

# The Department of Education's Intended Revision of Title IX Fails Regulatory and Civil Rights Analyses

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## KEY TAKEAWAYS

The new Title IX rule will erase hard-fought protections and equal opportunity, including in sports for girls and women in schools nationwide.

The rule will also roll back due process protections for those accused of sexual assault or harassment on campus and limit speech by creating a “hecklers veto.”

The Biden Administration has failed to show such monumental changes are needed or that Title IX has failed to prevent sex discrimination.

This year marks the 50th anniversary of the passage of Title IX of the Education Amendments of 1972,<sup>1</sup> the federal law prohibiting sex-based discrimination in any federally funded educational program. Title IX leveled the educational playing field for girls and women, has increased women’s participation in high school sports 10 times over,<sup>2</sup> and was hailed as a feminist triumph when it was enacted into law in 1972. But in a painful twist of irony, the same law that once provided a platform for female advancement is set to be sacrificed to Democratic President Joe Biden’s radical political agenda under the guise of “equality.”

Thanks to an impending rule change on Title IX’s interpretation and application, the sex discrimination of old is new again.

In addition to removing common sense due process protections for those accused of sexual assault on campus (the right to call witnesses or introduce

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evidence, for example),<sup>3</sup> this new Title IX rule would unilaterally expand<sup>4</sup> the prohibition against discrimination based on “sex” to include “sex stereotypes, sex-related characteristics (including intersex traits), pregnancy or related conditions, sexual orientation, and gender identity.”

As a result, any K–12 school or institution of higher education that receives federal funding would have to open its bathrooms, locker rooms, housing accommodations, sports teams, and any other sex-separated educational program or offering to the opposite sex, if those individuals simply *claim* to be female. Such a dangerous rule sacrifices the safety, privacy, and equality of girls and women to appease a pet policy agenda. It ignores the extensive congressional record on Title IX’s purpose and the law’s specific provision of separate spaces and programs to protect girls and women—those for whom the law was originally passed.

Publication of the proposed rule change from the Department of Education’s (“department’s”) Office of Civil Rights (OCR) is anticipated in June 2022,<sup>5</sup> poetically coinciding with Title IX’s 50th anniversary.

The Biden Administration’s overhaul of a 50-year-old education law is unnecessary—and fails both regulatory and civil rights law analyses. The new rule’s entanglement with other nondiscrimination laws; the failure of cited authority to support the rule; and the extensive, not-yet-studied economic and noneconomic costs that would result from the rule all conclusively establish that the department should put its plans on ice.

## Administrative Fiat

Title IX’s original prohibition is simple: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.”

Notwithstanding Title IX’s origins in the women’s movement and the extensive congressional record indicating its mission to equalize educational opportunities for women,<sup>6</sup> on January 20, 2021, in one of his first official acts as President, Joe Biden issued Executive Order 13988, “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”<sup>7</sup>

The order evinced the President’s intent to expand all statutory prohibitions on “sex discrimination” to include discrimination based on “sexual orientation” and “gender identity.”<sup>8</sup> In the order, he directed every federal governmental agency to review all “agency actions” that might prohibit such sex discrimination, specifying:

### Sec. 1. Policy

...It is the policy of my Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation. It is also the policy of my Administration to address overlapping forms of discrimination.

### Sec. 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation.

(a) The head of each agency shall, as soon as practicable and in consultation with the Attorney General, as appropriate, review all existing orders, regulations, guidance documents, policies, programs, or other agency actions (“agency actions”) that:

(i) were promulgated or are administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination, including any that relate to the agency’s own compliance with such statutes or regulations; and

(ii) are or may be inconsistent with the policy set forth in section 1 of this order.

(b) The head of each agency shall, as soon as practicable and as appropriate and consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.<sup>9</sup>

On June 22, 2021, the Department of Education issued a Notice of Interpretation indicating that when enforcing Title IX’s prohibitions on sex discrimination, it would interpret “sex” to include sexual orientation and gender identity.<sup>10</sup> That notice was immediately challenged by a coalition of 20 states, led by Tennessee, seeking declaratory and injunctive relief to invalidate the department’s interpretation.<sup>11</sup>

Shortly thereafter, in December of 2021, the department announced it would be issuing a notice of proposed rulemaking<sup>12</sup> on its revised Title IX rule, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” with publication planned for April 2022.<sup>13</sup> That publication has been twice delayed.

According to the department, the rulemaking was required for consistency with Executive Order 13988 and Executive Order 14021 of March

8, 2021.<sup>14</sup> The March order directed the department to evaluate both the statute’s original language on sex discrimination and the Title IX rule issued under the previous presidential administration on May 19, 2020.<sup>15</sup> The 2020 rule had clarified Title IX’s sexual harassment and sexual violence classifications and established due process protections for students accused of either.

Because Congress has declined the Biden Administration’s frequent calls to rewrite Title IX, the department now seeks to expand its federal nondiscrimination protections through rescission of a previous Title IX rule and publication of a new one—while masquerading the process as a simple clarification.<sup>16</sup>

## Entanglement with Other Nondiscrimination Law

Like much of civil rights law, Title IX intersects with other nondiscrimination provisions. In addition to constitutional guarantees of equal protection stemming from the 14th Amendment,<sup>17</sup> statutory law prohibiting sex discrimination in other contexts<sup>18</sup> and an impressive collection of nondiscrimination rules enforced by every federal agency complicate the rule-making process when identical terms appear. The department must therefore consider the impact of any purported revision on intersecting laws and in other contexts before moving forward with rulemaking.

No evidence exists that the Department of Education has done so.

A significant intersection with other nondiscrimination law arises in section 1557 of the Patient Protection and Affordable Care Act, which directly incorporates Title IX’s prohibition against sex discrimination and relies on its definition of protected classes. Section 1557 guarantees that no individual can “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under” any federally run or federally funded health program “*on the ground prohibited under...Title IX.*”<sup>19</sup>

**Section 1557.** As a result, the department’s altered definition of “sex discrimination” within Title IX would directly impact Section 1557 and health care more generally. In issuing its proposed Title IX rule, the department was also required to—but did not—evaluate the impact of the rule on Section 1557 and the health care context. The entanglement on “gender identity” vis-à-vis Title IX would have significant implications for medical professionals with conscience objections and health care facilities operated by faith-based organizations and would immediately create a conflict within the medical community between those who want to promote the use of gender-affirming medical treatments and those who prefer a “wait and see” approach.

**Food and Nutrition Service.** An additional intersection appears in the laws enforced by the U.S. Department of Agriculture’s (USDA’s) Food and Nutrition Service Civil Rights Division, which recently issued its own interpretation<sup>20</sup> and supporting memorandum<sup>21</sup> to state agencies and program operators. In providing guidance to schools receiving federal financial assistance from the Food and Nutrition Service, it clarified that it, too, was expanding “sex” discrimination provisions to include discrimination based on sexual orientation and gender identity.

The Food and Nutrition Service not only enforces the prohibition on sex discrimination found in Title IX, it also enforces similar provisions in the Food and Nutrition Act of 2008,<sup>22</sup> as amended by the Supplemental Nutrition Assistance Program,<sup>23</sup> and related regulations. By avoiding congressional amendment of these laws and the formal rulemaking process,<sup>24</sup> the USDA has established American lunchrooms as flashpoints of sex discrimination by holding food assistance hostage<sup>25</sup> until all laws that federally funded schools and educational associations are subject to are interpreted and applied in the same overly expansive, unjustified way. This approach would no doubt have a significant and negative impact on student populations most in need of supplemental nutritional assistance.

**State Law.** Additionally, 16 states have passed laws clarifying that within state and local education associations, biological males may not compete with biological females on scholastic athletic teams, no matter their gender identity. The department’s strongarming of states and schools through unilateral statutory expansion is even more egregious considering the U.S. Supreme Court’s recent reassertion in *Cameron v. EMW Women’s Surgical Center, P.S.C.*, that “[p]aramount among the States’ retained sovereign powers is the power to enact and enforce any laws that do not conflict with federal law.”<sup>26</sup> A state’s “opportunity to defend its laws in federal court” and to exercise its sovereign power to enact laws governing its own citizens “should not be lightly cut off.”<sup>27</sup> After all, “a State ‘clearly has a legitimate interest in the continued enforceability of its own statutes.’”<sup>28</sup>

Within such a conflict between state law and federal regulation, federalism concerns abound. The Supreme Court has continually expressed a commitment to the sovereign dignity of the states, particularly on matters such as education that are delegated to the states under the 10th Amendment.<sup>29</sup> In the battle between state laws governing “fairness in girls’ sports” and an unprecedented expansion of Title IX (a law that had previously served to protect those same girls for five decades), a conflict<sup>30</sup> between state and federal interpretations of antidiscrimination law seems destined for ultimate resolution by the U.S. Supreme Court.

## No Need for Regulatory Action or Revisions

Title IX’s original implementing regulations became effective after extensive congressional review, including six days of hearings to determine whether the proposed regulations were “consistent with the law and with the intent of the Congress in enacting the law.”<sup>31</sup> Where an agency’s statutory construction has been “fully brought to the attention of the public and Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.”<sup>32</sup>

While Title IX was amended by the Civil Rights Restoration Act of 1987,<sup>33</sup> Congress has never amended or altered it in such a way as to expand the definition of “sex” (understood to be the ordinary public meaning of biological sex, male and female) to include gender identity—despite ample opportunity to do so. Executive Order 12866 of September 30, 1993, on Regulatory Planning and Review<sup>34</sup> requires that “each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.”

But the department has failed to articulate a reason behind its activation of the regulatory review process, to identify the problem it seeks to address, or to establish how Title IX is suddenly insufficient to prevent sex discrimination in American schools. Instead, it has proposed the investment of taxpayer dollars, increased paperwork, and government man-hours to solve an unidentified dilemma.

**Due Process Protections Gutted.** By contrast, after thorough consideration of over 124,000 public comments and in response to a growing crisis of sexual violence in education, the department under the previous Administration issued its Title IX rule in 2020<sup>35</sup> that clarified that sexual harassment, including sexual assault, constituted unlawful sex discrimination. The 2020 rule (still in effect) provided important provisions ensuring due process in campus Title IX grievance proceedings that protect free speech and academic freedom and clarify an institution’s entitlement to a religious exemption under Title IX.<sup>36</sup> In a departure from previous Administrations, the 2020 rule also held public elementary and secondary schools accountable for sexual harassment by their employees, including sexual assault, a critical change given the epidemic of sexual assault by teachers and staff on students in our nation’s public schools.<sup>37</sup>

Given this, the current department’s decision to rewrite its Title IX regulations is not only unnecessary, but it promises to have serious,

harmful consequences for both students accused of sexual assault *and* their accusers.<sup>38</sup> It is anticipated that the proposed rule would force universities to implement procedures similar to those described by the 2011 Dear Colleague Letter (2011 DCL)<sup>39</sup> from then-Assistant Secretary of the Office of Civil Rights Russlynn Ali and the 2014 guidance document titled “Questions and Answers on Title IX and Sexual Violence” (2014 Q&A), described below.<sup>40</sup>

The department has provided no credible evidence of a need to change the current rule as applied to allegations of sexual assault by students at universities receiving federal funds. Under then-Secretary of Education Betsy DeVos, the department took three years to develop its 2020 Title IX rule,<sup>41</sup> which better serves all parties—from the accusers of sexual assault to those accused of sexual assault to university administrators.

**Sexual Assault and the Dear Colleague Letter.** Not only is there no proof that the 2020 Title IX rule has caused harm, but there is also no evidence that the policies of the 2011 Dear Colleague Letter and the 2014 guidance document helped *prevent* sexual assault on campuses. Instead, returning to the policies of 2011 and 2014 would cause the erosion of due process rights for students accused of sexual assault.

While the 2011 and 2014 policies were in force, universities had an obligation to adjudicate all reports of sexual assault internally using quasi-administrative tribunals that lacked many of the features of due process that are foundational to our criminal justice system.<sup>42</sup> By threatening the elimination of federal funding, the department coerced universities to use a “preponderance of the evidence” standard of proof, a much weaker standard than the “beyond a reasonable doubt” standard of our criminal justice system.<sup>43</sup> The department also pressured universities to complete investigations in 60 days and to use a single investigator model where *one person* acted as investigator, judge, and jury. It likewise forced schools to forbid the cross-examination of witnesses and to withhold evidence from the accused. If a university allowed the accused to appeal the school’s decision, it also had to allow the accuser to appeal, creating a situation akin to double jeopardy.<sup>44</sup>

**Wrongful Punishment.** As a result of the 2011 and 2014 policies, many innocent students were wrongfully punished by their universities. A 2019 study by Samantha Harris and K. C. Johnson<sup>45</sup> found that the number of lawsuits brought against universities by students who claimed to be wrongfully accused skyrocketed within two years of the 2011 DCL, particularly under the enforcement of then- (and now current) assistant secretary of the Office for Civil Rights, Catherine Lhamon.

In the 21 months from April 2011 through the end of 2012, only seven lawsuits were filed by students claiming they were wrongly accused of sexual misconduct. By 2017, that number increased 11-fold to 78 lawsuits. The total number of cases against universities between 2011 and 2019 was over 500. Federal and state courts ruled against universities in 151 of 298 decisions that were issued during the same time interval, having found the lack of due process in the campus tribunal hearings to have rendered them fundamentally unfair.<sup>46</sup>

A return to the Obama-era guidance on sexual violence would virtually guarantee the wrongful punishment of innocent people. Expulsion from school, loss of scholarships and financial aid, and reputational harm for wrongfully accused, much less punished individuals can and will dramatically change the trajectory of an individual's life and career.

**Imperiled Victims.** Most serious of all are the costs the current department's policies would have on potential victims of sexual assault. The 2011 DCL did not require that university administrators report accusations to proper law enforcement authorities, but "exerted improper pressure"<sup>47</sup> on them to change how they handled such sexual assault and harassment cases by arguing, among other things, for the speeding up of investigations that—if reported to law enforcement authorities—would otherwise have taken significantly longer to complete. By tipping the scales in favor of an accuser and coercing colleges to keep these cases on campus rather than referring them to law enforcement authorities, the OCR put other potential victims in peril by giving some rapists and other sexual predators a get-out-of-jail-free card.<sup>48</sup>

**Abuse and Misapplication.** Changes to the 2020 rule could also further attack freedom of inquiry on university campuses for students and professors. The Foundation for Individual Rights in Education has reported dozens of cases in which Title IX was abused and misapplied in the years following the 2011 DCL and 2014 Q&A.<sup>49</sup> Such abuse arose in the form of Title IX complaints filed by hypersensitive students claiming to have felt sexually harassed by otherwise innocent speech made by professors and students they found to be offensive.

In addition, whether by filing spurious Title IX complaints to remove undesirable voices from campus or forcing de facto speech codes into classroom pedagogy, many of the abusive Title IX investigations began without the professors' knowledge and without the ability for professors to access the evidence against them. These cases have artificially inflated the incidents of sexual harassment on campus and have had a chilling effect on free speech on university campuses as evidenced by the dramatic rise in self-censorship by students and professors alike.<sup>50</sup>



The current Title IX rule protects all parties involved in allegations of sexual assault. Any changes to the rule would likely undermine due process and subject victims to the possible trauma of knowing those who genuinely should have been reported to law enforcement authorities would likely remain free to commit criminal acts again. It would also muzzle students and teachers, preventing the free exchange of ideas so critical to higher education.

The burden is on the department to provide empirical evidence that the 2020 rule requires changes. And in the short time since that rule's enactment, the department has provided none.

## Unilateral Expansion of “Sex” Discrimination

In addition to rescinding the 2020 rule, the department's proposed notice of rulemaking indicates that it intends to unilaterally expand Title IX's prohibition against discrimination based on “sex” to include, among other things, sexual orientation and gender identity.

The text, history, and congressional record on Title IX indicate that its purpose was to equalize educational opportunities for women after they were subjected to decades of significant educational disparities compared to the opportunities afforded to male students. Yet the department has failed to articulate why Title IX is suddenly insufficient to protect the interests of women and girls as it was designed.<sup>51</sup>

During introduction of the Title IX bill he had authored,<sup>52</sup> Sen. Birch Bayh (D-IN) said:

We are all familiar with the stereotype [that] women [are] pretty things who go to college to find a husband, [and who] go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools not to waste a “man's place” on a woman stems from such stereotyped notions. But the facts contradict these myths about the “weaker sex” and it is time to change our operating assumptions...[This amendment is] an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.<sup>53</sup>

A House and Senate conference committee worked for several months to review and reconcile the more than 250 differences between the House and

Senate versions of their education bills. In 1972, the final legislation—the provision against sex discrimination—became Title IX.

Title IX filled the gap left by Title VII of the 1964 Civil Rights Act, which protects against sex discrimination in employment but otherwise excludes educational settings,<sup>54</sup> as well as the gap left by Title VI, which prohibits discrimination on the basis of race, color, and national origin within programs receiving federal funding—but is silent on sex discrimination.<sup>55</sup> These gaps necessitated a statutory remedy to address the vast educational disparities women and girls experienced in relation to boys and men before Title IX’s passage. In high school athletics alone, the rate of girls’ participation in 2016 was more than 10 times what it was prior to Title IX’s passage—representing an increase of over 1000 percent.<sup>56</sup>

The American Association of University Women asserts<sup>57</sup> that because of Title IX, women now constitute over 56 percent of America’s college students. In addition:

- Women hold nearly half (48 percent) of tenure-track teaching positions.
- Since Title IX’s passage, the number of female athletes climbed more than 10 times: Females now make up 42 percent of all high school athletes.
- In 1972, only 700 girls played soccer on high school teams. In 2018, there were 390,000.<sup>58</sup>

Accounting for the differences in the two sexes, Title IX and its implementing regulations contain a set of limited, sex-affirmative exceptions. These exceptions permit schools to take sex into account to address imbalances in admissions, academic programming, and sports. A sex binary—male and female—is the foundation upon which the entire statute’s operation rests. Title IX’s use of the words “both” and “either” to address educational disparities within its regulations reinforces the understanding that there are only two sexes and opportunities for both must be equal under the law.<sup>59</sup>

As stated in the preamble to the 2020 Title IX rule:

In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes. For example, the Department’s justification for not allowing schools to use “a single standard of measuring skill or progress in physical education classes...[if doing

so] has an adverse effect on members of one sex” was that “if progress is measured by determining whether an individual can perform twenty-five pushups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex.”<sup>60</sup>

These biological distinctions provide the imperative for Title IX and offer a compelling argument in favor of its continued operation without regulatory intervention or modification. It would be ironic and wrong to enable biological males who declare themselves women based on their own sense of a wholly subjective, malleable, and evolving gender identity to obtain an unfair and discriminatory advantage over biological women whose immutable, unchanging sex has been recognized for decades as worthy of protection under well-established federal law.

Title IX has—for 50 years—proven to be a barricade against discriminatory conduct in federally funded educational programs. The department must carefully consider the alteration of its fundamental protections for girls and women in education and identify a legitimate, rational basis for doing so.

***Bostock v. Clayton County***. The department has proffered *Bostock v. Clayton County*<sup>61</sup> and the Supreme Court’s determination that “sex discrimination” within the scope of employment under Title VII of the Civil Rights Act of 1964 also included discrimination on the basis of sexual orientation and transgender status as its rationale to similarly expand Title IX’s prohibition against sex discrimination in education to transgender status as well.

However, in his opinion for the majority in *Bostock*, Supreme Court Justice Neil Gorsuch began, “We proceed on the assumption that ‘sex’ signified what the employers suggest, referring only to biological distinctions between male and female.”<sup>62</sup> From there, the court noted, “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”<sup>63</sup>

Though *Bostock* has been cited endlessly for the proposition that the decision demands that all civil rights law be altered to reflect sexual orientation and transgender status as stand-ins for sex, the decision offers no such basis. Instead, the court explicitly limited its holding to Title VII.

Writing for the majority, Justice Gorsuch explained:

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. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us 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.”<sup>64</sup>

The court’s Title VII precedent supports the proposition that relying at least in part on an individual’s biological sex (as with the case of sexual orientation or transgender status<sup>65</sup>) is prohibited within an employment setting. Yet, unlike Title VII, which is a “sex-prohibitive” anti-discrimination law, Title IX differs significantly in its text, purpose, operation, and in certain of its applications, including athletics, for example. It is “sex-affirmative,” requiring consideration of a student’s biological sex.

For example, longstanding department regulations permit educational programs 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” and instruct universities to consider male or female sex in their distribution of athletic scholarships.<sup>66</sup>

Under the department’s reading of *Bostock*, any school receiving direct or indirect federal funding would have to open its bathrooms, locker rooms, housing accommodations, sports teams, and any other sex-separated educational program or offering to the opposite sex. Such a dangerous interpretation sacrifices the safety, privacy, and equality of girls and women to appease a pet policy agenda, unsupported by necessity. It ignores the extensive congressional record on Title IX’s purpose, the law’s specific provision of separate spaces to protect the privacy and safety of girls and women—those for whom the law was passed—and ignores the Supreme Court’s restriction of its holding in *Bostock* to Title VII alone.

## **The Costs to Local Educational Associations, State Educational Associations, Institutions of Higher Education, and the Public: Unstudied and Significant**

The department’s proposed Title IX rule promises to have sweeping, detrimental effects beyond the scope of discussion in this *Legal Memorandum*. Title IX’s intersection with myriad nondiscrimination provisions make this a virtual certainty. Yet there is no evidence that the department studied such effects in its development of the rule.

The department must anticipate some of the foregoing costs:<sup>67</sup>

1. costs of adjudication and complaint resolution borne by the department after an increase in claims of sex discrimination by girls and women who are newly required to share sports opportunities, housing, or private spaces with biological men;
2. costs accruing to individual schools, school districts, state educational associations, and athletic associations from lawsuits filed by girls and women brought under Title IX after the complaint resolution process offered by the department fails;
3. costs of litigation ensuing from the proposed rule's conflict with the laws of at least 16 states that were recently passed to ensure the existence of the same sex-based protections Title IX has always offered at the federal level;
4. costs of litigation borne by universities and colleges when students are wrongly accused of sexual violence or harassment without due process protections that ensure the fair resolution of investigations;
5. costs to those students and families who directly benefit from reduced-cost lunch or meal assistance programs administered through the U.S. Department of Agriculture;
6. costs of implementation of any new rule borne by state and local educational associations in ensuring their facilities, teams, housing, curriculum, signage, and policies are in compliance with the new rule; and
7. costs to the medical profession of staffing losses resulting from forced compliance with a sexual orthodoxy that conflicts with the religious beliefs of medical practitioners and contradicts the governing principles of faith-based medical facilities.

Federalism concerns again arise within the context of how the department's rule would impact state schools, hospitals, insurance plans, and medical facilities based on Title IX's intersection with section 1557 of the Affordable Care Act.<sup>68</sup> A prudent approach would include consultation with the states before issuing a rule that imposes such substantial costs and impact on them.<sup>69</sup> No evidence exists that such consultation has occurred.

Those bearing the brunt of the direct impact on the department's Title IX rule will, of course, be young women and girls.

One study revealed that 94 percent of senior female executives<sup>70</sup> played competitive sports. Eliminating young women's athletic opportunities would likely negatively impact their long-term professional opportunities and ultimately result in market effects that are hard to quantify and have not yet been studied. The costs of lower female college enrollment, lost female scholarships, and female displacement on school athletics rosters would no doubt be extensive and must be considered before the department moves forward with the rulemaking process.

## Conclusion

The Department of Education's upcoming rulemaking on Title IX is a solution in search of a problem. Especially damning is the department's rush to rescind a still-new Title IX rule—one that resulted from arduous consideration of stakeholder input and was designed to ensure that students, teachers, and universities were all well-protected under federal law.

The proposed rule would erase the legal status of and hard-fought protections for girls and women in nearly every K–12 and higher education institution in the country. It would remove commonsense protections for students in campus sexual assault and harassment proceedings and return investigative power to the hands of a single unelected bureaucrat. It would muzzle students and professors through the initiation of opportunistic Title IX complaints. And it would perpetuate the type of discrimination it claims to want to eliminate by pitting males against females once again.

For the women's movement, Title IX was a watershed. It has successfully changed the lives of girls and young women in America by broadening their educational horizons and setting them up for success in later life. On its 50th anniversary, a revision of the kind proposed by the Department of Education makes a mockery of all that Title IX's champions worked to achieve.

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## Endnotes

1. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, Pub. L. 92–318, as amended by Pub. L. 93–568, §3, 88 Stat. 1855.
2. SUSAN WARE, *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS* vi, 23 (2007).
3. Bianca Quilantan, *Biden Officials Prepare to Blow Up Trump’s Rules on Sexual Misconduct in Schools*, POLITICO (May 7, 2022), <https://www.politico.com/news/2022/05/07/schools-rules-on-transgender-students-sexual-assault-00029945>.
4. Laura Meckler, *New Title IX Rules Set to Assert Rights of Transgender Students*, WASH. POST (Mar. 30, 2022), <https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/>.
5. Bianca Quilantan, *The Unintended Consequences of a Title IX Rule Delay*, POLITICO (May 23, 2022), <https://www.politico.com/newsletters/weekly-education/2022/05/23/the-unintended-consequences-of-a-title-ix-rule-delay-00034280>.
6. See Celebrating the 25th Anniversary of Title IX, 143 CONG. REC. 4218 (1997): “The House Education and Labor Committee had a large body of evidence of discrimination against girls and women in our education system. Since I came to the Congress and the committee in 1965 the committee had been involved in hearings related to equal educational opportunities for girls and women. We scrutinized textbooks which only portrayed successful men, admissions policies which excluded women from graduate and professional schools, and vocational education courses.”
7. Executive Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).
8. The Biden Administration has repeatedly emphasized its commitment to “combatting” what it calls “legislative attacks on transgender kids at the state level.” See White House, Fact Sheet: Biden–Harris Administration Advances Equality and Visibility for Transgender Americans (Mar. 31, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/30/fact-sheet-biden-harris-administration-advances-equality-for-transgender-americans/>.
9. Executive Order No. 13988.
10. U.S. Dep’t of Educ., Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021).
11. *Tennessee, et al. v. U.S. Dept. of Education, et al.*, case no. 3:21-cv-00308 (E.D. Tenn.) (filed August 30, 2021).
12. Rulemaking is the policymaking process for executive and independent agencies of the federal government. Agencies use this process to develop and issue rules (known also as “regulations”). The process is governed by various laws, largely the Administrative Procedure Act (5 U.S.C. ch. 5), as well as the Congressional Review Act, Paperwork Reduction Act, and Regulatory Flexibility Act. In addition, certain executive orders such as 12866, 13563, and 13579 also establish principles and guidance for the rulemaking process. The rulemaking process can result in a new rule, an amendment to an existing rule, or the repeal of an existing rule altogether.
13. *Statement by U.S. Department of Education Assistant Secretary for Civil Rights Catherine E. Lhamon on Title IX Update in Fall 2021 Unified Agenda and Regulatory Plan*, U.S. DEP’T OF EDUC. (Dec. 10, 2021), <https://www.ed.gov/news/press-releases/statement-us-department-education-assistant-secretary-office-civil-rights-catherine-lhamon-title-ix-update-fall-2021-unified-agenda-and-regulatory-plan>.
14. Executive Order No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021).
15. U. S. Dep’t of Educ., Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 34 C.F.R. Part 106 (May 19, 2020).
16. This attempt to wrestle away the authority of another branch of government (in the present instance, Congress) through administrative fiat has been recognized by the Supreme Court as not unlike King James I’s pressure on judges to approve his attempts to raise revenue without Parliament’s participation. See *Perez v. Mortgage Bankers Ass’n.*, 575 U.S. 92, 124–125 (2015) (Thomas, J., concurring in the judgment).
17. U.S. CONST. amend. XIV, § 1.
18. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Equal Pay Act of 1963, 29 U.S.C. chap. 8 § 206(d).
19. 42 U.S.C. § 18116 (a), citing Title IX, 20 U.S.C. § 1681 *et seq.* (emphasis added).
20. U.S. Dep’t of Agriculture, “USDA Promotes Program Access, Combats Discrimination Against LGBTQI+ Community,” USDA No. 0100.22, May 5, 2022, <https://www.fns.usda.gov/news-item/usda-0100.22>.
21. U.S. Dep’t of Agriculture, “Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing—Policy Update,” Policy Memo CRD 01–2022, May 5, 2022, <https://www.fns.usda.gov/cr/crd-01-2022>.
22. 7 U.S.C. 2011, *et seq.*, as amended through Pub. L. 117–103.
23. Formerly the Food Stamp Program, 7 U.S.C. § 2013, *et seq.*
24. Whether or not the USDA will ultimately engage in the formal rulemaking process under the Administrative Procedure Act remains to be seen.
25. The USDA has indicated there will be no “grace period” for schools receiving Food Nutrition Service funding and has required immediate adherence to its Title IX interpretation of “sex” to include “sexual orientation and gender identity.” See U.S. Dep’t of Agriculture, Memo CRD 02–2022, Questions and Answers Related to CRD 01–2022 Application of *Bostock v. Clayton County* to Program Discrimination Complaint Processing—Policy Update,” May 5, 2022, <https://fns-prod.azureedge.us/sites/default/files/resource-files/crd-01-2022-qa.pdf>.

26. *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1011 (2022).
27. *Id.*
28. *Id.* (quoting *Maine v. Taylor*, 477 U.S. 131, 137 (1986)).
29. U.S. CONST. amend. XIV: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."
30. As the notice of proposed rulemaking on Title IX has already been delayed twice as of the date of this memorandum, only the department's notice of interpretation on Title IX exists. But such interpretative rules serve only to "advise the public of the agency's construction of the statutes and rules which it administers." They "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." See *Perez v. Mortgage Bankers Ass'n.*, 575 U.S. 92, 96 (2015) (quoting *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)).
31. *N. Haven Bd. Of Educ. V. Bell*, 456 U.S. 512, 531–33 (1982).
32. *Id.* at 531–535 (internal citations and quotation marks omitted).
33. Pub. L. No. 100–259, § 3(a), 102 Stat. 28, 29 (1988).
34. Executive Order No. 12866, 58 Fed. Reg. 90 (Oct. 4, 1993).
35. 85 Fed. Reg. 30,026 (May 19, 2020), *supra* note 15.
36. Among other provisions, the 2020 Title IX rule requires colleges to provide live hearings and allow students' advisers to cross-examine parties and witnesses involved. Institutions must also presume that those accused of sexual misconduct are innocent prior to the investigative and decision-making process. The 2020 rule also clarifies that stalking, domestic violence, and dating violence are officially considered examples of sexual harassment under Title IX and specifies that religious schools are exempt from the provisions of Title IX without having to offer proof of what provisions of that law conflict with their religious tenets by submitting a written statement to the Assistant Secretary for Civil Rights in order to qualify for Title IX's religious exemption. The 2020 rule also prevents the chilling of and infringement upon the First Amendment freedoms of students, teachers, and faculty by broadening the scope of prohibited speech and expression to include only those claims of sexual harassment that amount to conduct that jeopardizes a person's equal educational access. See U.S. Dep't of Educ., Final Rule, 34 C.F.R. Part 106, *supra* note 15.
37. Recognizing that elementary and secondary education environments are different than post-secondary environments (and where minor children might be afraid to come forward with complaints), the department clarified in its 2020 rule that the actual knowledge of any elementary or secondary school employee of sexual harassment or sexual assault was sufficient for purposes of Title IX's non-discrimination provisions and furthered the department's policy goals of preventing such discrimination. See U.S. Dep't of Educ., Final Rule, 34 CFR Part 106, *supra* note 15. See also Moriah Balingit, *Sexual Assault Reports Sharply Increased at K-12 Schools, Numbering Nearly 15,000*, *Education Department Data Shows*, WASH. POST (Oct. 15, 2020), <https://www.washingtonpost.com/education/2020/10/15/sexual-assault-k-12-schools/>.
38. The department's 2020 rule created an obligation to respond promptly and supportively to persons alleged to be victimized by sexual harassment, established fair grievance processes that provided due process protections to both alleged victims and alleged perpetrators, instituted effective implementation of remedies for victims, and ensured that complainants had clear information about how to access supportive measures a school has available (and how to file a formal complaint initiating a grievance process against a respondent if the complainant chooses to do so) if and when an alleged victim wants the school to respond to her/his complainant's situation. Like the accused, claimants were also permitted under the department's 2020 rule to introduce evidence and cross-examine witnesses.
39. U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter from Russlynn Ali (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
40. U.S. Dep't of Educ., Off. for Civ. Rts., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
41. 85 Fed. Reg. 30,026 (May 19, 2020), *supra* note 15.
42. Students accused of criminal sex offenses like rape and felony sexual assault would otherwise—within the criminal justice system—be tried according to the "beyond a reasonable doubt" standard.
43. While campus tribunal proceedings are different from criminal trials and therefore not subject to a "beyond a reasonable doubt" standard, the 2011 DCL of the department settled on the lowest burden of proof to guide the adjudication of these administrative proceedings by dictating a "preponderance of the evidence" standard—often described as "more likely than not," or "50.01 percent certain." See Dear Colleague Letter, *supra* note 39; and Questions and Answers on Title IX, *supra* note 40. In so doing, the department opted not to use what would have been arguably the most workable option and a middle-of-the-road approach: the "clear and convincing evidence" standard. "Clear and convincing" evidence means that the evidence is highly and substantially more likely to be true than untrue, and the trier of fact must have an abiding conviction that the truth of the factual contention is highly probable. See *Colorado v. New Mexico*, 467 U.S. 310 (1984). In particular, the 2011 DCL from the department stated: "The 'clear and convincing' standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence."



44. John Schoof, *Dangerous Changes Coming for Title IX*, HERITAGE FOUND. ISSUE BRIEF No. 5238, Nov. 16, 2021, <https://www.heritage.org/education/report/dangerous-changes-coming-title-ix>.
45. Samantha Harris and K. C. Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 LEGIS. AND PUB. POL'Y 64 (Dec. 2019).
46. *Id.* at 67.
47. See *Open Letter from Members of The Penn Law School Faculty Regarding Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities 1* (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf>.
48. Hans von Spakovsky, *Campus Sexual Assault: Understanding the Problem and How to Fix It*, HERITAGE FOUND. LEGAL MEMORANDUM No. 211, July 25, 2017, <https://www.heritage.org/crime-and-justice/report/campus-sexual-assault-understanding-the-problem-and-how-fix-it>.
49. Greg Lukianoff and Adam Goldstein, *John McWhorter Is Right About the Chilling Effect of Title IX Campus Safetyism*, FIRE (Sept. 11, 2020), <https://www.thefire.org/john-mcwhorter-is-right-about-the-chilling-effect-of-title-ix-campus-safetyism/>.
50. *Id.*
51. McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 286 (2d Cir. 2004) (Title IX was “enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities.”)
52. Senator Bayh was driven to pass Title IX in part because of his wife’s own experiences, saying, “My late wife, Marvella, educated me about discrimination against women in higher education after her experience being told by the University of Virginia that ‘women need not apply.’” Dana Hunsinger Benbow, *Sen. Birch Bayh, in Tears: “I Had No Idea That Title IX Would Have This Kind of Impact,”* INDYSTAR (Mar. 14, 2019), <https://www.indystar.com/story/sports/2019/03/14/sen-birch-bayh-tears-i-had-no-idea-title-ix-would-have-impact/3161553002/>.
53. 118 CONG. REC. 5804, 5808 (1972).
54. 42 U.S.C. § 2000e *et seq.* (1964).
55. *Id.*, §§ 2000d–2000d-7.
56. Amy S. Wilson, *45 Years of Title IX: The Status of Women’s Intercollegiate Athletics*, NAT’L COLLEGIATE ATHLETIC ASS’N (2017), <http://www.ncaapublications.com/p-4510-45-years-of-title-ix.aspx?CategoryID=0&SectionID=0&ManufacturerID=0&DistributorID=0&GenreID=0&VectorID=0&>.
57. Am’n Ass’n of Univ. Women, *Title IX: Leveling the Playing Field*, <https://www.aauw.org/issues/education/title-ix/> (accessed April 11, 2022).
58. *Id.*
59. See *e.g.*, 20 U.S.C. § 1681(a)(2): “[A]n institution which admits only students of *one* sex to being an institution which *admits both sexes*.” (emphasis added).
60. 85 Fed. Reg. 30,178 (May 19, 2020), *supra* note 15. This proposition is supported, for example, in the service agencies (including the United States Air Force, Military, and Naval Academies), where female enlistees are held to different physical fitness performance standards than their male counterparts. See, *e.g.*, *Air Force PT Test Standards*, AIR FORCE PT, <https://airforce-pt.com/events/air-force-academy-candidate-fitness-test/>.
61. 140 S. Ct. 1731 (2020).
62. *Id.* at 1739.
63. *Id.* at 1741.
64. *Bostock v. Clayton Cty.*, 140 S.Ct. 1737.
65. In *Bostock*, Justice Neil Gorsuch wrote that, “An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge. Or take 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...But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” *Bostock*, 140 S.Ct. 1741–1742.
66. 34 C.F.R. §§ 106.41(b), and 106.37(c).
67. The full costs and impacts associated with the department’s intended rule change are too extensive for consideration in this *Legal Memorandum*.
68. See *supra* note 19.

69. Fifteen attorneys general have already expressed significant concern with the department's intended rulemaking on Title IX. See Cozen O'Connor, *Montana AG Leads Coalition Objecting to Proposed Title IX Rulemaking* (Apr. 8, 2022), <https://www.jdsupra.com/legalnews/montana-ag-leads-coalition-objecting-to-5246235/>.
70. *Why Female Athletes Make Winning Entrepreneurs*, ESPN-W AND EY (2017), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_gl/topics/entrepreneurship/ey-why-female-athletes-make-winning-entrepreneurs.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/entrepreneurship/ey-why-female-athletes-make-winning-entrepreneurs.pdf).