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ATTORNEY GENERAL OF TEXAS

September 12, 2022

Miguel A. Cardona, Ed.D.
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Re: Docket No. ED-2021-OCR-0166

Dear Secretary Cardona:

The State of Texas, as a common provider of education, has a compelling interest in the Department of Education ("Department") issuing clear, practical regulatory guidance regarding recipients' obligations under Title IX of the Education Amendments of 1972.[1] *See* 20 U.S.C. § 1681 *et seq.* For this reason, the Office of the Attorney General of Texas ("Texas OAG") has reviewed the Department's Proposed Rule to its Title IX regulations, published in the Federal Register on July 12, 2022. *See* 87 Fed. Reg. 41,390.

To Texas OAG's disappointment, rather than building upon the good work done by Secretary Betsy DeVos during the Department's last rulemaking,[2] the Proposed Rule promises to repeat the mistakes of the Department's ill-advised 2011 Dear Colleague Letter,[3] which had a detrimental impact on publicly funded education across the country, including in Texas. Specifically, the Proposed Rule would rollback constitutional safeguards while at the same time expanding recipients' liability far beyond what Title IX allows. Indeed, the Proposed Rule goes so far as to reinterpret the word "sex" as to include "sexual orientation" and "gender identity," even though the court opinion the Department cites applies only to employment law.

Texas OAG opposes the Department's efforts to revive the failures of the 2011 Dear Colleague Letter. Experience has shown that the combination of heightened responsibility, along with a deemphasis on individual rights, forces academic institutions that receive federal funds into a no-win situation in which they risk civil rights lawsuits and litigation expenses if they follow the Department's guidance and invite federal or private enforcement actions if they do not. The

[1] *See*, e.g., Tex. Educ. Agency, 2020 *Comprehensive Biennial Report on Texas Public Schools* at 297 (Dec. 4, 2020) (reporting that Texas received $5.3 billion dollars for K-12 education, which represented 16.4 percent of the total funds Texas spent in FY 2020), https://tea.texas.gov/sites/default/files/comp_annual_biennial_2020.pdf.
[2] *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020).
[3] *See*, *e.g.*, Russlynn Ali, OCR, U.S. Dept. of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

consequence is that many academic institutions will be pressured into hyper-policing controversial speech as well as removing procedures that helped guarantee fair process to students accused of discrimination or harassment should the Department proceed with the Proposed Rule.

I. Like the 2011 Dear Colleague Letter, the Proposed Rule will bully academic institutions to violate their students' constitutional rights as a way of avoiding accusations of non-compliance.

Prior to May 2020, the Department of Education had never issued comprehensive regulations that treated sexual harassment, including sexual assault, as unlawful sex discrimination. The Department instead relied on a series of guidance documents, such as the 2011 Dear Colleague Letter, that instructed participants to treat Title IX compliance like a zero-sum calculation, where the rights and interests of some students were sacrificed for the sake of others.[4] In response to this instruction, many academic institutions, including those located in Texas, found it easier to strip students and faculty of their constitutional rights rather than risk an enforcement action that could imperil their access to federal funds.

The situation did not improve until Secretary DeVos directed the Department to rescind the 2011 Dear Colleague Letter and promulgate regulations via notice and comment rulemaking in 2020 that recognized that combating sexual harassment and protecting civil liberties are not mutually exclusive. Yet, not two years later, the Department is poised to erase all that progress and issue a new Proposed Rule that mimics the worst features of the 2011 Dear Colleague Letter. Absent a major course change, the Proposed Rule promises to produce the same conditions that led academic institutions to abandon their obligation to respect the constitutional rights of their campus community.

The Proposed Rule, like the 2011 Dear Colleague Letter, takes an expansive view of recipients' responsibilities under Title IX. Not only does it reinvent the definition of "sex discrimination" to include "sexual orientation" and "gender identity" impermissibly, *see infra* at 4-6, but the Proposed Rule also expands when, where, and how recipients must respond to claims of sexual harassment. For example:

- According to § 106.44(a), a recipient "must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects." 87 Fed. Reg. 41572.

- Additionally, in § 106.2, the Proposed Rule amends the definition of "sexual harassment" to include unwelcome sex-based conduct (1) "that is sufficiently severe *or* pervasive," and (2) "that based on the totality of the circumstances and evaluated *subjectively and objectively*, denies or limits a person's ability to participate in" the recipient's education program or activity. 87 Fed. Reg. 41569 (emphasis added).

[4] *See*, *e.g.*, Russlynn Ali, OCR, U.S. Dept. of Educ., Dear Colleague Letter: Sexual Violence (Apr. 4, 2011) (conditioning student's right to due process on it not "restrict[ing] or unnecessarily delay[ing] the Title IX protections for the complainant"), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

On its own, the redefinition of "sex discrimination" to include sexual orientation and gender identity increases the odds of academic institutions intruding on protected rights when seeking to enforce Title IX. However, when combined with the other listed changes, the danger becomes especially acute.

When compared to the 2020 regulations, the standards advanced by the Proposed Rule would create far more opportunities for recipients to inadvertently fall out of compliance. The previous version of § 106.44(a) required recipients to "respond promptly in a manner that is not deliberately indifferent"—something they could achieve if their response was not "clearly unreasonable in light of the known circumstances." 85 Fed. Reg. 30574. Recipients therefore had more flexibility in how to craft a response that was appropriate to the facts and parties involved. Recipients were also judged based on the information they had on hand as opposed to the benefit of hindsight, which the Proposed Rule would arguably allow.

The previous definition of sexual harassment, meanwhile, utilized the *Davis* standard, which demarcated sexual harassment as unwelcome conduct that was "so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access," as "determined *by a reasonable person*." 85 Fed Reg. 30574 at § 106.30 (emphasis added). In other words, the conduct needed to be both severe and pervasive before recipients' obligations under Title IX would trigger, not merely one or the other as under the Proposed Rule. In addition, the determination of whether a statement or action met any of these elements was measured by an objective assessment. There was less risk that recipients would be drawn into a Title IX dispute because of a student's idiosyncratic reaction to innocent conduct.

Experience has shown time and again that unless recipients have clear, defined lines, marking when and where their Title IX obligations end, they will air on the side of caution and overregulate anything deemed offensive.[5] Matters related to sexual orientation and gender identity remain hotly contested topics in public discourse, often provoking heightened emotion. Logic dictates that given recipients poor track record, the expansion of recipients' duty to respond to alleged harassment, combined with the addition of subjectivity to the definition of harassment, will prompt academic institutions to target unpopular viewpoints related to these topics.

Of course, the right to free speech and expression are not the only constitutional mainstays at risk. The Proposed Rule would also directly curtail due process protections for Texas students by opting to lower the standard for sex-based harassment to a "preponderance-of-the-evidence" standard; bar accused students from access to evidence, offering them instead a mere "description" of "relevant" evidence; limit students' opportunity to meaningful cross-examination; and permit recipients to adopt the investigator model, in which a single "decisionmaker" adjudicates the proceedings as prosecutor, judge, and jury.

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[5] *See*, *e.g.*, Eastern Illinois University, Internal Governing Policies, #175 – Sexual Harassment, https://castle.eiu.edu/auditing/175.php (banning students from "a variety of behaviors including . . . offensive or inappropriate language or jokes;" encouraging complaints before "harassment reaches an intolerable level;" and further stating that that "[t]he university can and will address inappropriate behaviors even if those behaviors are not yet severe or pervasive"); *see also* Council on Postsecondary Education, Sexual Harassment and Sexual Violence Policy, https://tinyurl.com/manbmcm8 (using a definition of sexual harassment that contemplates discipline arising from a single joke, comment, or innuendo from male colleagues, such as calling a female supervisor "bossy").

Not only do these changes rub against multiple court cases, which recognize the need for procedural safeguards during Title IX adjudications,[6] but the weakened standard would be introduced at the same time that recipients' liability would expand. The Department thus poses to give recipients cause to initiate more zealous Title IX enforcement proceedings while simultaneously reducing students' access to a fair hearing when accused of harassment—the exact same combination that led academic institution into believing that constitutional rights and Title IX compliance were in conflict following the 2011 Dear Colleague Letter.

The fallout from the Department's miscalculation will fall on students. In the absence of meaningful safeguards, academic institutions have and will again impose life-altering consequences on students without ever giving them a real opportunity to defend themselves.[7] A finding of guilt can exact severe monetary and reputational costs on students, ranging anywhere from expulsion and academic suspension to loss of tuition, housing, scholarships, and job opportunities. At the very least, it places a black mark on a student's record. At its most extreme, it can topple any chance a student has at a successful career. The consequences are "punishment[s] in any reasonable sense of that term." *Doe v. Univ. of Notre Dame*, 3:17CV298, 2017 U.S. Dist. LEXIS 69645, at *34 (N.D. Ind. May 8, 2017). And they warrant the protections of due process, which the Proposed Rule would deny.

II. The U.S. Supreme Court expressly limited *Bostock* to Title VII. The Department cannot cite the opinion as justification for redefining "sex discrimination" in a totally unrelated statute.

For the entire half century since Title IX has taken effect, both the Department and recipients have understood Title IX's prohibition on sex discrimination to mean that no person could "be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity" on account of their *biological sex*. Notwithstanding this history, the Department, by means of the Proposed Rule, seeks to overturn Title IX's well-established definition of sex discrimination so that the statute's protections extend to a person's sexual orientation and gender identity as well.

Putting aside the merits of such a policy, the Department lacks the legal justification to initiate and support such a radical departure in the interpretation of Title IX, which is evident from the Department's own explanation for the change. The Department hinges its redefinition of sex discrimination almost entirely on the U.S. Supreme Court's opinion in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). There, the Court was posed with the question of whether sex discrimination, as defined in Title VII of the Civil Rights Act of 1964, included discrimination on the bases of sexual

[6] *See, e.g.*, *Doe v. Univ. of Sciences*, 961 F.3d 203, 214 (3rd Cir. 2020) (notions of fairness are satisfied when the accused has a chance to test witness credibility and a live, adversarial hearing); *Doe v. Purdue Univ.*, 928 F.3d 652, 663 (7th Cir. 2019) (student's hearing must be "a real one, not a sham or pretense"); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (student has a right to cross-examine witnesses and accuser when credibility is at issue); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603–07 (D. Mass. 2016) (single investigator model did not allow for effective review by a neutral party).

[7] Jonathan Taylor, Milestone: 700+ Title IX/Due Process Lawsuits by Accused Students, Title IX for All (May 11, 2021), https://titleixforall.com/milestone-700-title-ix-due-process-lawsuits-by-accused-students/

orientation and gender identity. After assessing the statue's text and legislative history, the Court determined that it did. *Id.* at 1737.

Although *Bostock* may warrant an update to federal employment regulations, the Court's reading of Title VII does not justify upending the interpretation of another, unrelated statute that was enacted nearly a decade later, pursuant to a different constitutional power. The Court in fact stipulated as such in *Bostock*, stating that its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," such as Title IX; nor did its holding address other issues that were not before the Court such as "sex segregated bathrooms, locker rooms, and dress codes"—all of which make an appearance in the Proposed Rule. 140 S. Ct. at 1753; *see also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself.").

Thus, while it might be accurate to say that *Bostock* influenced the Department, *Bostock* did not necessitate the reinterpretation of Title IX; nor did it provide the Department any guidance on whether Title IX should encompass sexual orientation and gender identity as bases for sex discrimination, let alone what policies the Department might promulgate given the new definition. The Department instead acted of its volition. Because of this, the Department had an obligation to articulate why *Bostock* precipitated the Department's about-face, as well as expound how the Court's reasoning in *Bostock* applied to each regulation the Department crafted to implement its revised interpretation. But no explanation was ever offered.

Had the Department analyzed *Bostock* and compared the two statutes, it would have become apparent that not only does "Title VII differ[] from Title IX in important respects," *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021), but that Title IX is governed by a separate standard that makes *Bostock* inapposite. Congress enacted Title IX pursuant to the Spending Clause. Title IX must therefore comply with the Clear Statement Rule, which requires "Congress [to] speak with a clear voice" and "unambiguously" put state funding recipients on notice of the conditions of federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The U.S. Supreme Court explains, "[u]nlike legislation enacted under § 5," such as Title VII, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. "The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.*

Despite clear precedent that the Clear Statement Rule governs Title IX, *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005), the Department ignores this feature of spending legislation when rationalizing its decision to graft *Bostock* onto Title IX. This is a mistake. As the *Bostock* Court acknowledged, its interpretation of "sex discrimination" in Title VII to include "sexual orientation" and "gender identity" was unexpected. 140 S. Ct. at 1750-1753. "[I]t would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time." *Id.* at 1755 (Alito, J., dissenting).

There are of course naysayers who argue that the States should have anticipated that the definition of "sex discrimination" would ultimately evolve to include these categories, but fifty years of Title IX rulemaking establish otherwise. The Department did not interpret "sex discrimination" in Title IX as encompassing anything beyond biological sex until the recent presidential administration. As the Department admitted in its explanation of the Proposed Rule, "The Department's Title IX regulations have never directly addressed the application of Title IX to discrimination based on sexual orientation or gender identity." 87 Fed. Reg. 41394. To the contrary, when the Department had the opportunity to expand the definition of "sex" in 2020, it refrained from doing so. 85 Fed. Reg. 30177.

What's more, even if the revised definition was foreseeable when Title IX was passed, that would not justify the Proposed Rule's requirement that recipients take the affirmative step of providing accommodations for individuals whose gender identity diverges from their biological sex to avoid a "more than de minimis harm." *See* 87 Fed. Reg. at 41,534–37. Title IX, after all, has no accommodation requirement, and the provision in Title VII relating to sex discrimination similarly lacks such language. Neither Texas nor her sister states therefore would have had clear notice that their acceptance of federal funds was conditioned on them dismantling sex-separate spaces in public education—a policy that many states, including Texas, have deemed harmful to students.

CONCLUSION

Everyone agrees that academic institutions should take a hard stance against sexual harassment and discrimination in education, including by enforcing Title IX, as enacted by Congress. That commitment, however, should not come at the expense of other students' rights; nor should it force recipients to assume responsibilities that are not prescribed by statute. The Proposed Rule violates both principles. We advise the Department to reject it and leave the regulations promulgated by the Department's rulemaking in 2020 in place.

Very truly yours,

Ken Paxton

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