qualified for state tournaments had the opportunity to compete. However, the principal acknowledged that, at the state level, some people might argue that a transgender athlete defeated a District student (i.e., Student 2); therefore, that student lost out on an award.

### **Student 3**

OCR determined that Student 3 was enrolled at School 3 as a 9<sup>th</sup> grade student during school year 2018-2019. Regionally, School 3 participated in the Fairfield County Interscholastic Athletic Conference (FCIAC). Statewide, School 3 participated in Class LL for indoor and outdoor track. During school year 2018-2019, Student 3 was a student-athlete on School 3's girls' varsity outdoor track team.

The Complainant asserted that, pursuant to the Revised Transgender Participation Policy and the resulting participation of Students A and B, the CIAC denied Student 3 opportunities to advance to higher levels of competition and/or win titles at events, such as the Outdoor State Open Championship, held on June 3, 2019. During an interview with OCR, Student 3 stated that when competing against transgender athletes, it was frustrating for her to know that she would not be able to do as well as she otherwise could do. In a video the Complainant provided, Student 3 asserted that even before she gets to the track, she already knows that she is not going to win first or second place if she races against transgender athletes; and that no matter how hard she works, she will not be able to win the top spot.

### **Competition Against Students A and B**

Descriptions of some of the girls' track indoor and outdoor post-season events in which Students 1, 2, and/or 3 participated with Students A and/or B during school years 2017-2018 and 2018-2019 are set forth below.

1. During school year 2017-2018, in the Indoor State Open Championships, Student B participated in the 55-meter dash. In the preliminary for the 55-meter dash, Student B placed 2<sup>nd</sup> and Student 2 placed 16<sup>th</sup>. The top 8 finishers advanced to the finals; however, even though Student 2 would not have advanced to the finals even absent Student B's participation, Student B's finish in the top 8 in the preliminary denied an opportunity for the 9<sup>th</sup> place finisher to advance to the finals. See chart summarizing the results:

<b>2017-2018 Indoor State Open Championships Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Seed</b>	<b>Heat</b>
1	*	7.26q	*	7.31	1
2	<b>Student B</b>	7.30q	School B	7.31	1
3	*	7.34q	*	7.39	3
4	*	7.35q	*	7.28	2
5	*	7.40q	*	7.39	3
6	*	7.42q	*	7.48	3
7	*	7.43q	*	7.38	2
8	*	7.44	*	7.44	1
9T	*	7.53	*	7.47	3
9T	*	7.53	*	7.40	2

<b>2017-2018 Indoor State Open Championships Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Seed</b>	<b>Heat</b>
...	...	...	...	...	
16	Student 2	7.78	School 2	7.46	2

2. During school year 2017-2018, in the Outdoor State Open Championships, Student A and Student B participated in the 100-meter dash. In the preliminary for the 100-meter dash, Student A placed 1<sup>st</sup> and Student B placed 4<sup>th</sup>. The top 8 finishers advanced to the finals, including Student 2 (who placed 2<sup>nd</sup>) and Student 1 (who placed 8<sup>th</sup>); however, Student A's and Student B's finishes in the top 8 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 100-meter dash, Student A placed 1<sup>st</sup>, Student B placed 2<sup>nd</sup>; Student 2 placed 4<sup>th</sup>; and Student 1 placed 6<sup>th</sup>. The top six finishers were awarded medals and advanced to the New England Regional Championships, including Student 1 and Student 2; however, Student A's and Student B's finishes in 1<sup>st</sup> and 2<sup>nd</sup> place, respectively, denied an opportunity for two female student-athletes to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships.<sup>35</sup> Student A placed 1<sup>st</sup> at the preliminaries of the 100-meter dash at New England Regional Championships. The top 8 finishers advanced to the finals, including Student 2 (who placed 7<sup>th</sup>);<sup>36</sup> however, Student A's finish in the top 8 in the preliminary denied an opportunity for a female student-athlete to advance to the finals.<sup>37</sup> See charts summarizing the results below:

<b>2017-2018 Outdoor State Open Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Seed</b>	<b>Heat</b>
1	Student A	11.75q	School A1	11.77	3
2	Student 2	12.26q	School 2	12.61	2
3	*	12.38q	*	12.33	1
4	Student B	12.39q	School B	12.22	2
5	*	12.46q	*	12.57	3
6	*	12.52q	*	12.74	2
7	*	12.54q	*	12.34	1
8	Student 1	12.58q	School 1	12.91	3
9	*	12.63	*	12.73	3
10	*	12.64	*	12.68	2
...	...	...	...	...	...
25	*	13.17	*	12.98	

<sup>35</sup> Student A, Student B, and Student 2 also participated in the 200-meter dash, and finished 1<sup>st</sup>, 7<sup>th</sup> and 10<sup>th</sup>, respectively, in the final. Student A's 1<sup>st</sup> place finish denied an opportunity for one female student-athlete to advance to the New England Regional Championships in the 200-meter dash, along with the benefit of receiving a medal for the Outdoor State Open Championships.

<sup>36</sup> Student 1 placed 25<sup>th</sup>.

<sup>37</sup> In the finals of the 100-meter dash, Student A placed 1<sup>st</sup>, while Student 2 placed 7<sup>th</sup>.

<b>2017-2018 Outdoor State Open Championships Girls 100-Meter Dash Finals</b>				
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Points</b>
<b>1</b>	<b>Student A</b>	11.72#	School A1	10
<b>2</b>	<b>Student B</b>	12.29	School B	8
3	*	12.36	*	6
4	Student 2	12.39	School 2	5
5	*	12.47	*	4
6	Student 1	12.67	School 1	3
7	*	12.71	*	2
8	*	12.80	*	1

<b>2017-2018 Outdoor New England Regional Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)</b>						
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>	<b>Tie-breaker</b>	<b>State</b>
<b>1</b>	<b>Student A</b>	12.46q	School A1	5		CT
2	*	12.59q	*	4		MA
3	*	12.64q	*	3		MA
4	*	12.65q	*	1		MA
5	*	12.81q	*	1	12.805	CT
6	*	12.81q	*	2	2.809	CT
7	Student 2	12.82q	School 2	2		CT
8	*	12.92q	*	5		RI
9	*	12.94	*	3		MA
10	*	12.95	*	5		MA
...	...	...	...	...	...	...
25	Student 1	13.5010	School 1	3	13.497	CT
33	*	13.84	*	1		RI

<b>2017-2018 Outdoor New England Regional Championships 100-Meter Dash Finals</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Tie breaker</b>	<b>State</b>
<b>1</b>	<b>Student A</b>	11.97	School A1		CT
2	*	12.26	*		MA
3	*	12.31	*		MA
4	*	12.50	*		MA
5	*	12.56	*	12.554	CT
6	*	12.56	*	12.559	CT
7	Student 2	12.58	School 2		CT
8	*	12.69	*		RI



3. During school year 2018-2019, in the Indoor Class S Statewide Championships, Student A and Student B participated in the 55-meter dash. In the preliminary for the 55-meter dash, Student A placed 1<sup>st</sup> and Student B placed 2<sup>nd</sup>. The top 7 finishers advanced to the finals, including Student 2 (who placed 3<sup>rd</sup>); however, Student A's and Student B's finishes in the top 7 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 55-meter dash, Student A placed 1<sup>st</sup>, Student 2 placed 2<sup>nd</sup>, and Student B placed 3<sup>rd</sup>. The top 14 finishers advanced to the State Open Championship. While all three student-athletes advanced to the State Open Championship, Student A's and Student B's participation denied an opportunity to two female student-athletes to participate in the State Open Championship for the 55-meter dash.<sup>38</sup> See charts summarizing results below:

<b>2018-2019 Indoor Class S Statewide Championships Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)</b>				
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>	<b>Heat</b>
<b>1</b>	<b>Student A</b>	7.16q	School A2	8
<b>2</b>	<b>Student B</b>	7.30q	School B	6
3	Student 2	7.38q	School 2	7
4	*	7.61q	*	1
5	*	7.63q	School A2	1
6	*	7.63q	*	5
7	*	7.68q	*	3
8	*	7.70	*	5
9	*	7.71	*	2
10	*	7.74	*	4
....	....	....	....	....
48	*	8.37	*	3

<b>2018-2019 Indoor Class S Statewide Championships Girls 55-Meter Dash Finals</b>				
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>	<b>Points</b>
<b>1</b>	<b>Student A</b>	7.03	School A2	10
2	Student 2	7.27	School 2	8
<b>3</b>	<b>Student B</b>	7.33	School B	6
4	*	7.48	*	4
5	*	7.51	School A2	2
6	*	7.53	*	1
7	*	7.54	*	-

4. During school year 2018-2019, in the Indoor State Open Championship, Student A and Student B participated in the 55-meter dash. In the preliminary for the 55-meter dash, Student A placed 1<sup>st</sup> and Student B placed 2<sup>nd</sup>. The top 7 finishers advanced to the

<sup>38</sup> Student A also placed 1<sup>st</sup> in the finals of the 300-meter dash, which denied an opportunity to one girl to participate in the State Open Championship for the 300-meter dash.

finals, including Student 2 (who placed 4<sup>th</sup>); however, Student A's and Student B's finishes in the top 7 in the preliminary would have denied an opportunity for two female student-athletes to advance to the finals, including Student 1 (who placed 8<sup>th</sup>). In the finals of the 55-meter dash, Student A placed 1<sup>st</sup>, Student B placed 2<sup>nd</sup>, and Student 2 placed 3<sup>rd</sup>. The top six finishers are awarded medals and advance to the New England Regional Championships; however, Student A's and Student B's finishes in 1<sup>st</sup> and 2<sup>nd</sup> place, respectively, denied an opportunity for two female student-athletes to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships.<sup>39</sup> Further, since Student 2 placed 3<sup>rd</sup>, Student A's and Student B's participation denied an opportunity to Student 2 to place 1<sup>st</sup> in the 55-meter dash and receive the benefit of a 1<sup>st</sup> place medal. In the Indoor New England Regional Championship, in the preliminaries for the 55-meter dash, Student A placed 2<sup>nd</sup>, Student B placed 3<sup>rd</sup>, and Student 2 placed 8<sup>th</sup>. The top 8 finishers advanced to the finals. Although all three advanced to the finals, Student A's and Student B's 2<sup>nd</sup> and 3<sup>rd</sup> place finishes, respectively, denied an opportunity to two female student-athletes to advance to the finals. In the finals of the 55-meter dash, Student A placed 1<sup>st</sup>, Student B placed 3<sup>rd</sup>, and Student 2 placed 8<sup>th</sup>. See charts summarizing results below:

<b>2018-2019 Indoor State Open Championships</b>				
<b>Girls 55-Meter Dash Preliminaries (Top 7 Advance to Finals)</b>				
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>	<b>Heat</b>
<b>1</b>	<b>Student A</b>	7.00q	School A2	3
<b>2</b>	<b>Student B</b>	7.07q	School B	3
3	*	7.24q	*	2
4	Student 2	7.27q	School 2	1
5	*	7.27q	*	1
6	*	7.29q	*	2
7	*	7.34q	*	3
8	Student 1	7.37	School 1	2
9	*	7.41	*	3
10	*	7.45	*	2
....	....	....	....	....
16	*	7.85	School A2	2

<b>2018-2019 Indoor State Open Championships</b>				
<b>Girls 55-Meter Dash Final</b>				
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>	<b>Points</b>
<b>1</b>	<b>Student A</b>	6.95	School A2	10
<b>2</b>	<b>Student B</b>	7.01	School B	8
3	Student 2	7.23	School 2	6

<sup>39</sup> Student A also placed 1<sup>st</sup> in the finals of the 300 meter dash in the Indoor State Open Championships, which denied an opportunity to a female student-athlete to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Indoor State Open Championships.

<b>2018-2019 Indoor State Open Championships Girls 55-Meter Dash Final</b>				
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>	<b>Points</b>
4	*	7.24	*	4
5	*	7.26	*	2
6	*	7.33	*	1
7	*	7.39	*	-

<b>2018-2019 Indoor New England Regional Championships Girls 55-Meter Dash Preliminaries (Top 8 Advance to Finals)</b>				
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>	<b>Heat</b>
1	*	7.08q	* MA	2
2	<b>Student A</b>	7.09q	School A2- CT	4
3	<b>Student B</b>	7.24q	School B- CT	3
4	*	7.28q	*- MA	3
5	*	7.29q	*- MA	4
6	*	7.30q	* -CT	1
7	*	7.30q	*- MA	1
8	Student 2	7.30q	School 2 - CT	1
9	*	7.39	*- MA	1
10	*	7.40	* - RI	4
....	....	....	....	....
30	*	7.92	* - VT	3

<b>2018-2019 Indoor New England Regional Championships Girls 55-Meter Dash Finals</b>			
<b>Place</b>	<b>Athlete</b>	<b>Time</b>	<b>High School</b>
1	<b>Student A</b>	6.94	School A2- CT
2	*	7.04	* - MA
3	<b>Student B</b>	7.17	School B- CT
4	*	7.23	* - MA
5	*	7.27	* - MA
6	*	7.27	* - CT
7	*	7.31	* - MA
8	Student 2	7.32	School 2 - CT

- During school year 2018-2019, in the Outdoor Class S Statewide Championships, Student A participated in the 100-meter dash and the 200-meter dash; and Student B participated in the 100-meter dash. In the preliminary for the 100-meter dash, Student A placed 2<sup>nd</sup> and Student B placed 3<sup>rd</sup>. The top 8 finishers advanced to the finals, including Student 2 (who placed 1<sup>st</sup>); however, Student A's and Student B's finishes in the top 8 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 100-meter dash, Student A placed 1<sup>st</sup>, Student 2 placed 2<sup>nd</sup>, and Student B placed 3<sup>rd</sup>. While all three student-athletes advanced to the

State Open Championship, Student A's participation denied Student 2 the benefit of a 1<sup>st</sup> place finish in the Class S Statewide Championship for the 100-meter dash. Similarly, in the finals of the 200-meter dash, Student A placed 1<sup>st</sup> and Student 2 placed 2<sup>nd</sup>.<sup>40</sup> While both students advanced to the State Open Championship, Student A's participation denied Student 2 the benefit of a 1<sup>st</sup> place finish in the Class S Statewide Championship for the 200-meter dash. See charts summarizing results below:

<b>2018-2019 Outdoor Class S Statewide Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)</b>				
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>
1	Student 2	12.14	School 2	4
2	<b>Student A</b>	12.18	School A2	5
3	<b>Student B</b>	12.50	School B	3
4	*	12.73	*	1
5	*	13.05	*	1
6	*	13.08	*	2
7	*	13.16	School A2	4
8	*	13.22	*	5
9	*	13.27	*	3
10	*	13.30	*	4
...	...	...	...	...
35	*	14.28	*	5

<b>2018-2019 Outdoor Class S Statewide Championships Girls 100-Meter Dash Finals</b>				
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Points</b>
<b>1</b>	<b>Student A</b>	11.93#	School A2	10
<b>2</b>	Student 2	12.02	School 2	8
<b>3</b>	<b>Student B</b>	12.28	School B	6
4	*	12.82	*	5
5	*	12.86	*	4
6	*	13.13	*	3
7	*	13.14	*	2
8	*	13.31	School A2	1

<b>2018-2019 Class S Statewide Championships Girls 200-Meter Dash Finals</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>	<b>Points</b>
1	<b>Student A</b>	24.47#	School A2	6	10
2	Student 2	24.79	School 2	6	8
3	*	25.92	School A2	6	6
4	*	26.17	*	6	5

---

<sup>40</sup> Student B scratched.

<b>2018-2019 Class S Statewide Championships Girls 200-Meter Dash Finals</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>	<b>Points</b>
5	*	26.30	*	3	4
6	*	26.41	*	6	3
7	*	26.76	School A2	6	2
8	*	26.85	*	3	1
9	*	26.93	*	5	
10	*	27.02	*	6	
...	...	...	...	...	...
32	*	28.95	*	2	
...	...	...	...	...	...
--	<b>Student B</b>	SCR	School B		

6. During school year 2018-2019, in the Outdoor State Open Championship, Student A and Student B participated in the 100-meter dash. In the preliminary for the 100-meter dash, Student A placed 1<sup>st</sup> and Student B placed 5<sup>th</sup>. The top 8 finishers advanced to the finals, including Student 2 (who placed 3<sup>rd</sup>) and Student 3 (who placed 4<sup>th</sup>)<sup>41</sup>; however, Student A's and Student B's finishes in the top 8 in the preliminary denied an opportunity for two female student-athletes to advance to the finals. In the finals of the 100-meter dash, Student 2 placed 1<sup>st</sup>, Student 3 placed 3<sup>rd</sup>, and Student B placed 4<sup>th</sup>.<sup>42</sup> The top 6 finishers were awarded medals and advanced to the New England Regional Championships; however, Student B's finish in 4<sup>th</sup> place denied an opportunity for a female student-athlete to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships. Student A, Student 2 and Student 3 also participated in the 200-meter dash and finished 1st, 4<sup>th</sup>, and 3rd, respectively, in the final. Student A's 1st place finish denied an opportunity for one female student-athlete to advance to the New England Regional Championships, along with the benefit of receiving a medal for the Outdoor State Open Championships. Student A placed 1st in the finals of the 200-meter dash at the Outdoor New England Regional Championships; Student 3 placed 3rd and Student 2 placed 5th. See charts summarizing results below:

<b>2018-2019 Outdoor State Open Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>	<b>Tie</b>
1	<b>Student A</b>	11.64q	School A2	3	
2	*	11.98q	*	1	
3	Student 2	12.07q	School 2	2	
4	Student 3	12.11q	School 3	3	
5	<b>Student B</b>	12.20q	School B	1	
6	*	12.44q	*	2	12.433

<sup>41</sup> Student 1 placed 14<sup>th</sup>.

<sup>42</sup> Student A had a false start and was disqualified.

<b>2018-2019 Outdoor State Open Championships Girls 100-Meter Dash Preliminaries (Top 8 Advance to Finals)</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>	<b>Tie</b>
7	*	12.44q	*	1	12.436
8	*	12.45q	*	3	
9	*	12.50	*	3	
10	*	12.56	*	1	
***					
14	Student 1	12.79	School 1	3	
***					
24	*	13.25	*	3	

<b>2018-2019 Outdoor State Open Championships Girls 100-Meter Dash Finals</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Points</b>	<b>Tie</b>
1	Student 2	11.67	School 2	10	
2	*	11.92	*	8	
3	Student 3	12.04	School 3	6	
4	<b>Student B</b>	12.22	School B	5	
5	*	12.36	*	4	
6	*	12.38	*	3	12.375
7	*	12.38	*	2	12.378
--	<b>Student A</b>	FS	School A2		

<b>2018-2019 Outdoor State Open Championships Girls 200 Meter Dash Finals</b>					
<b>Place</b>	<b>Student</b>	<b>Time</b>	<b>School</b>	<b>Heat</b>	<b>Points</b>
<b>1</b>	<b>Student A</b>	24.33	School A2	3	10
2	*	24.75	*	3	8
3	Student 3	25.01	School 3	3	6
4	Student 2	25.24	School 2	3	5
5	*	25.38	*	3	4
6	*	25.55	*	3	3
7	*	25.63	*	2	2
8	*	25.79	*	2	1
9	*	26.28	*	2	
10	*	26.44	*	2	
...	...	...	...	...	...
--	Student 1	DNS	School 1	2	

*Team School Championships Involving Students A and B*

OCR reviewed the race results for the 2018-2019 Indoor State Open Championship and confirmed the following order of finish of schools for the state championship:

- School A2 – 54 points
- School 1 – 39 points
- School 3 – 34 points
- Hillhouse – 34 points
- Norwich Free Academy – 21 points

OCR further confirmed that School A2 earned 10 points for each of Student A's 1<sup>st</sup> place finishes. OCR determined that other School A2 student-athletes at the meet earned the team the following points:

- 2<sup>nd</sup> place in the 300-meter dash, earning School A2 8 points,
- 1<sup>st</sup> place in the 600-meter run, earning School A2 10 points;
- 5<sup>th</sup> place in the 4 x 200 relay, earning School A2 2 points; and
- 3<sup>rd</sup> place in the shot put, earning School A2 6 points

OCR also reviewed the results for the 2018-2019 Outdoor State Open Championships, held on June 3, 2019. OCR determined that School A2 placed 3rd (38 points) in the team championship, a full 20 points behind School 2, which placed first (58 points) and Windsor, which placed 2<sup>nd</sup> (43 points). The top 5 finishers were as follows:

- School 3 – 58 points
- Windsor – 43 points
- School A2 – 38 points
- Norwich Free Academy – 32 points
- Immaculate – 30 points

Student A participated in the 100-meter dash, the 200-meter dash, and the 4 x 400 relay in the 2018-2019 Indoor State Open Championship, and earned 10 points for School A2 for Student A's first place finish in the 200-meter dash; and was also on School A2's 4 x 400 relay team, which placed 1st and also earned 10 points for School A2.

*School Districts Investigated by OCR*

***Glastonbury:***

Glastonbury advised OCR that as a CIAC member school, it must comply with all of the CIAC's by-laws, policies, rules, and regulations, including the Revised Transgender Participation Policy. Glastonbury reported that it does not currently have any transgender students of which it is aware participating in its athletics program. Glastonbury stated that it must allow students to participate on the athletics team consistent with their gender identity because of state law and the Revised Transgender Participation Policy. Glastonbury stated that it has not challenged the CIAC's Revised Transgender Participation Policy because it is consistent with the requirements of state law, with which Glastonbury already must comply.

Glastonbury's Athletic Director stated that no female athletes were denied participation on any of their athletic teams as a result of having transgender athletes participate, and that student-athletes were eligible to participate in all meets that the District participated in if they met the requirements (i.e., qualifying marks, selection for relay team which is a determination made at the coaching level). The Athletic Director stated that the complaint filed with OCR addresses what is perceived as an inability to win.

Glastonbury's Principal stated that some district parents complained that a female student was affected by having a transgender student from another team participate in track events. The principal advised OCR that she never verified the times or records brought to her attention, nor did she make a determination regarding the allegations.

In emails dated May 2-10, 2018, Parent 2 requested guidance from the Athletic Director regarding the participation of Student A in girls' track events and whether it was consistent with the CIAC's Revised Transgender Participation Policy. The Athletic Director stated that she had spoken with someone at the CIAC who indicated that Student A would have had to declare her gender identity prior to the start of the school year in August. Parent 2 stated that she informed the CIAC that Student A participated as a male during the indoor season and then as a female during the outdoor season in 2017-2018; and stated that the CIAC advised her that it would be following up with School A1. On May 10, 2018, the Athletic Director advised Parent 2 that she was following up and had placed a call to the CIAC. In an email dated May 11, 2018, the Athletic Director responded to Parent 2, advising her that based on her reading of the CIAC rule, as well as confirmation she received from the CIAC, Student A's participation was in compliance with the Revised Transgender Participation Policy. She noted that if Parent 2 had been told Student A had to declare prior to the start of the school year, that was misinformation, as that requirement is nowhere in the language of the policy. The Athletic Director advised Parent 2 that she also shared this information with the track coach.

On May 23, 2018, Parent 2 advised the Athletic Director via email that she had been discussing transgender eligibility with her legislative office and wanted to make the Athletic Director aware. In an email dated May 29, 2018, Parent 2 asked the Athletic Director if students declaring a gender identity are required to produce any supporting documentation, or if there is a waiting period. In an email dated June 6, 2018, Parent 2 advised the Athletic Director that she intended to request a meeting with the CIAC regarding the transgender policy; the Athletic Director acknowledged the email and stated that there had been articles and some troubling behavior around the issue, and advised that a letter to the CIAC was probably the best route for the parent to take.

In an email dated July 2, 2018, to the Athletic Director, Parent 2 stated that the CIAC had refused to entertain any policy changes in response to her correspondence with them; it was her understanding that member schools set policy; and she wanted to meet with the Athletic Director to share her research. The Athletic Director responded attempting to schedule a time to meet. Thereafter, in an email dated July 18, 2018, Parent 2 forwarded to the Athletic Director copies of responses she had received from the CIAC Executive Director. In the email, she stated that, although the CIAC stated that the state legislature needed to make a change, her state representatives informed her that athletics policies fall under the CIAC's jurisdiction.



In an email dated January 27, 2019, to School 1 administrators, Parent 3 alleged that Student A, whom Parent 3 identified as a boy who identifies as a girl, was participating in track and creating an unfair and unsafe environment in girls track. He provided, as an example, that during the 4 x 400 relay event on January 26, 2019, in the second leg, Student A “had physicality” with a runner from Windsor, resulting in a significant lead for Bloomfield. The student-athlete running the last leg of the relay for Windsor was unable to close the gap that Student A had created. He also provided an example that at the Yale Invitational held on January 12, 2019, a student-athlete came in second to Student A, despite having run a faster time than 182 other girls in the 300-meter sprint. He asked that the unsafe and unfair situation be addressed now before it affected other sports.

In response, on January 29, 2019, the District’s school board chair emailed Parent 3 and thanked him for sharing his experiences and concerns, but noted that the CIAC handbook indicated that it would be contrary to state and federal law to preclude transgender students from participating. She stated that, accordingly, she did not believe that exclusion was an option, but advised that this was just her opinion.

In an email dated February 17, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 3 asserted that the Revised Transgender Participation Policy directly affected the outcome of School 1’s winning the 2018-2019 Indoor State Open Championship held on February 16, 2019. Specifically, Parent 3 stated that School A2 earned the highest number of points due to the participation of Student A, who earned 20 points for the team by herself. Parent 3 alleged that, but for Student A’s participation, School 1 would have won the state title. Specifically, Parent 3 asserted that School A2 was only able to win because Student A placed first in two separate events, earning School A2’s team 20 of its total 54 points. Parent 3 also noted that Student A participated on the 4 x 400 relay, which earned the school 8 points for second place. Parent 3 acknowledged in his email that it was possible that School A2 still would have placed 2<sup>nd</sup> in the 4 x 400 relay, even if another athlete had run in Student A’s place.<sup>43</sup>

In an email dated February 25, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 4 questioned the inclusion of transgender athletes’ competitive times in results, which he argued affected all of the other athletes competing. Parent 4 further stated that recognizing the transgender athletes’ results insulted the “current cisgender record holder who has worked hard and competed fairly.” Parent 4 also asserted that the potential to compete for a college scholarship was at stake because the participation of transgender athletes resulted in other athletes not being able to compete at the New England Regionals, expand their résumés, and gain additional exposure to college recruiters and coaches. Parent 4 alleged that the CIAC was violating its own rules by allowing transgender athletes to compete; and asked that the results of the State Open Championship be recalculated, and points redistributed, and that the Revised Transgender Participation Policy be changed for the outdoor 2019 season. Parent 4 also suggested potential solutions to continue to allow transgender athletes to compete but change the competitive categories or “which scores count.”

---

<sup>43</sup> Parent 3 further asked that the CIAC adopt the NCAA and IOC policy, whereby a transgender athlete must undergo hormone treatment for one year before being able to compete; allow transgender athletes to run in events as exhibition participants where their results do not count; or “another fair and safe solution.”

In an email dated March 3, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 3 followed up on his original request that the Revised Transgender Participation Policy be revised. Parent 3 alleged that the policy prevented deserving girls from qualifying for the New England Regionals. For example, Parent 3 stated that at the New England Regionals on March 2, 2019, a Bloomfield transgender athlete (Student A) placed first in the 55-meter and 300-meter dash events. He also stated that by participating in the 4 x 400-meter relay event, Student A provided Bloomfield with a .06 second lead over Glastonbury in the final results.

In an email dated March 5, 2019, to School 1 administrators and the CIAC Executive Director, among others, Parent 4 stated that no other states at the New England Regionals had transgender student-athletes participating, and many people “expressed surprise and concern that their cisgender girls were forced to compete against transgender girls.” In another email dated March 5, 2019, to School 1 administrators, Parent 4 requested a meeting to review the current policy regarding transgender athletes and its impact on competitive fairness; and alleged that “cisgender girls are being deprived of fair and equal opportunity.”

In an email dated March 7, 2019, to the District Superintendent, a parent (Parent 5) stated her opinion that the CIAC should adopt NCAA standards regarding transgender participation. In an email dated March 10, 2019, to School 1 administrators and the CIAC Executive Director, Parent 3 advised that the National Scholastic Athletic Foundation (NSAF), which hosts the national championships, had released statements regarding its transgender policy, which required athletes to take gender affirming hormones. Parent 3 then stated that at the New England Regionals on March 2, 2019, Bloomfield beat Glastonbury in the 4 x 400 relay with Student A participating on Bloomfield’s team. He then noted that at the New Balance National championships held over March 8-10, 2019, Glastonbury’s 4 x 400 relay team came in 14<sup>th</sup> in the nation, while Bloomfield’s came in 34<sup>th</sup>, running without Student A.

On March 15, 2019, Parent 2 and the Parent 4 met with the Athletic Director and the Principal. The Principal stated that Parent 2 wanted School 1 to put forth a request for the CIAC to change its policy, and she communicated to them that the school was comfortable with the CIAC’s following the state law and was not willing to ask the CIAC to change their policy. The Athletic Director did not recall that Parent 2 and Parent 4 raised any specific concerns about the policy, other than that the policy set up an uneven playing field. The Athletic Director stated that it was difficult to keep Parent 2 focused on what was Parent 2’s real issue, as Parent 2 had started talking about separate math classes. The Athletic Director stated that she did not leave the meeting with any clear understanding of what Parent 2 was saying. She noted that Parent 2 and Parent 4 also wanted to show them photos of other non-district students, which they refused to discuss due to Family and Educational Rights and Privacy Act of 1974 (FERPA). In an email dated March 18, 2019, following their meeting, Parent 2 summarized her continued concerns that the transgender policy may violate Title IX; included information from her state legislative office that there is no law to be changed and that any changes would be the responsibility of the CIAC and member schools; and provided examples of contradictions within the CIAC policies, relative to co-ed teams.

On March 18, 2019, Parent 3 requested a meeting with administrators at School 1 to discuss the transgender policy. In an email dated March 25, 2019, to School 1 administrators, Parent 3 stated

that he learned that the CIAC had sent out a survey to member schools regarding the transgender policy. He included links to resources in his email and urged School 1 not to just “rubber stamp” the policy. In response to his request, on April 2, 2019, the principal and School 1’s Athletic Director met with Parent 3. Both the principal and Athletic Director described the meeting as lasting thirty minutes, per Parent 3’s request. The Athletic Director stated that, during the meeting, Parent 3 discussed biological differences and the challenges female athletes face, and what could happen when transgender athletes participate in other sports. The principal stated that Parent 3 was focused on the safety of his child with allowing a transgender student to participate in track. The principal stated that she communicated to Parent 3 that the district was not looking at asking the CIAC to change the transgender policy. On April 2, 2019, Parent 3 emailed the principal and Athletic Director thanking them for meeting with him; he emphasized two points relative to the fairness of the policy and the implications if an elite transgender athlete were ever to participate. He also included resources related to Oregon’s policy, as well as an NSAF’s press release regarding transgender participation.

In an email dated April 12, 2019, to the District Director of Health and Physical Education, K-12 (the Director), Parent 2 acknowledged their recent conversation regarding Title IX; asked the Director for clarification regarding why the principal, as a voting CIAC member, could set different athletic expectations for girls and boys teams and questioned why that did not violate Title IX. Parent 2 also questioned why the CIAC had separate competitions for boys and girls if the CIAC’s purpose was just participation, and whether the concept of gender fluidity would satisfy Title IX when there was no distinction between the sexes.

*Canton:*

Canton advised OCR that it was required to comply with the CIAC’s Revised Transgender Participation Policy because the CIAC is the governing body for interscholastic athletics. Canton also noted that the Revised Transgender Participation Policy follows state law. Canton reported that it does not currently have any transgender students of which it is aware participating in its athletics program, nor has it challenged the CIAC’s Revised Transgender Participation Policy.

*Danbury:*

Danbury stated that it was required to follow the Revised Transgender Participation Policy because the CIAC is the governing body of athletics for the state and it is required to follow all of the CIAC rules, regulations, and policies. Danbury reported that it does not currently have any transgender students of which it is aware participating in its athletics program. Danbury stated that it has not expressed concerns about the policy to the CIAC.

*Hartford (School A1):*

Student A was a 10<sup>th</sup> grade student who participated on School A1’s athletics program during school year 2017-2018.<sup>44</sup> During the indoor track season of school year 2017-2018, Student A

---

<sup>44</sup> During school year 2017-2018, Student A attended another school in Hartford that does not have a sports program; as a result, Student A participated in athletics through School A1’s program.

was a student-athlete on School A1's boys' indoor track team. During the outdoor track season of school year 2017-2018, Student A was a student-athlete on School A1's girls' outdoor track team. School A1 staff stated that as a CIAC member, School A1 is required to follow the CIAC policy and is also required to follow state law.

*Bloomfield:*

Student A was enrolled in School A2 in Bloomfield as an 11<sup>th</sup> grade student during school year 2018-2019. Bloomfield stated that as a member of the CIAC, it is required to follow the CIAC rules regarding participation, eligibility, and other matters, including the Revised Transgender Participation Policy.<sup>45</sup> Bloomfield denied that Student A's participation has had a negative impact on other female students in the district, as Bloomfield does not cut any students from the girls' indoor or outdoor track teams; therefore, anyone who wishes to participate can. Bloomfield staff opined that while a student may have lost to a transgender student, overall, everyone's performance has benefited from the participation of Student A; and that participation in athletics is not about winning.

*Cromwell:*

Student B was enrolled in School B in Cromwell as a 10<sup>th</sup> grade student during school year 2017-2018, and as an 11<sup>th</sup> grade student during school year 2018-2019. During school years 2017-2018 and 2018-2019, Student B was a student-athlete on School B's varsity girls' indoor and outdoor track teams.

Cromwell stated that it has one transgender student (Student B) participating in its interscholastic athletics program, and noted that Student B's records since her enrollment at School B in school year 2016-2017 have indicated that she was female; accordingly, Student B was placed on female rosters. Cromwell staff stated that they are required to follow the Revised Transgender Participation Policy as it is set by the CIAC, which is their governing body. Cromwell staff stated that none of their district students have been affected negatively by Student B's participation.

**Legal Standards**

Subpart D of the regulation implementing Title IX prohibits discrimination on the basis of sex in education programs and activities. 34 C.F.R. § 106.31(b)(7) of Subpart D states that in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex, limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.41 of Subpart D specifically applies to athletics. The regulation implementing Title IX, at 34 C.F.R. § 106.41(a), states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against, in

---

<sup>45</sup> Bloomfield denied that it has received any requests from students to participate in its interscholastic athletics program pursuant to the Revised Transgender Participation Policy. Bloomfield stated that it currently has a transgender student participating on its girls track team (Student A), but noted that the student registered and enrolled at School A2 as a female, i.e., the student's school records indicated that she was female; therefore, Bloomfield was not required to make any determinations pursuant to the policy.

any interscholastic athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. The regulation implementing Title IX, at 34 C.F.R. § 106.41(b), states that, notwithstanding the requirements of 34 C.F.R. § 106.41(a), a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.<sup>46</sup> The regulation implementing Title IX, at 34 C.F.R. § 106.6(c), states that the obligation to comply with the regulation is not obviated or alleviated by any rule or regulation of any athletic or other league, which would render any student ineligible to participate or limit the eligibility or participation of any student, on the basis of sex, in any education program or activity operated by a recipient.<sup>47</sup>

The Supreme Court’s holding in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), does not alter the relevant legal standard under 34 C.F.R. § 106.41, or how that provision interacts with 34 C.F.R. § 106.31 or 34 C.F.R. § 106.6. In *Bostock*, the U.S. Supreme Court held that an employer violated Title VII of the Civil Rights Act of 1964 by terminating a transgender employee on the basis of their transgender status. See *Bostock*, 140 S. Ct. at 1743 (“For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”). However, the Court expressly declined to decide questions about how its interpretation of Title VII would affect other statutes:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.

*Id.* at 1753. Indeed, the Court clearly stated that the “only question before [it] is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’” *Id.*

The Court’s holding was consistent with the position of the transgender employee who filed suit in a companion case to *Bostock*—*R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 1731 (2020). During oral argument before the U.S. Supreme Court, the employee’s counsel conceded that the outcome of the case was not relevant, one way or another, to the question of whether a recipient’s willingness to allow a biological male who identified as a transgender female to compete against biological females constituted a violation under Title IX:

---

<sup>46</sup> Where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. 34 C.F.R. § 106.41(b).

<sup>47</sup> OCR understands that the CIAC and the individual school districts maintain that the Revised Transgender Participation Policy is consistent with, and required by, Connecticut state law. OCR takes no view on the requirements of Connecticut law except to note that the duty to comply with Title IX and its implementing regulation is independent of any such requirements.

JUSTICE GINSBURG: [T]his is a question of someone who has transitioned from male to female ... and wants to play on the female team. She is not questioning separate female/male teams. But she was born a man. *She has transitioned. She wants to play on the female team. Does it violate Title IX which prohibits gender-based discrimination?*

MR. COLE: Right. And I think *the question again would not be affected even by the way that the Court decides this case*, because the question would be, is it permissible to have sex-segregated teams, yes, where they involve competitive skill or – or contact sports, and then the question would be, how do you apply that permissible sex segregation to a transgender individual?

Oral Arg. Tr., *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, at 17-18, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf). (emphasis added). After reviewing *Bostock*, the Office for Civil Rights concurs with counsel for the employee's concession in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, that the *Bostock* holding does not alter the legal authority for sex-segregated teams under Title IX. Even if *Bostock* applied to Title IX—a question the Supreme Court expressly declined to address—its reasoning would only confirm that Title IX does not permit a biologically male student to compete against females on a sex-segregated team or in a sex-segregated league.

As an initial matter, despite some similarities, Title IX differs from Title VII in important respects. Title IX has different operative text, is subject to different statutory exceptions, and is rooted in a different Congressional power. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275, 286-87 (1998). Significantly, unlike Title VII, one of Title IX's crucial purposes is protecting women's and girls' athletic opportunities. Indeed, Title IX was passed, and implemented by regulations, to prohibit discrimination on the basis of sex in education programs and activities and to protect equal athletic opportunity for students who are biological females, including providing for sex-segregated athletics. Congress specifically mandated that the Department of Education consider promulgating regulations to address sports. After first enacting Title IX, Congress subsequently passed another statute, entitled the Javits Amendment, which instructed the Secretary of Education to publish regulations "implementing the provisions of Title IX . . . which shall include with respect to intercollegiate activities reasonable provisions considering the nature of the particular sports." Public Law 93-380 (HR 69), Section 844, 88 Stat 484 (August 21, 1974). Congress indicated in the same bill that following the publication of those regulations, Congress itself would review the regulations and determine whether they were "inconsistent with the Act from which [they] derive[] [their] authority." *Id.*

Pursuant to the Javits Amendment, the Secretary of Health, Education, and Welfare subsequently published Title IX regulations, including regulatory text identical to the current text of the athletics regulations. After Congressional review over six days of hearings, Congress ultimately allowed the regulations to go into effect, consistent with its prior statement that Congress itself would review the regulations to ensure consistency with Title IX. See *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004) (laying out the history of the Javits Amendment, and the response from Congress to the regulations promulgated thereunder). In doing so, Congress deemed the Department's athletics regulations to be consistent with Title IX.

The Department’s regulations validly clarify the scope of a recipient’s non-discrimination duties under Title IX in the case of sex-specific athletic teams. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (“The degree of deference [to the Department of Education] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.”). Specifically, although the Department’s regulations have long generally prohibited schools from “provid[ing] any athletics separately” on the basis of sex, they permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. § 106.41(a), (b). In those circumstances, men and women are not similarly situated because of their physiological differences, and separating them based on sex is accordingly not prohibited by Title IX. *See Bostock*, 140 S. Ct. at 1740 (“To ‘discriminate against’ a person, then, would seem to mean treating that individual worse than others who are similarly situated.”). Thus, schools may offer separate-sex teams. Indeed, such separate-sex teams have long ensured that female student athletes are afforded an equal opportunity to participate. 34 C.F.R. § 106.41(c)(1). Those regulations authorize single-sex teams because physiological differences are relevant.

Even assuming that the Court’s reasoning in *Bostock* applies to Title IX—a question the Court expressly did not decide—the Court’s opinion in *Bostock* would not affect the Department’s position that its regulations authorize single-sex teams under the terms of 34 C.F.R. § 106.41(b). The *Bostock* decision states, “An individual’s homosexuality or transgender status is not relevant to employment decisions” because an employee’s sex is not relevant to employment decisions, and “[se]x plays a necessary and undisguisable role in the decision” to fire an employee because of the employee’s homosexual or transgender status. *Bostock*, 140 S. Ct. at 1741, 1737. Conversely, however, there are circumstances in which a person’s sex *is* relevant, and distinctions based on the two sexes in such circumstances are permissible because the sexes are not similarly situated. Congress recognized as much in Title IX itself when it provided that nothing in the statute should be construed to prohibit “separate living facilities for the different sexes.” *See, e.g.*, 20 U.S.C. § 1686; *see also* 34 C.F.R. § 106.32(b) (permitting schools to provide “separate housing on the basis of sex” as long as housing is “[p]roportionate” and “comparable”); 34 C.F.R. § 106.33 (permitting “separate toilet, locker room, and shower facilities on the basis of sex,” so long as the facilities “provided for students of one sex shall be comparable to such facilities provided for students of the other sex”).

The Court’s opinion in *Bostock* also does not affect the Department’s position that its regulations authorize single-sex teams based only on biological sex at birth—male or female—as opposed to a person’s gender identity. The Court states that its ruling is based on the “assumption” that sex is defined by reference to biological sex, and its ruling in fact rests on that assumption. *See Bostock*, 140 S. Ct. at 1741 (“[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”). The logic that an employer must treat males and females as similarly situated comparators for Title VII purposes necessarily relies on the premise that there are two sexes, and that the biological sex of the individual employee is necessary to determine whether discrimination because of sex occurred. Where separating students based on sex is

permissible—for example, with respect to sex-specific sports teams—such separation must be based on biological sex.

Additionally, if *Bostock*'s reasoning under Title VII were applied to policies regarding single-sex sports teams under Title IX, it would confirm that the Department's regulations authorize single-sex teams only based on biological sex. In *Bostock*, the Court took the position that "homosexuality and transgender status are inextricably bound up with sex," such that "when an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex." *See id.* at 1742, 1744. Under that logic, special exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete. For all of these reasons, the Department continues to interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams "for members of *each sex*" (emphasis added), to mean operation of teams for biological males, and for biological females, and does not interpret Title IX to authorize separate teams based on each person's transgender status, or for members of each gender identity. When a recipient provides "separate teams for members of each sex" under 34 C.F.R. § 106.41(b), the recipient must separate those teams on the basis of biological sex, and not on the basis of homosexual or transgender status.

The holding in *Bostock* addressed the context of an employment situation in which a distinction based on sex was prohibited and not permitted under Title VII. The *Bostock* holding does not alter the legal authority for single-sex athletic teams under Title IX because Title IX and its implementing regulations permit certain distinctions based on sex under 34 C.F.R. 106.41(b). The Office for Civil Rights therefore issues this Revised Letter of Impending Enforcement Action to clarify that it will continue to proceed with bringing the recipients in this matter into compliance with Title IX.

### **Analysis and Conclusions**

The Complainant alleged that the CIAC's Revised Transgender Participation Policy discriminated against female student-athletes competing in interscholastic girls' track in the state of Connecticut on the basis of their sex. Specifically, the Complainant alleged that as a result of the CIAC's Revised Transgender Participation Policy, Students A and B were permitted to compete in girls' track athletic competitions, which resulted in female student-athletes being denied the benefits of an education program or activity and the opportunities to participate in higher level and/or post-season competitions.

#### **The CIAC:**

OCR determined that the CIAC, by purporting to provide sex-segregated teams under 34 C.F.R. § 106.41(b) yet permitting the participation of biologically male students in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, denied



female student-athletes benefits and opportunities, including to advance to the finals in events; to advance to higher level competitions, such as the State Open Championship or the New England Regional Championship; to win individual and team state championships, along with the benefit of receiving medals for these events; to place higher in any of the above events; to receive awards and other recognition; and possibly to obtain greater visibility to colleges and other benefits. For these same reasons, OCR also determined that the CIAC treated students differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes, including the opportunity to compete on and against teams comprised of members of one sex. Indeed, CIAC also treated male student-athletes whose gender identity does not align with their sex more favorably than other male student-athletes, by affording them the opportunity to compete on and against teams comprised of members of the opposite sex.

With respect to the three student-athletes on whose behalf the complaint was filed (Student 1, Student 2, and Student 3), Student A's and Student B's 1<sup>st</sup> and 2<sup>nd</sup> place finishes, respectively, in the preliminaries of the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied Student 1, who placed 8<sup>th</sup>, the opportunity of advancing to the finals in this event, since only the top 7 finishers advanced to the finals. Student A's and Student B's participation in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy had the most significant impact on Student 2. Specifically, Student A's 1<sup>st</sup> place finish, in the finals of the 2018-2019 Outdoor Class S Statewide Championship for the 100-meter dash and the 200-meter dash, denied Student 2, who placed 2<sup>nd</sup> in both events, the benefit of a 1<sup>st</sup> place finish; and Student A's and Student B's 1<sup>st</sup> and 2<sup>nd</sup> place finishes, in the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied an opportunity for Student 2, who placed 3<sup>rd</sup>, to place 1<sup>st</sup> in the event and receive the benefit of a 1<sup>st</sup> place medal. Denying a female student a chance to win a championship due to the lack of opportunity to compete on and against teams comprised solely of members of one sex, is inconsistent with Title IX's mandate of equal opportunity for both sexes.<sup>48</sup> Accordingly, OCR determined that the CIAC denied athletic benefits and opportunities to female student-athletes competing in interscholastic girls' track in the state of Connecticut through the Revised Transgender Participation Policy, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). OCR also has concerns that additional violations may have resulted from the Policy and from Student A's and B's participation in girls' track, including but not limited to losses or lowered placement in regular season meets; losses or lowered placement in conference championships; and an inability for some female student-athletes to participate generally in a race at any level (not just championship level).

With respect to the Team Championships for the 2018-2019 Indoor State Open Championship, absent Student A's participation, School A2 earned 26 points in 4 different events. Adding the 8 points for the 4 x 200 relay, in which School A2 may have placed and earned points even without Student A, School A2 would have earned 34 points, behind School 1, which had 39 points. Subtracting the 8 relay points would have also placed School A behind School 3. Thus, Student A's participation may have denied School 1 and its female student-athletes the benefit of a team

---

<sup>48</sup> See *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 294-95 (2d Cir. 2004) ("A primary purpose of competitive athletics is to strive to be the best. . . . Treating girls differently regarding a matter so fundamental to the experience of sports—the chance to be champions—is inconsistent with Title IX's mandate of equal opportunity for both sexes.").

championship, and may have denied School 3, and other schools, the benefit of a higher placement.<sup>49</sup>

**Glastonbury:**

OCR determined that the participation of Glastonbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 1, and other female student-athletes competing against Students A and B, denied athletic benefits and opportunities to Student 1 and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Further, Glastonbury is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Glastonbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student athletes were denied the opportunity to compete in events that were exclusively female, whereas male students were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Glastonbury's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R § 106.6(c).

The participation of Glastonbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 1, and other female student-athletes competing against Students A and B, denied Student 1 the opportunity to place higher in events, such as the 100-meter dash at the 2017-2018 Outdoor State Championship and New England Regional Championship; the 55-meter dash at the 2018-2019 Indoor CCC Regional Championship; and the 200-meter dash at the 2018-2019 Outdoor State Championship. Student A's and Student B's 1<sup>st</sup> and 2<sup>nd</sup> place finishes, respectively, in the preliminaries of the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied Student 1, who placed 8<sup>th</sup>, the opportunity of advancing to the final in this event, since only the top 7 finishers advanced to the finals.

**Canton:**

OCR determined that the participation of Canton in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 2, and other female student-athletes, competing against Students A and B, denied athletic benefits and opportunities to Student 2, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Further, Canton is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Canton placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were

---

<sup>49</sup> With respect to the 2018-2019 Outdoor State Open Championships, held on June 3, 2019. The top five finishers were as follows: School 3: 58 points; Windsor: 43 points; School A2: 38 points; Norwich Free Academy: 32 points; Immaculate: 30 points. Student A's participation earned school A2 an additional 10 to 20 points and a third-place finish when School A2 might otherwise have finished no better than 5<sup>th</sup>.

coeducational; female student athletes were denied the opportunity to compete in events that were exclusively female, whereas male students were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Canton's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R § 106.6(c).

The participation of Canton in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 2, and other female student-athletes competing against Students A and B, denied Student 2 the opportunity to place higher in events, such as the Class S Outdoor Championships; the Indoor and Outdoor State Open Championships; and the New England Regional Championships. Specifically, Student A's and Student B's 1<sup>st</sup> and 2<sup>nd</sup> place finishes respectively, in the 2018-2019 Indoor State Open Championship for the 55-meter dash, denied an opportunity for Student 2, who placed 3<sup>rd</sup>, to place 1<sup>st</sup> in the event and receive the benefit of a 1<sup>st</sup> place medal. Student A's 1<sup>st</sup> place finish, in the finals of the 2018-2019 Outdoor Class S Statewide Championship for the 100-meter dash and the 200-meter dash, denied Student 2, who placed 2<sup>nd</sup> in both events, the benefit of a 1<sup>st</sup> place finish. Student A's 1<sup>st</sup> place finish in the finals of the State Open Championship in the 200-meter dash denied Student 2, who finished 4<sup>th</sup>, the benefit of a top-three finish.

#### **Danbury:**

OCR determined that the participation of Danbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 3, and other female student-athletes, competing against Students A and B, denied athletic benefits and opportunities to Student 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Further, Danbury is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Danbury placed female student-athletes in athletic events against male student-athletes, resulting in competitive disadvantages for female student-athletes. The athletic events in which the female student-athletes competed were coeducational; female student athletes were denied the opportunity to compete in events that were exclusively female, whereas male students were able to compete in events that were exclusively male. Accordingly, the districts' participation in the athletic events sponsored by the CIAC denied female student-athletes athletic opportunities that were provided to male student-athletes. Danbury's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R § 106.6(c).

The participation of Danbury in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student 3, and other female student-athletes competing against Students A and B, denied Student 3 the opportunity to place higher in events, such as at the Outdoor State Open Championships and the New England Regional Championships. Specifically, Student A's 1<sup>st</sup> place finish in the finals of the State Open Championship in the 200-meter dash denied Student 3, who finished 3<sup>rd</sup>, the benefit of placing 2<sup>nd</sup> in the event; and Student A's 1<sup>st</sup> place finish in the finals of the 200-meter dash at the Outdoor New England Regional Championships denied Student 3, who finished 3<sup>rd</sup> the benefit of placing 2<sup>nd</sup> in the event.

**Hartford (School A1):**

Student A participated in girls' outdoor track on School A1's team in Hartford during school year 2017-2018. OCR determined that the participation of School A1 in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student A's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Further, Hartford is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Hartford's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

**Bloomfield:**

Student A participated in girls' indoor and outdoor track for Bloomfield during school year 2018-2019. OCR determined that the participation of Bloomfield in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student A's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. Section 106.41(a). Further, Bloomfield is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Bloomfield's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

**Cromwell:**

Student B participated in girls' indoor and outdoor track for Cromwell during school years 2017-2018 and 2018-2019. OCR determined that the participation of Cromwell in athletic events sponsored by the CIAC, consistent with the CIAC's Revised Transgender Participation Policy, which resulted in Student B's participating in events against Students 1, 2, and 3, and against other female student-athletes, denied athletic benefits and opportunities to Students 1, 2, and 3, and other female student-athletes, in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(a). Further, Cromwell is not providing separate teams for each sex as permitted under 34 C.F.R. § 106.41(b). Cromwell's obligation to comply with the regulation implementing Title IX is not obviated or alleviated by any rule or regulation of the CIAC. 34 C.F.R. § 106.6(c).

For the aforementioned reasons, OCR also determined that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury treated student-athletes differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes.

## **II. RETALIATION**

The Complainant also alleged that (1) the CIAC retaliated against Parent 1, after Parent 1 complained about the Revised Transgender Participation Policy, by informing Parent 1, in March

2019, that the CIAC’s Executive Director would no longer accept communications from her; and (2) that Glastonbury’s track coach retaliated against Student 1, for her and Parent 2’s advocacy against the Revised Transgender Participation Policy, by (a) replacing Student 1 on the sprint medley relay team in February 2019; (b) telling Student 1 and her parents that he could not give a good report to college coaches about her in March and May 2019; (c) denying Student 1 a position as a team captain in March 2019; and (d) suggesting that Student 1 should leave the outdoor track team due to her schedule, in March and May 2019.

## **Findings of Fact**

### **1. Allegation Regarding the CIAC’s Retaliation**

OCR determined that the CIAC Handbook in effect during school year 2018-2019 sets forth the CIAC’s “Communication Protocol Rules, Regulations and Interpretations” (Communication Protocol). According to the Communication Protocol, the CIAC Board of Control is the official body charged with the responsibility of interpreting the CIAC’s rules and regulations. The Communication Protocol provides, in pertinent part, that “[i]nquiries to the CIAC office from parents, student-athletes, coaches and the public requesting an interpretation of the rules and regulations will be referred back to the member school principal or his/her designee.” In addition, Section 4.21 of the CIAC Handbook, “Regulation Interpretation/CIAC Protocol in Providing Decisions to School Personnel and Public (Effective July 1, 2006),” provides, in pertinent part, “The CIAC staff will not discuss CIAC rules and regulations with anyone other than school administrators and athletic directors. Telephone inquiries from parents and coaches will not be honored. **All calls from anyone other than the athletic director or school administrator will be referred back to the school.**” (Emphasis in original.)

OCR determined that Parent 1 initially contacted the CIAC about the policy when she sent a letter dated February 21, 2018, to the CIAC’s former Executive Director, in which she requested that the CIAC establish a rule to address transgender athletes’ participating in the girls’ state championship track competitions. In an email dated March 10, 2018, the former Executive Director responded by acknowledging that issues surrounding transgender student-athlete participation are complicated; advising Parent 1 that the CIAC’s policy is directly aligned with state anti-discrimination law, including the state’s definition of gender to include gender identity; and reminding Parent 1 that most high school athletes are minors and are therefore afforded a unique level of legal protection regarding their right to privacy.

On January 24, 2019, Parent 1 sent an email to the CIAC’s current Executive Director, attaching a letter in which she again requested that the CIAC establish a rule for transgender athletes’ participating in state championship track competitions and setting forth her own proposal for the placement and scoring of transgender female athletes participating in state championships.<sup>50</sup> The

---

<sup>50</sup> Specifically, Parent 1 proposed the following: “Male-to-female transgender athletes who have not yet undergone hormone therapy should compete as exhibition athletes, with results not included for scoring and placing. This would ensure that the needs of both of these protected classes are met. The transgender athletes would still be able to **participate** on the team in which they identify and the female-born athletes would be afforded the opportunity to **compete** in a race that is not clouded by questions of unfair advantage.” (Emphasis in original.)

Executive Director responded by email the same day, advising Parent 1 that the appropriate process for addressing her proposal would be to speak with the athletic director or principal at her child's school, as policy or rule proposals "may be submitted through member leagues, sport committees, member principals, [the Connecticut Association of Athletic Directors], or the Connecticut High School Coaches Association." Parent 1 replied to the director's email that same day, January 24, 2019, stating that she would follow up with the principal and athletic director at her child's school to see if they would be willing to submit her proposal.

OCR determined that on February 1, 2019, the principal and the Executive Director spoke by telephone, regarding Parent 1's letter and proposal. The Executive Director memorialized the call in an email to the principal that same day, in which he stated that the CIAC would be convening a gender subcommittee meeting on February 7, 2019, with the task of reviewing all the CIAC bylaws, processes, procedures in which gender plays a role, including the Revised Transgender Participation Policy; and that he would share a redacted copy of Parent 1's letter with the subcommittee members, in order "to provide all points of view to ensure a rich discussion among committee members."

OCR determined that in response to Parent 1's request, made through her building principal, for an in-person meeting with a CIAC representative, the Executive Director attended a meeting at the school with Parent 1 and the principal on February 28, 2019. The Executive Director stated that, at the meeting, he explained to Parent 1 why the CIAC believed that the Revised Transgender Participation Policy was in alignment with Title IX and Connecticut state law, and advised Parent 1 that he believed that Title IX did not apply to the parent's concerns because Title IX does not address winning. Following the meeting, that same day, Parent 1 sent an email to the Executive Director, in which she thanked him for visiting the school and wrote that "[i]t was helpful to hear from you directly regarding the transgender policy and to understand what the CIAC process will be for reviewing this issue."

OCR determined that on March 28, 2019, Parent 1 sent an email to the Executive Director, in which she attached a letter and included links to several websites concerning issues related to the Revised Transgender Participation Policy. The Executive Director responded by email that same day, stating that he had read her email, and cordially reminded her that any further correspondence to the CIAC should come through her principal. The Complainant did not provide, nor did OCR find, evidence of any further communications between Parent 1 and the Executive Director.

The Executive Director denied that he banned Parent 1 from sending communications to him. Rather, the Executive Director stated that he treated Parent 1 in a manner consistent with how he treated other individuals in similar situations, by reminding her of the CIAC's policy that communications must go through the member school's representative. OCR determined that the Executive Director has responded in a similar manner to other parents who sought to communicate directly with him in a similar fashion. OCR determined that none of the similarly situated parents had engaged in protected activities.

## **2. Allegations Regarding Glastonbury Track Coach Retaliation**

The Complainant also alleged that a Glastonbury track coach retaliated against Student 1, for her and Parent 2's advocacy against the Revised Transgender Participation Policy, by (a) replacing Student 1 on the sprint medley relay team in February 2019; (b) telling Student 1 and her parents that he could not give a good report to college coaches about her in March and May 2019; (c) denying Student 1 a position as a team captain in March 2019; and (d) suggesting that Student 1 should leave the outdoor track team due to her schedule, in March and May 2019.

**Allegation (a):**

OCR determined that a team made up of students from Glastonbury's girls' indoor track team competed at the 2019 New Balance Nationals Track and Field championships ("Nationals"). The track coach stated that the meet is not a CIAC or school-sanctioned meet; therefore, any student who participates does so on an individual basis, not on behalf of Glastonbury. The track coach stated that, accordingly, the Glastonbury coaches do not choose who may attend the meet or choose which athletes will participate in which events. Rather, the individual students choose, on their own, whether to compete in the meet, and who will compete in the events, including relays. The track coach further stated that it was his understanding that Student 1 was not selected to run in a relay at the meet, but he denied that he played a role in this decision. He further stated that his understanding was that the other athletes decided that Student 1 would not compete in the relay, but he did not know why they had made that decision.

Student 1 confirmed that it is each individual student-athlete's decision whether to attend Nationals, if she qualifies; however, she stated that for relay events, a track coach was responsible for signing up the various teams. Parent 2 indicated that this is to prevent students from different schools entering themselves as a single "power team." Student 1 stated that although she had a qualifying time for the sprint medley relay in December 2018,<sup>51</sup> she was not asked to join the sprint medley relay team for Nationals in March 2019. Student 1 stated that, during the regular season, coaches pick the best athletes that are capable of running times that they would like to see for an overall split in the event, but that she was not fully aware of how the coaches make those determinations. Student 1 acknowledged that she was not sure which coach picked the sprint medley relay team for Nationals, but she assumed that a coach picked the team because that was what was done for all other meets during the season.

**Allegation (b):**

The Complainant stated that at the first practice of the outdoor season on March 16, 2019, the track coach told Parent 4 that he had nothing good to say about Student 1 to a college coach; and on or about May 1, 2019, the track coach told Student 1 that he could not give a good report of her to college coaches.

The track coach denied that he told either Student 1 or her parents that he could not give a good report to college coaches about Student 1. The track coach stated that it is his practice to be completely honest with college coaches, to ensure that college coaches continue to trust and rely

---

<sup>51</sup> The records Glastonbury provided indicate that Student 1 participated on a sprint medley relay team during a meet held on December 22, 2018.

on his recommendations of athletes. The track coach stated that because of this, on or about March 16, 2019, in the course of a discussion with Parent 4 about the Student 1's workouts and her college future, he told Parent 4 that he is "100% honest with a college coach when asked any questions about any of the athletes."<sup>52</sup> The track coach stated that he had also told Student 1 that he would be 100% honest with college coaches, although he did not recall the date of this conversation or the specific context in which the subject was raised. The track coach also advised OCR that Student 1 has not requested that he give a recommendation or report to any college coach on her behalf, nor has any college coach requested information about Student 1.

Student 1 denied that the track coach told her that he would be honest with any college coaches, and instead maintained that the track coach told her, and Parent 4, that he did not have anything good to say about her and could not give a good report about her. Student 1 stated that the track coach made this statement to her one day when she was letting him know that she was leaving practice for work. Student 1 confirmed that she has not asked the track coach to speak with any coaches on her behalf.

### **Allegation (c):**

The Complainant stated that the track coach told Student 1 that he did not select her as team captain because she departed early from practice on Fridays for work, despite her having served as team captain during the indoor season and not receiving any complaints about her as a captain. The track coach stated that students who wish to be considered for a team captain position are required to submit a written statement concerning their interest at the beginning of each season, indoor and outdoor. All of the coaches then select the team captains as a group. If there are any disagreements among the coaches, the track coach makes the final decision regarding the selection. The track coach stated that the qualifications for team captain are hard work, dedication, leadership, sportsmanship, and appropriately representing the high school. The track coach stated that the number of captains for the team typically ranges from three to seven for each season, depending on the size of the team and the number of qualified athletes who apply.

The track coach stated that in December 2018, Student 1 was selected as a captain for the indoor season 2018-2019; but that the decision was not unanimous because at least two coaches questioned Student 1's qualifications for a captain position, stating that they believed that she had not shown enough leadership, dedication and maturity.<sup>53</sup> The track coach stated that despite the concerns raised by other coaches, he chose Student 1 to be a captain for that season because he had observed her helping new athletes on the team and he believed that she would step up to the challenge.

The track coach stated that in March 2019, Student 1 applied to be a captain for the outdoor season 2018-2019. He stated that after speaking with all of the coaches, it was unanimous that they would not select Student 1 to be a captain for a number of reasons. He stated that the main reason was that during the indoor season (December 2018 – January 2019), Student 1 had, on several

---

<sup>52</sup> The track coach stated that in reply to his remark, Parent 4 stated that he understood.

<sup>53</sup> Specifically, an assistant track coach stated that he had concerns about Student 1's being selected as captain because he did not believe that Student 1 had the maturity to be a captain.



occasions, displayed poor sportsmanship at meets by ripping off her headband and storming away at the conclusion of her race. In addition, the track coach stated, and another coach confirmed, that during the indoor season, Student 1 often skipped her sprint workouts in favor of spending more time doing her long jump workouts; or claimed that she had an injury and could not do her sprint workouts, despite being able to do her long jump workouts and being cleared by the trainer. An assistant coach confirmed that during the indoor season, Student 1 failed to follow his instructions during practice, often did not complete her workouts, and exhibited poor sportsmanship at meets. Both the assistant coach and another coach agreed that Student 1 should not be selected as a captain for the outdoor season. The track coach stated that during a prior school year, he declined to select a student as team captain because she similarly failed to demonstrate leadership qualities/maturity. Glastonbury stated that this student had not engaged in protected activities.

#### **Allegation (d):**

The Complainant alleged that on or about March 25, 2019, the track coach told Student 1 that she should consider leaving the team if she did not attend full practice every day. The Complainant alleged that the track coach had not asked other student-athletes to leave the team due to missing practices for work commitments. The Complainant also alleged that on or about May 1, 2019, the track coach complained to Student 1 about her missing Friday practices.

The track coach denied that he had an issue with Student 1's leaving practice early on Fridays and denied that he specifically told her that she should leave the team. The track coach stated that he and the other coaches emphasized the importance of practice during meetings held at the beginning of the season with the student-athletes and their parents; but he denied having told any students recently, including Student 1, that they should consider leaving the team if they did not attend full practice every day. The track coach further stated that he was aware that Student 1 left practice early on Fridays for work; and stated that he did not object to this, particularly because the team often ends practice early on Fridays during the winter when the gym is used for high school basketball games and because Friday practices are typically lighter prior to the track team competitions on the weekends.

#### **Legal Standards**

The regulation implementing Title IX, at 34 C.F.R. § 106.71, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The following three elements must be satisfied to establish a *prima facie* case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a *prima facie* case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory

reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

## **Analysis and Conclusions**

### **1. Allegation Regarding the CIAC's Retaliation**

The Complainant alleged that the CIAC retaliated against Parent 1, after Parent 1 complained about the Revised Transgender Participation Policy, by informing Parent 1, in March 2019, that the CIAC's Executive Director would no longer accept communications from her. OCR determined that Parent 1 engaged in protected activity on February 22, 2018, January 24, 2019, and March 28, 2019, when she sent emails expressing concern regarding the Revised Transgender Participation Policy to the CIAC's Executive Director;<sup>54</sup> and on February 28, 2019, when Parent 1 met with the Executive Director in person to discuss her concerns about the policy. OCR determined that the CIAC was aware of Parent 1's protected activity.

OCR determined, however, that the CIAC proffered a legitimate, non-retaliatory reason for the Executive Director's statement to Parent 1 that "further correspondence to CIAC has to come through your principal"; namely, that the CIAC staff typically did not communicate directly with parents and Parent 1 should have communicated her concerns with the athletic director or school administrator. OCR determined that the proffered reason was not a pretext for retaliation, as the Executive Director's instruction was consistent with the CIAC policy and the Executive Director's directives to other parents who had not engaged in protected activities. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the CIAC retaliated against Parent 1, after Parent 1 complained about the Revised Transgender Participation Policy, by informing Parent 1, in March 2019, that the Executive Director would no longer accept communications from her. Accordingly, OCR will take no further action with respect to this allegation.

### **2. Allegations Regarding Glastonbury Track Coach Retaliation**

OCR determined that Parent 2 engaged in protected activity by sending emails to the Athletic Director in May, June, and July 2018, expressing her concerns that as a result of the Revised Transgender Participation Policy "[c]isgender girls are no longer provided opportunities in scholastic athletics that are equal and proportionate to the opportunities that boys are provided"; meeting with the Athletic Director, the principal, and the superintendent, on or about August 1, 2018, to discuss these concerns; meeting with the Athletic Director and Parent 4, on or about March 15, 2019, to again discuss these concerns; and telephoning and sending an email to the School's Title IX Coordinator in March and April 2019. OCR determined that Parent 2 also engaged in protected activity in May and June 2018, and in March 2019, when she sent emails to the track coach regarding her objections to the policy and a petition that she had initiated in opposition to

---

<sup>54</sup> As discussed previously, Parent 1 communicated with the former the Executive Director in her email on February 22, 2018; and with the current Executive Director from January 24, 2019, onward.

the policy. OCR determined that the Glastonbury track coach was aware of the Parent 2's protected activity.

With respect to Allegation (a), OCR determined that neither the track coach nor any other Glastonbury employee denied Student 1 an opportunity to participate on a sprint medley relay team at the New Balance Nationals. Rather, the students themselves chose who would participate. Accordingly, OCR could not substantiate that the track coach or other Glastonbury employee subjected Student 1 to an adverse action. Absent an adverse action, OCR does not proceed further with retaliation analysis. Accordingly, OCR will take no further action regarding Allegation (a).

With respect to Allegation (b), OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of evidence supports the allegation. Here, OCR did not find that the preponderance of the evidence supported the Complainant's assertion that the track coach told Parent 2 or Student 1 that he would not give a good report about Student 1 to college coaches. Based on the foregoing, OCR determined that there was insufficient evidence to substantiate that the track coach subjected Student 1 to the alleged adverse action. Absent an adverse action, OCR does not proceed further with a retaliation analysis. Accordingly, OCR will take no further action regarding Allegation (b).

With respect to Allegation (c), OCR determined that the Glastonbury proffered a legitimate, non-retaliatory reason for not selecting Student 1 as a captain for the spring 2019 outdoor season; namely, that track coaches had concerns about Student 1's maturity and dedication after the winter 2018 indoor season. Even assuming that the track coach also told Student 1 that the decision had to do with her leaving practice early on Fridays, OCR determined that would still be a legitimate, non-retaliatory reason for not selecting her. OCR determined that the proffered reasons were not a pretext for retaliation, as other coaches corroborated the reasons for the decision and the track coach gave an example of another student who had not been re-selected as captain based on similar behaviors, who had not engaged in protected activities. Additionally, OCR determined that there was no causal connection between the protected activity and the alleged adverse action, as the track coach selected Student 1 as a captain for the indoor season after she and Parent 2 had engaged in protected activities in 2018 and prior to their again engaging in protected activities in 2019. Therefore, OCR determined that there was insufficient evidence to substantiate the Complainant's allegation that the Glastonbury track coach retaliated against Student 1, for her and Parent 2's advocacy against the Revised Transgender Participation Policy, by denying Student 1 a position as a team captain in March 2019. Accordingly, OCR will take no further action regarding Allegation (c).

With respect to Allegation (d), OCR must often weigh conflicting evidence in light of the facts and circumstances of each case and determine whether the preponderance of evidence supports the allegation. Here, OCR did not find that the preponderance of the evidence supported the Complainant's assertion that the track coach told Student 1 in March 2019 and May 2019, that she should consider leaving the team if she had to leave practice early. Based on the foregoing, OCR determined that there was insufficient evidence to substantiate that the track coach subjected Student 1 to the alleged adverse action. Absent an adverse action, OCR does not proceed further with a retaliation analysis. Accordingly, OCR will take no further action regarding Allegation (d).

### **Attempts to Resolve the Complaint**

Via e-mail on February 12, 2020, OCR notified the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that it had determined that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury violated Title IX, and provided a proposed resolution agreement (the Agreement) to each that would resolve OCR's compliance concerns. During subsequent telephone calls with counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury, held during the period of February 13, 2020, through March 13, 2020, OCR informed counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury of the specific violation, and explained the nature of the violations and the basis of its findings. On multiple occasions during these communications, OCR informed counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury of the 90-calendar day timeframe for negotiations as set forth in Section 303(f) of the *Manual*. OCR also informed counsel for the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that the *Manual* states that OCR may end the negotiation period at any time prior to the expiration of the 90-calendar day period when it is clear that agreement will not be reached. On March 12, 2020, counsel for Bloomfield, Hartford, and Cromwell, and on March 13, 2020, counsel for the CIAC, Glastonbury, Canton and Danbury, informed OCR that their clients would not sign the Agreements.

On March 17, 2020, OCR issued impasse letters to the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury notifying the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that the negotiations had reached an impasse and a final agreement had not been reached. Further, the letter informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that in accordance with the *Manual*, Section 303(g), if an agreement was not reached within 10 calendar days of the date of the letter, i.e., by March 30, 2020, OCR would issue a Letter of Impending Enforcement Action indicating that the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury are in violation of Title IX. OCR also referred the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury to the *Manual*, at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>, in particular, Sections 303-305 and 601-602, for more information.

In emails dated March 27, 2020, OCR informed the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury that in view of their COVID-19-related duties and responsibilities, OCR was extending the ten-calendar day-deadline to respond to OCR's proposed resolution agreements for a period of 30 days, to April 27, 2020; and that if agreement was not reached by that date, OCR would issue a Letter of Impending Enforcement Action pursuant to Section 305 of the *Manual*. None of the entities in this matter—the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury entered into a resolution agreement with OCR to remedy the violations, and a Letter of Impending Enforcement Action was sent on May 15, 2020. No response to that Letter was received, either before or after the Court's decision in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), on June 15, 2020.

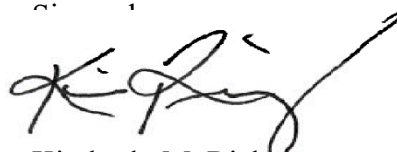
Based on the failure of the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury to resolve the identified areas of noncompliance, OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance to

the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury, or refer the cases to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States under its laws. OCR will take further enforcement action after no fewer than 10 calendar days from the date of this letter if resolution of these complaints has not yet been reached. This letter constitutes a formal statement of OCR's interpretation of Title IX and its implementing regulations and should be relied upon, cited, and construed as such. Congress explicitly delegated to the OCR the task of prescribing standards for athletic programs under Title IX. As a result, the degree of deference to the Department is particularly high in Title IX cases.

This Letter of Impending Enforcement Action is not intended and should not be interpreted to address the compliance of the CIAC, Glastonbury, Bloomfield, Hartford, Cromwell, Canton, and Danbury with any other regulatory provision or to address any issues other than those addressed in this letter. The complainant may file a private suit in federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions, please contact Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801, or [nadja.r.allen.gill@ed.gov](mailto:nadja.r.allen.gill@ed.gov).



Kimberly M. Richey  
Acting Assistant Secretary for Civil Rights

cc: Glenn Lungarini, CIAC Executive Director, via email only  
Alan B. Bookman, Glastonbury Superintendent, via email only  
Kevin D. Case, Canton Superintendent, via email only  
Dr. Enza Macri, Cromwell Superintendent, via email only  
Dr. Sal V. Pascarella, Danbury Superintendent, via email only  
Dr. James Thompson, Jr., Bloomfield Superintendent, via email only  
Dr. Leslie Torres-Rodriguez, Hartford Superintendent, via email only  
Roger G. Brooks, Alliance Defending Freedom, Complainant, via email only

# Exhibit 3

Case Nos. 20-35813, 20-35815

---

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

LINDSEY HECOX, ET AL.,

*Plaintiffs-Appellees,*

v.

BRADLEY LITTLE, ET AL.,

*Defendants-Appellants.*

AND

MADISON KENYON, ET AL.,

*Appellants-Intervenors.*

---

Appeal from the Order dated August 17, 2020 of the  
United States District Court for the District of Idaho, Boise,  
Honorable David C. Nye, Case No. 1:20-cv-184-DCN.

---

**BRIEF OF *AMICUS CURIAE* WOMEN'S LIBERATION FRONT  
IN SUPPORT OF APPELLANTS AND REVERSAL**

---

Lauren R. Adams  
Women's Liberation Front  
1800 M Street NW #33943  
Washington, DC 20033-7543  
(540) 918-0186  
legal@womensliberationfront.org  
Counsel for *Amicus Curiae*

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states it is a non-profit 501(c)(3) organization. *Amicus curiae* has no corporate parent and is not owned in whole or in part by any publicly-held corporation.



## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF AUTHORITIES .....	1
INTRODUCTION AND INTEREST OF AMICUS CURIAE.....	7
ARGUMENT .....	9
I. WOMEN’S SEX-BASED RIGHTS AND PROTECTIONS ARE NOT AND CANNOT BE DIMINISHED BASED ON IDIOSYNCRATIC AND SUBJECTIVE BELIEFS ABOUT GENDER IDENTITY. ....	9
A. “Gender Identity” and “Transgender” are quasi-spiritual concepts that are not bound to gender dysphoria or any medical treatment. ....	11
B. Gender identity ideology focuses on a metaphysical gendered soul over the material reality of biological sex, and prioritizes “affirming” gender identity above all other considerations.....	16
C. Subjective psychological distress is not a valid legal basis for diminishing protections for women under sex-based civil rights law. ....	23
II. WOMEN AND GIRLS ARE DISADVANTAGED ON THE BASIS OF SEX; THEY LOSE CRITICAL PROTECTIONS IF THE LAW FAILS TO RECOGNIZE THE FEMALE SEX-CLASS.....	25
A. The cultural, legal, and physical barriers to athletic participation for women are based on their biological sex...	25
B. Sex stereotyping is not a permissible basis for sports segregation.....	30
C. Gender identity advocates seek to open female athletics to any male, with no requirement for cross-sex hormones or a female self-identity. ....	31

D.	Challenging the use of sex-based language in the law is a strategy used to intentionally hinder women’s ability to defend their rights. ....	34
III.	<i>BOSTOCK</i> DOES NOT PROVIDE RELEVANT OR PERSUASIVE AUTHORITY IN THIS CASE. ....	36
A.	The Court was explicit that the holding is narrow and is not meant to be applied to other civil rights laws.....	37
B.	Title IX regulations permit differential treatment of the sexes to achieve equal opportunity for girls and women. ....	38
C.	<i>Bostock</i> did not implicate the rights of other individuals under Title VII in the same manner that the decision below infringes on the rights of women and girls under Title IX. .	40
	CONCLUSION.....	41
	CERTIFICATE OF COMPLIANCE .....	43
	CERTIFICATE OF SERVICE .....	44

## TABLE OF AUTHORITIES

### Cases

<i>Blatt v. Cabela’s Retail Inc.</i> , No. 5 :2014-cv-04822 (E.D. Pa. 2017) .....	13
<i>Bostock v. Clayton Cty., Georgia</i> , 140 S. Ct. 1731 (2020).....	36, 37, 38, 39, 40
<i>Clark ex rel. Clark v. Arizona Interscholastic Ass’n.</i> , 695 F.2d 1126 (9th Cir. 1982) .....	15, 16, 30
<i>Cleveland Bd. of Ed. V. LaFleur</i> , 414 U.S.632 (1974) .....	9
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) .....	9
<i>Doe 2 v. Shanahan</i> , 917 F.3d 694 (D.C. Cir. 2019).....	11, 13
<i>Doe ex rel. Doe v. Boyertown Area Sch. Dist.</i> , 897 F.3d 518 (3d Cir. 2018) .....	17
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011) .....	40
<i>In the Matter of Jones David Hollister</i> , 470 P.3d 436 (Or. Ct. App. 2020) .....	33
<i>Lynch v. Lewis</i> , 2014 WL 1813725 (M.D. Ga. May 7, 2014) .....	35
<i>Michael M. v. Superior Court</i> , 450 U.S. 464 (1981).....	30

<i>Phillips v. Martin Marietta Corporation</i> , 400 U.S. 542 (1971) .....	9
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) .....	9
<i>Roe v. Wade</i> , 410 U.S. 113 (1973) .....	9
<i>Rosa v. Park W. Bank &amp; Trust Co.</i> , 214 F.3d 213 (1st Cir. 2000) .....	41
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000) .....	41
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004) .....	40
<i>United States v. Varner</i> , No. 19-40016 (5th Cir. 2020) .....	34, 35, 36
<i>United States v. Virginia</i> , 518 U.S. 515 (1996) .....	30

## **Constitutional Provisions**

U.S. Const. amend. XIX .....	9
------------------------------	---

## **Statutes**

S.B. 132, 2019-2020 Sen. Reg. Sess. (Cal. 2020) .....	10
Wash. Admin. Code 246-490-075 .....	10

## Other Authorities

- American Academy of Child & Adolescent Psychology, *Conversion Therapy* (2018),  
[https://www.aacap.org/AACAP/Policy\\_Statements/2018/Conversion\\_Therapy.aspx](https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx) ..... 20
- American Medical Association, *LGBT Change Efforts* (2019),  
<https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf> ..... 20
- American Psychiatric Association, *Gender Dysphoria* (2013),  
<http://bit.ly/2Re1MA5>. .... 13
- American Psychological Association, *Building Your Resilience*, (2012),  
<https://www.apa.org/topics/resilience> ..... 24
- Asaf Orr, *et. al.*, SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS 24, (Human Rights Campaign Foundation, 2015), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf?mtime=20200713142742&focal=none>..... 12, 31, 32
- Ben Vincent, TRANSGENDER HEALTH: A PRACTITIONER’S GUIDE TO BINARY AND NON-BINARY TRANS PATIENT CARE 126 (Jessica Kingsley Publishers, 2018)..... 11
- Committee on Adolescent Health Care, *Female Athlete Triad*, American College of Obstetricians and Gynecologists, Committee Opinion No. 702 (June 2017),  
<https://www.acog.org/en/Clinical/Clinical%20Guidance/Committee%20Opinion/Articles/2017/06/Female%20Athlete%20Triad>..... 28
- Eli Coleman, *et. al.*, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE, 7th edition at 97 (2012) ..... 11, 12, 13, 23, 24

Gender Spectrum, <i>The Language of Gender</i> , <a href="https://www.genderspectrum.org/articles/language-of-gender">https://www.genderspectrum.org/articles/language-of-gender</a> (last visited Nov. 1, 2020) .....	34
GLAAD, <i>Accelerating Acceptance</i> at 4 (2017), <a href="https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf">https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance  .pdf</a> .....	15
Human Rights Campaign, <i>Understanding the Transgender Community</i> , <a href="https://www.hrc.org/resources/understanding-the-transgender-community">https://www.hrc.org/resources/understanding-the-transgender-  community</a> (last visited Nov. 1, 2020) .....	14, 15
<i>In re. Connecticut Interscholastic Athletic Conference, et al</i> , Case No. 01- 19-4025 (Aug. 31, 2020) (“Revised OCR letter”) at 35, <a href="https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf">https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/011  94025-a2.pdf</a> .....	38, 39
J.L. Turban, <i>et. al.</i> , <i>Association Between Recalled Exposure to Gender  Identity Conversion Efforts and Psychological Distress and Suicide  Attempts Among Transgender Adults</i> , JAMA PSYCHIATRY (2020).....	20
Jack Turban, <i>The Disturbing History of Research into Transgender  Identity</i> , Scientific American, Oct. 23, 2020, <a href="https://www.scientificamerican.com/article/the-disturbing-history-of-research-into-transgender-identity/">https://www.scientificamerican.com/article/the-disturbing-history-of-  research-into-transgender-identity/</a> .....	22
Jason D. Vescovi, <i>The Menstrual Cycle and Anterior Cruciate Ligament  Injury Risk</i> , Sports Medicine 41, 91-101 (2011) .....	27
M.S.C. Wallien, <i>et al.</i> , <i>Psychosexual outcome of gender-dysphoric  children</i> , JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 47, 1413–1423 (2008) .....	13

National Center for Transgender Equality, <i>What is Gender Dysphoria?</i> , (July 9, 2016), <a href="https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people">https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people</a> . .....	12
Oral Arg. Tr., R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107, available at <a href="https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf">https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf</a> .....	37
R. D'Angelo, <i>et al.</i> , <i>One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria</i> at 1, ARCHIVES OF SEXUAL BEHAVIOR (Oct. 21, 2020), <a href="https://rdcu.be/b9AQi">https://rdcu.be/b9AQi</a> .....	21, 22
Rebekka J. Findlay, <i>How the menstrual cycle and menstruation affect sporting performance: experiences and perceptions of elite female rugby players</i> , British Journal of Sports Medicine, Vol. 54, Issue 18 (2020)	28
S.E. James, <i>et. al.</i> , <i>The Report of the 2015 U.S. Transgender Survey</i> (National Center for Transgender Equality, 2015) .....	14
Sex, Male, and Female, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003) .....	7, 16, 19
<i>Soul Definition</i> , Dictionary.com (based on Random House Unabridged Dictionary, 2020), <a href="https://www.dictionary.com/browse/soul">https://www.dictionary.com/browse/soul</a> .....	17
Women's Sport and Fitness Foundation, <i>Barriers to sports participation for women and girls</i> , (2008), <a href="https://www.lrsport.org/uploads/barriers-to-sports-participation-for-women-girls-17.pdf">https://www.lrsport.org/uploads/barriers-to-sports-participation-for-women-girls-17.pdf</a> .....	26
Women's Sports Foundation, <i>Chasing Equity: The Triumphs, Challenges and Opportunities in Sports for Girls and Women</i> , (2020) <a href="https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf">https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf</a> ..	26, 27

## **Regulations**

34 C.F.R. 106.41(b) .....	38
---------------------------	----

## **Court Documents**

Expert Declaration of Jack L. Turban. ER248-275 .....	19, 22, 23, 33
Expert Declaration of Joshua D. Safer, ER244-45 .....	18
Memo. in Supp. of Pltfs' Mot. for Prelim. Injunct., ECF No. 22-1.....	32
Memorandum Decision and Order, ER001-087..11, 16, 17, 19, 20, 23, 29, 30, 35	
Supp. Declaration of Joshua D. Safer, ER702-03.....	18



## INTRODUCTION AND INTEREST OF AMICUS CURIAE<sup>1</sup>

*Amicus* is the Women’s Liberation Front (“WoLF”), a non-profit radical feminist organization dedicated to the liberation of women by ending male violence, protecting reproductive sovereignty, preserving woman-only spaces, and abolishing gender and sex discrimination. WoLF has over 800 members who live, work, attend school and play sports across the United States, including nearly 300 in the 9th Circuit. WoLF’s interest in this case stems from its interest in empowering and protecting the safety and privacy of women and girls and preserving women’s sex-based civil rights.<sup>2</sup> Those rights have been threatened by recent court decisions and agency policies that embrace the vague concept of “gender identity” in a manner that overrides statutory and

---

<sup>1</sup> No counsel for any party authored any part of this brief, and no party, their counsel, or anyone other than WoLF, has made a monetary contribution intended to fund its preparation or submission, and counsel of record for all parties have consented to its filing.

<sup>2</sup> *Amicus* uses “sex” throughout to mean exactly what Congress meant when it incorporated the longstanding meaning of that term into Title VII of the Civil Rights Act: “the fundamental distinction, found in most species of animals and plants, based on the type of gametes produced by the individual,” and the resulting classification of human beings into those two reproductive classes: female (women and girls) or male (men and boys). *See Sex, Male, and Female*, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), <https://medical-dictionary.thefreedictionary.com>.

Constitutional protections that are based explicitly on “sex.” If, as a matter of law, “sex” is no longer understood to be an immutable characteristic, but instead merely a subjective self-declared and mutable “identity” – then the ability to protect female people from sex-based discrimination is greatly diminished.

Plaintiffs ask the Court to proclaim that women and girls are no longer a discrete category worthy of civil rights protection, but men and boys who claim to have a female “gender identity” are. If the Court rules in their favor, it will mark a truly fundamental shift in American law and policy that strips women of their Constitutional right to privacy, threatens their physical safety, undercuts the means by which women can achieve educational equality, and ultimately works to erase women and girls under the law. It would not only revoke the very rights and protections that specifically secure women’s access to school athletics, but would do so in order to extend those rights and protections to men claiming to be women.

WoLF urges the Court to rule in favor of Appellants, reverse the preliminary injunction order below, and affirm the long-standing legal

principle that women and girls are protected under Title IX on the basis of sex.

## ARGUMENT

### **I. WOMEN’S SEX-BASED RIGHTS AND PROTECTIONS ARE NOT AND CANNOT BE DIMINISHED BASED ON IDIOSYNCRATIC AND SUBJECTIVE BELIEFS ABOUT GENDER IDENTITY.**

U.S. civil rights law recognizes the need to protect people from the subjective beliefs of others, including subjective beliefs founded on sex-stereotypes. Women and girls are thus protected under the law from subjective beliefs about whether and how women should work, vote, have children or not have children, and how they ought to look and behave.<sup>3</sup> Under the law, no longer are women (or men) governed by such regressive beliefs.

---

<sup>3</sup> U.S. Const. amend. XIX (the right to vote cannot be limited on the basis of sex); *Cleveland Bd. of Ed. V. LaFleur*, 414 U.S.632 (1974) (mandatory leave for pregnant teachers violates due process); *Craig v. Boren*, 429 U.S. 190 (1976) (different drinking ages for men and women violates the 14th amendment); *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971) (refusal to hire women with preschool-age children violates the Civil Rights Act of 1964); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex stereotyping is a form of sex discrimination); *Roe v. Wade*, 410 U.S. 113 (1973) (women have a right to terminate a pregnancy).

In stark contrast, being “transgender” depends on the continued existence of sex-stereotypes. Plaintiffs’ definition of “transgender” purports to be grounded in science, but in reality describes a personal, quasi-spiritual philosophy. Evidence offered to the court about dysphoria, cross-sex hormones, or “social” “transitioning” is irrelevant because being “transgender” is a matter of self-declaration, not only in culture but also in law. *See, e.g.* Wash. Admin. Code 246-490-075 (revised in 2018 to permit a legal change of the sex designation on one’s birth certificate by completing a simple form)<sup>4</sup>; S.B. 132, 2019-2020 Sen. Reg. Sess. (Cal. 2020) (recently enacted law requiring prison housing placement based on self-declared gender identity, prohibiting consideration of anatomy, hormones, or legal sex). Indeed, though not legally binding, even the World Professional Association for Transgender Health (WPATH) defines “transgender” in a vague and subjective manner, as “an adjective to describe a diverse group of

---

<sup>4</sup> Washington’s law includes the option to adopt gender “X,” defined as “a gender that is not exclusively male or female, including, but not limited to, intersex, agender, amalgagender, androgynous, bigender, demigender, female-to-male, genderfluid, genderqueer, male-to-female, neutrois, nonbinary, pangender, third sex, transgender, transsexual, Two Spirit, and unspecified.”

individuals who cross or transcend culturally defined categories of gender.” Eli Coleman, *et. al.*, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE, 7th edition at 97 (2012) (“WPATH Standards”).

**A. “Gender Identity” and “Transgender” are quasi-spiritual concepts that are not bound to gender dysphoria or any medical treatment.**

A core concept of gender identity ideology is that the sole criteria for whether somebody is transgender is that they say they are transgender. Memorandum Decision and Order, ER001-087 at 005 (defining “transgender woman” as a male person who self-identifies as female, with no other benchmarks.) *See also Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019). Under this philosophy, a male becomes a female when he declares himself so, even if he chooses not to “transition.” *Id.*

The belief that there are objective or verifiable requirements to be considered “transgender” is referred to disparagingly as “transmedicalism,” and is considered outdated and “transphobic.” Ben Vincent, TRANSGENDER HEALTH: A PRACTITIONER’S GUIDE TO BINARY AND NON-BINARY TRANS PATIENT CARE 126 (Jessica Kingsley Publishers,

2018). Professionals are strongly discouraged from “gatekeeping” or attempting to verify the sincerity of a person’s declared gender. Asaf Orr, *et. al.*, SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS 24, (Human Rights Campaign Foundation, 2015), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf?mtime=20200713142742&focal=none>.

Plaintiffs foster misconceptions by using the terms “gender dysphoria” and “transgender” more or less interchangeably to support their position. But these terms are not in fact synonymous, and many transgender-identified people do not have gender dysphoria. WPATH Standards at 5. The National Center for Transgender Equality says: “On its own, being transgender is not considered a medical condition. Many transgender people do not experience serious anxiety or stress associated with [their gender identity], and so may not have gender dysphoria.” National Center for Transgender Equality, *What is Gender Dysphoria?*, (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

Likewise, gender dysphoria, which is marked by significant distress at the thought of one's sex, is also experienced by people who do not identify as transgender. American Psychiatric Association, *Gender Dysphoria* (2013), (discussing the diagnostic criteria contained in the APA's Diagnostic and Statistical Manual of Mental Disorders (DSM-5)), <http://bit.ly/2Re1MA5>. For example, "crossdressers, drag queens/kings or female/male impersonators, and gay and lesbian individuals" also commonly experience gender dysphoria. WPATH Standards at 7.

WPATH guidelines acknowledge that gender identity and gender dysphoria are distinct concepts. *Id.* at 6, 96. Federal courts have recognized this distinction as well. *Blatt v. Cabela's Retail Inc.*, No. 5 :2014-cv-04822 at 3 (E.D. Pa. 2017); *see also Doe 2* at 696 (2019). Doctors diagnose gender dysphoria using clinical criteria; in contrast, a person's "gender identity" is a subjective experience that is self-identified and unverifiable. Most people who experience gender dysphoria – whether they identify as transgender or not – do so for a limited time, especially if they are young. M.S.C. Wallien, et al., *Psychosexual outcome of gender-dysphoric children*, JOURNAL OF THE

AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, 47, 1413–1423 (2008).

Many who identify as transgender identify as one of dozens of “non-binary” gender identities; for example, demigirl (or demiboy), genderqueer, genderfluid, bigender, or another idiosyncratic label a person might invent based on their belief that it “reflect[s] their personal experience.” Human Rights Campaign, *Understanding the Transgender Community*, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Nov. 1, 2020). Nearly half of all respondents to the National Transgender Discrimination Survey (NTDS) identify as “non-binary” (neither exclusively male nor exclusively female). S.E. James, *et. al.*, *The Report of the 2015 U.S. Transgender Survey* (National Center for Transgender Equality, 2015).

The lack of a discrete identifiable class of persons claiming some form of “transgender” identity is further evidenced by the considerably different population numbers reported by different sources. Though estimates offered to the district court were under 1% of the general population, a study by the University of Connecticut and the Human Rights Campaign concluded that a “larger portion” of the age group who



participate in Title IX athletics “is identifying somewhere on the broad trans spectrum.” *Understanding the Transgender Community, supra.*

GLAAD, Inc. (formerly the Gay & Lesbian Alliance Against

Discrimination) reported in 2017 that 12% of millennials claim to have a gender identity that does not align with their biological sex. GLAAD,

*Accelerating Acceptance* at 4 (2017),

[https://www.glaad.org/files/aa/2017\\_GLAAD\\_Accelerating\\_Acceptance.p](https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf)

[df](https://www.glaad.org/files/aa/2017_GLAAD_Accelerating_Acceptance.pdf). These staggeringly different figures are reported by highly regarded

institutions. It is unlikely that the higher numbers – which are

primarily reported from the teens and young adults – are purely the

result of an increase in formal gender dysphoria diagnoses. Rather, the

younger generation is increasingly adopting a quasi-spiritual

philosophy regarding one’s relationship with their sexed body and with

society at large.

The district court relied on conservative outlier estimates in

distinguishing this case from *Clark ex rel. Clark v. Arizona*

*Interscholastic Ass’n.*, 695 F.2d 1126 (9th Cir. 1982), positing that

transgender athletes “could not” displace female athletes “to a

substantial extent” because less than “one percent of the population”

identified as transgender. ER065 (preliminary injunction order using the standard set forth in *Clark* at 1131). The actual number of transgender-identified individuals is much greater, and because the definition of “transgender” is both subjective and capacious, the true potential for female displacement is unknown, and cannot be dismissed as insubstantial. (Even if the number cited by the district court was accurate, it is a misapplication of *Clark*, and *Amicus* concurs with the legal arguments presented on this matter by the Appellants.)

**B. Gender identity ideology focuses on a metaphysical gendered soul over the material reality of biological sex, and prioritizes “affirming” gender identity above all other considerations**

Understanding the quasi-spiritual nature of “gender identity” requires an examination of some basic terms. Sex is defined by reproductive function; a male produces sperm and a female produces eggs, gestates, and gives birth.<sup>5</sup> Although people’s lives and personalities are not defined by their sex, their sex is always defined by their biology. In contrast, a “gender identity” is a subjective statement

---

<sup>5</sup> See Sex, Male, and Female, MILLER-KEANE ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH (7th ed. 2003), <https://medical-dictionary.thefreedictionary.com/medicine>.

of self-perception grounded in emotion. The district court adopted a circular (and therefore invalid) definition of “gender identity” as a “deep-core sense of self as being a particular gender.” ER005, citing *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018). The disconnect of the metaphysical “gender identity” from physical sex is akin to the religious concept of a soul: “the principle of life, feeling, thought, and action in humans, regarded as a distinct entity separate from the body, and commonly held to be separable in existence from the body; the spiritual part of humans as distinct from the physical part.” *Soul Definition*, Dictionary.com (based on Random House Unabridged Dictionary, 2020), <https://www.dictionary.com/browse/soul>.

Spiritual beliefs provide many people with a sense of purpose and a way to make sense of the world. But these beliefs – which are impossible to observe or verify – can neither be imposed on the public nor used to justify eroding civil rights protections against sex-based discrimination. Likewise, girls and women are female whether or not they look or act in a stereotypically feminine manner. To believe that sex is determined by a gendered soul or feminine appearance, rather

than biology, is to believe that femininity is the same thing as being female. This belief is offensive and harmful to women and antithetical to civil rights jurisprudence. Yet the court is being asked to adopt this regressive belief, urged along by declarants testifying about various facets of an ideology not grounded in material reality.

Plaintiffs' declarant in support of their motion for preliminary injunction, Dr. Safer, argues that gender identity is "innate," "durable," and "largely a biological phenomenon." Expert Declaration of Joshua D. Safer, ER244-45, ¶ 17, 18, 21. He asserts that "biological sex' is an imprecise term that can cause confusion," and lists a number of factors that supposedly encompass a person's sex, including factors that have no bearing on sexual reproductive class such as "sex hormone levels" and "gender identity." Supp. Declaration of Joshua D. Safer, ER702-03, ¶19-23.<sup>6</sup> Importantly, Dr. Safer's list omits gametes entirely. *Id.*

---

<sup>6</sup> Dr. Safer thus asserts that how "masculine" or "feminine" one's appearance is ("secondary sex characteristics" such as height, fat distribution, and breast tissue) is a factor in determining one's sex. Under this distasteful theory, a woman who has excess facial hair and male-pattern baldness due to a common medical condition such as polycystic ovarian syndrome would be less than fully female. ER702, ¶ 20-21. The inclusion of "gender identity" as a determinant of biological sex is also offensive, as it further implies that a woman who doesn't feel a strong connection with her "womanhood" is also less female.

However, a fundamental aspect of human biology is the fact that humans (and indeed all sexually-reproducing organisms) reproduce by fusing two types of gametes: sperm (produced by males) and ova (produced by females). *See* n.2, *supra*. The exclusion of gametes from Dr. Safer's list is ideologically driven; since the type of gamete one produces is dispositive in determining one's sex, omitting gametes as a defining factor in sex makes the concept of "gender identity" appear more objective and relevant, while fostering the misimpression that actual physical sex is unknowable and ineffable.

There are also indications that ideology rather than science inspires some of the Expert Declaration of Jack L. Turban. ER248-275. As an initial matter, Dr. Turban never states that sex-segregated sports are "equivalent to gender identity conversion efforts" [GICE], *contra* ER065 (quoting Pltf's Rep. to Opp. For Mot. For Prelim. Injunct., ECF No. 58 at 11), and none of his cited evidence would support that conclusion. Likewise, the professional organizations cited in the declaration do not consider denying a man a place on the women's team to be a form of GICE, nor do they assert that allowing him to play on

the women's team constitutes legitimate "transgender health care."<sup>7</sup>

Nevertheless, Plaintiffs relied on this declaration in contending that refusal to make exceptions to Title IX sex-segregation constitutes GICE, and the district court's ruling reflects this misunderstanding. ER065.

Moreover, Dr. Turban's declaration is based on his own research defining GICE as *any* professional interaction the patient subjectively perceives as not "affirming" of their transgender identity. J.L. Turban, *et. al., Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts*

---

<sup>7</sup> The American Academy of Child and Adolescent Psychology (AACAP)'s definition of GICE only addresses "therapeutic intervention," defining "conversion therapies" as those which treat certain gender identities or expressions as "pathological." AACAP, *Conversion Therapy*, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHOLOGY (2018), [https://www.aacap.org/AACAP/Policy\\_Statements/2018/Conversion\\_Therapy.aspx](https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx). The American Medical Association (AMA) uses similar language and also identifies some of the prohibited practices, for example aversive conditioning and hypnosis. AMA, *LGBT Change Efforts (so-called "conversion therapy")* (2019), <https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf>. Sex-segregation in sports does not meet the AACAP or AMA's definition of GICE because it does not serve as a therapeutic remedy for gender dysphoria, nor does it treat "gender identity" as pathological—it is simply irrelevant in determining eligibility for sex-specific athletic competition.

*Among Transgender Adults*, JAMA PSYCHIATRY (2020). However, a group of scientists and clinicians recently published a detailed critique exposing “serious methodological flaws” and “unsupported claims” in Dr. Turban’s data and methodology. R. D’Angelo, *et al.*, *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria* at 1, ARCHIVES OF SEXUAL BEHAVIOR (Oct. 21, 2020), <https://rdcu.be/b9AQi>. According to their analysis, “heeding [Dr. Turban’s] recommendations will limit access to ethical psychotherapy for individuals suffering from [gender dysphoria], further disadvantaging this already highly vulnerable population.” *Id.* at 1-2.

Indeed, even basic human biology or sex education classes would meet Dr. Turban’s definition of GICE. Taken to its logical conclusion, his approach would require public education officials to give a dysphoric adolescent inaccurate information about their body and sexual health in order to “affirm” their identity. Such an approach would deprive *all* students of accurate knowledge in hopes it would avoid distress for a few students.

Dr. Turban’s advocacy is only aimed at favorable mental health outcomes if a patient’s transgender identity is “affirmed.” His

testimony to the district court was given as a “mental health researcher,” ER250, ¶ 4, yet he recently wrote an article for Scientific American arguing *against* mental health research into causes of gender dysphoria and transgender identity. Jack Turban, *The Disturbing History of Research into Transgender Identity*, Scientific American, Oct. 23, 2020, <https://www.scientificamerican.com/article/the-disturbing-history-of-research-into-transgender-identity/>. Dr. Turban ignores the harms caused by “affirmation-only” therapy for the growing number of patients who “feel deeply traumatized by inappropriate transitions.” *One Size Does Not Fit All* at 2. That is particularly troubling because the survey that forms the basis of his research (and his declaration in this case) intentionally disqualified responses from those whose gender dysphoria desists or who “detransition,” and would therefore have benefitted from agenda-free care. *Id.* Dr. Turban’s belief in the gendered soul relies on affirmation just as much as a person who identifies as transgender, thus he denounces even neutral, ethical treatments for gender dysphoria that may secondarily result in desistance from a transgender identity. *Id.*



**C. Subjective psychological distress is not a valid legal basis for diminishing protections for women under sex-based civil rights law.**

Subjective distress about one's sex has never previously served to define a class of persons protected under civil rights laws. Yet the ruling below ostensibly ends single-sex sports based in part on the largely self-reported propensity of an ill-defined class of individuals to threaten or engage in self-harm. ER063. No law justifies or requires this result.

Plaintiffs contend that doctors essentially “prescribe” the legal remedy they seek: that transgender-identifying males must be permitted to play on girl's and women's sports teams as part of the treatment for gender dysphoria. ER263-64 ¶ 28. The district court's preliminary injunction order went along with that approach, placing on women and girls the burden of giving up athletic and education opportunities supposedly to “treat” male students' mental health needs. The district court did not and cannot identify any legal authority for conscripting women's athletic programs to provide mental health treatment for males.

Setting aside the legal infirmity of that approach, WPATH's extensive guidelines on treatment of dysphoria do not support a court

ruling compelling other people or institutions to behave in a certain way or to act as if the patient's subjective feelings and claims about his gender identity are literally true. On the contrary, WPATH recommends therapeutic techniques focused on building resilience as a means of reducing depression and anxiety. WPATH Standards at 29. The American Psychological Association defines resilience as "the process of adapting well in the face of adversity... or significant sources of stress" and further states that "resilience involves behavior, thoughts, and actions that anyone can learn and develop." American Psychological Association, *Building Your Resilience*, (2012), <https://www.apa.org/topics/resilience>.

Single-sex sports exist for a reason and are critical to women's equality in athletics. If athletes have distress due to the legally permissible sex-segregation in sports, then per official WPATH guidelines the appropriate treatment path would be to learn coping skills and seek social support to manage these feelings.

## **II. WOMEN AND GIRLS ARE DISADVANTAGED ON THE BASIS OF SEX; THEY LOSE CRITICAL PROTECTIONS IF THE LAW FAILS TO RECOGNIZE THE FEMALE SEX-CLASS.**

The biological distinction between men and women has been the criteria by which women have been discriminated against, excluded from public life, exploited, enslaved, sexually abused, and disenfranchised all throughout history. Women are not asked how they identify or how they see themselves before they experience these things. Women's feelings are wholly irrelevant to their condition and standing in this world.

### **A. The cultural, legal, and physical barriers to athletic participation for women are based on their biological sex.**

For many, from the moment she is identified as female at or before birth, a girl enters a pipeline of disparate treatment from her family, community, and the law. In families with limited resources, a son may receive higher quality nutrition and better health care than a daughter. A male child is more likely to attend school, and less likely to be withdrawn by his family before graduation. In no country on earth is he denied – on account of his sex – the right to vote, to work, to own property, to move about society, or to speak his mind freely. In

contrast, girls do not have the same advantageous treatment. Even in the U.S., despite ostensible legal equality between the sexes, there are still significant disadvantages to being born female, including many barriers to women's participation in sports. Women's Sport and Fitness Foundation, *Barriers to sports participation for women and girls*, (2008), <https://www.lrsport.org/uploads/barriers-to-sports-participation-for-women-girls-17.pdf>.

Practical barriers include lack of funding (including low pay for female athletes and many fewer sponsorship opportunities), personal safety, transportation, and facilities access. *Id.* Cultural barriers include religious constraints on “modesty,” negative messaging from parents and other adults, and ideas about femininity and competition. *Id.* See also Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges and Opportunities in Sports for Girls and Women*, (2020) <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>. One particularly insidious barrier is sexual harassment and abuse from coaches and officials. One advocacy group reported that some girls and

women drop out in response to abuse, and others endure it for the sake of competing, or because of fear, low self-esteem, or isolation. *Id.*

As of 2020, girls in American high schools and colleges still participate in sports at a rate 7-10% lower than boys, and 87% of NCAA schools offered more and higher-quality athletic opportunities to male students. *Id.* Coaches face barriers of their own: 31% of female coaches believed they would risk their job if they spoke up about Title IX and sex-based disparities, 60% reported being paid less than male coaches, and 63% reported facing sex discrimination in the workplace. *Id.*

There has been significant discussion of the differences between men and women in areas such as size, speed, and strength, which necessitate single-sex teams for safety and fair play. But girls and women have additional physiological challenges. Female athletes are far more prone to severe injury even in single-sex competition, especially during the first few weeks of their menstrual cycle. Jason D. Vescovi, *The Menstrual Cycle and Anterior Cruciate Ligament Injury Risk*, Sports Medicine 41, 91-101 (2011). They are also vulnerable to a condition called Female Athlete Triad, which causes osteoporosis, increases in fractures, and psychological issues such as depression,

anxiety, body dysmorphia, and eating disorders. Committee on Adolescent Health Care, *Female Athlete Triad*, American College of Obstetricians and Gynecologists, Committee Opinion No. 702 (June 2017),

<https://www.acog.org/en/Clinical/Clinical%20Guidance/Committee%20Opinion/Articles/2017/06/Female%20Athlete%20Triad>. Male athletes lack the same vulnerabilities and thus enjoy a significant competitive advantage over female athletes.

Girls contend with female biological functions even in peak health. Most menstruate once they reach puberty, which can cause monthly disturbances in training schedules and impair performance, particularly if the athlete experiences common symptoms such as premenstrual dysphoric disorder, pain, or heavy bleeding. Rebekka J. Findlay, *How the menstrual cycle and menstruation affect sporting performance: experiences and perceptions of elite female rugby players*, British Journal of Sports Medicine, Vol. 54, Issue 18 (2020), (reporting that three quarters of elite rugby players and half of elite female runners and rowers report that menstrual symptoms adversely affected

their performance). Women can get pregnant, intentionally or not, which can disrupt their participation and even their careers.

With all of this in mind, it is important to remember two facts. One, a male athlete's self-identification as female does not subject him to this same myriad of obstacles female athletes face, so he retains an innate competitive advantage regardless of his subjective identity claims. Two, a female athlete does not escape any of these obstacles, nor does she gain any competitive advantage, by self-identifying as male.

The district court stated that the purpose of Title IX (redressing historic discrimination against women) does not apply to transgender athletes, because they too are a disadvantaged group. ER064. Many men are members of disadvantaged groups due to characteristics such as race, ethnicity, disability, or socio-economic class. Nonetheless, this fact does not entitle individual men to special treatment under legally-permissible programs and policies established to address and prevent sex discrimination. Women's disadvantage – as a class – stems from their sex.

**B. Sex stereotyping is not a permissible basis for sports segregation.**

Sex is a permissible basis by which most sports can be segregated, because the substantial, enduring physical differences in male and female physiology (and attendant competitive advantage conferred on males) means that the sexes are “not similarly situated in certain circumstances.” *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981); *United States v. Virginia*, 518 U.S. 515, 533 (1996). Conversely, if there were no innate competitive advantages associated with male physiology, then all sex-segregation in sports would be legally questionable.

Despite being well-settled law, Plaintiffs seek a declaration from the court that exclusively female teams are no longer permissible under law; that they must include males with a “feminine” gender expression or identity. This is directly contrary to the spirit and letter of Title IX and the Equal Protection Clause, under which sex stereotyping has long been recognized as a form of prohibited sex discrimination. As noted by the district judge, courts are not compelled by the Equal Protection Clause to disregard sex differences. ER063, citing *Michael M.*, 450 U.S. at 481; *See also Clark* at 1131. Segregating sports by masculine and



feminine sex stereotypes is no more permissible or logical than segregating by race or sexual orientation.

**C. Gender identity advocates seek to open female athletics to any male, with no requirement for cross-sex hormones or a female self-identity.**

Although the value and logic of single-sex sports are almost universally recognized, advocates for gender identity ideology inadvertently challenge the entire foundation of single-sex sports in order to justify unfettered access of male athletes to female teams.

A document called “Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools” was created and widely distributed by several professional organizations including the ACLU and the Human Rights Campaign. Orr, 2015, *supra*. This guide instructs schools to permit male students to play on girls’ sports teams “without posing additional requirements.” *Id.* at 24. It tells schools that “there is no reason to doubt the sincerity” of a male athlete who asserts a transgender identity to compete against females and they should be allowed to do so with no restrictions at all. *Id.* at 28. It informs schools that requiring male athletes to take hormones to “participate in [female] sports is inappropriate.” *Id.* (On this *Amicus* agrees, only

because it is inappropriate for *any* person to be given medically-unnecessary and harmful exogenous hormones for the purpose of creating a more “feminine” or “masculine” superficial appearance.)

In justifying this position, they misappropriate concerns about sexism toward women, describing single-sex athletics as “grounded in sex stereotypes about the differences and abilities of males versus females.” *Id.* Plaintiffs echo this in stating that the Title IX regulations (which protect women’s safety and athletic opportunity) are “based on unwarranted . . . [romantic] paternalism.” Memo. in Supp. of Pltfs’ Mot. for Prelim. Injunct., ECF No. 22-1 at 20 Indeed, Schools In Transition claims that mixed-sex teams do not pose any safety risks to female athletes, since “the safety rules of each sport are designed to protect players of all sizes and skill levels.” *Schools in Transition* at 28. Incredibly, schools are also told by these advocacy groups that they are prohibited from telling the female athletes (or their parents) that they will be competing against male athletes. *Id.* at 27.

Gender identity advocates also believe that male athletes should be able to compete as female even if they do not self-identify as female—so long as they claim not to identify as male. These

organizations argue that people who claim atypical gender identities must be allowed to choose how their sex is treated under the law, and have won some legal victories toward that end. *In the Matter of Jones David Hollister*, 470 P.3d 436, 439 (Or. Ct. App. 2020) (in which the court ruled that a state statute permitting individuals to change the sex designation on their legal documents must allow those who identify as “non-binary” to choose male, female, or non-binary). The court noted that the statute’s previous requirement for medical “transition” was rescinded, thereby “shifting the focus away from physical anatomy to affirming gender identity.” *Id.* at 443.

This reflects a quasi-spiritual belief in the supremacy of a gendered soul, and the comparative irrelevance of the physical body. Dr. Turban echoes this in his declaration, calling sex-segregated teams “unsafe and unethical” for males who self-identify as female, even those who take no cross-sex hormones (and are thus physiologically identical to any other male, with all incumbent athletic advantage). ER263, ¶ 27 n.23. Dr. Turban does not consider how unsafe and unethical it is to force females to choose between competing against males or not competing at all. Physical safety and fair play for girls are simply

obstacles to the emotional fulfillment of male athletes. This directly conflicts with statutory and constitutional provisions which do recognize the existence of a female body – and must do so in order to continue these protections.

**D. Challenging the use of sex-based language in the law is a strategy used to intentionally hinder women’s ability to defend their rights.**

The 21st century has introduced a new challenge in defending equality: expunging the female sex-class in language and in the law. Plaintiffs seek to redefine “female” to include members of both sexes and redefine “sex” to mean one’s state of mind instead of one’s reproductive class. The advocacy group Gender Spectrum promotes this practice, observing that “the power of language to shape our perceptions of other people is immense.” Gender Spectrum, *The Language of Gender*, <https://www.genderspectrum.org/articles/language-of-gender> (last visited Nov. 1, 2020). Though some judges have chosen to use “preferred” pronouns, there is absolutely no basis in law for a court to *compel* their use by another party. *United States v. Varner*, 948 F.3d 250, 254 (5th Cir. 2020) (“no authority supports the proposition that we may require litigants, judges, court personnel, or anyone else to refer to

gender-dysphoric litigants with pronouns matching their subjective gender identity.”).

Still, the district court directed Intervenors to avoid using male pronouns or the words “male” or “man” to refer to Lindsay Hecox.

ER029. Though this choice was ostensibly motivated by “civility,” the district court acknowledged the Plaintiffs’ true motive for the request: concern that Intervenors’ use of *accurate* language would “prejudice the adjudication of their claims” because so-called “misgendering tactics... will delay and impair efficient resolution.” ER027. Plaintiffs understand that striking all references to Lindsay’s sex increases the chances the court will endorse the notion that biological sex is irrelevant to sports if the person feels they have a feminine “gender identity.”

Plaintiffs’ linguistic strategy worked. Though the district court contended that it was not a factual or legal finding, the prejudicial effect is nonetheless evident in the determination that excluding men and boys from women’s sports is an “invalid interest” if they claim to self-identify as female. ER079; *see also* ER028 (citing *Lynch v. Lewis*, 2014 WL 1813725, at \*2 n.2 (M.D. Ga. May 7, 2014) This is precisely the

outcome the 5th Circuit appropriately sought to avoid, for “if a court were to compel the use of particular pronouns... it could raise delicate questions about judicial impartiality... the court may unintentionally convey its tacit approval of the litigant’s underlying legal position.” *Varner*, 948 F.3d at 256.

This compelled speech has irretrievably impacted the record, which now – rife with feminine pronouns and references to Lindsay as female – will unavoidably influence how a neutral arbiter perceives the arguments. The 9th Circuit should follow the 5th Circuit’s lead on the issue of compelled pronouns by “declin[ing] to enlist the federal judiciary in this quixotic undertaking.” *Id.* at 258.

### **III. *BOSTOCK* DOES NOT PROVIDE RELEVANT OR PERSUASIVE AUTHORITY IN THIS CASE.**

The Supreme Court recently decided in *Bostock v. Clayton Cty., Georgia* that “for an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex,” and that doing so is a violation of Title VII of the Civil Rights Act. 140 S. Ct. 1731, 1743 (2020). Applying the *Bostock* decision to this case would be a significant error, and the 9th Circuit should not strain to

extend whatever principle the Supreme Court aimed to establish in *Bostock* to the setting of school athletics.

**A. The Court was explicit that the holding is narrow and is not meant to be applied to other civil rights laws.**

*Bostock* narrowly addressed only the issue of firing an employee who asserts a transgender status. The Court rejected any suggestion that the holding applied to other state or federal sex discrimination laws, saying: “none of [them] are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.” *Bostock* at 1753.

A narrow interpretation of *Bostock* is further supported by the record. Justice Ginsburg asked Plaintiff’s counsel during oral arguments whether his arguments extended to permissible sex segregation in athletics under Title IX, and counsel responded that it: “would not be affected even by the way that the Court decides this case.” Oral Arg. Tr., *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, at 17-18, available at [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-107\\_c18e.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf). Since neither the Plaintiffs nor the Court

attempted to address Title IX in that decision, a broad construction of *Bostock* extended unreservedly to Title IX is completely unsupported.

**B. Title IX regulations permit differential treatment of the sexes to achieve equal opportunity for girls and women.**

The logic used in the *Bostock* decision is this: The employee's sex in that case was generally not relevant to employment decisions under Title VII, so self-identification as the opposite sex was also not relevant to employment decisions. *Bostock* at 1737. In contrast, an athlete's sex is expressly relevant under Title IX regulations, which in some cases *require* differential treatment on the basis of sex in order to assure equal *opportunity*. 34 C.F.R. 106.41(b). The Plaintiffs' argument that sex should be determined by a person's internal sense of their own identity is antithetical to the reasoning behind single-sex teams. *Id.*

The U.S. Department of Education's Office of Civil Rights (OCR) recently affirmed in a Revised Letter of Impending Enforcement Action (relating to a separate matter) that *Bostock* is inapplicable to Title IX athletics, stating:

The logic that an employer must treat males and females as similarly situated comparators for Title VII purposes necessarily relies on the premise that there are two sexes, and that the biological sex of the individual employee is necessary



to determine whether discrimination because of sex occurred. Where separating students based on sex is permissible—for example, with respect to sex-specific sports teams—such separation must be based on biological sex.

In re. Connecticut Interscholastic Athletic Conference, et al, Case No. 01-19-4025 (Aug. 31, 2020) (“Revised OCR letter”) at 35,

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>. OCR stated further that, if *Bostock* does apply,

then under the logic of that case:

[S]pecial exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete.

*Id.* at 36.

Moreover, the court in *Bostock* failed to define “transgender” in any meaningful way beyond a person’s assertion that they have a gender identity at odds with their sex. The court reasoned that merely self-identifying as a woman – if a plaintiff alleges that identification was the basis for termination of employment – is sufficient to provide

protection from termination. *Bostock* at 1741. The Court thus did not find it necessary to define what it means to be “transgender” beyond that lowest of etymological bars.

**C. *Bostock* did not implicate the rights of other individuals under Title VII in the same manner that the decision below infringes on the rights of women and girls under Title IX.**

A critical difference between the provisions of Title VII at issue in *Bostock* and the provisions of Title IX at issue here makes them inapposite: Unlike the harms that would flow from reinterpreting Title IX to prohibit single-sex athletic competitions, extending protection on the basis of “gender identity” in *Bostock* did not violate another employee’s rights under Title VII.

Similarly, restoring a transgender-identified plaintiff’s position with the Georgia General Assembly’s Office of Legislative Counsel under the Equal Protection Clause, as in *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011), did not infringe the Equal Protection rights of anyone else. Holding that a fire department’s adverse employment action on the basis of transgender identity was cognizable under Title VII, as in *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004), did not violate anyone else’s Title VII rights. Deciding that

refusal to give a cross-dressing man a loan application was discrimination “on the basis of sex” under the Equal Credit Opportunity Act, as in *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000), did not violate anyone else’s rights to equal credit opportunity. And applying the Gender Motivated Violence Act to an attempted rape by a prison guard of a prisoner who identified as transgender, as in *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000), did not infringe on anyone else’s rights under that Act.

But Title IX is different. Congress enacted Title IX as a remedial statute for the benefit of women. Granting Title IX rights to men who self-identify as women necessarily violates the rights Congress gave women in this law.

## CONCLUSION

If the words “women” and “girls” and “female” have no clear meaning; if women and girls do not face barriers to athletic participation because of their sex; if women and girls would have the same opportunity for safe, fair play on co-ed sports teams; if women are

not a discrete legally-protectable category, then one might rightly wonder why the Title IX regulations exist in the first place.

The outcome of this case is a statement on whether the Ninth Circuit will honor the plain text and original intent of Title IX, which is to prohibit discrimination on the basis of sex. Women and girls deserve more than what the district court's ruling gives them, and we urge the Court to overturn the preliminary injunction and to reverse the district court's prejudicial decision to compel speech from the Appellants.

Lauren R. Adams  
Women's Liberation Front  
1800 M Street NW #33943  
Washington, DC 20033-7543  
(540) 918-0186  
legal@womensliberationfront.org

Counsel for *Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the brief contains 6,679 words, according to the word count feature of the software (Microsoft Word Version 2010) used to prepare the brief. The brief has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

/s/ Lauren R. Adams  
Lauren R. Adams  
*Counsel for Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2020, I electronically filed the foregoing Brief Of *Amicus Curiae* Women's Liberation Front In Support Of Plaintiff-Appellant And Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: Nov. 19, 2020

/s/ Lauren R. Adams  
Lauren R. Adams  
*Counsel for Amicus Curiae*