November 9, 2015

U.S. Department of Health and Human Services
Office for Civil Rights
Attn: 1557 NPRM (RIN 0945-AA02)
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, SW
Washington, DC 20201

VIA Web Submission
http://www.regulations.gov

Re: Comment on proposed regulation against nondiscrimination in health programs and activities
RIN 0945-AA02

Alliance Defending Freedom submits the following comment on proposed rule 45 CFR 155. This comment focuses only on the part of the proposed rule that reinterprets the ban on sex discrimination in Title IX of the Education Amendments of 1972 to ban gender identity discrimination in health programs. This re-interpretation is unwarranted, unnecessary, and illegitimate. The Department of Health and Human Services (HHS) has no authority to reinterpret a clear, congressionally enacted statute in a way that violates that statute's text, purpose, structure, legislative history, and 40 plus year history of judicial interpretation. If adopted, proposed rule 45 CFR 155 would contradict congressional intent, exceed HHS's rule-making authority, and violate the Administrative Procedures Act (APA). For these reasons, Alliance Defending Freedom asks that HHS rewrite the gender identity sections of proposed rule 45 CFR 155 to reflect what Congress *actually* intended and what Congress *actually* said in Title IX – ban discrimination "on the basis of sex." 20 U.S.C. § 1681.

Statutory and Administrative Background

Proposed rule 45 CFR 155 seeks to implement Section 1557 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18116). *See* Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54172 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92). According to Section 1557,

> an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance…

42 U.S.C. § 18116 (emphasis added). Thus, Section 1557 incorporates the anti-discrimination language from other statutes and applies that language to health programs.

As the underlined language above shows, Section 1557 references Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.). Title IX says that "[n]o 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 (emphasis added). By incorporating this language from Title IX, Section 1557 bans discrimination "on the basis of sex" and relies on the meaning of that language in Title IX. *See Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, Civil Action No. 14–6978, 2015 WL 1963588, at *6 (E.D. Pa. May 4, 2015) ("Congress's express incorporation of the enforcement mechanisms from [Title IX and other] federal civil rights statutes, as well as its decision to define the protected classes by reference thereto, manifests an intent to import the various different standards and burdens of proof into a Section 1557 claim, depending upon the protected class at issue."). In other words, Section 1557 prohibits the same thing Title IX prohibits – discrimination "on the basis of sex."

Because proposed rule 45 CFR 155 seeks to implement Section 1557 and because Section 1557 incorporates Title IX's ban on discrimination "on the basis of sex," proposed rule 45 CFR 155 should also ban discrimination "on the basis of sex." And proposed rule 45 CFR 155 does do this. *See* § 92.101(a)(1) (banning discrimination "on the basis of…sex…under any health program.").

But the proposed rule does not stop there. It extends far beyond Title IX and defines "on the basis of sex" to include "gender identity" as defined as "an individual's internal sense of gender, which may be different from that individual's sex assigned at birth. The way an individual expresses gender identity is frequently called 'gender expression,' and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth; an individual with a transgender identity is referred to in this part as a transgender

individual." § 92.4. Proposed rule 45 CFR 155 thus defines sex in a way that encompasses gender identity and prohibits gender identity discrimination.

But Title IX never mentions gender identity, much less defines "sex" to include gender identity. Yet, HHS declares its redefinition of "sex" to be a "well accepted interpretation" for 3 reasons: (1) the Office for Civil Rights – a sub-agency of the U.S. Department of Education – "has previously interpreted sex discrimination to include discrimination on the basis of gender identity," (2) "[o]ther Federal agencies have similarly interpreted the meaning of sex discrimination," and (3) "courts, including in the context of Section 1557, have recognized that sex discrimination includes discrimination based on gender identity."

But as this comment will show, these three explanations fall short. HHS cannot base its statutory misinterpretation on the (mis)interpretation of other agencies that have no authority or justification for their misinterpretation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). Thus, HHS cannot justifiably reinterpret sex to mean gender identity in the health care context based on the faulty interpretations from other agencies.

So at most, HHS cites four cases to justify its misinterpretation, but these cases either do not interpret Title IX at all or do not support HHS's interpretation or do not consider the enormous weight of contrary precedents. Even more telling, HHS never analyzes Title IX's text, purpose, structure, or legislative history, each of which confirms that sex in Title IX means sex, not gender identity. Nor have these factors escaped judicial comment. For the past 40 years, courts have relied on these same factors to interpret sex in Title IX and Title VII – a statute similar to Title IX – to mean sex, not gender identity. In fact, courts have explicitly rejected the exact misinterpretation HHS now proposes. So HHS is not simply proposing a novel, unsubstantiated interpretation. It is proposing an interpretation that contradicts the vast majority of decisions from Article III judges, judges who span the political spectrum.

Because the proposed rule misinterprets Title IX, the proposed rule also violates the Administrative Procedures Act. HHS has no authority to reinterpret a federal statute in a way that contradicts that statute's letter and spirit. Congress makes laws, not unelected administrators. The proposed rule also violates the Administrative Procedures Act because HHS's recently discovered interpretation is arbitrary and capricious. HHS provides no bases for changing Title IX's long-standing and well-accepted meaning, especially when that change will violate people's constitutional right to privacy and to religious freedom. The proposed rule, therefore, will lead to unnecessary lawsuits under the APA and will waste taxpayer

dollars in the process. This comment justifies this conclusion and proposes that HHS follow a better course for its proposed rule – actually follow what Title IX says.

Legal Analysis

I. The proposed rule incorrectly redefines "on the basis of sex" in Title IX to mean "on the basis of gender identity."

Proposed rule 45 CFR 155 bans gender identity discrimination in health facilities on the premise that Title IX bans gender identity discrimination. This premise is wrong. Title IX bans discrimination based on sex, not gender identity. Title IX's text, structure, legislative history, congressional action, judicial interpretations, and policy concerns all confirm this conclusion.

A. Title IX's text and structure demonstrates that "sex" does not encompass "gender identity."

Title IX's prohibition on sex discrimination is remarkably succinct and clear: "[n]o 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 . . . ." 20 U.S.C. § 1681(a). Title IX continues, however, to identify instances where its ban on sex discrimination *does not* apply, shedding light on the proper meaning of sex discrimination. For example, Title IX explains that it shall not be interpreted to prohibit educational institutions from "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This provision recognizes the legitimate interest in separating people based on physiological differences in intimate settings or when privacy may be compromised. Title IX also allows different institutions to separate the sexes in historically accepted situations:

- Military training institutions. § 1681(a)(4);
- Fraternities and sororities. § 1681(a)(6)(A); and
- Boy Scouts and Girl Scouts. § 1681(a)(6)(B).

These exceptions indicate that Title IX sought to eradicate *invidious* sex discrimination yet still allow for legitimate, biologically-based distinctions. Therefore, this text and structure show that discrimination on the basis of "sex" does not—and was not intended to—encompass gender identity.

Indeed, during Title IX's consideration, adoption, and implementation, it was understood that "sex" in Title IX referred solely to the biological state of being a male or a female, not any psychological identification with a certain sex. For this reason, federal courts have held that the term "sex" in both Titles IX and VII "means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, Civil Action No. 3:13–213, 2015 WL 1497753, at *13 (W.D. Pa. Mar. 31, 2015).

Quite simply, the plain meaning of sex discrimination is that "it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (interpreting the meaning of the prohibition of sex discrimination found in Title VII, which was adopted before Title IX). A ban on sex discrimination does not encompass "discrimination against a person who . . . [is] a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be a male." *Id.* Indeed, a "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born." *Id.*

These judicial definitions of the word "sex" did not just appear out of nowhere. They reflect the common definition of "sex" found in leading dictionaries before and after Title IX's passage. Indeed, the 1961 edition of the *Oxford English Dictionary* defines "sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." Sex, 9 *Oxford English Dictionary* 578 (1961). And a dictionary from 1939 defines "sex" in purely biological terms. Sex, *Webster's New International Dictionary of the English Language* (2d ed. unabridged 1939). This biological understanding of "sex" has persisted even after Congress passed Title IX in 1972. *See, e.g.*, Sex, *Webster's New Collegiate Dictionary* (1981) (defining sex, in relevant part, as "either of two divisions or organisms distinguished respectively as male or female" or as "the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"). In light of these consistent dictionary definitions, HHS cannot claim that Congress understood sex to include gender identity. The plain meaning of sex is biological sex.

Moving from text to structure, Title IX's regulations confirm that Title IX bans discrimination based on sex, not gender identity. Because Title IX's text speaks so clearly, regulations interpreting Title IX unsurprisingly permit "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. This regulation creates an exception to the general prohibition on sex discrimination for only one reason: the undeniable biological differences between the sexes. *See G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, No. 4:15CV54, 2015 WL 5560190, at *6-7 (E.D. Va. Sept. 17, 2015) (relying on this regulation to reject a Title IX gender identity discrimination claim and to reject the Department of Education's recent efforts to interpret Title IX to encompass gender identity discrimination).

Because this Title IX regulation presupposes the biological definition of sex, HHS should not adopt a conflicting regulation that encompasses gender identity. Statutes and regulations should be interpreted in a way to avoid conflicts, not create them. *See In re Transcon Lines*, 58 F.3d 1432, 1440 (9th Cir. 1995) (a court "must, whenever possible, attempt to reconcile potential conflicts in statutory provisions"). Moreover, agency officials passed § 106.33 in 1975 only a few years after Congress passed Title IX. Therefore, this regulation more likely reflects Congressional intent for Title IX than HHS's recently proposed rule. Officials in 1975 can discern the meaning of the words Congress approved in 1972 better than officials in 2015. And this conclusion carries even greater weight since the Department of Education formally adopted 34 C.F.R. § 106.33. Department of Education officials specialize in educational policy and in interpreting Title IX, and they can discern the meaning of Title IX better than HHS officials who specialize in health policy. In other words, § 106.33 deserves more deference than HHS's contradictory, proposed regulation, and HHS should avoid an interpretation that contradicts § 106.33. In this respect, the present regulatory structure of Title IX counsels against HHS's outlier interpretation.

B. Title IX's legislative history demonstrates that "sex" does not encompass "gender identity."

Title IX's legislative history reinforces that Title IX bans "sex" discrimination, meaning discrimination based on the biological classifications of males and females, not gender identity. In fact, the legislative history proves that while Congress desired to eliminate *invidious* discrimination on the basis of biological sex, Congress did not intend to prohibit differential treatment of the sexes when physiological differences called for it.

For example, during the Congressional debates on Title IX, the Senate sponsor explicitly stated that he did not read Title IX as requiring "integration of dormitories between the sexes," "the desegregation of football fields," or "that the men's locker room be desegregated." 117 Cong. Rec. 30407 (1971) (statement of Sen. Bayh). One year later, the legislative record again confirmed that Congress contemplated differential treatment on the basis of sex when such differentiation is legitimate, "such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or *other instances where personal privacy must be preserved*." 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) (emphasis added).

To now say that Title IX bans gender identity discrimination—thereby eliminating legitimate differential treatment based on biological differences—turns a blind eye to the uniform testimony of Title IX's legislative history.

C. Congress's actions demonstrate that "sex" does not encompass "gender identity."

As Title IX's text and legislative history show, the Congress that passed Title IX did not include gender identity in Title IX's definition of sex. While some may believe that HHS should now correct Congress's failure to ban gender identity discrimination, that action exceeds HHS's power. But *even if* HHS had the power to divine and implement what Congress would have done if Congress knew what we know today, HHS still should not interpret Title IX to encompass gender identity. Indeed, we have a very good idea of how the current Congress would define sex in Title IX because Congress has repeatedly rejected attempts to expand sex in various statutes to include gender identity.

Take the Student Non-Discrimination Act of 2011. This Act recognizes that while federal civil rights laws address discrimination on the basis of sex, they do "not expressly address discrimination on the basis of sexual orientation or gender identity." S. 555, 112th Cong. § 2(a)(6). To address that perceived problem in existing federal law—including Title IX—the Act sought to make it unlawful for students to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" on the "basis of actual or perceived sexual orientation or gender identity." § 4(a).

Moreover, when Senator Franken reintroduced the Act, he noted that the bill would "provide meaningful remedies for discrimination in public schools based on sexual orientation or gender identity, *modeled on Title IX's* protection against discrimination and harassment based on gender." 157 Cong. Rec. S1548-01 (2011) (statement of Sen. Franken) (emphasis added). Senator Franken's statement shows that he distinguished between gender identity on one hand and gender (i.e. biological sex) on the other and that he intended the Act to cover ground that Title IX admittedly does not—namely, gender identity discrimination. Although Senator Franken and the co-sponsors of the Act desired to expand the protections of Title IX to cover gender identity, Congress refused to take that step.

The failed efforts to expand sex to include gender identity show two things. First, even those who want Congress to ban gender identity discrimination do not think current laws like Title IX encompass gender identity. If those most favorable to interpreting Title IX to include gender identity do not interpret Title IX that way, that does not bode well for HHS's proposed interpretation. Second, recent congresses do not want Title IX to encompass gender identity. If they wanted sex in Title IX to encompass gender identity, Congress would have seized on one of the many opportunities to do so.

It is clear that what the 1972 Congress meant by sex when it passed Title IX is a binary male/female distinction. HHS must follow that definition. HHS cannot justify a change to Title IX based on evolving societal norms or evolving notions of the meaning of sex and gender. HHS is not equipped or authorized to make that determination.

D. Legal precedents demonstrate that "sex" does not encompass "gender identity."

While HHS asserts that its proposed rule does nothing more than adopt a "well-accepted interpretation of discrimination 'on the basis of sex'" as including "discrimination based on gender identity," the cases HHS cites do not justify its assertion. *See* Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54176. Of the cases HHS cites, only one addresses Title IX and that case accepts HHS's interpretation of Title IX without analyzing Title IX's text, structure, purpose, or legislative history. *See Rumble v. Fairview Health Servs.*, No. 14–cv–2037 (SRN/FLN), 2015 WL 1197415 at *9-11 (D. Minn. Mar. 16, 2015). In contrast, a different court has reached the exact opposite conclusion about Title IX after thoroughly analyzing Title IX and Title VII. *Johnston*, 2015 WL 1497753, at *10-18. As that court held, "sex" "means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex" and that Congress must act if it wishes to include gender identity protections in Title IX. *Id.* at *13. In light of that case, HHS can hardly say its interpretation is the "well-accepted" interpretation of Title IX.

The other cases HHS cites interpret Title VII. And not all of them even support HHS's contention. For example, *Barnes v. City of Cincinnati* explicitly notes that it involved a question of "sex discrimination based [on the plaintiff's] failure to conform to sex stereotypes." 401 F.3d 729, 733 (6th Cir. 2005). That is different from the question of whether a prohibition on sex discrimination also bans discrimination on the basis of gender identity. Thus, *Barnes* does not affirm the proposition for which HHS cites it. Furthermore, *Schroer v. Billington* shied away from explicit endorsement of HHS's current position, noting that the case did not require it "to draw sweeping conclusions about the reach of Title VII" because the plaintiff would still prevail even if the word "sex" in Title VII refers "only to anatomical or chromosomal sex." 577 F. Supp. 2d 293, 307-08 (D.D.C. 2008).

Furthermore, within the universe of Title VII cases, courts overwhelmingly reject HHS's proposed interpretation of sex discrimination. For example, one court rejected a party's contention that Title VII's ban on sex discrimination also bans gender identity discrimination, holding that "if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." *Ulane*, 742 at 1087. *See also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("[T]here is nothing in the record to

support the conclusion that the plain meaning of 'sex' encompasses anything more than male and female."). Another federal court recently noted that "*nearly every federal court* that has considered the question in the Title VII context has found that transgendered individuals are not a protected class under Title VII." *Johnston*, 2015 WL 1497753, at *12 (emphasis added). These rulings directly contradict HHS's assertion that it is "well-accepted" that a ban on "sex" discrimination necessarily includes a ban on "gender identity" discrimination. Rather than simply seeking to clarify what exists in actuality, the proposed rule impermissibly seeks to break new ground. *See Ulane*, 742 F.2d at 1086 ("For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating.").[1]

In sum, the cases HHS cites provide minimal support for its suggested interpretation of Title IX, and the vast majority of cases reject HHS's suggested interpretation of sex discrimination. HHS's assertion that it is just implementing a "well-accepted" interpretation of discrimination "on the basis of sex" is not credible. Rather than adopting a well-settled interpretation, HHS does the exact opposite, thereby inviting litigation in the process.

E. Policy considerations demonstrate that "sex" does not encompass "gender identity."

In addition to Title IX's text, structure, purpose, and legislative history, policy considerations justify interpreting Title IX to prohibit sex discrimination, not gender identify discrimination. It will cause problems to interpret sex in Title IX to mean gender identity, and an interpretation causing problems should be avoided if possible. These problems stem from the fact that men and women indisputably have physiological differences. Therefore, our society has appropriately distinguished the sexes in certain instances when biological realities make these distinctions legitimate. A rule that treats "gender identity" as synonymous with "sex" will undercut the ability to make these legitimate distinctions, thereby weakening the ability of healthcare providers to effectively serve the public.

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[1] Nor can HHS use the concept of gender stereotyping in *Price Waterhouse v. Hopkins* to justify redefining sex to include gender identity. 490 U.S. 228 (1989). Although *Price Waterhouse* interpreted sex in title VII to include sex stereotyping, *Price Waterhouse* did not adopt the concept of gender identity. And subsequent courts have interpreted *Price Waterhouse* to merely prohibit discrimination based on gender non-conforming behavior that "is demonstrable through the plaintiff's appearance or behavior." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) ("The Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle."). The concept of gender identity far exceeds external behaviors like dress and hairstyle because gender identity involves an "individual's internal sense of gender," as proposed rule 45 CFR 155 acknowledges. 80 Fed. Reg. 54172, 54216 (proposed Sept. 8, 2015).

This problem arises since the proposed rule will inevitably lead people to claim the right to access services and facilities legitimately restricted to members of the opposite biological sex based on the theory that restrictions based on biological differences discriminate against their "gender identity." Public restrooms in health care facilities exemplify this point. Because public restrooms often afford minimal privacy, public restrooms are generally separated based on the biological sex of the users. But someone who identifies with the opposite sex could argue that the HHS rule allows him to use a hospital's public restrooms that are designated for the opposite biological sex. This outcome would place vulnerable, sick, and injured people in a situation where they are compelled to use the hospital's restrooms due to their unfortunate health crisis – like someone in the waiting room of a busy emergency room – only to find their privacy expectations shattered by the presence of a member of the opposite biological sex. If this possibility becomes reality, people with a sense of modesty, people who have suffered from past sexual abuse from members of the opposite sex, and people of certain religions may be deterred from seeking important medical treatment to avoid the loss of privacy.

Another possible problem could arise in a group counseling session for female rape victims. If a biological male who identifies as a female wished to attend that group counseling session, and the provider excludes him, HHS's proposed rule would allow that biological male to object on the basis of gender identity discrimination. The success or even the threat of such a claim could cause providers to stop separating counseling sessions based on biological sex. And some women will likely stop attending those sessions as a result and forego treatment critical to their recovery.

While the list of problems caused by HHS's proposed rule could continue, these examples illustrate some of the harms that could arise. Title IX does not mandate these unfortunate results. In fact, the above examples reflect the exact type of legitimate sex-based distinctions contemplated during the evaluation of Title IX. *See supra* Section I.B. When Congress evaluated Title IX, legislators understood that legitimate sex-based distinctions based on biology could and should continue for the public welfare. HHS's proposed rule would undercut those distinctions and overstep its bounds by rewriting a statute in a way that harms the public's privacy, safety, and health interests.

II. The proposed rule violates the Administrative Procedures Act because the proposed rule arbitrarily misinterprets Title IX and infringes on privacy.

The APA is a congressional statute that empowers courts to invalidate unlawful actions by federal agencies. According to the APA, a court can invalidate an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). The proposed HHS rule violates both these standards.

First, the proposed rule is arbitrary and capricious. It is arbitrary and capricious because a) HHS does not explain its decision to expand sex to include gender identity and b) that inclusion is completely implausible. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (setting forth these factors to evaluate arbitrary and capricious standard). The rule is inadequately explained because HHS can cite only one Title IX case to justify changing the 40 year old definition of sex in Title IX. Nor does HHS offer any policy reason for this change. And HHS never considers the practical or constitutional harms created by defining sex to include gender identity. *See supra* §I.E (identifying some of these harms). Neither does HHS consider the long judicial history of defining sex in Title IX and in Title VII so as to not include gender identity. HHS completely fails to consider these important aspects of the problem. Instead, HHS is content to hide behind the unpersuasive justifications offered by other agencies. But that hardly constitutes "reasoned decisionmaking." *State Farm*, 463 U.S. at 52. Moving from explanation to implausibility, this comment already explained why the proposed rule interprets Title IX implausibly – the proposed rule interprets Title IX in a way that ignores Title IX's text, structure, purpose, legislative history, and judicial interpretation. *See supra* §I. Interpretations do not get more implausible than that.

Nor can HHS justify its implausible interpretation by invoking deference. While courts ordinarily defer to federal agencies when agencies interpret their own statutes, courts only defer to agency interpretations of ambiguous statutes. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). And Title IX's definition of sex is not ambiguous. *See supra* §I. HHS's reinterpretation of Title IX deserves no deference. *See Chevron*, 467 U.S. at 842-43 (noting that if "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Even if Title IX were ambiguous, the proposed rule still deserves no deference. Courts only defer to agencies when they interpret statutes they administer. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997). But HHS does not administer Title IX and has no expertise in interpreting Title IX. That's the Department of Education's job. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993). HHS deserves no deference for its interpretation of Title IX. *See Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981) ("The Secretary's construction is not entitled to special deference to the extent it rests on the interpretation of another agency's statutes and regulations.").

This conclusion holds true even though Section 1557 incorporates Title IX and HHS has authority to administer Section 1557. That incorporation does not grant authority or expertise to HHS to administer Title IX. *See American Federation of Government Employees v. Shinseki*, 709 F.3d 29, 33 (D.C. Cir. 2013) (refusing to defer to Department of Veterans Affairs' interpretation of statute cross-referenced in statute administered by VA). Indeed, Congress would not delegate how to define terms in Title IX to an agency with no expertise in crafting educational policy. *See King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (refusing to defer to IRS's interpretation of a statute because that statute referenced Obamacare and the IRS "has no expertise in crafting health insurance policy of this sort"). The health care officials at HHS do not get to set the country's educational policy. They are neither elected nor qualified to do so. For this reason, HHS deserves no deference for its misinterpretation of Title IX. And with no deference to hide behind, HHS's interpretation of Title IX must stand on its own merits. And on its own merits, HHS's interpretation of Title IX is arbitrary and capricious. That violates the APA.

Second, the proposed rule violates the APA because the proposed rule infringes constitutional and statutory rights to privacy, religious speech, and religious exercise. The proposed rule violates the right to privacy by forcing patients to be exposed to members of the opposite sex in private areas. As the Ninth Circuit has recognized, "[s]hielding one's unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir. 1988) (emphasis added). Based on this personal dignity, courts have found a right to bodily privacy that includes the right to access private restrooms and changing areas without exposure to the opposite sex. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (finding that a transgender individual's use of a women's restroom threatened female employees' privacy interests).[2]

But the HHS's proposed rule violates this right by defining sex to include gender identity. The proposed rule will in turn force health facilities – like nursing homes – to allow biological males who identify as female to access female changing areas and biological females who identify as males to access male changing areas. Men and women who access the restrooms affiliated with their biological sex will then be exposed to the opposite sex and suffer humiliation, embarrassment, and the accompanying loss of their constitutional right to privacy. *See Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009) (rejecting a students' Title IX, Title VII, and First and Fourteenth Amendment arguments for opposite-sex restroom use because a public college was motivated by privacy and safety reasons, not the student's sex). HHS does not deny or even mention the elementary

[2] This right even extends to prisoners. *See Strickler v. Waters*, 989 F.2d 1375, 1387 (4th Cir. 1993) ("[W]hen not reasonably necessary, exposure of a prisoner's genitals to members of the opposite sex violates [prisoners'] constitutional rights.").

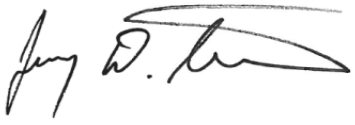
principle of personal dignity that courts like the Ninth Circuit have clearly articulated.

Turning to the constitutional and statutory rights protecting religious speech and exercise, the proposed rule will violate these rights by forcing religious persons to offer gender transition services and to participate in services affirming gender identity when doing so violates the beliefs of people of faith. The joint comment submitted by the United States Conference of Catholic Bishops, the National Association of Evangelicals, and others provides some concrete examples of these scenarios. As that comment explains, these examples will violate the Religious Freedom Restoration Act. These examples may also violate the First Amendment. *See, e.g., Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012) (holding that state university would violate First Amendment if university punished counselor for referring homosexual client to another counselor for religious reasons). These violations prove that the proposed HHS rule cannot possibly comply with the APA. A better solution is available. Do not interpret Title IX to contradict constitutional and statutory rights. Do not interpret Title IX to contradict the APA. Interpret Title IX to ban discrimination based on sex, not gender identity.

Conclusion

For the past 40 years, judges, administrators, lawyers, and legislators have understood sex in Title IX to mean sex, not gender identity. Were all these people wrong? Were they wrong for 40 years? What changed? Title IX's text, purpose, structure, and legislative history did not change. Courts did not overrule their prior interpretations of sex in Title IX and Title VII. Only one thing changed: the identity and political agendas of agency officials. But changing officials and changing agendas does not change statutory meaning. Only Congress can do that. Because Congress has not changed the meaning of sex in Title IX and because sex in Title IX means sex, not gender identity, Alliance Defending Freedom asks HHS to revise its proposed rule to reflect the text and purpose of Title IX. Title IX regulations should achieve Congress's goals, not advance HHS's agenda.

Sincerely,



David A. Cortman
Jeremy Tedesco
Jonathan A. Scruggs
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260