TITLE IX: FACT SHEET

UPDATE: On April 6, 2023, the Biden administration lawlessly introduced its Notice of Proposed Rulemaking (NPRM) on Title IX that would expand the meaning of sex discrimination that would force schools to allow students of the opposite biological sex to play on athletic teams consistent with their espoused gender identity. The proposed regulation may be accessed here. The public comments period will be for 30 days following the publication of the NPRM in the *Federal Register*. We ask that you submit your comments to the *Federal Register* here and consult our "resource" page on the Citizens Defending Freedom website to help make your voice heard.

Recently, a number of federal agencies including the U.S. Department of Education and the U.S. Department of Justice, among others, have issued guidelines on Title IX, which prohibits sex-based discrimination, that seek to broaden the language of the text to include sexual orientation and gender identity as protected categories[1]. This is a response to President Biden's Executive Order 13988 "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" and the 2020 Supreme Court ruling in *Bostock v. Clayton County* (207 L. Ed. 2d 218), a Title VII case involving employment discrimination that has since been misinterpreted to push an unlawful and unconstitutional understanding of Title IX that:

- *Allows a student's chosen gender identity to replace his or her biological sex when deciding which bathroom he or she uses, or which athletic team he or she participates in.*
- *Erodes student privacy by permitting biological males to undress in otherwise sex-separated, intimate facilities reserved for biological females.*
- *Eradicates Title IX's sex-specific protections by systemically disadvantaging female students in schools forced to compete against biological males identifying as women in sports competitions.*
- *Forces every college and university receiving federal funds to admit biological males identifying as females to women's sporting events or else face boundless civil rights lawsuits.*
- *Coerces doctors into performing harmful and irreversible medical procedures that violate their right to religion and conscience.*

To address the misapplication of *Bostock*, Citizens Defending Freedom offers this fact sheet to 1) clarify the legal issues; 2) provide guidance to concerned parents and patriot citizens alike; and 3) ensure that students are afforded the protections they are entitled to.

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I. *Bostock* doesn't apply to Title IX.

- The central question before the U.S. Supreme Court in *Bostock* was whether an employer under the federal employment law, Title VII, could fire someone simply for being homosexual or transgender, or otherwise discriminate against a person "because of such individual's sex." (140 S.Ct. at 1753).
- The court in *Bostock* decided the case narrowly, specifically refusing to extend its holding to Title IX. For this reason, *Bostock* does not implicate Title IX or any other non-Title VII statutes. As the majority opinion states: "The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination…." [but] we do not prejudge any such question today." (*See Bostock* 140 S. Ct. at 1753).

II. It is unlawful to implement a sweeping expansion of federal law without congressional approval.

- The *Bostock* court also acknowledged that assuming applications of Title VII to Title IX "would risk amending the statutes outside the legislative process reserved for the people's representatives." (140 S. Ct. at 1738).

- While there have been congressional attempts to amend Title IX to add "sexual orientation and gender identity" to broaden Title IX's protections on the basis of sex[2], these attempts have been unsuccessful.

- As such, altering the definition of "sex" under Title IX to include gender identity and sexual orientation is a decision solely reserved to Congress.

- It is also unlawful for unelected officials to rewrite federal law without Congress' authority. Currently, Congress has not granted federal agencies the power to redefine the meaning of "sex."

- In June 2022, the U.S. Supreme Court in *West Virginia v. EPA* (142 S.Ct. 2587) affirmed that a federal agency may not implement sweeping expansions of regulatory authority without clear congressional authorization. Accordingly, anyone failing to comply with this ruling could face immediate litigation for exceeding congressional authority.

III. Officials are obligated to recognize the statutory language in the original and historical context in which it was drafted.

- Also in *West Virginia v. EPA*, the U.S. Supreme Court observed that "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dept. of the Treasury*, 489 U.S. 803, 809 (1989)). This means abiding by the definition of the word "sex" to be biological and binary as it was when Title IX was passed in 1972 and therefore not in a manner that would include sexual orientation or gender identity.

- A year after Title IX was passed, the U.S. Supreme Court in the 1973 decision, *Frontiero v. Richardson* (411 U.S. 677), recognized that "sex, like race and national origin, is an immutable

[1]See, U.S. Department of Justice Civil Division, "Memorandum: Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972;" U.S. Department of Education Office of Civil Rights' Notice of Interpretation (NOI) on Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity (NOTE: This is not a final DOE rule. When the rule is finalized, it is likely several States will initiate litigation and seek a nationwide injunction to prevent implementation of the rule by the Department of Education as a violation of the "major questions doctrine" following the U.S. Supreme Court holding on June 30, 2022, in *West Virginia v. Environmental Protection Agency*.)

[2]See e.g. H.R. 1652, 113th Cong, (2013); S. 439, 114th Congress (2015).

(unchanging) characteristic determined solely by the accident of birth" (Id. at 686, quoting *Weber v. Aetna Cas. & Sur. Co.,* 406 U.S. 164, 175 (1972)).

- Thus, the term "sex" in Title IX means binary, biological sex (male or female) because it is the only ordinary public meaning of "sex" at the time of Title IX's enactment. As such, Title IX says nothing about sexual orientation and gender identity.

IV. Title IX is posited on the differences between the sexes, not their dilution, to ensure equal opportunity and privacy among the sexes.

- Because Title IX was passed in 1972 and must be understood in the context in which it was written, Title IX's protections assume a necessary difference between the two biological sexes to ensure equal protection under the law.

- As recently stated by the U.S. District Court for the Northern District of Texas, Amarillo Division in *Neese v. Becerra* (2022), "Title IX expressly allows sex distinctions and sometimes even *requires* them to promote equal opportunity. Hence how this would lead to undermining one of Title IX's major achievements, giving young women an equal opportunity to participate in sports." (quoting *Bostock* 140 S. Ct. at 1779 (Alito, J., dissenting)).

- The privacy afforded by sex-separated facilities is well-established, as several courts have recognized the importance of upholding these distinctions to safeguard the privacy interests of students.[3]

- Most recently, the 11th Circuit Court of Appeals in *Adams v. School Board of St. John's County* (2022), not only determined that a Florida school board did not violate the rights of a student who claimed to be transgender by separating school bathrooms based on the biological sex of students, but also noted that the school board's bathroom policy "is clearly related to…its objective of protecting the privacy interests of students to use the bathroom away from the opposite sex and to shield their bodies from the opposite sex in the bathroom, which, like a locker room or shower facility, is one of the spaces in a school where such bodily exposure is most likely to occur" (*Id* at 312).

TAKEAWAYS

- Contrary to the efforts of judicial activists, progressive policymakers, and unelected bureaucrats, Title IX does not currently cover sexual orientation or gender identity per the U.S. Supreme Court and the U.S. Congress. This is a sweeping expansion of regulatory authority without clear congressional authorization.

- Many parents and students have raised legitimate safety and privacy concerns for school bathrooms and other facilities currently undesignated by biological sex that the *Bostock* ruling did not address. Therefore, the applicability of Title IX on the issue is unsettled law.

- These resources on Title IX can also be located on Citizens Defending Freedom's website and through your local Citizens Defending Freedom chapter.

[3]See *Chaney v. Plainfield Healthcare* Ctr., 612 F.3d 908, 913 (7th Cir. 2010) ("[T]he law tolerates same-sex restrooms or same-sex dressing rooms…to accommodate privacy needs."); *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (noting "society's undisputed approval of separate public restrooms for men and women based on privacy concerns' "); *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2009) (explaining "the constitutional right to privacy... includes the right to shield one's body from exposure to viewing by the opposite sex.")