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U.S. Department of Education
Office for Civil Rights
400 Maryland Ave. SW
PCP–6125
Washington, D.C. 20202

Subj: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
RIN 1870 - AA16

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops and the National Catholic Educational Association, we respectfully submit the following comments on the proposed rule, published in 87 Fed. Reg. 41390 (Jul. 12, 2022), on nondiscrimination on the basis of sex in education programs or activities receiving Federal financial assistance (the "NPRM").

The USCCB opposes all unjust discrimination, including on the basis of sex, and thus supports numerous aspects and potential applications of the NPRM. However, other elements of the NPRM are of concern.

I. Definitional provisions (106.2)

A. "Pregnancy or related conditions"

The NPRM proposed to define the term "pregnancy or related conditions" to include "termination of pregnancy" as distinct from "childbirth," which is also included. The USCCB supports nondiscrimination protections for women who have suffered the heartbreak of a miscarriage. We also support the numerous ways in which the proposed regulations would ensure that pregnant students and teachers are provided appropriate accommodations and support as they carry and bear their children.

While regulations implementing Title IX have prohibited discrimination on the basis of "termination of pregnancy" for many years, there is a particular need for clarity about the meaning of that term now, in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health.* We note that the NPRM makes no mention of abortion at all, and we agree

with that approach to the extent it reflects an intent by the Department not to interpret the phrase "termination of pregnancy" in a manner that would expand abortion access or otherwise promote or facilitate abortion. However, covered entities may reasonably fear that the Department may nonetheless attempt to apply its Title IX regulations to such effect via sub-regulatory guidance or enforcement efforts, Administrative Procedure Act requirements notwithstanding. We therefore request that the Department clarify in the final rule that, consistent with Title IX's abortion neutrality clause (20 U.S.C. § 1688), the phrase "termination of pregnancy" refers to miscarriage, not abortion.

B. "Sex-based harassment"

The proposed definition of "sex-based harassment" would include not only sexual harassment but also harassment "on the bases described in § 106.10." Section 106.10 describes the scope of Title IX's sex discrimination provision to prohibit discrimination on the basis of, inter alia, sexual orientation and gender identity.

The USCCB stands against harassment or bullying of students who experience same-sex attraction or gender dysphoria. Students who identify as gay, lesbian, or transgender bear the full measure of human dignity we each have received through our Creator, and they must therefore be treated with kindness and respect.

There is a difference between, on the one hand, harassment and, on the other hand, respectful expression of and adherence to one's beliefs about sex and the nature of the human person. The NPRM does not preclude the possibility that respectful expression of beliefs, or behavior motivated by beliefs, would be characterized as creating a hostile environment. Relevantly, in the NPRM's discussion of the Department's abandonment of its previous interpretation of Title IX, the Department cites, as no longer effective, a 2020 letter expressing its view at the time that Title IX does not require a school to mandate the use of a student's preferred pronouns. 87 Fed. Reg. at 41536. But respectful expression of relevant views or beliefs could take myriad forms. For example, would a biology teacher who consistently teaches about human sexuality as a fact of our genetics and anatomy be guilty of harassment? Would an elementary school principal who regularly begins announcements or assemblies by greeting "boys and girls" be speaking unlawfully, on account of students who self-identify as "nonbinary"?

II. Scope of sex discrimination (106.10)

The NPRM would add a new section 106.10, noted above, that would essentially define the meaning of "sex" under Title IX, to include "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." This provision is both contrary to law and unreasonable.

A. Principles

A brief introductory note on Catholic thought, which is not based on faith alone but also on reason applied to the empirical world, may help illuminate both our approach to the NPRM in

general, and ultimately the need and right of some of our institutions to Title IX's statutory religious exemption.

The Catholic Church teaches each person is created by God in his image, and therefore that each person has immeasurable dignity, and that we should all treat each other accordingly. Our bodies are good and part of our identity. The complementarity of the sexes carries and reflects necessary significance, whereby a husband and wife fully and freely give of themselves to each other in love, open to the gift of new life. This further becomes the basis of the family, which the Church and others have often observed is the first building block of society.

With respect to "gender identity" then, the Catholic teaching expressed through Pope Francis understands that "'biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated.'"[1] Further, each human being, "man and woman, should acknowledge and accept his sexual identity,"[2] which is both biological and God-given. Respect for the immutability of sex does not mean that Catholic teaching condones unjust discrimination. In Catholic schools, for example, students who experience gender discordance are to receive the same educational opportunities as anyone else.

Catholic teaching is similar with regard to "sexual orientation." Individuals who experience same-sex attraction are to be "accepted with respect, compassion, and sensitivity,"[3] including in educational settings.[4] This does not mean, however, that educators should be compelled to act contrary to the principle that sexual conduct is specially reserved for lifelong marriage between one man and one woman, ordered by its nature toward the good of the spouses and to the procreation and education of children,[5] who in turn have a right to (and on average have the best outcomes with[6]) a married mother and father.[7]

B. Sexual orientation and gender identity

The NPRM argues that the inclusion of sexual orientation and gender identity discrimination within the meaning of sex discrimination under Title IX is required under *Bostock*

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1 Pope Francis, Apostolic Exhortation *Amoris Laetitia*, no. 56 (2016).

2 Catechism of the Catholic Church, nos. 2333, 2393.

3 *Id.*, no. 2358.

4 Congregation for Catholic Education, *Male and Female He Created Them: Towards a Path of Dialogue on the Question of Gender Theory in Education*, no. 16 (2019), available at http://www.educatio.va/content/dam/cec/Documenti/19_0997_INGLESE.pdf.

5 *See* Catechism of the Catholic Church, nos. 2360, 2363; *Gaudium et Spes*, no. 48 (1965).

6 *See* Ian Rowe, "The power of the two-parent home is not a myth," *Thomas B. Fordham Institute* (Jan. 8, 2020); Ron Haskins, "Marriage, Parenthood, and Public Policy," *National Affairs* (Spring 2014); Kimberly Howard and Richard V. Reeves, "The marriage effect: Money or parenting?," *The Brookings Institution* (Sep. 4, 2014); Susan L. Brown, "Marriage and Child Well-Being: Research and Policy Perspectives," *J. Marriage Fam.* (Oct. 1 2010), 72(5): 1059-1077. While each of these vary on what exact contributing or related factors are credited to what degree, recommendations, and findings with respect to the timing of marriage relative to birth of children, all recognize that, directly or indirectly, children in general do better with two married parents than they otherwise would.

7 *See* Pope Francis, colloquium on "The Complementarity of Man and Woman," Rome (Nov. 17, 2014); Pope Francis, audience with International Catholic Child Bureau (Apr. 11, 2014).

v. Clayton County, Georgia, 140 S. Ct. 1731 (2020). But *Bostock* specifically noted that it did not reach the question of the meaning of sex discrimination in other civil rights statutes such as Title IX, *id.* at 1753, least of all resolve that question in the direction favored by the NPRM. The NPRM also fails to offer a reasoned explanation of the Department's departure from its previously expressed understanding of *Bostock*'s effect on Title IX.

In what the NPRM refers to as the Rubinstein memo – a January 8, 2021, memo from the Department's Office of General Counsel (OGC) to the Acting Assistant Secretary for the Office for Civil Rights regarding the application of *Bostock* to Title IX – OGC concluded that "we must give effect to the ordinary public meaning at the time of enactment and construe the term 'sex' in Title IX to mean biological sex, male or female." For its part, the *Bostock* Court itself assumed such a meaning in Title VII. *Bostock*, 140 S. Ct. at 1739 ("[W]e proceed on the assumption that 'sex' signified what the employers suggest, referring only to biological distinctions between male and female"). Further, while OGC found that, under *Bostock*, "[d]epending on the facts, complaints involving discrimination on the basis of transgender status or homosexuality might fall within the scope of Title IX's nondiscrimination mandate because they allege sex discrimination," OGC "emphasize[d] that Title IX and its implementing regulations, unlike Title VII, may require consideration of a person's biological sex, male or female" (emphasis in original). With this understanding, OGC opined that it is not a violation of Title IX for restrooms, athletics, and pronouns to be regarded in accord with biological sex. In reaching this conclusion, OGC also noted that *Bostock*'s reasoning on the unlawfulness of terminating a person's employment *because of* their transgender status itself does not at all imply that treating a transgender-identifying person consistently with their biological sex in lawfully sex-separate facilities or activities is somehow unlawful.

Subsequently, in a January 17, 2021, memo to the Department of Justice's Civil Rights Division, Acting Assistant Attorney General Daukas came to a similar conclusion: "the *Bostock* reasoning may carry over [to Title IX] in some respects," but "where the physiological differences of the sexes *are* relevant to education programs or activities, sex may be taken into account" (emphasis in original).

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

C. Sex characteristics

The preamble of the NPRM suggests that the primary but non-exclusive purpose of the inclusion of "sex characteristics" in section 106.10 is to prohibit discrimination against people with abnormalities or disorders of sexual development (termed "intersex traits"). The USCCB supports the goal of eliminating discrimination against people with such naturally occurring traits, and harmful stereotypes as may be related to sex characteristics. It would be inappropriate, however, if "sex characteristics" were to be used as a way to refer to "gender identity" under another name. Any such interpretation would warrant the same concerns we express in this comment with respect to gender identity.

D. Evidentiary deficiencies

We note at the outset of this discussion that we oppose bullying, harassment, or any other denial of an equal educational opportunity to anyone, regardless of their sexuality. Fully consistent with this commitment, we must also acknowledge the fact of the rapid increase in the number of youth identifying as transgender, nonbinary, queer, gender-nonconforming, or otherwise questioning their sexual identity, and the many unanswered questions generated by this fact. In the face of this great uncertainty, and of the high stakes of the well-being of our nation's children, we urge the Department to proceed with extreme caution. This means, among many other things avoiding drawing any premature conclusions, or enshrining any of them in law through the regulatory process. This is particularly true of regulations affirming or compelling support for pathways and interventions which, if later determined to be harmful, would remain irrevocable. We therefore strongly oppose the Department's attempt to enforce its operative understanding of "gender identity" in this (or any) regulation. To do so threatens the very same youth that the Department seeks to protect

Historically, various sources placed the rate of people identifying as the opposite sex at fewer than 1 in 10,000.[8] In 2017, a UCLA study found it to be approximately 1 in 150 for youth.[9] A year later, a University of Minnesota study came in just under 1 in 30. Just last year, a 2021 Gallup Poll reported by the Washington Post found 1 in 6 of Generation Z adults identify as "LGBT," albeit with notable attribution to bisexuality.[10] The 2022 version found that number to be up again at over 1 in 5,[11] far above other generations and what would be statistically explainable as natural occurrence. In the meantime, from 2017 to 2021, Florida's Medicaid regulator, for example, reported the number of children on puberty suppressants nearly

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[8] Zucker K.J., Lawrence A.A., Kreukels B.P., "Gender Dysphoria in Adults." *Annu. Rev. Clin. Psychol.* 2016;12:217-47. doi: 10.1146/annurev-clinpsy-021815-093034. Epub 2016 Jan 18. PMID: 26788901 (citing prevalence studies, some conducted prior to the Diagnostic and Statistical Manual's redefinition of "gender identity disorder" into distinct "gender dysphoria").

[9] Noel Alumit, "UCLA Study Finds an Estimated 150,000 U.S. youths ages 13-17 identify as transgender," *UCLA Newsroom* (Jan. 18, 2017), *available at* https://newsroom.ucla.edu/stories/stories-20170118 (note, link to study has since been updated).

[10] Samantha Schmidt, "1 in 6 Gen Z adults are LGBT. And this number could continue to grow," *The Washington Post* (Feb. 24, 2021).

[11] Julianne McShane, "A record number of U.S. adults identify as LGBTQ. Gen Z is driving the increase," *The Washington Post* (Feb. 17, 2022).

quadrupled, and other striking statistics.[12] In just one year, from 2016 to 2017, gender-related surgeries for females quadrupled; and, abroad in the UK, diagnoses of gender dysphoria in young girls were up 4,400% over the decade.[13] Similar observations abound.[14] Amid the otherwise inexplicable degree of increase, some have posited a social role, challenging the conceptualization of gender identity as something naturally innate or immutable.[15]

It is appropriate to protect all students from unjust discrimination and potential self-harm. It threatens far more harm than good, however, to attempt such protection by using federal regulation to mandate unquestioning affirmation of a phenomenon that is so undefined and wanting of further study. This harm is worsened when the mandate applies to schools that form impressionable children even before the age of reason. It is one thing to protect children with gender dysphoria; it is quite another to require everyone in their school environment to think of, speak to, and treat them as if they were members of the opposite biological sex.

In drawing this critical distinction, the Department should consider recent experience in Europe as cautionary. In Western Europe and Scandinavia, at least four countries have taken steps back from medicalized "gender affirming care" for children and moved on to more holistic approaches, which would account for comorbidities in mental health.[16] This squares with emerging evidence that the path of "affirming" interventions, such as puberty suppression, may carry health risks involving bone density and issues affecting other bodily tissues including

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[12] Jon Brown, "Florida Medicaid sees 'soaring increase' of kids receiving puberty blockers, hormones, irreversible surgery," *FoxNews.com* (Aug. 31, 2022).

[13] Abigail Shrier, "How 'peer contagion' may play into the rise of teen girls transitioning," *New York Post* (Jun. 27, 2020).

[14] *See, e.g.*, Samuel P. Veissière, "Why Is Transgender Identity on the Rise Among Teens?" Psychology Today (Nov. 28, 2018); Gordon Rayner, "Minister orders inquiry into 4,000 per cent rise in children wanting to change sex," *The Telegraph* (Sep. 16, 2018); Georgiann Davis, "More people are identifying as trans and gender nonconforming. Why?" *Houston Chronicle* (Jul. 9, 2018); Lindsey Tanner, "More U.S. teens identify as transgender, survey finds," *USA Today* (Feb. 5, 2018).

[15] Lisa Littman, "Correction: Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria," *PLOS ONE*, 14(3): e0214157 (Mar. 19, 2019).

[16] Just this July, it was announced that Britain's National Health Service will be shutting down the United Kingdom's predominant gender clinic, in part due to its practice of pushing large numbers of children into medical gender transition procedures, in favor of an approach that will consider other contributing factors and treatments. Jasmine Andersson and Andre Rhoden-Paul, "NHS to close Tavistock child gender identity clinic," BBC News (July 28, 2022). In February of this year, Sweden's National Board of Health updated guidelines for the treatment of gender dysphoria in minors, backing away from the previously dominant hormone therapy approach. Society for Evidence-based Gender Medicine, "SEGM Summary of Key Recommendations from the Swedish National Board of Health and Welfare (Socialstyrelsen/NBHW)" (Feb. 27, 2022), citing https://www.socialstyrelsen.se/om-socialstyrelsen/pressrum/press/uppdaterade-rekommendationer-for-hormonbehandling-vid-konsdysfori-hos-unga/ (*See also* English summary, p.10, *available at* https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/kunskapsstod/2022-2-7774.pdf). The same month, France's National Academy of Medicine similarly advised "great medical caution" and "the greatest reserve" with respect to treatment of children identifying as transgender. Académie Nationale de Médecine, "Medicine and gender transidentity in children and adolescents," (Feb. 25, 2022), *available at* https://www.academie-medecine.fr/la-medecine-face-a-la-transidentite-de-genre-chez-les-enfants-et-les-adolescents/?lang-en. Last year, Finland's Health Authority had likewise issued guidelines preferring psychotherapy over medicalized interventions for minors. Society for Evidence-based Gender Medicine, "One Year Since Finland Broke with WPATH 'Standards of Care'" (July 2, 2021), citing original *at* https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Original.pdf.

possible sterility.[17] These interventions similarly lead nearly 100% of patients to move on to further "transition" procedures[18] that, in turn, are not proven effective in the long term.[19] By contrast, absent such interventions, an overwhelming majority of children experiencing gender dysphoria would desist through puberty.[20]

To be sure, nothing in the NPRM imposes a medical mandate on minors.[21] Our concern, however, is that a federal regulation codifying and imposing affirmation of a concept of gender identity that lacks evidentiary support would have widespread negative effects. Because it would operate in all levels of our nation's schools, it would likely shape school policies and social landscapes in a manner that similarly elides relevant and developing evidence, and so promotes, facilitates, and reinforces harmful interventions that are often irrevocable.

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[17] P.W. Hruz, L.S. Mayer, and P.R. McHugh, "Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria," *The New Atlantis*, 52 (2017); Paul R. McHugh, M.D., *Transgender Surgery Isn't the Solution, supra.*

[18] A.L. de Vries et al., "Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-up Study," *J Sex Med* 8, no. 8 (2011).

[19] In 2020, for example, a study employing the world's largest data set on patients receiving "gender-affirming" surgeries was corrected, saying that "the results demonstrated no advantage of surgery in relation to subsequent mood or anxiety disorder-related health care." The same study had already similarly found no benefit from hormonal procedures. Richard Branstrom & John E. Pachankis, "Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study," *Am. J. Psychiatry,* 177:734 (Aug. 2020) (republished for correction). Earlier, the U.S. Department of Health and Human Services under the Obama Administration expressed reservations about the efficacy and outcomes of "gender reassignment surgery" and declined to issue a national coverage mandate. Center for Medicare & Medicaid Services, Decision Memo for Gender Dysphoria and Gender Reassignment Surgery, CAG-00446N (Aug. 30, 2016) (finding that "the clinical evidence is inconclusive," that "there is not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes," and that "we cannot exclude therapeutic interventions as a cause of the observed excess morbidity and mortality").

We realize that studies relied upon by those of other views produce contrary recommendations. Yet, these studies are often critically limited either to the short-term or by failure to adequately consider a high number of persons who are lost to follow-up and do not respond in the long-term. *See generally* Lawrence S. Mayer and Paul R. McHugh, "Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences," *The New Atlantis*, no. 50 (Fall 2016). Moreover, popular reporting on these studies, which often drives policy making in this area, sometimes conflates suicidal ideation, attempted suicide, and the commission of suicide, each of which should be prevented and deserve their own distinct care and consideration.

[20] Paul R. McHugh, M.D., "Transgender Surgery Isn't the Solution: A Drastic Physical Change Doesn't Address Underlying Psycho-Social Troubles," *Wall Street Journal* (June 12, 2014); Thomas D. Steensma et al., "Desisting and Persisting Gender Dysphoria after Childhood: A Qualitative Follow-up Study," *Clinical Child Psychology and Psychiatry* 16, no. 4 (2011); Kelley D. Drummond, Susan J. Bradley, Michele Peterson-Badali, and Kenneth J. Zucker, "A Follow-up Study of Girls with Gender Identity Disorder," *Dev. Psychol.* 44:1 (2008): 34-35; Madeleine S.C. Wallien, and Peggy T. Cohen-Kettenis,(2008); "Psychosexual outcome of gender-dysphoric children," *Journal of the American Academy of Child & Adolescent Psychiatry* 47:12 (2008): 1413–23. doi:10.1097/ CHI.0b013e31818956b9.

[21] The Department of Education's interpretation of Title IX, however, would inform the Department of Health and Human Services' interpretation of the same for purposes of its pending regulations implementing section 1557 of the Affordable Care Act, which reference Title IX and, as proposed, would likely result in medical mandates. 87 Fed. Reg. 47824.

III. Application (106.11)

Revisions to section 106.11 would require covered schools to "address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States." Although schools' disciplinary policies may allow for consideration of off-campus conduct, the above language seems to require schools to rectify any and all sex-based harassment that occurs off-campus, so long as it "contribut[es] to the hostile environment" in the school. The language does not limit the obligation according to how far removed the harassing conduct may be from the reach of the school. This overbreadth robs covered schools of any discretion in determining what is and what is not within the schools' appropriate role and capacity to resolve. Similarly, it may impose unrealistic logistical burdens on schools that must attempt to conduct investigations and disciplinary proceedings about behavior far removed from their educational environments. The USCCB therefore requests that the Department withdraw this proposed revision to section 106.11.

IV. Consideration of sex in admissions (106.15 & 106.21)

For the purposes of clarity for the regulated community, the USCCB suggests that the Department should reiterate in the preamble to the final rule that the revised provisions in 106.21 do not apply to non-vocational elementary and secondary schools. This clarification is appropriate in light of the existing provision at paragraph 106.15(d), the proposed provision at paragraph 106.31(a)(3), and existing guidance from the Department.[22]

V. Sex-separate programs, activities, and facilities (106.31)

The USCCB requests that the Department withdraw the proposed revisions to section 106.31. As the Rubinstein memo accurately observed, "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" (emphasis in original). The proposed revision to 106.31(a)(2) would prohibit any different treatment or separation of the sexes that imposes "more than a *de minimis* harm" on a person. The revision then defines "more than a de minimis harm" to include a recipient's "[a]dopt[ing] a policy or engag[ing] in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity."

A. Discriminatory double standards

There is a discriminatory double standard embodied in the proposed rule text and the analysis that supports it. On the one hand, the preamble takes the position that, for students or employees made to share showers, living quarters, or other intimate spaces with members of the opposite biological sex, the appropriate question is whether they are thus subjected to a hostile environment (a high bar), and that the answer is that they are not. 87 Fed. Reg. at 41535-36. On the other, the proposed rule text at paragraph 106.31(a)(2) takes the position that, for students

[22] U.S. Department of Education, "Guidelines regarding Single Sex Classes and Schools" (May 3, 2002), *available at* https://www2.ed.gov/about/offices/list/ocr/t9-guidelines-ss.html#_ftnref3.

who identify as transgender who are made to share showers, living quarters, or other intimate space with members of the same biological sex, the appropriate question is whether they are thus subjected to a *de minimis* harm (a low bar), and the answer appears to be that they are.

In another such double standard, the regulations would do nothing to prevent those who identify with a gender different from their biological sex from using facilities or activities of their biological sex. And so those individuals would have the uniquely advantageous treatment of dual access that no one else has. These differential treatments themselves thus discriminate on the basis of gender identity (between transgender and non-transgender persons) and would be contrary to the (albeit incorrect) interpretation of Title IX that the NPRM espouses that would otherwise prohibit discrimination on that basis.

B. Internal contradiction

The preamble's discussion of the proposed section 106.31, in which the Department attempts to explain what, exactly, a prohibition on gender identity discrimination under Title IX would mean, demonstrates the flaws of section 106.31 by lapsing into internal contradiction.

Throughout the discussion on proposed paragraph 106.31(a), the preamble first reiterates that differential treatment or separation on the basis of sex is prohibited if it leads to more than a *de minimis* harm, except where (regardless of harm level) it is permitted by statute or regulation. It also states that not treating a transgender-identifying person in accord with their asserted gender identity in sex-specific programs or activities is greater than a *de minimis* harm. 87 Fed. Reg. at 41534-37. In support of the latter proposition, the Department cites three court cases involving restrooms and one involving athletics, where access to facilities or teams according to gender identity was ruled to be legally required. *Id.* at 41535. By situating this discussion in the context of describing what would be prohibited under Title IX, the NPRM thus very strongly suggests that it violates Title IX to treat a transgender-identifying person in accord with their biological sex in a range of contexts (including but not limited to restrooms and athletics).[23] That the Department holds this view is also indicated through its currently enjoined resource of June 2021, "Confronting Anti-LGBTQI+ Harassment in Schools."[24]

The NPRM then appears to all but contradict itself by hollowing out, in an array of contexts, the foundation on which its requirement of treatment in accord with gender identity is based – the *de minimis* harm determination. The preamble discussion rightly acknowledges that there are statutory and regulatory provisions that permit certain sex-separate programs or activities regardless of level of harm imposed by the separation. This implicitly concedes that, in those certain contexts, treatment in accord with gender identity is *not* required, because the

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[23] Another interpretation of this preamble passage is that the Department understands sections 106.33 and 106.41 to only permit schools to treat the sexes differently in restrooms and athletics if done so in a manner that imposes a harm that is *de minimis* or less. Otherwise, the schools in the cited cases would not have violated Title IX. But this explanation would generate as much ambiguity as it would resolve – for instance, by failing to explain why sections 106.33 and 106.41 are different in this regard from the other statutory and regulatory provisions permitting differential treatment of the sexes.

[24] Available at https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf; *see State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022) (enjoining interpretation).

greater-than-*de minimis* harm on which that requirement would be based is not a factor in those contexts. The preamble mentions several examples of statutes and regulations where sex-separate programs and activities are permitted regardless of level of harm: 20 U.S.C. §§ 1681(a)(5) (single-sex colleges), 1681(a)(6) (fraternities and sororities), 1686 (living arrangements); 34 C.F.R. § 106.33 (restrooms and locker rooms, so long as comparable in quality),[25] and 106.41 (athletics). *Id.* at 41536. Notably, the NPRM does not include amendments to sections 106.33 nor 106.41, which seems to ratify the position that those sections permit sex-based separation regardless of level of harm.

The contradiction then is most evident with respect to whether restrooms and locker rooms must be available based on gender identity, because they appear as an example *both* 1) in the cases cited by the Department in support of requiring access to sex-separate facilities on the basis of gender identity due to there being a greater than *de minimis* harm, *and* 2) among the acknowledgments of where regulations permit sex-separation regardless of level of harm caused by separation itself (provided that the facilities are comparable). *Id*. at 41535-36. Athletics would be similar but is deferred to a later rulemaking. *Id.* at 41537-38. Combined with the statutory provisions permitting sex separation, the sum of these specific applications makes the contradiction practically all-encompassing. For if schools must admit persons to sex-separate programs and activities on the basis of gender identity – except in cases of restrooms, locker rooms, athletics, housing, single-sex institutions, and fraternities and sororities – then what areas are left for that requirement to affect?

The apparent intent of the Department, hollowed out by its own legal reasoning, leaves this proposed rule impractical for regulated entities to comprehend, much less follow.

C. Need for clarity

Despite the major implications of this proposed revision, the NPRM thus offers virtually no coherent detail on the practical import the revised section 106.31 has for recipients' compliance obligations. As noted in the Rubinstein memo, Title IX permits and may even require differential treatment of the sexes in numerous contexts. As a non-exhaustive list, the final rule should specifically clarify whether a recipient must:

- Allow a biologically male student who identifies as female to use shower facilities designated for biological females
- Allow a biologically male student who identifies as female to play on a sports team designated for biological females
- Allow a biologically male student who identifies as female to use bathroom facilities designated for biological females
- Allow a biologically male student who identifies as female to be placed in living quarters designated for biological females
- Allow a biologically male student who identifies as female to be placed in overnight trip accommodations designated for biological females

[25] The preamble includes reference to section 106.33 in the context of a discussion of other statutory and regulatory provisions that permit a more than *de minimis* harm. 87 Fed. Reg. at 41536. But it is not made explicit whether this reference is in fact meant to suggest that section 106.33 permits such harm.

- Allow a biologically male student who identifies as female to participate in a human sexuality class designated for biological females

For reasons of law, logic, and prudence, the answer to each of these questions should be no – the Department should permit recipients to separate students based on sex, irrespective of their asserted gender identity. But if, as we suspect, the Department intends otherwise, the Department should say so clearly, rather than leaving schools wondering what is required of them. As written, the proposed rule fails to offer sufficient direction on these questions for the public to have the opportunity for meaningful comment on the proposed section 106.31.

D. Athletics under 106.31 - regardless of deferral on 106.41

Although, as noted, the NPRM would not amend the existing provisions at section 106.41 that specifically govern school athletics and permit sex-separate competition, it is difficult to see how the broad language of the new rule text at paragraph 106.31(a) would not be used to attempt to require schools to allow students who identify as transgender to play on a sports team that corresponds with their asserted gender identity. The Department of Education has already signaled outside of the rulemaking process that it understands Title IX to impose such a requirement, by including it by way of example in the June 2021 resource, "Confronting Anti-LGBTQI+ Harassment in Schools," which is presently under a preliminary injunction.[26]

Further, this NPRM itself cites *B.P.J. v. West Virginia State Board of Education*, a case brought by a biologically male student who identifies as female against a West Virginia state law requiring biologically male students at public schools to participate on biologically male sports teams, and in which the court granted a preliminary injunction against the law. 87 Fed. Reg. at 41535. For its part, the Department of Justice filed a statement of interest in the case, in which it argued that "any interpretation of Title IX's regulations that requires gender identity discrimination would violate the statute's nondiscrimination mandate."[27]

VI. Pregnancy (106.40 & 106.57)

The proposed rule text at sections 106.40 and 106.57 would provide important protections for students and employees, respectively, against discrimination on the basis of pregnancy or related conditions. The USCCB supports the Department's goal of making schools a more welcoming and accommodating environment for pregnant women. As mentioned in the above discussion of the proposed definition of the term "pregnancy or related conditions," the USCCB would oppose any application of the term to include abortion.

VII. Religious exemption (106.12)

The USCCB is pleased that the NPRM would not amend the current provisions at section 106.12, which implement the statutory exemption in Title IX for religious schools. We

[26] Available at https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf; *see State of Tenn., et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).

[27] Statement of Interest of the United States, *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347 (S.D.W.Va. 2021) *available at* https://www.justice.gov/crt/case-document/file/1405541/download.

encourage the Department to take steps within its authority to encourage other federal agencies to adopt the Department's approach to the Title IX religious exemption – namely, that religious schools are not required to preemptively seek written assurance from the Department of their exemption under Title IX, or otherwise be barred from asserting that exemption in response to an investigation or complaint. That requirement of pre-approval, which had been imposed by the Department in the past, is unlawful and lacks statutory authority.

Thank you for the opportunity to comment.

Respectfully submitted,

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