



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I
5 POST OFFICE SQUARE, 8th FLOOR
BOSTON, MASSACHUSETTS 02109-3921

October 16, 2020

President Kim Mooney
By email: president@franklinpierce.edu

Re: Complaint No. 01-20-2023
Franklin Pierce University

Dear President Mooney:

This letter is to advise you of the outcome of the complaint that the U.S. Department of Education (Department), Office for Civil Rights (OCR) received against Franklin Pierce University (University). The complaint alleges that the University denies female student-athletes equal athletic benefits and opportunities by permitting transgender athletes to participate in women's intercollegiate athletic teams.

OCR enforces Title IX, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving federal financial assistance from the Department. Because the University receives federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

OCR determined that it has jurisdiction and that the allegation was timely filed, and therefore opened the following issue for investigation:

Whether the University denies female student-athletes equal athletic benefits and opportunities by permitting transgender athletes to participate in women's intercollegiate athletic teams, in violation of 34 C.F.R. § 106.41.

Prior to the completion of OCR's investigation, the University requested to resolve the compliance review under Section 302 of OCR's *Case Processing Manual* (CPM), and OCR determined that it was appropriate to resolve this matter pursuant to the enclosed Resolution Agreement.

Legal Standard

Subpart D of the regulation implementing Title IX prohibits discrimination on the basis of sex in education programs and activities. 34 C.F.R. § 106.31(b)(7) of Subpart D states that in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex, limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.41 of Subpart D specifically applies to athletics. The regulation implementing Title IX, at 34 C.F.R. § 106.41(a), states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against, in

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

any interscholastic athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. The regulation implementing Title IX, at 34 C.F.R. § 106.41(b), states that, notwithstanding the requirements of 34 C.F.R. § 106.41(a), a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.¹ The regulation implementing Title IX, at 34 C.F.R. § 106.6(c), states that the obligation to comply with the regulation is not obviated or alleviated by any rule or regulation of any athletic or other league, which would render any student ineligible to participate or limit the eligibility or participation of any student, on the basis of sex, in any education program or activity operated by a recipient.

The Supreme Court’s holding in *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020), does not alter the relevant legal standard under 34 C.F.R. § 106.41, or how that provision interacts with 34 C.F.R. § 106.31 or 34 C.F.R. § 106.6. In *Bostock*, the U.S. Supreme Court held that an employer violated Title VII of the Civil Rights Act of 1964 by terminating a transgender employee on the basis of their transgender status. *See Bostock*, 140 S. Ct. at 1743 (“For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.”). However, the Court expressly declined to decide questions about how its interpretation of Title VII would affect other statutes:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none 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.

Id. at 1753. Indeed, the Court clearly stated that the “only question before [it] is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’” *Id.*

The Court’s holding was consistent with the position of the transgender employee who filed suit in a companion case to *Bostock—R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 1731 (2020). During oral argument before the U.S. Supreme Court, the employee’s counsel conceded that the outcome of the case was not relevant, one way or another, to the question of whether a recipient’s willingness to allow a biological male who identified as a transgender female to compete against biological females constituted a violation under Title IX:

JUSTICE GINSBURG: [T]his is a question of someone who has transitioned from male to female ... and wants to play on the female team. She is not questioning separate female/male teams. But she was born a man. *She has transitioned. She*

¹ Where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. 34 C.F.R. § 106.41(b).

wants to play on the female team. Does it violate Title IX which prohibits gender based discrimination?

MR. COLE: Right. And I think *the question again would not be affected even by the way that the Court decides this case*, because the question would be, is it permissible to have sex-segregated teams, yes, where they involve competitive skill or – or contact sports, and then the question would be, how do you apply that permissible sex segregation to a transgender individual?

Oral Arg. Tr., *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107, at 17-18, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf. (emphasis added). After reviewing *Bostock*, the Office for Civil Rights concurs with counsel for the employee’s concession in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, that the *Bostock* holding does not alter the legal authority for sex-segregated teams under Title IX. Even if *Bostock* applied to Title IX—a question the Supreme Court expressly declined to address—its reasoning would only confirm that Title IX does not permit a biologically male student to compete against females on a sex-segregated team or in a sex-segregated league.

As an initial matter, despite some similarities, Title IX differs from Title VII in important respects. Title IX has different operative text, is subject to different statutory exceptions, and is rooted in a different Congressional power. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275, 286-87 (1998). Significantly, unlike Title VII, one of Title IX’s crucial purposes is protecting women’s and girls’ athletic opportunities. Indeed, Title IX was passed, and implemented by regulations, to prohibit discrimination on the basis of sex in education programs and activities and to protect equal athletic opportunity for students who are biological females, including providing for sex-segregated athletics. Congress specifically mandated that the Department of Education consider promulgating regulations to address sports. After first enacting Title IX, Congress subsequently passed another statute, entitled the Javits Amendment, which instructed the Secretary of Education to publish regulations “implementing the provisions of Title IX . . . which shall include with respect to intercollegiate activities reasonable provisions considering the nature of the particular sports.” Public Law 93–380 (HR 69), Section 844, 88 Stat 484 (August 21, 1974). Congress indicated in the same bill that following the publication of those regulations, Congress itself would review the regulations and determine whether they were “inconsistent with the Act from which [they] derive[] [their] authority.” *Id.*

Pursuant to the Javits Amendment, the Secretary of Health, Education, and Welfare subsequently published Title IX regulations, including regulatory text identical to the current text of the athletics regulations. After Congressional review over six days of hearings, Congress ultimately allowed the regulations to go into effect, consistent with its prior statement that Congress itself would review the regulations to ensure consistency with Title IX. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004) (laying out the history of the Javits Amendment, and the response from Congress to the regulations promulgated thereunder). In doing so, Congress deemed the Department’s athletics regulations to be consistent with Title IX.

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. *See Cohen v. Brown Univ.*, 991 F.2d 888,

895 (1st Cir. 1993) (“The degree of deference [to the Department of Education] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.”). Specifically, although the Department’s regulations have long generally prohibited schools from “provid[ing] any athletics separately” on the basis of sex, they permit schools to “operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. § 106.41(a), (b). In those circumstances, men and women are not similarly situated because of their physiological differences, and separating them based on sex is accordingly not prohibited by Title IX. *See Bostock*, 140 S. Ct. at 1740 (“To ‘discriminate against’ a person, then, would seem to mean treating that individual worse than others who are similarly situated.”). Thus, schools may offer separate-sex teams. Indeed, such separate-sex teams have long ensured that female student athletes are afforded an equal opportunity to participate. 34 C.F.R. § 106.41(c)(1). Those regulations authorize single-sex teams because physiological differences are relevant.

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 regulations authorize single-sex teams under the terms of 34 C.F.R. § 106.41(b). The *Bostock* decision states, “An individual’s homosexuality or transgender status is not relevant to employment decisions” because an employee’s sex is not relevant to employment decisions, and “[se]x 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 Court’s opinion in *Bostock* also does not affect the Department’s position that its 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 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 (“[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”). 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. 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.

Additionally, if *Bostock*'s reasoning under Title VII were applied to policies regarding single-sex sports teams under Title IX, it would confirm that the Department's regulations authorize single sex teams only based on biological sex. In *Bostock*, the Court took the position that "homosexuality and transgender status are inextricably bound up with sex," such that "when an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex." See *id.* at 1742, 1744. Under that logic, special exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete. For all of these reasons, the Department continues to interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams "for members of *each sex*" (emphasis added), to mean operation of teams for biological males, and for biological females, and does not interpret Title IX to authorize separate teams based on each person's transgender status, or for members of each gender identity. When a recipient provides "separate teams for members of each sex" under 34 C.F.R. § 106.41(b), the recipient must separate those teams on the basis of biological sex, and not on the basis of homosexual or transgender status.

The holding in *Bostock* addressed the context of an employment situation in which a distinction based on sex was prohibited and not permitted under Title VII. The *Bostock* holding does not alter the legal authority for single-sex athletic teams under Title IX because Title IX and its implementing regulations permit certain distinctions based on sex under 34 C.F.R. 106.41(b).

Summary of Investigation to Date

In September 2018, the University adopted a policy to govern the participation of transgender student athletes in its intercollegiate athletics program, titled the "Transgender Participation and Inclusion Policy" (Policy). The Policy states that its provisions "closely follow the recommendations of the NCAA" and are "[c]onsistent with NCAA policies and bylaws." The Policy generally provides that a "transgender student-athlete should be allowed to participate in any sports activity," with guidelines and restrictions regarding testosterone use and suppression as follows:

With respect to transgender student athletes who are undergoing hormone treatment, the Policy states:

A male to female (MTF) transgender student athlete who is taking hormone treatment related to gender transition will be considered male for eligibility purposes and counted as a male student athlete until she completes one year of hormone treatment related to gender transition, including testosterone suppression. After one year of treatment, she will be eligible and counted as female. If she decides to compete on a men's or mixed team before completing one year of

hormone treatment, she will be entitled to be treated as female for all other purposes.

A female to male (FTM) transgender student athlete who is taking prescribed testosterone related to gender transition may not participate on a women's team after beginning the hormone treatment. Instead, he may compete on a men's team and will be counted as male in a mixed team after obtaining a medical exemption for testosterone use from the NCAA.

....

With respect to transgender student athletes who are *not* undergoing hormone treatment, the Policy states:

Any transgender student athlete who is not taking hormone treatment related to gender transition may compete in intercollegiate sport consistent with the sex the student athlete was designated at birth.

A female to male (FTM) transgender student athlete who is not taking prescribed testosterone related to gender transition may participate on a men's or women's team and will not convert a women's team into a mixed team.

A male to female (MTF) transgender student athlete who is not taking prescribed hormone treatment related to gender transition may not participate on a women's team and will be counted as a male student athlete in determining whether a team is a mixed team. Nevertheless, if she decides to participate on a men's or mixed team, she is to be treated as female for all other purposes as outlined in the following sections of this policy.

OCR confirmed that, as stated in the Policy, the provisions quoted above are consistent with the NCAA's Policy on Transgender Student-Athlete Participation, which was promulgated in 2011.

Resolution

OCR has concerns that the Policy denies female student-athletes equal athletic benefits and opportunities by permitting transgender athletes to participate in women's intercollegiate athletic teams. As noted above, prior to OCR's completion of the investigation, the University expressed an interest in resolving this compliance review under Section 302 of the CPM, and OCR determined that it would be appropriate to resolve the issues OCR had identified. The University signed the enclosed Resolution Agreement that, when fully implemented, will resolve the complaint. The Resolution Agreement requires the University to rescind the Policy, cease any and all practices related thereto, and comply with 34 C.F.R. § 106.41 with respect to its intercollegiate athletics program. OCR will monitor the University's implementation of the Agreement.

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues

other than those addressed in this letter. This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

Sincerely,

/s/

Timothy Mattson
Compliance Team Leader

Enclosure

cc: Philip Catanzano, Esq. (*by email*: phil.catanzano@hklaw.com)