



September 10, 2022

Hon. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Docket Number: ED-2021-OCR-0166

Re: Notice of Proposed Rulemaking (NPRM) – Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Federal Registry No: 2022-13734

Submitted electronically

Dear Secretary Cardona:

The Association of Christian Schools International (ACSI) is the largest Protestant school association and serves 2,250 member schools in the United States alone with a total of some 5,000 member schools around the globe. Through extended services and resources beyond formal membership, ACSI has the privilege of serving and influencing over 25,000 Christian schools all over the world. ACSI exists to strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ.

The Christian faith teaches the dignity of each human person, each of whom is made in the image of God and thus deserving of respect. This imperative of love and respect for every human person inspired Christians to rescue foundlings in pagan Rome, found hospitals, promote education, serve the poor, and promote liberty of conscience. Thus, Christian schools stand for human dignity and do not condone bullying or discrimination. The Christian faith does not permit the mistreatment of individuals made in God's image.

In terms of sexuality, the Christian faith teaches that human flourishing calls for sex to be reserved for marriage only, and that marriage is a covenant between one man and one woman for one lifetime with children as God may give. It is worth noting that Orthodox and Catholic Christians teach that marriage is also a sacrament, thus implicating marriage as a means of God's grace, His "unmerited favor towards sinners." And, all three branches of Christianity – Protestant, Orthodox, and Catholic – have a high view of marriage and, consequently, a strong conviction against divorce except in limited, specific circumstances.

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Christian schools therefore teach, and Christian individuals do their best to live out, these timeless, proven truths which, in fact, promote *individual*, personal flourishing in ways that a real and loving God intended. Naturally, individual flourishing in community also promotes the *common* good and contributes in positive ways to a thriving society.

These Christian standards are part and parcel of a Christian faith and practice that reflects the Good News of the Gospel of Jesus Christ: a loving God has created an understandable order designed to benefit His special creation, each human person. He provided a Redeemer who took the punishment each individual deserves for his sin precisely so each person may enjoy God's free offer of forgiveness. God offers each human person a clear conscience simply upon our asking and our turning away from sin and toward what He intends for our good. Proverbs 13 promises that "he who confesses and forsakes them [i.e., his transgressions] will find compassion." Proverbs chapter three summarizes: "Fear the Lord and turn away from evil. It will be healing to your body and refreshment to your bones" (NASB).

In this regard, the federal Constitution guarantees freedom of conscience in the First Amendment which forbids the federal government from establishing an official religion and compels the federal government to respect the free exercise of religion. The *first* line of the *first* item in the Bill of Rights is "Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof." Christians, like all others, have a lawful, inherent right to expect the full freedom to live out their faith and, as a practical example in just one area of concern, to be treated equally – not as second class citizens – in government programs of general applicability. The Supreme Court has made this non-religious-discrimination requirement clear in cases such as *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) and *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020).

As federal actors, the U.S. Department of Education (USDE) has an obligation to ensure that those rights are respected.

On June 23, 2022, the 50th anniversary of Title IX of the Education Amendments of 1972, the USDE announced it would issue a Notice of Proposed Rulemaking (NPRM) related to Title IX which it did formally on July 12, 2022 with 60 days for public comment. The NPRM came slightly more than one year after a USDE request for public input in June 2021 sparked by two Executive Orders: Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (published January 25, 2021), and Executive Order 14021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity* (published March 11, 2021). In particular, the latter sought review of agency actions that "are or may be inconsistent with governing law, including Title IX."

ACSI submitted public comment on June 10, 2021, in response to the request for public input. Regrettably, the NPRM repeats, and, in many ways, worsens the errors of the original Executive Order which we examined in our original submission. The NPRM thus would formalize those errors into regulation as we explain below.

The NPRM, like Executive Order 13988 from which it springs, erroneously attempts to apply the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) to the wholly unrelated law in Title IX of the Education Amendments of 1972 when the decision itself is clearly limited to employment issues specific to Title VII of the Civil Rights Act, to wit:

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." Bostock v. Clayton County, 140 S. Ct. 1731 (2020) at 1753.

Not only did the Court make clear that its ruling applied *only* to Title VII, it emphasized that: "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." *Ibid.*

Our own public comment in June 2021 urged the Department to reverse course, but, in addition, on July 15, 2022, a federal court enjoined enforcement on procedural grounds of the guidance in a Notice of Interpretation of June 22, 2021, which the Department issued ahead of the 2022 NPRM. The legal challenge to the Department's reasoning was brought by 20 state attorneys general, led by Tennessee. The preliminary injunction is thus in place in nearly half the states.

In addition, for the last 50 years, Congress has had every opportunity to redefine the concept of sex within Title IX. It has refused to do so. Thus, the Executive Branch has plain evidence from the Judicial and the Legislative Branches that it has no authority to reinterpret Title IX in the way the NPRM attempts to do.

The NPRM, then, was issued based on a misapplication of a Supreme Court decision which itself explicitly applied only to Title VII of the Civil Rights Act and no other statute. That wrongful approach became part of a Notice of Interpretation which was challenged by 20 states and subsequently enjoined by a federal court as the case proceeds. It was issued despite Congressional refusal to change the meaning of sex. And, further, the NPRM goes well beyond sexual orientation to include discrimination on the basis of "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."

One reason the Court did not apply its ruling in *Bostock* beyond Title VII of the Civil Rights Act is clearly stated in the citation above: the Court did not evaluate any other law. *Bostock* was about discrimination in employment (Title VII) whereas Title IX is about sex discrimination in educational programs. The Court did not attempt to determine the implications for free speech (use of pronouns) or privacy (bathrooms, locker rooms, dormitories) or religious liberty (human dignity that respects the human person and the truth about marriage) in an *employment* case. And yet that is precisely what

the NPRM attempts to do without authority here in the case of education where all of these are seriously implicated.

We note that the NPRM did not change the current regulation governing the exemption for religious schools guaranteed in the statute. This is a good thing. However, the NPRM could consider adding how the Department would protect faith-informed institutions and their participants from the wrongful application of its requirements. For example, despite Title IX's religious exemption, over the spring and summer of 2022, the U.S. Department of Agriculture (USDA) attempted to impose on religious schools non-discrimination categories from which they are exempt. The USDA relented only when litigation was brought in Florida that led it to issue clarifying guidance.

Thus, there is reason for the Department of Education separately to acknowledge the existence of the religious exemption and the fact that religious institutions are or may well be exempt from its wrongful application of Title IX to sexual orientation and gender identity precisely because religious institutions respect human dignity, acknowledge the reality of biological sex, and teach that sexuality is best channeled into marriages of one man and one woman for one lifetime with children as God may give.

We would also urge the Department within the bounds of its authority to encourage other federal agencies to adopt the Department's standard for the Title IX religious exemption, namely that schools are not required to seek written assurance of their exemption or lose their right to the exemption in the event of a complaint or investigation. To require pre-approval, as the Department itself has attempted in the past, is unlawful and lacks statutory authority.

Along these lines, the Department does have the authority to pledge that it will not allow or participate in any retaliatory action against religious institutions which assert their statutory right to the Title IX exemption. In the past, the Department has taken actions, now rectified, that were widely interpreted as hostile to religious institutions which asserted their statutory Title IX exemption. **It would therefore be appropriate for the Department to make a statement which could be a part of the Final Rule to the effect that it will not engage in such hostility nor encourage others to do so.**

The Department must be careful to recognize – and not to restrict – the right of religious Americans and religious institutions to full participation in American life. This includes religious institutions which choose to be recipients of federal financial assistance (in accord with the Supreme Court's multiple rulings barring discrimination in programs of general applicability). At minimum, the Department must make clear that it is not discrimination to teach and to live out the reality that sexuality is best reserved for marriage, that all children deserve to use a restroom that respects their privacy, and thus gives them the human dignity that they do, in fact, possess.

ACSI thus recommends that the NPRM withdraw its proposed changes that expand the meaning of sex to include "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" in Section 106.10.

We note that the NPRM puts off possible new regulations covering sports. However, Section 106.31's expansive revisions prohibit "more than a *de minimis* harm" when treating the sexes differently or

separating them, and then defines “more than a *de minimis* harm” at Section 106.31(a)(2) to include a policy or practice “that prevents a person from participating in an education program or activity consistent with the person’s **gender identity**.” (Emphasis added). This would surely be used to compel schools to allow a student who may identify as transgender to play on teams aligned with the student’s gender identity, not a student’s biological sex. **We recommend the Department withdraw its proposed changes to Section 106.31.**

Finally, we note that Section 654 of the Treasury and General Government Appropriations Act of 1999 (Public Law 105-277) requires agencies to conduct a family impact assessment of “proposed agency actions on family well-being” including assessing whether –

- (1) the action strengthens or erodes the stability or safety of the family, and, particularly, the marital commitment;*
- (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;*

These standards seem relevant here and **we urge the Department to conduct such an assessment as part of its responsibilities related to the NPRM.**

Thank you for the opportunity to express our views.

Respectfully submitted,



P. George Tryfiates
Vice President for Public Policy & Legal Affairs