



September 13, 2023

Sent Via E-Mail and Certified U.S. Mail

Office for Civil Rights
U.S. Department of Education
Renaissance Tower
1201 Elm Street, Suite 1000
Dallas, Texas 75270

Re: Request for Investigation into Keller ISD

To Whom It May Concern:

We are writing to respond to the baseless allegations of discrimination made by the American Civil Liberties Union of Texas (“ACLU”) against Keller Independent School District (“Keller ISD”).

Keller ISD has been the focus of the ACLU and other activist groups on a variety of issues. Most recently, the ACLU has complained that Keller ISD’s policies regarding the use of facilities that align with a student’s biological sex and the use of preferred pronouns violate Title IX of the Education Amendments of 1972. The ACLU’s complaint against Keller ISD is both factually and legally incorrect. In short, it is nothing more than an attempt to bully Keller ISD and other school districts into silence and submission.

There is no federal or state law that prohibits the actions taken by Keller ISD. Interpreting Title IX in the way suggested by the ACLU requires a perverse and illogical reading given that Title IX and its implementing regulations may necessarily require a consideration of a person’s biological sex when policies are being considered and implemented. *See, e.g.*, 20 U.S.C. §§ 1681(a), 1686; 34 C.F.R. §§ 106.32(b), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61. In other words, Title IX specifically calls for distinctions to be made based on biological sex. Any other interpretation of Title IX makes no sense.

The ACLU relies primarily on the Supreme Court’s 2020 decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). But of course, the ACLU ignores the fact that the *Bostock* decision itself was narrowly decided and specifically states that its decision regarding sex *did not* “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.” *Id.* at 1753. There

are multiple courts across the country that have affirmed that *Bostock* has not been extended to the Title IX context like the ACLU claims. See *Neese v. Becerra*, Case No. 2:21-CV-163-Z, Opinion and Order (Nov. 11, 2022), available at [Neese Opinion](#) (there is no “precedential authority” that would apply *Bostock* to the Title IX context); *L.W. et al. v. Skrmetti, et al.*, Case No. 23-5600, Opinion (6th Cir. July 8, 2023) (affirming that *Bostock* applies only to Title VII claims); available at [Skrmetti Opinion](#); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (the analysis under Title VII does not apply to an analysis under Title IX).

These court decisions are consistent with information from the Department of Education. According to a 2021 Memorandum, “Title IX’s statutory and regulatory provisions permit, and in some cases require, biological sex, male or female, to be taken into account in an education program or activity.” January 8, 2021 Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights at p. 6, available at [Richey Memo](#). The DOE further recognizes that under Title IX, the only construction for the use of the term “sex” is biological sex – male or female. This construction is entitled to extra weight because it has been the subject of robust Congressional review. See *North Haven Bd. of Ed. V. Bell*, 456 U.S. 512, 531-32 (1982).

Moreover, Title IX contains a variety of exceptions that authorize or allow for sex-separate activities and intimate facilities to be provided on the basis of biological sex or for members of each biological sex. Compare 42 U.S.C. §§ 2000e-1, 2000e-2 with 20 U.S.C. §§ 1681(a), 1686. According to the ACLU, making distinctions based on biological sex will subject Keller ISD students to providing “private medical information” and will invade the privacy of Keller ISD students. Apparently, the ACLU has forgotten that birth certificates, vaccination records, vision, hearing, and diabetes screenings, and a host of other private information is required and provided to public schools routinely. To act as if biological sex based on one’s birth certificate somehow crosses the line is disingenuous.

We must also address several of the false statements made in the ACLU’s complaint to the Office of Civil Rights. For example, the ACLU claims that the DOE recently determined “that a school district’s removal of certain books may create ‘a hostile environment for students based on sex, in violation of Title IX.’” But a reading of the quoted letter demonstrates that the DOE made no such determination. Rather, the DOE was asked to investigate the issue of whether a hostile environment was created under either Title IX or Title VII. And in the DOE’s letter, its entire discussion of whether a hostile environment may have been created was made in the context of Title VII’s regulations, not Title IX. See Letter to Superintendent Bearden Re: OCR Complaint No. 04-22-1281, United States Department of Education Office for Civil Rights, Region IV (May 19, 2023), available at [Bearden Letter](#).

With respect to the issue of using “affirming pronouns,” the ACLU claims that the DOE has recognized that declining to do so “violates Title IX.” The DOE factsheet cited to support this

claim states no such thing. The factsheet only identifies the refusal to use affirming pronouns as an example of something that the Office of Civil Rights *could* investigate. See *Confronting Anti-LGBTQI+ Harassment in Schools*, Department of Education (June 2021), available at [Fact Sheet](#).

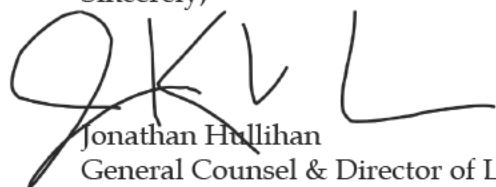
These are just two examples of the blatant misrepresentations made by the ACLU in an effort to bully and silence courageous districts like Keller ISD.

Finally, the ACLU's complaint cites several sources to support the notion that Keller ISD's policies will harm the mental health of transgender, non-binary, and intersex students. But conveniently, of course, the ACLU does not include any reference to the research that shows that 61-98% of children who struggle with their sex as a boy or girl come to accept their sex by adulthood if not subjected to chemical or surgical interventions or social transitions. Michael K Laidlaw, et al. "Letter to the Editor: "Endocrine Treatment of Gender-Dysphoric/ Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism* 104(3):686-687 (March, 2019), <https://doi.org/10.1210/jc.2018-01925> ("Children with GD will outgrow this condition in 61-98% of cases by adulthood").

Research also shows that the mental health risks for transgender individuals actually increase exponentially after transition. Cecilia Dhejne, et al., "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden" *PLOS One* 6(2) (2011), <https://doi.org/10.1371/journal.pone.0016885>

Keller ISD's policies regarding the use of facilities and pronouns are legal, appropriate, and in the best interests of all its students, including those who identify as transgender. The ACLU's complaint should be seen for the blatant fundraising effort that it is and ignored.

Sincerely,



Jonathan Hullihan
General Counsel & Director of Legal Operations
Citizens Defending Freedom

Sincerely,



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