

Women's Liberation Front Public Testimony for Ohio HB183 10/16/23:
From testimony WoLF filed with the Department of Education in 2021 on rulemaking re Title IX:

Intimate Facilities

In OGC Memo. at 9-11 the Department examined 34 C.F.R. § 106.33, which permits schools to provide separate bathrooms, locker rooms, and showers on the basis of sex as long as the school provides comparable facilities for each sex. Applying the same interpretation and application of the Bostock decision to this Title IX regulation as to the Title IX athletic regulation, the Department concluded, “Therefore, we believe the plain ordinary public meaning of the controlling statutory and regulatory text requires a recipient providing” separate intimate facilities on the basis of sex “to regulate access based on biological sex.” OGC Memo. at 9. The Department acknowledged contrary decisions in the Fourth Circuit and Eleventh Circuit, where courts held that denying students access to school bathrooms in accordance with the student’s gender identity rather than biological sex violated Title IX despite the permissive regulation (34 C.F.R. § 106.33) that allows schools to provide single-sex intimate facilities. OGC Memo. at 9-10. But the Department remained “unpersuaded by the Title IX analysis in both Adams and Grimm” because, inter alia, those court decisions “failed to rigorously analyze Title IX’s plain text . . . or to fairly address the legal consequences of the Department’s unique implementing regulations[.]”

Because the term “sex” refers to biological sex and not to gender identity (a proposition supported by Bostock, 140 S. Ct. at 1738-39), the Title IX regulation permitting single-sex intimate facilities authorizes separate, comparable facilities on the basis of sex but does not authorize provision of facilities on the basis of

gender identity. If a facility is purportedly provided for females, but males with a female gender identity are permitted access, then the facility is no longer single-sex. Thus, an interpretation of Title IX that would force a school desiring to provide single-sex facilities to grant access based on gender identity would effectively eliminate the discretion of schools to lawfully provide single-sex facilities. Instead, the Department should reinforce the validity of 34 C.F.R. § 106.33 (which is already a permissive, not mandatory, regulation). Facilities for using toilets, changing clothing, or showering inherently involve vulnerability and implicate dignity and privacy interests. Providing single-sex intimate facilities (comparable for each sex) has traditionally been a valuable way to ensure that women and girls feel safe enough to participate fully in public life. For this reason, constitutional equal protection challenges to single-sex facilities have been largely unsuccessful.⁹ Single-sex intimate facilities should remain a legally permissible option for schools to provide, particularly for the benefit of women and girls.