**Title IX Roundtable**

**Jennifer C. Braceras**
**Founder, Independent Women's Law Center**

**Tuesday, March 12, 2024**

Good afternoon, Senators.

I'm Jennifer Braceras, founder of Independent Women's Law Center. I am also the mother of one son and three daughters, two of whom are college field hockey players. For almost thirty years, I have practiced, taught, and written about federal anti-discrimination law, including Title IX.

I want to begin today by reminding everyone that Title IX does one thing and one thing only—***it outlaws discrimination in education***.[1] And it outlaws discrimination on the basis of a single category—***sex***.

Title IX ***covers*** sports, as it covers every aspect of the educational experience. But it is not specifically a sports statute. It is not a fairness statute. And it is not a statute that outlaws ***all*** forms of discrimination.

In passing the landmark legislation, Congress deliberately kept the statute narrow. Title VI already prohibited racial discrimination in education, but rather than amend that law to add sex to the list of protected categories, Congress created an entirely new law in recognition of the fact that sex and race are very different. That is, while there is never an acceptable reason to segregate on the basis of race, physical differences between males and females[2] mean that separating the sexes is sometimes safe and often wise. The drafters of Title IX did not set out to eliminate women's spaces, only to ensure that schools would provide equal educational opportunities to both sexes (and this is the language the statute uses "both sexes", meaning male and female).

Accordingly, for more than 50 years, the regulations implementing Title IX have explicitly permitted single-sex sports teams[3]—so long as "***both*** sexes" have equal opportunities.[4]

---

1 "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C § 1681.

2 ***See United States v. Virginia***, 518 U.S. 515, 533 (1996) (Ginsburg, J.) ("Physical differences between men and women ... are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'") (quoting ***Ballard v. United States***, 329 U.S. 187, 193 (1946)).

3 34 CFR § 106.41(b).

4 34 CFR § 106.41(c).

That doesn't mean that schools must field two football teams—one for girls and one for boys—or two separate field hockey teams. But it does mean that they have to provide male and female students with roughly the same number of opportunities to play sports.

Unfortunately, new rules proposed by the Biden administration flip the entire edifice of Title IX on its head. By claiming that Title IX prohibits discrimination on the basis of "gender identity", a term ***never*** mentioned in the statute,[5] the proposed rules pressure schools to let male students who identify as women roster with women's teams.[6]

***But how can teams with limited roster spots, budgets, scholarship money, and resources possibly do this while providing equal opportunity for female athletes?***

The answer is, they cannot. In short, the Department of Education's proposed rules pit the rights of women and girls against those asserted by biological males who identify as women. This directly contradicts Title IX, the goal of which was to make sure schools equalized educational opportunities for males and females.

To paraphrase Chief Justice Roberts, writing in another context, Title IX is not an "'open book" to which the Department of Education may "add pages and change the plot line.'"[7] But that is exactly what these proposed rules do. And, as such, they are a brazen assault on congressional power and on our constitution's separation of powers.[8]

---

5 Notably, legislation to add "gender identity" to the categories protected by civil rights law has failed to pass Congress multiple times. ***See***, ***e.g***., The Equality Act 2021 , Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2021, S. 2186, 2021 Student Non-Discrimination Act.

6 A separate proposed rule specifically addresses athletics, requiring that schools let students compete on teams consistent with their "gender identity" unless a particular school can demonstrate, to the satisfaction of the Department of Education, that it would be unfair or unsafe to students on a particular team. In other words, the proposed rule establishes a new default position that women's sports aren't just for women, but for anyone who identifies as a woman. See Comment of Independent Women's Law Center and Independent Women's Forum regarding implications of the Department of Education's proposed Title IX rule, available at https://bit.ly/450dPDq.

7 ***West Virginia v. EPA***, 142 S. Ct. 2587 (2022).

8 The Biden administration claims that the Supreme Court's decision in ***Bostock v. Clayton County***, 140 S. Ct. 1731 (2020), compels the conclusion that Title IX prohibits discrimination based on "gender identity." 86 Fed. Reg. 32637 (June 22, 2021). But there is no reason that ***Bostock*** should "automatically apply in the Title IX context." ***Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021).*** Not only are the two statutes structurally different (Title VII is commerce clause legislation, while Title IX is a spending clause measure), athletics are a unique setting (unlike employer hiring and firing decisions) in which biological sex differences are not only relevant, they are often dispositive. ***See also Kleczek v. Rhode Island Interscholastic League, Inc.***, 612 A.2d 734, 738 (R.I. 1992) ("Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition.")

In applying ***Bostock*** to Title IX in general, and to athletics in particular, the administration overlooks the Supreme Court's express caveats about the holding's applicability outside of employment law and creates new law. ***Tennessee v. U.S. Dep't of Educ.,*** No. 3:21-CV-308, 2022 WL 2791450, at *21 (E.D. Tenn. July 15, 2022). This it must not do. ***See Biden v. Nebraska***, 143 S. Ct. 2355 (2023) (Department of Education lacks authority to forgive billions of dollars of federal student loans without clear congressional authority); ***West Virginia v EPA***, 142 S. Ct. 2587 (2022) (the EPA may not adopt regulations that go beyond the scope of the environmental statutes written by Congress).