



Comments of the Regulatory Action Center

RE: Nondiscrimination on the Basis of Sex in Education Programs or Activities
Receiving Federal Financial Assistance
Docket No. ED-2021-OCR-0166

The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rulemaking process of government agencies to which they are entitled to contribute.

On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the Biden administration's proposal to expand Title IX to prohibit discrimination on the basis of gender identity and sexual orientation. We strongly oppose this expansion of Title IX.

Title IX of the Education Amendments of 1972 protects students and school employees from discriminating "on the basis of sex" in schools and universities receiving federal funds (that is, virtually all schools and higher-education institutions). Congress enacted Title IX in 1972 to ensure that girls and women had access to the same educational opportunities and programs as boys and men. Fifty years after its enactment, Title IX has been an unqualified success. President Biden would destroy that legacy by adopting this misguided proposal.

In a Notice of Proposed Rulemaking issued by the Department of Education, the Biden administration proposes to expand Title IX to include LGBTQI+ students. While the issue of transgender students' participation on a particular male or female athletics team will be addressed in a future rulemaking¹, this proposal would require schools to allow participation in programs and facilities that are consistent with a person's gender identity.

¹ Department of Education. (2022, June 23). *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*.
<https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>

This means that schools would have to open women's/girls' bathrooms and other facilities to individuals just because they claim to be, or "identify as," female. It is not hard to imagine the harm that could happen when the safety and privacy of women and girls is sacrificed to carry out a leftist policy agenda.

The proposed rule would dramatically expand what conduct is prohibited, capturing under "harassment" innocent comments that happen to offend someone. Overworked teachers will be forced to take on another role: speech police, patrolling the playground to punish children's taunts lest someone be offended. Such a sweeping prohibition will surely run afoul of the First Amendment in many instances.

The proposed rule would also curtail the Trump administration's Title IX due process requirements for students and employees accused of sexual assault or harassment. Under the Biden administration's proposal, those accused would *not* have the right to a live hearing and cross-examination of witnesses. The proposal would also allow a single person to both investigate and adjudicate the allegations of sexual assault or harassment.

The biggest problem, however, is that adopting this proposal would be illegal. Congress enacted Title IX to provide women and girls with equal educational opportunities—period. Without a doubt, Congress never contemplated expanding and twisting Title IX's protections to endanger the physical safety of, and undercut the opportunities for, females.

The administration claims that the Supreme Court decision in *Bostock v. Clayton County*² requires the adoption of this proposed rule. But the Court's opinion actually states the opposite:

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. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us 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." As used in Title VII, the term " 'discriminate against' " refers to "distinctions or differences in treatment that injure protected individuals." [Citation omitted.] Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.³

Once again, the Biden administration has chosen to legislate through regulation. Only Congress—elected to represent the people—can make such sweeping policy determinations

² 140 S.Ct. 1731 (2020).

³ *Id.* at 1753.

involving such sensitive issues and trade-offs. Unless and until Congress acts, the Biden administration should leave Title IX alone.

Our public schools are failing America's children. Learning loss due to misguided COVID school closures is well-documented. President Biden should leave the legislating to Congress, as the Constitution dictates—and leave schools alone to focus on educating our children.

Respectfully submitted,

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