UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

September 1, 2020

Ms. Penny Nance
CEO and President
Concerned Women for America
P.O. Box 34300
Washington, DC, 20043
Via email: DDenny@cwfa.org

Dear Ms. Nance:

I would like to thank you for your June 25, 2020, letter to Secretary DeVos expressing support for the efforts of the Trump Administration and the U.S. Department of Education (Department) to protect female student athletes under Title IX of the Education Amendments Act of 1972 (Title IX). Your letter has been forwarded to me, and I am pleased to provide this response.

Secretary DeVos and I share your commitment to ensuring that Title IX is vigorously enforced at every level of education. The Department's Office for Civil Rights (OCR) is responsible for enforcing Title IX, and the Department remains committed to the full, fair, and effective enforcement of that statute. Please be assured that OCR will continue to investigate all complaints under Title IX thoroughly, including those related to female athletics. In your letter, you express concern regarding the impact of the U.S. Supreme Court's opinion in the *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020). The Department has carefully reviewed the Supreme Court's decision before reaching its position, which is outlined below.

The *Bostock* decision was narrowly decided under Title VII of the Civil Rights Act of 1964, and by its own terms, does not control Title IX. The Department does not enforce Title VII. Indeed, Congress specifically designed Title VII to apply only to workplaces. *Bostock*, 140 S. Ct. at 1737("[I]n Title VII, Congress outlawed discrimination in the workplace."). By contrast, both the text and the purpose of Title IX and its implementing regulations are different than those of Title VII. In fact, in cases addressing educational environments under Title IX, the Supreme Court has recognized the significant differences between workplaces and schools by noting that courts "must bear in mind that schools are unlike the adult workplace." *Davis v. Monroe*, 526 U.S. 629, 651 (1999). In *Bostock* itself, the Court firmly rejected the idea that its holding would sweep across all statutory or regulatory provisions that prohibit sex discrimination. *Bostock*, 140 S. Ct. at 1753 ("[N]one 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."). Thus, *Bostock* does not control the Department's interpretation of Title IX.

Even assuming that the Court's reasoning in *Bostock* applies to Title IX—a question the Court expressly did not decide—the Court's opinion in *Bostock* would not affect the Department's position that its Title IX regulations authorize single-sex sports teams. *See* 34 C.F.R. § 106.41. The *Bostock* decision states that "[a]n individual's homosexuality or transgender status is not relevant to employment decisions" because an employee's sex is not relevant to employment

decisions, and "[s]ex plays a necessary and undisguisable role in the decision" to fire an employee because of the employee's homosexual or transgender status. *Bostock*, 140 S. Ct. at 1741, 1737. Conversely, however, there are circumstances in which a person's sex *is* relevant, and distinctions based on the two sexes in such circumstances are permissible because the sexes are not similarly situated. Congress recognized as much in Title IX itself when it provided that nothing in the statute should be construed to prohibit "separate living facilities for the different sexes." *See, e.g.*, 20 U.S.C. §1686; *see also* 34 C.F.R. § 106.32(b) (permitting schools to provide "separate housing on the basis of sex" as long as housing is "[p]roportionate" and "comparable"); 34 C.F.R. § 106.33 (permitting "separate toilet, locker room, and shower facilities on the basis of sex," so long as the facilities "provided for students of one sex shall be comparable to such facilities provided for students of the other sex").

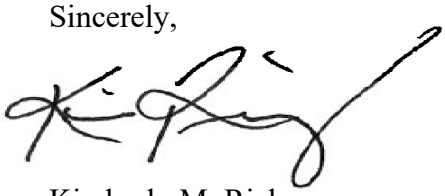
The Department's regulations validly clarify the scope of a recipient's non-discrimination duties under Title IX in the case of sex-specific athletic teams. The Supreme Court's opinion in *Bostock* does not affect the Department's position that its Title IX regulations authorize single-sex teams based only on biological sex at birth—male or female—as opposed to a person's gender identity. The Court states that its *Bostock* ruling is based on the "assumption" that sex is defined by reference to biological sex, and its ruling in fact rests on that assumption. *See Bostock*, 140 S. Ct. at 1741. The logic that an employer must treat males and females as similarly situated comparators for Title VII purposes necessarily relies on the premise that there are two sexes, and that the biological sex of the individual employee is necessary to determine whether discrimination because of sex occurred. Under such reasoning, where separating students based on sex is permissible—for example, with respect to sex-specific sports teams—such separation must be based on biological sex.

We note that the holding in *Bostock* states that "sex" is a necessary component of discrimination on the basis of homosexuality or transgender status, based on the rationale that an employer who fires an individual for being homosexual or transgender does so based on traits or actions it would not have questioned in members of the opposite sex. The holding in *Bostock* thus makes clear that discrimination, specifically based on someone's status as homosexual or transgender, may constitute discriminatory conduct on the basis of sex. However, a recipient does not target transgender individuals for discriminatory treatment merely because it distinguishes students by or accounts for biological sex. Nor, of course, must recipients locate a specific exception in Title IX or its implementing regulations in order to establish that their conduct which considers sex does not constitute discrimination under Title IX. This is consistent with the Department's overall position that all students should be free from discrimination and harassment and are entitled to a safe and effective learning environment.

Neither the holding nor the reasoning in *Bostock* requires OCR to change its position regarding Title IX cases involving student athletes who identify as transgender. The Department will continue to pursue its enforcement of complaints, such as the one described in the Revised Letter of Impending Enforcement Action issued to the Connecticut Interscholastic Athletic Conference and Glastonbury Public Schools, among others (available here). Consistent with this Administration's ongoing commitment to non-discrimination and equal opportunity, the Department will continue to vigorously support and protect female student athletes under Title IX.

Thank you for your continued interest in the work of the Department.

Sincerely,



Kimberly M. Richey
Acting Assistant Secretary for Civil Rights