

## **Suggested Comment for FAIR Supporters**

I write to request amendment of the proposed Title IX regulations on several grounds.

The proposed regulations would require schools to allow students to access single-sex sports and facilities that align with their gender identity. As such, they elevate gender identity-based rights over sex-based rights. It is legitimate and reasonable to protect sex-based spaces for reasons of safety, privacy, and fairness. That decision should be made by individual institutions or through the democratic process, and not mandated by the executive branch of the federal government. Additionally, to comply with the regulations, schools and universities would need to have either all-gender sports teams, locker rooms, and dormitories, or a separate team and facility for any number of potential gender identities beyond male and female that people use.

The proposed definition of “sex-based harassment” is much broader than the definition established by the Supreme Court, and will result in individuals being disciplined for conduct that does not rise to the level of harassment under federal law. The Department must apply the standard recognized by the Supreme Court. The proposed definition will also enable schools and universities to punish individuals for civilly declining to use the preferred pronouns of others. Although the regulations protect First Amendment rights, they make no allowance for *state* free speech rights, such as California’s statute giving students at private high schools and universities the same speech rights they have off campus.

The proposed regulations deny due process norms that are foundational to American society. They would require school and university employees to report anything they see or overhear that “may” constitute sex discrimination. That means grievance procedures could be launched based on suspicions alone and without anything similar to probable cause. Additionally, they would grant a school’s Title IX Coordinator plenary power over the grievance process: that person could initiate complaints, preside over hearings, determine what questions can be asked, decide guilt, and determine remedies, all in the same case. Those roles must be diffused among different persons for the protection of all parties. The Title IX Coordinator may also remove students from their classes and housing and place them in “education programs” immediately after a report has been filed and before the adjudication process has begun. Although the regulations call such measures “non-punitive,” they would likely be considered unjust punishment by an accused who has not yet been found guilty of anything. Moreover, in sex-based harassment proceedings involving university students, the proposed regulations change the requirement of “equal” access to evidence to “equitable” access to evidence, allowing universities to withhold evidence from one party if they believe it is “equitable” to do so.

I urge the Department to amend the proposed regulations as follows:

1. 106.2: Replace the first sentence of “hostile environment harassment” with: “Unwelcome conduct that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the person’s educational experience, that the person is effectively denied equal access to the recipient’s resources and opportunities.”
2. 106.6(d): Add as subsection (3): “Restrict any rights that would otherwise be protected under any State law guaranteeing free speech.”

3. 106.10: Add at the end, “Notwithstanding, recipients shall not be precluded from separating based on biological sex rather than gender identity when reasonable to ensure privacy, safety, and fairness.”
4. 106.31(a)(2): Delete the last sentence and replace with, “Recipients with sex-specific facilities, activities, and programs shall not be required to establish facilities, activities, or programs for gender identities other than male and female.”
5. 106.44: Replace “conduct that may constitute sex discrimination under Title IX” with “conduct the employee reasonably believes constitutes sex discrimination under Title IX,” delete subsection (f)(5), and add to (g)(2), “No supportive measure that results in the involuntary removal of the respondent from any class, any athletic activity, or the respondent’s housing, or that requires the respondent to participate in counseling, training, or education programs, may be imposed without a finding of probable cause that sex discrimination occurred.”
6. 106.45(b)(2): Replace the last sentence with, “The decision-maker may not be the same person as the Title IX Coordinator or investigator.”
7. 106.48(e)(7): Add as subsection (v), “The term ‘equitable access to the evidence’ refers to the manner and mode of delivery of evidence, and shall not be read as permitting a postsecondary institution to withhold any relevant and not otherwise impermissible evidence from any party.”