



VIA ACMS FILING

Molly C. Dwyer, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

April 23, 2024

Re: *Roe v. Critchfield*, Case No. 23-2807
*Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) and
Circuit Rule 28-6*

Dear Ms. Dwyer:

On April 19, 2024, the Department of Education released new Title IX regulations, available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf>. Relevant excerpts are attached. The regulations take effect August 1, 2024, thus governing the 2024-25 academic year.

Defendants' argument that Title IX permits S.B.1100 is already meritless under current law. A new regulation confirms that conclusion and conclusively forecloses Defendants' argument. Defendants relied on 34 C.F.R. § 106.33, which permits sex separation in facilities. But language added to 34 C.F.R. § 106.31(a)(2) confirms that even where regulations permit sex separation, schools "must not" carry out such separation in a manner that subjects a person to more than de minimis harm. Attachment A at 1524. This language further specifies that



preventing participation “consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.” *Id.*

As the Department explains, schools can “separate students on the basis of sex in contexts where separation is generally not harmful, and § 106.31(a)(2) does not change that.” *Id.* at 1270. But where separation causes more than de minimis harm, “such as when it denies a transgender student access to a sex-separate facility ... consistent with that student’s gender identity,” it violates Title IX’s nondiscrimination mandate. *Id.* at 1268. That holds true “even if ‘sex’ under Title IX were to mean only sex assigned at birth.” *Id.* at 1277.

The Department’s accompanying discussion is also relevant to several issues addressed by Plaintiffs:

- the substantial harm to transgender students from being excluded from facilities matching their gender identity (Attachment B at 1268 and 1272-73; Pls.Opening.Br.54-59);
- the import of *United States v. Virginia* (Attachment B at 1269-70; Pls.Reply.Br.13-14);
- schools’ ability to protect safety and privacy without discriminating against transgender students (Attachment B at 1274-75; Pls.Reply.Br.10-18);

- the statute governing “living facilities” such as university dormitory housing, 20 U.S.C. § 1686, is not the statutory authority for the restroom regulation (Attachment B at 1276-77; Pls.Reply.Br.22 n.10);
- a regulation cannot override Title IX’s statutory nondiscrimination mandate (Attachment B at 1278; Pls.Opening.Br.49 n.9); and
- Title IX itself provides notice under the Spending Clause (Attachment C at 1218-19; Pls.Reply.Br.25).

Respectfully submitted,

s/ Peter C. Renn

Peter C. Renn
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on April 23, 2024. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

s/ Peter C. Renn

Peter C. Renn

Attachment A

or related conditions, or adopt or implement any policy, practice, or procedure that so discriminates; and

(iii) Make a pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss or Mrs.” A recipient may ask an applicant to self-identify their sex, but only if this question is asked of all applicants and if the response is not used as a basis for discrimination prohibited by this part.

§ 106.30 [Removed]

14. Section 106.30 is removed.

15. Section 106.31 is amended by revising paragraph (a) to read as follows:

§ 106.31 Education programs or activities.

(a) *General.*

(1) Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance.

(2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person’s gender identity subjects a person to more than de minimis harm on the basis of sex.

(3) This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of:

(i) A recipient to which subpart C does not apply; or

(ii) An entity, not a recipient, to which subpart C would not apply if the entity were a recipient.

* * * * *

16. Section 106.40 is revised to read as follows:

§ 106.40 Parental, family, or marital status; pregnancy or related conditions.

(a) *Status generally.* A recipient must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy or related conditions.*

(1) *Nondiscrimination.* A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions. A recipient does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.

(2) *Responsibility to provide Title IX Coordinator contact and other information.* A recipient must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator's contact information and informs

Attachment B

shall provide equal athletic opportunity for members of both sexes”), *with, e.g.*, 34 CFR 106.21(a) (“No person shall, on the basis of sex, be denied admission . . .”).

Consistent with the longstanding athletics regulations, § 106.31(a)(2) does not apply to permissible sex separation of athletic teams. The Department of Education issued a notice of proposed rulemaking that would, if finalized, provide a standard for criteria for a student’s eligibility to participate on sex-separate athletic teams in the future. *See* Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 FR 22860 (Apr. 13, 2023) (Athletics NPRM). The Athletics NPRM said a categorical ban on transgender students playing sports consistent with their gender identity would not satisfy the proposed regulation, but more targeted criteria, substantially related to sport, level of competition, and grade or education level, could be permissible. The Department is continuing to evaluate comments on that proposed regulation, and will issue its final rule on this standard for criteria for a student’s eligibility to participate on sex-separate athletic teams in the future. Until that rule is finalized and issued, the current regulations on athletics continue to apply.

Changes: To clarify the scope of § 106.31(a)(2), the Department is replacing “unless otherwise permitted by Title IX or this part” with “except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations at §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b)”.

3. Participation Consistent with Gender Identity

Comments: Some commenters supported § 106.31(a)(2) because providing access to sex-separate activities and facilities consistent with a student’s gender identity aligns with Title IX’s statutory

text and purpose of ensuring that all students have equal opportunity to participate in federally funded education programs and activities free of sex discrimination, as well as case law interpreting Title IX and other sex discrimination laws.

Other commenters asserted that there is no basis in the statutory text or case law for the principle that treating a person inconsistent with their gender identity constitutes sex discrimination. Some commenters argued that § 106.31(a)(2) effectively eliminates the sex-based distinctions that Title IX allows. Some commenters noted that the Supreme Court in *Bostock* declined to prejudge questions about “sex-segregated bathrooms, locker rooms, and dress codes” and did not address whether treating a person inconsistent with their gender identity constitutes sex discrimination. 590 U.S. at 681. Other commenters asserted that § 106.31(a)(2) is at odds with *United States v. Virginia*, which recognized that sex-based classifications are sometimes permissible because certain “differences between men and women” are “enduring.” 518 U.S. at 533.

Some commenters argued that § 106.31(a)(2) elevates protections for transgender students over other students, especially cisgender girls and women.

Some commenters asked the Department to clarify how a recipient should determine a person’s gender identity for purposes of proposed § 106.31(a)(2); what medical, procedural or documentation requirements a recipient can impose on a person prior to permitting access to sex-separate facilities; and whether a recipient may require a student to disclose medical records and related information.

Some commenters asked the Department to clarify whether the prohibition on preventing students from participating consistent with their gender identity in § 106.31(a)(2) would apply to sex-separate restrooms, locker rooms, housing, classes or portions of classes, and academic

programs. Many commenters expressed concern about issues such as competitive fairness and safety in school athletic programs if § 106.31(a)(2) were applied to sex-separate athletic teams. Some commenters urged the Department to modify the proposed regulations to require recipients to provide gender-neutral facilities, noting, for example, that nonbinary students may not be fully accommodated by sex-separate facilities.

Some commenters said the de minimis harm standard could result in chilling protected speech both at an individual and group association level and feared that § 106.31(a)(2) would result in compelling and restricting speech in violation of the First Amendment.

Some commenters expressed concern about the propriety of students participating in education programs and activities consistent with their gender identity. Those commenters suggested that § 106.31(a)(2) would effectively eliminate single-sex spaces and could compromise some students' privacy and safety. Some commenters urged the Department to require that all students have access to a single-occupancy restroom or changing facility, or require transgender students to use separate facilities. Other commenters argued that requiring a student to use a separate facility can be stigmatizing and could result in the disclosure of a student's transgender status. Some commenters asked whether a recipient or a student organization would violate Title IX if they offer a transgender person a private alternative to sex-separate shared spaces, to be sensitive to their needs or preferences.

Some commenters noted that § 106.31(a)(2) is consistent with case law concluding that denying a student access to a recipient's education program or activity, including extracurricular activities or facilities, consistent with their gender identity causes students harm in violation of Title IX. Some commenters asserted that preventing students from participating in school consistent with their gender identity causes more than de minimis harm and stated that many

transgender students avoid school bathrooms or other sex-separate spaces at school because they do not feel safe using them. Some commenters argued that permitting students to participate in school consistent with their gender identity positively impacts their mental health and improves educational outcomes and noted that major organizations representing medical professionals support such policies. Other commenters argued that affirming a gender identity different than a person's sex assigned at birth could do more harm than good, particularly for young children. These commenters asserted that school policies that accept students' requests to treat them consistent with a gender identity that does not align with their sex assigned at birth are harmful.

Commenters asked the Department to clarify whether proposed § 106.31(a)(2) requires recipients to allow students to live in sex-separate housing consistent with gender identity. Some commenters felt that the Department's interpretation of 20 U.S.C. 1686 in the July 2022 NPRM—to permit sex separation in living facilities even when it causes more than de minimis harm—would conflict with *Grimm*'s analysis and Title IX's statutory text. Commenters also asked how proposed § 106.31(a)(2) applies in the context of random roommate assignment programs for students.

Some commenters argued that provisions permitting separation by "sex" should be interpreted to focus on physiological differences between males and females to align with contemporary dictionary definitions and courts' understanding of the term. Commenters noted that the original Title IX rulemaking did not mention "gender identity," and asserted that the current regulations permitting separation by sex (*e.g.*, bathrooms, locker rooms, and athletic teams) assume "sex" is limited to sex assigned at birth. One commenter argued that § 106.31(a)(2)'s focus on gender identity undermines the Department's statement in the July 2022 NPRM that Title IX does not depend on any particular definition of the term "sex." Some

commenters said that separating locker rooms, bathrooms, and shower facilities by sex assigned at birth is authorized by 20 U.S.C. 1686, citing *Adams*, 57 F.4th 791.

Discussion: The Department disagrees with commenters who assert that § 106.31(a)(2)'s articulation of a recipient's nondiscrimination obligation with respect to gender identity is inconsistent with Title IX. As explained in the July 2022 NPRM, *see* 87 FR 41535, courts have recognized that, except as otherwise provided in the statute, Title IX prohibits all sex discrimination, including gender identity discrimination in federally funded education programs and activities, and that students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity. *See, e.g., Whitaker*, 858 F.3d at 1045–46 (discussing district court's findings, based on expert testimony, that denying transgender student's access to a sex-separate education program or activity consistent with his gender identity imposed significant harm on his mental health and overall well-being in violation of Title IX); *Grimm*, 972 F.3d at 617–18 (holding that evidence that a transgender boy suffered physical, emotional, and dignitary harms as a result of being denied access to a sex-separate program or activity consistent with his gender identity was sufficient to constitute sex-based harm prohibited under Title IX); *Bd. of Educ. Of the Highland Loc. Sch. Dist.*, 208 F. Supp. 3d at 870–71 (describing stigma and isolation and interference with learning caused by district's exclusion of transgender girl from a sex-separate education program or activity consistent with her gender identity and concluding that such harm is sufficient to demonstrate a Title IX violation).

The Department disagrees that § 106.31(a)(2) is inconsistent with Supreme Court precedent, including *Bostock* and *Virginia*. 87 FR 41532. Under *Bostock*, treating a person worse because their sex assigned at birth differs from their gender identity is sex discrimination under

Title IX, just as it is under Title VII. 87 FR 41532 (citing *Bostock*, 590 U.S. at 659–62). *Bostock*, however, did not purport to address the specific question of whether sex separation in bathrooms or locker rooms “might not qualify as unlawful discrimination or find justifications under other provisions” of the law, 140 S. Ct. at 1753, which is the question the Department addresses here with respect to Title IX.

The Department has determined, based on a careful reading of Title IX and each of its statutory provisions, that sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination. However, when such separation imposes more than de minimis injury on a protected individual, *see Bostock*, 590 U.S. at 681, such as when it denies a transgender student access to a sex-separate facility or activity consistent with that student’s gender identity, this would violate Title IX’s general nondiscrimination mandate, 20 U.S.C. 1681. The Department recognizes, however, that the statute created exceptions to that general nondiscrimination mandate in 20 U.S.C. 1681(a)(1)–(9), and also carved out from its general nondiscrimination mandate the maintenance of sex-separate living facilities in 20 U.S.C. 1686; and Congress further recognized that the unique circumstances of athletics also merit a different approach to addressing sex discrimination in that context, as reflected in the Department’s promulgation of §§ 106.41(b) and (c). Therefore, as explained above and in the July 2022 NPRM, the Department interprets those provisions to mean that, in those contexts, recipients may carry out sex-specific policies and practices in a manner that may cause more than de minimis harm to a protected individual. 87 FR 41536.

Title IX protects students from sex discrimination, including sex-based harassment, in a recipient’s education program or activity, including when they access sex-separate facilities. This protection applies with equal force to all students, including transgender and nonbinary students.

Under § 106.31(a)(2), a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm. Title IX also prohibits sex-based harassment, including when students access sex-separate facilities. Section 106.31(a)(2) does not specify how a recipient must provide access to sex-separate facilities for students who do not identify as male or female. For nonbinary students, a recipient may, for example, coordinate with the student, and the student's parent or guardian as appropriate, to determine how to best provide the student with safe and nondiscriminatory access to facilities, as required by Title IX. Under § 106.44(a), a recipient must respond promptly and effectively when it knows of conduct that reasonably may constitute sex discrimination, including sex-based harassment, in its education program or activity, including in any sex-separate facilities.

The Department disagrees with commenters who argued that this interpretation of Title IX is inconsistent with the Supreme Court's recognition in *Virginia* that physiological differences can sometimes justify sex-based classifications. Title IX's statutory prohibition on sex discrimination is "narrower in some respects and broader in others" than the substantive rights and protections guaranteed under the Equal Protection Clause. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009). Thus, although equal protection case law may inform the Department's interpretation, the Department does not read *Virginia* as opining on the scope of Title IX's statutory exceptions. But some lessons from *Virginia* are instructive in the Title IX context. For instance, *Virginia* recognized that, unlike in the context of race or national origin classifications, some sex-based classifications may be constitutionally permissible because of enduring physical differences between the sexes. *Virginia*, 518 U.S. at 533. Like *Virginia*, § 106.31(a)(2) acknowledges that there are circumstances in which sex differentiation is not presumptively discriminatory. Nonetheless, *Virginia* goes on to hold that reliance on these

generalized differences alone cannot substantiate a categorical sex-based exclusion from an education program under the Equal Protection Clause. 518 U.S. at 533. To do so would be to rely on the “notably circular argument” that separation on the basis of sex can serve as both an institution’s discriminatory means and its justifiable end under the intermediate scrutiny analysis. *See id.* at 544–45 (“Virginia and VMI trained their argument on ‘means’ rather than ‘end,’ and thus misperceived our precedent.”).

The Department also disagrees that § 106.31(a)(2) eliminates the sex-based distinctions permitted by Title IX. As explained in the July 2022 NPRM, the Department recognizes that Title IX does not treat all sex-based distinctions as impermissible discrimination. 87 FR 41534. The Department’s regulations have always recognized that recipients can separate students on the basis of sex in contexts where separation is generally not harmful, and § 106.31(a)(2) does not change that. However, consistent with Supreme Court precedent and Title IX’s general nondiscrimination mandate, § 106.31(a)(2) clarifies that when such otherwise permissible sex separation causes more than de minimis harm to a protected individual—and the harm is not otherwise permitted by Title IX—such harm cannot be justified or otherwise rendered nondiscriminatory merely by pointing to the fact that, in general, there are physical differences between the sexes.

Section 106.31(a)(2)’s prohibition on preventing students from participating consistent with their gender identity applies to any circumstance in which a recipient engages in permissible sex separation or differentiation, except when more than de minimis harm is permitted by the statute. For example, the text of § 106.31(a)(2) makes clear that it does not apply to sex-separate athletic teams permitted under 34 CFR 106.41(b). As noted above, Congress made clear that the Title IX regulations should reflect the fact that athletic competition raises unique considerations

and the Department's regulations have always permitted more than de minimis harm to individual students in the context of sex-separate athletic teams. On the other hand, § 106.31(a)(2) applies in contexts for which there is no statutory exception, such as sex-separate restrooms and locker rooms under § 106.33, and single-sex classes or portions of classes under § 106.34(a) and (b). The Department has always treated access to facilities and classes differently than athletics. Classes, for example, focus on learning skills and competencies and do not raise the unique issues that are present in sex-separate interscholastic or intercollegiate athletic competition. As explained in more detail below, a recipient can address any concerns about the application of § 106.31(a)(2) to contexts like classes and facilities without preventing students from participating consistent with their gender identity.

With respect to concerns that the “de minimis harm” standard will chill or otherwise limit protected speech, the Department reiterates that § 106.31(a)(2) generally prohibits a recipient from preventing a person from participating in school consistent with their gender identity. The provision does not in any way limit § 106.6(d), which states that nothing in the Title IX regulations requires a recipient to restrict any rights that would otherwise be protected from government action by the First Amendment; deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments; or restrict any other rights guaranteed against government action by the United States Constitution. The Department reaffirms that a recipient may not invoke Title IX to require restricting speech, expression, or conduct in violation of the First Amendment. Similarly, the Department also underscores that none of the amendments to the regulations change or are intended to change the commitment of the Department, through these regulations and OCR's administrative enforcement, to fulfill its obligations in a manner that is fully consistent with the

First Amendment and other guarantees of the Constitution of the United States. For additional information regarding Title IX and the First Amendment, see the discussion of Hostile Environment Sex-Based Harassment—First Amendment Considerations (§ 106.2).

With respect to commenters' questions about how a recipient should determine a person's gender identity for purposes of § 106.31(a)(2), the Department is aware that many recipients rely on a student's consistent assertion to determine their gender identity, or on written confirmation of the student's gender identity by the student or student's parent, counselor, coach, or teacher. However, requiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate in a recipient's education program or activity consistent with their gender identity imposes more than de minimis harm. In particular, a recipient may not require a person to provide documentation (such as an amended birth certificate or evidence of medical treatment) to validate their gender identity for purposes of compliance with § 106.31(a)(2) if access to such documentation is prohibited by law in that jurisdiction.

The Department agrees with commenters who noted the substantial harm transgender students experience when they are excluded from a sex-separate facility consistent with their gender identity, and § 106.31(a)(2) properly accounts for such harm. As detailed in the July 2022 NPRM, several Federal courts have found that excluding students from sex-separate facilities and activities consistent with their gender identity can impose significant harm on those students' mental health and overall well-being. 87 FR 41535. These findings are consistent with the guidelines published by well-established medical organizations, which say being able to live consistent with one's gender identity is critical to the health and well-being of transgender

youth.⁹⁰ To the extent there are also harms associated with being treated consistent with a gender identity that differs from one's sex assigned at birth, individuals (and their parents, as appropriate) are better positioned to weigh any harms and benefits for themselves than is an educational institution. Section 106.31(a)(2) therefore simply prohibits a recipient from adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity when that person seeks to participate consistent with their gender identity.

The Department disagrees that prohibiting more than de minimis harm in the context of sex-separate bathrooms and locker rooms would result in the elimination of the sex-based separation that Title IX allows in this context. Recipients continue to have discretion under these regulations to provide sex-separate facilities consistent with Title IX's nondiscrimination mandate; making Title IX's protections against sex-based harms explicit does not change that.

The Department also disagrees that § 106.31(a)(2) elevates protections for transgender students over cisgender students. The application of § 106.31(a)(2) is not limited to transgender students—and indeed protects all students from harm when a recipient separates or treats students differently based on sex. As explained in more detail above, § 106.31(a)(2) recognizes that students experience sex-based harm when they are excluded from sex-separate facilities consistent with their gender identity. However, based on the Department's enforcement experience, listening sessions with stakeholders, and its review of Federal case law, the Department is unaware of instances in which cisgender students excluded from facilities

⁹⁰ See World Professional Association for Transgender Health, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S1 (2022); Jason Rafferty et al., Am. Acad. of Pediatrics, *Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents* 142 Pediatrics 72 (2018); Tanya Albert Henry, *Exclusionary Bathroom Policies Harm Transgender Students*, American Medical Association (Apr. 17, 2019), <https://www.ama-assn.org/delivering-care/population-care/exclusionary-bathroom-policies-harm-transgender-students>.

inconsistent with their gender identity have experienced the harms transgender students experience as a result of exclusion from facilities consistent with their gender identity.

While the Department strongly agrees that recipients have a legitimate interest in protecting all students' safety and privacy, we disagree that such goals are inconsistent with § 106.31(a)(2). As noted in the July 2022 NPRM, a recipient can make and enforce rules that protect all students' safety and privacy without also excluding transgender students from accessing sex-separate facilities and activities consistent with their gender identity. 87 FR 41535; *see also, e.g.*, Rehearing Amicus Brief of School Administrators from Twenty-Nine States and the District of Columbia in Support of Plaintiff-Appellee Gavin Grimm, *Grimm*, 972 F.3d 586 (No. 19–1952), 2019 WL 6341095. The Department disagrees that it has disregarded potential harms to cisgender students.

The Department does not agree with commenters who alleged there is evidence that transgender students pose a safety risk to cisgender students, or that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interest. In many cases, Federal courts have rejected claims that treating students consistent with their gender identity necessarily harms cisgender students in violation of Title IX. For example, when plaintiffs have asserted only unsubstantiated and generalized concerns that transgender persons' access to sex-separate spaces infringes on other students' privacy or safety, courts have rejected those claims. *See, e.g.*, *Grimm*, 972 F.3d at 626 (Wynn, J., concurring); *Whitaker*, 858 F.3d at 1052 (holding that transgender student's presence provides no more of a risk to other students' privacy rights than does the presence of any other student in a sex-separate space); *Boyertown*, 897 F.3d at 521 (same); *Parents for Priv.*, 949 F.3d at 1228–29 (holding that “[t]he use of facilities for their intended purpose, without more, does not constitute an act of harassment

simply because a person is transgender”); *Cruzan v. Special Sch. Dist. # 1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam) (holding that a transgender woman’s mere presence in a sex-separate space did not constitute actionable sexual harassment of her women co-workers). The Supreme Court has also rejected the notion that the preferences or discomfort of some can justify otherwise unconstitutional discrimination against others. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

The Department also appreciates the opportunity to clarify that nothing in Title IX or the final regulations prevents a recipient from offering single-occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason. The Department agrees with commenters that access to gender-neutral or single-occupancy facilities may be helpful for accommodating students who do not want to use shared sex-separate facilities. The Department declines the suggestion to require that recipients provide gender-neutral or single-occupancy facilities because such facilities are not the only way a recipient could provide nondiscriminatory access to its facilities. In addition, the proposal would likely carry significant cost implications and it would be appropriate to seek public comment on this issue before making any such changes. Additionally, nothing in § 106.31(a)(2) prohibits recipients from taking nondiscriminatory steps to ensure privacy and safety for all students in a recipient’s sex-separate facilities—steps that many recipients already take consistent with their general codes of conduct, including rules prohibiting harassment, assault, and other forms of misconduct.

The Department has previously made clear that all students are protected from sex discrimination under Title IX, and that a recipient generally must treat transgender students consistent with their gender identity with respect to their participation in single-sex classes and activities. *See* U.S. Dept of Educ., Office for Civil Rights, Questions and Answers on Title IX

and Single-Sex Elementary and Secondary Classes and Extracurricular Activities, at 25 (Dec. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/faqs-title-ix-single-sex-201412.pdf>. The Department recognizes that § 106.31(a)(2) interprets Title IX differently from the 2021 Rubinstein Memorandum. The Department explained in detail in the July 2022 NPRM why it disagreed with the reasoning in that archived memorandum. *See* 87 FR 41536–37. The Rubinstein Memorandum’s suggestion that Title IX requires separation according to sex assigned at birth or that treating a student inconsistent with their gender identity does not implicate Title IX is at odds with Title IX’s text and purpose and the reasoning of the courts that had considered the issue. The Department reiterates that § 106.31(a)(2) is consistent with Federal case law on this point, *see, e.g., Metro. Sch. Dist. of Martinsville*, 75 F.4th 760; *Grimm*, 972 F.3d 586; *Whitaker*, 858 F.3d 1034, and to the extent some courts have come to a different conclusion, *see, e.g., Adams*, 57 F.4th 791; *Bridge v. Okla. State Dep’t of Educ.*, No. CIV-22-00787, 2024 WL 150598, at *8 (W.D. Okla. Jan. 12, 2024); *Roe v. Critchfield*, No. 1:23-cv-00315, 2023 WL 6690596, at *1 (D. Idaho Oct. 12, 2023), the Department does not agree with those courts’ interpretation of Title IX for the reasons that follow.

For example, in *Adams*, the Eleventh Circuit held that a school district policy preventing a transgender boy from using the boys’ restroom did not violate Title IX because the Court determined that “sex” as used in Title IX can only refer to “biology and reproductive function,” not gender identity, 57 F.4th at 812–15, and that restrooms are covered by a statutory provision permitting a recipient to maintain “separate living facilities for the different sexes,” *id.* at 812–15 (quoting 20 U.S.C. 1686). The Department determined that it is not necessary to resolve the question of what “sex” means in Title IX for the Department to conclude that no statutory provision permits a recipient to discriminate against students—*i.e.*, to subject them to more than

de minimis harm—in the context of maintaining certain sex-separate facilities or activities. In particular, contrary to the reasoning in *Adams*, even if “sex” under Title IX were to mean only sex assigned at birth, Title IX’s “living facilities” provision, does not permit a recipient to subject a person to more than de minimis harm on that basis in any context *except* living facilities. As explained in the July 2022 NPRM, 20 U.S.C. 1686 specifically carves out from Title IX’s general statutory prohibition on sex discrimination an allowance for recipients to maintain sex-separate living facilities. 87 FR 41536; 20 U.S.C. 1686 (“Notwithstanding anything to the contrary contained in [Title IX],” nothing in Title IX “shall be construed to prohibit any educational institution . . . from maintaining separate living facilities for the different sexes.”). And it provides the statutory basis for the Department’s housing provision at § 106.32(b)(1). But that carve-out does not apply to the remainder of § 106.32 or to any other aspects of a recipient’s education program or activity for which Title IX permits different treatment or separation on the basis of sex, such as bathrooms, locker rooms, or shower facilities—regulations that the Department adopted under different statutory authority, and which have long been addressed separately from “living facilities.” The Department notes that when HEW adopted the original Title IX regulations, it cited section 907 of the Education Amendments (20 U.S.C. 1686) as one of the sources of its statutory authority for the housing provision, 40 FR 24141 (codified at 45 CFR 86.32 (1975)), whereas it cited only sections 901 and 902 of the Education Amendments (20 U.S.C. 1681–1682) as its statutory authority for the provision governing toilet, locker room, and shower facilities, 40 FR 24141 (codified at 45 CFR 86.33 (1975)), and the Department of Education retained those authorities when it adopted its own Title IX regulations in 1980. 45 FR 30955 (May 9, 1980) (codified at 34 CFR 106.32 and 106.33). As the statutory sources cited in the text of the regulations themselves demonstrate, a recipient’s provision of separate bathrooms

and locker rooms is governed not by 20 U.S.C. 1686, but by the statute’s general nondiscrimination mandate, 20 U.S.C. 1681. And § 106.33 “cannot override the statutory prohibition against *discrimination* on the basis of sex.” *Grimm*, 972 F.3d at 618 (emphasis in the original). The *Adams*’ court’s reasoning therefore cannot be reconciled with Title IX’s plain text and ignores that Congress could have, but did not, address anything other than the practice of maintaining sex-separate “living facilities” in 20 U.S.C. 1686. *See* 87 FR 41536 (“Congress’s choice to specify limited circumstances where harm resulting from sex separation is permitted illustrates that, outside of those contexts, Title IX’s general prohibition on sex discrimination prohibits such harm.”). The Department therefore declines to adopt the Eleventh Circuit’s reasoning in *Adams* that the statutory carve out for living facilities governs the interpretation of § 106.33, the Department’s regulations on bathrooms and locker rooms, or any other regulatory provision other than housing, 34 CFR 106.32(b)(1).

With respect to commenters’ questions about whether § 106.31(a)(2) prohibits a recipient from excluding students from sex-separate housing consistent with their gender identity, it does not, because of the express carve-out for sex-separate living facilities under 20 U.S.C. 1686. But that is the extent of the reach of 20 U.S.C. 1686, and nothing in the statute or final regulations precludes a recipient from voluntarily choosing to adopt policies that enable transgender students to access sex-separate housing consistent with their gender identity.

Changes: None.

4. Parental Rights

Comments: Some commenters expressed concern that proposed § 106.31(a)(2) would prevent schools from respecting a parent’s wishes regarding how their child should be treated and urged the Department to clarify parental rights in this context. Some commenters asserted that in most

Attachment C

recognized that Title VII’s prohibition on sex discrimination encompasses discrimination based on a failure to conform to stereotypical gender norms.

Federal courts’ more recent analyses of Title IX’s coverage of sexual orientation and gender identity discrimination are more persuasive because they apply *Bostock* and *Price Waterhouse* and acknowledge the full scope of Title IX’s prohibition on sex discrimination. *See, e.g., Grabowski*, 69 F.4th at 1113 (Title IX prohibits sexual orientation discrimination); *Grimm*, 972 F.3d at 616 (Title IX prohibits gender identity discrimination); *Whitaker*, 858 F.3d at 1049 (same); *cf. Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808–09 (11th Cir. 2022) (recognizing that *Bostock* held that discrimination because a person is gay or transgender “necessarily entails discrimination based on sex,” but opining that this holding did not resolve the question of whether a school board’s policy excluding transgender students from bathrooms consistent with their gender identity was otherwise permissible under Title IX).

Although Congress has not amended Title IX to clarify its application to sexual orientation and gender identity discrimination, the Department agrees with the Supreme Court that “congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” *LTV Corp.*, 496 U.S. at 650 (citations and quotations omitted). The Department’s interpretation of Title IX flows from the statute’s “plain terms,” *see Bostock*, 590 U.S. at 662–63, 674–76, and is consistent with the recent analysis of the statute’s text and structure by various Federal courts, *see Grabowski*, 69 F.4th at 1113; *Grimm*, 972 F.3d at 616.

The Department disagrees with commenters who argued that Title IX’s contractual nature demands a narrow reading of the law or that § 106.10 constitutes an unfair surprise or retroactive

condition. While Title IX is in the nature of a contract, under Congress’s Spending Clause authority, recipients have been on notice since enactment of Title IX that the statute means that no recipient may discriminate on the basis of sex. *See Jackson*, 544 U.S. at 175 (“Because Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.”); *see also Bennett*, 470 U.S. at 665–66, 673 (noting that “the possibility that application of [the condition] might be unclear in [some] contexts” does not render it unenforceable under the Spending Clause); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 184, 286 n.15 (1987) (holding that individuals with contagious diseases are covered by Section 504 and rejecting lack of notice objections given Spending Clause statute’s broad nondiscrimination mandate); *Grimm*, 972 F.3d at 619 n.18. Moreover, the notice required for the Spending Clause is satisfied by the text itself; just as the Supreme Court held in *Bostock* regarding Title VII, it is clear from the statutory text that, by its plain terms, Title IX covers discrimination that, like sexual orientation and gender identity discrimination is based on “sex.” *Cf. Bostock*, 590 U.S. at 662–63 (holding Title VII’s prohibition on discrimination on the basis of sexual orientation or gender identity flows from the statute “plain terms”). Further, this rulemaking process has afforded recipients notice and opportunity to comment, and recipients that do not wish to comply with the requirements of the final regulations have had and continue to have the opportunity to decline Federal funding. Further, the Department will not—and does not have the authority to—enforce these final regulations retroactively; they apply only to sex discrimination that allegedly occurred on or after August 1, 2024.

Consistent with Title IX, the final regulations provide for an appropriate balance between State and Federal authority. By statute, Congress has conferred authority on the Department to