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EO 12866 Meeting
Nondiscrimination on the Basis of Sex in
Education Programs or Activities Receiving
Federal Financial Assistance
RIN: 1870-AA16

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Thank you for the opportunity to provide comments on OIRA's review of the Title IX proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."

OMB cancelled a previous EO 12866 meeting EPPC had scheduled for a different rule,¹ so we are glad you are willing to hear EPPC scholars' input on this rule.

Today there are 8 major concerns/points we want to raise of importance to OIRA and the Department of Education (ED).

1. The Rule should have a meaningful public comment period.

- As you know, under EO 12866, for most rules, an agency should give the public at least 60 days for meaningful comment. The Administrative Procedure Act (APA) suggests less than 30-days is highly suspect and problematic.
- There has been a concerning trend by this administration of providing the public less than 30 days for comment from publication of the notification of proposed rulemaking in the federal register. For example, CMS in HHS published a 145-page, triple-columned notice of proposed rulemaking on January 5 with a public comment deadline on January 27, a mere 22 days to provide input on a complex, major, and economically significant proposed rule. That was outrageously short.
- We ask that for this rule the Department provides a minimum of 60 days, if not 90 days, to allow the public time to provide meaningful input as required by law, and that these dates be from publication not inspection of the NPRM. Any shorter would suggest that the Department has prejudged the rule and is not interested in the public's input. Surely fairness and equity suggest the public should have a reasonable amount of time to consider and comment on the proposed rule, especially for a rule that is certainly to be major and economically significant.

¹ Rachel Morrison, "Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion," *National Review*, October 8, 2021. <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/>.

2. The Rule should recognize that “sex” under Title IX means “biological sex,” not “gender identity.”

- Title IX prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance.² Title IX and its accompanying regulations clearly recognize the fact of biological sexual difference and clearly presuppose “sex” as a binary classification (male or female). This is clearly shown by the following references:
 - Title IX provisions are not to be construed as prohibiting an educational institution “from maintaining separate living facilities for the different sexes,” 20 U.S.C. 1686;
 - “an institution which admits only students of one sex to being an institution which admits students of both sexes,” 20 U.S.C. 1681(a)(2);
 - references to “men’s” and “women’s” associations as well as organizations for “boys” and “girls” in the context of organizations “the membership of which has traditionally been limited to persons of one sex,” 20 U.S.C. 1681(a)(6)(B);
 - references to “boys” and “girls” conferences, 20 U.S.C. 1681(a)(7)(A);
 - “separation of students by sex within physical education classes or activities,” 34 CFR 106.34;
 - “classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls,” 34 CFR 106.34; and
 - “separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport,” 34 CFR 106.41.
- While advancing equality between the sexes, Title IX permits separation “on the basis of sex” specifically to take account of biological differences between males and females. Title IX aims to protect reasonable sex-based distinctions, not obliterate them.
- Efforts to shoehorn “gender identity” into Title IX’s protections against “sex discrimination” undercut the very purpose of Title IX, which was intended to ensure female equality, opportunity, safety, and privacy. Subjective “gender identity” labels should not be privileged under the law and certainly should not be a vehicle to deprive females of sex-specific protections.
- Interpreting “sex” to include the concept of “gender identity” not only undercuts the sex-based protections permitted under Title IX but also renders them virtually meaningless.
- “Gender identity” is not the same as “biological sex.” In fact, a declaration that one’s “gender identity” is “transgender” signals a *rejection* of one’s biological sex or sex-based identity. According to the American Psychological Association, “transgender” is “an umbrella term ... wherein one’s assigned biological sex doesn’t match their felt identity.”³ The Human Rights Campaign Foundation publication entitled *Coming Out: Living Authentically as Transgender or Non-binary* defines “gender identity” as a person’s subjective self-perception, and a “transgender” gender identity as one that is “different

² Office for Civil Rights, U.S. Dep’t Educ., *Title IX and Sex Discrimination* (last modified Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

³ American Psychological Association & National Association of School Psychologists. (2015). *Resolution on gender and sexual orientation diversity in children and adolescents in schools*. <https://www.apa.org/pi/lgbt/resources/diversity-schools?item=3>.

from their sex assigned at birth.”⁴ Expressing a transgender “gender identity” *contradicts* but cannot *change* a person’s immutable biological sex.

- The statutory language of Title IX clearly intended to protect sex-based distinctions in specific situations. Redefining “sex” to mean “gender identity” completely erases those protections and disadvantages *females* who rely on sex-based (not “gender-identity”-based) protections to ensure their safety, privacy, and educational opportunities (including athletic opportunities). Title IX’s sex-based distinctions are grounded in common sense, historical perspective, and biology: they recognize that women’s safety is often threatened by the intrusion of males into private spaces where women are sexually vulnerable (e.g., spaces for toileting, showering, and sleeping) and women’s progress and equality are limited in specific arenas, such as interscholastic athletics, where biological differences between the sexes come into play. Title IX’s specific language, based on an understanding of sex as binary (male or female), permits and accommodates separate facilities for males and females (toileting, locker rooms, etc.) and certain kinds of sex-specific activities and athletic competitions *in fulfillment* of its statutory intent to ensure equality between males and females.
- “Gender identity” or “transgender status” is irrelevant when it comes to Title IX’s enumeration of specific exceptions to the rule against “sex” discrimination—only biological sex matters. And the fact remains that males who identify as “transgender girls” or “transwomen” are still biologically male and should be regarded as such for purposes of Title IX.
- ED has indicated that it intends to propose rules that re-interpret “sex” under Title IX to mean “gender identity” or “transgender status.” If ED proceeds down that path, then it needs to address the following:
 - Define “gender identity” and “transgender status.”
 - Address the inherent contradiction of re-interpreting “sex” (an immutable reality) to include “gender identity” and “transgender status” (subjective self-identifiers based on a person’s rejection of their own biological sex) and provide a rationale for any proposal that re-defines “sex” in terms inherently contradictory to the statutory intent of Title IX as a whole and to Title IX’s specific provisions regarding sex-specific clubs, activities, facilities, and athletics.
 - Provide a textual basis and legal justification for a re-interpretation that effectively privileges “gender identity” over sexual identity (biological sex) and threatens to erase the protections (safety and privacy) and gains (athletics) that Title IX secured for females.
 - As requested below, these explanations should be accompanied by a cost analysis that considers and justifies the added financial, health, administrative, legal, and other costs likely to be incurred by institutions and individuals as a result of the Department’s undoing of sex-based protections and opportunities that have been in place for decades and successfully ensured female equality and advancement.

⁴ “Gender identity - One’s innermost concept of self as man, woman, a blend of both or neither – how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.” *Coming Out: Living Authentically as Transgender or Non-binary*, Human Rights Campaign Foundation. <https://www.hrc.org/resources/coming-out-living-authentically-as-transgender-or-non-binary>.

- If this Administration aims to privilege anti-discrimination measures based on “gender identity” or “transgender” status, then it should be transparent about that goal and strive to accomplish it legislatively not through the administrative process. Americans deserve a say, through their elected representatives, on whether females must relinquish their hard-fought sex-based protections in order to privilege male aspirations asserted under the cover of a feminine “gender identity.”
- If ED intends to propose a definition of “sex discrimination,” we suggest the only change needed is to clarify that “sex” under Title IX means “biological sex.” This clarification would foreclose further attempts to shoehorn “gender identity” into the category of “sex.” “Gender identity” should *not* be included in any definition of “sex discrimination” under Title IX.

3. Title IX was not amended by *Bostock*, and *Bostock* does not support the need for regulatory action.

- EO 12866, section 1(b) establishes the principles of regulation, including 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.”
- Without going through the notice and comment process, ED issued a “Notification of Interpretation” on June 16, 2021, explaining that it will enforce Title IX’s sex discrimination prohibition as including discrimination on the basis of gender identity and sexual orientation based on *Bostock v. Clayton County*.⁵ As indicated in the unified agenda, the anticipated proposed rule seeks to align Title IX regulations with this interpretation.
- However, as the Supreme Court stated in *Perez v. Mortgage Bankers Association*, “Interpretive rules ‘do not have the force and effect of law and are not accorded that weight in the adjudicatory process.’” 575 U.S. 92, 97 (2015). Thus, ED’s June 2021 Notice of Interpretation is neither authoritative nor sufficient to justify a proposed rule change.
- To the extent ED is relying on *Bostock* as the impetus for issuing the anticipated proposed rule, that basis is deficient. *Bostock* was not a Title IX case. Rather, in *Bostock* the Supreme Court held that under Title VII “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.’”⁶ In addition, *Bostock*’s Title VII analysis cannot apply to Title IX because it has a different sex-specific structure and, unlike Title VII, uses language based on biology, as detailed above.
- The Court acknowledged concerns by some that its decision could make sex-segregated bathrooms, locker rooms, and dress codes “unsustainable” and “sweep beyond Title VII to other federal or state laws that prohibit sex discrimination.”⁷ But the Court stated that

⁵ Office for Civil Rights, U.S. Dep’t Educ., Notification of Interpretation: 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. 32,637 (June 16, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

⁶ 140 S. Ct. 1731, 1737 (2020).

⁷ *Id.* at 1753.

such questions were for “future cases” and the Court would not prejudge any such questions because “none of th[o]se other laws [we]re before [them].”⁸

- Likewise, ED should not prejudge those questions, especially as it relates to sex-segregated bathrooms, lockers rooms, dress codes, and housing in the education context. The Supreme Court was clear that *Bostock* was not deciding any issue beyond hiring and firing in the employment context under Title VII. It is wrong for ED to contradict the Court and say that *Bostock* requires its regulatory action.
- To the extent ED chooses to rely on *Bostock*, that decision rested on the assumption that “sex” refers only to the “biological distinctions between male and female.”⁹ To be consistent with *Bostock*, any definition of “sex” that ED proposes must also and continue to be “biological distinctions between male and female” and cannot assume a gender spectrum or fluidity. Further, the Court did not mention the term “gender identity” once in *Bostock*, rather it used the term “transgender status.” Thus, ED cannot rely on *Bostock* to support the inclusion of the term “gender identity” within the definition of “sex discrimination” under Title IX.

4. The Rule must consider its impact on Section 1557 and health care.

- When issuing Title IX regulations, the Department must consider the impact of those regulations on other laws and in other contexts. For example, Section 1557 of the Patient Protection and Affordable Care Act incorporates Title IX’s prohibition against sex discrimination. 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.”¹⁰
- Thus, how ED defines the ground of sex discrimination under Title IX in its regulations could have direct impact for Section 1557 and the health care context. As such, in issuing its proposed Title IX rule, ED must also evaluate the impact of the rule on Section 1557 and the health care context.
- This analysis will have particular application to the requirements to evaluate the impact of regulations on small businesses and federalism.

5. Title IX’s statutory religious exemption should not be touched.

- Title IX contains several statutory exemptions, including this specific religious exemption: it does not apply to an educational institution that is “controlled by a religious organization,” to the extent that its application would be inconsistent with the religious tenets of the organization.¹¹ This exemption should be recognized in full.
- Congress’s express religious exemption in Title IX protects religious freedom rights recognized under the First Amendment and secured by the Religious Freedom Restoration Act. In keeping with these religious liberty protections, ED should not propose any changes to the current Title IX regulations that might violate the text of Title IX or unconstitutionally burden religiously affiliated recipients or hinder any recipient in the exercise of its constitutional rights. For example, it would be an unacceptable burden

⁸ *Id.*

⁹ *Id.* at 1739.

¹⁰ 42 U.S.C. § 18116(a) (citing Title IX, 20 U.S.C. § 1681 *et seq.*).

¹¹ 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.

on religious freedom to require institutions to assert religious exemptions proactively, regardless of whether any complaint or investigation has been initiated, or to require an institution to publicize or proactively express its intent to exercise the religious exemption, or to specify in advance which proposed rules might be inconsistent with its religious tenets. Constraints such as these would have an unacceptable “chilling” effect on the recipient’s willingness to exercise their free exercise rights.

6. The Rule must include a meaningful economic analysis and consider its high costs.

- The Title IX rule is surely an economically significant rule, that requires meaningful economic analysis under EO 12866 and OMB Circular A–4. EO 12866 states: “In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”
- As part of its regulatory impact and economic analysis of the costs, benefits, and transfers, the rule should take into consideration the following key inputs:
 - *Costs on religious institutions.* ED’s proposal to repeal the 2020 rule, to require institutions to seek an anticipatory approval of their religious exemption, or to require them to receive recognition of their status as an institution under religious control would add costs and heighten the administrative burden on every educational institution under religious control. The 2020 rule avoids these unnecessary costs by deferring to colleges and universities concerning their religious control under the Title IX exemption.
 - *Costs associated with dismantling Title IX’s provision for single-sex athletic competition.* It has been nearly 50 years since Title IX became law and ensured equal educational opportunities on the basis of sex. Title IX was pivotal for females: interscholastic athletic opportunities for girls and young women skyrocketed in the years following its enactment. On a national level, ten times as many females now participate in high school sports compared to the pre-Title IX era.¹² What changed? Because of Title IX, schools created new opportunities for girls and young women—females—to participate and compete in athletic activities with other females. Because of these new opportunities, females—in massive numbers—came off the sidelines and became athletes, experiencing the exhilaration of competition, teamwork, fitness, recognition, and athletic excellence. According to a 2020 report by the Institute for the Study of Youth Sports, for example, nearly half of high school females in Michigan are athletes.¹³

¹² Kennedy, C. L. (2010). A new frontier for women’s sports (beyond title IX). *Gender Issues*, (1-2), 78. doi:10.1007/s12147-010-9091-y. <https://link.springer.com/article/10.1007/s12147-010-9091-y>.

¹³ Kochanek, Jill and Gould, Daniel, *The Status of High School Girls’ Sport Participation: A Report Compiled for the State of Michigan Women in Sports Task Force*, Institute for the Study of Youth Sports, Michigan State University, East Lansing, Michigan (2020).

This outstanding level of participation and achievement for female athletes is possible *only* because of *female* sports teams—teams separated on the basis of biological sex. How do we know? Because pre-Title IX, females did not participate at the same level, achieve the same levels of excellence, nor enjoy the same level of opportunities.

- *Benefits of female-only sports.* The reason why we have *female* sports is because we recognize the significant physiological and anatomical differences between males and females, and the resulting performance advantage for males—an advantage that has not diminished even though female athletes now receive the same top-level training as male athletes. Biological sex must continue to be the basis for participation standards in interscholastic athletics. A research review published in 2021 in the journal *Sports Medicine* states that “the performance gap between males and females becomes significant at puberty and often amounts to 10-50%, depending on the sport.”¹⁴ This performance gap is greatest in sports like track and field that require explosive power – track and field, incidentally, is the among the most popular sports for high school female athletes.¹⁵ The basis of this performance gap is physiological: Males and females are physiologically different—on average, males have a built-in biological advantage. They are bigger, stronger, faster, have more muscle mass, stronger bones, greater lung and cardio capacity, and more fast-twitch muscle fibers (which gives an advantage in explosive power); males, on average, also have more upper-body muscle and lower-body muscle than females.¹⁶ The male body is simply built differently—an advantage conferred by nature. As exercise physiologists have long acknowledged, in direct competitions between male and female athletes, males will win. For females to have the chance to win, especially at elite levels of competition, males and females must compete in separate categories.¹⁷ This performance advantage cannot be erased even when males suppress their testosterone production: longitudinal studies show that “the loss of lean body mass, muscle area and strength typically amounts to 5% after 12 months of

¹⁴ Hilton, E. and Lundberg, T, Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage, *Sports Medicine* (2021) 51:199-214. <https://doi.org/10.1007/s40279-020-01389-3>.

¹⁵ Kochanek, Jill and Gould, Daniel, *The Status of High School Girls’ Sport Participation: A Report Compiled for the State of Michigan Women in Sports Task Force*, Institute for the Study of Youth Sports, Michigan State University, East Lansing, Michigan (2020).

¹⁶ Saez-Saez de Villarreal E., Requena B., Newton R. U. (2010). Does plyometric training improve strength performance? A meta-analysis. *J. Sci. Med. Sport* 13 513–522. 10.1016/j.jsams.2009.08.005. <https://pubmed.ncbi.nlm.nih.gov/19897415/>; Miller AE, MacDougall JD, Tarnopolsky MA, Sale DG. Gender differences in strength and muscle fiber characteristics. *Eur J Appl Physiol Occup Physiol*. 1993;66(3):254-62. doi: 10.1007/BF00235103. PMID: 8477683. <https://pubmed.ncbi.nlm.nih.gov/8477683/>.

¹⁷ “Virtually all elite sports are segregated into male and female competitions. The main justification is to allow women a chance to win, as women have major disadvantages against men who are, on average, taller, stronger, and faster and have greater endurance due to their larger, stronger muscles and bones as well as a higher circulating hemoglobin level. Hence, elite female competition forms a protected category with entry that must be restricted by an objective eligibility criterion related, by necessity, to the relevant sex-specific physical advantages.” Handelsman, D. J., Hirschberg, A. L., & Bermon, S. (2018). Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance. *Endocrine reviews*, 39(5), 803–829. <https://doi.org/10.1210/er.2018-00020>.

treatment” to suppress testosterone.¹⁸ Moreover, suppressing testosterone does not eliminate enduring male-bodied anatomical advantages. A 15-year-old male who uses medication to suppress his natural testosterone does not lose the performance advantages conferred by nature, rooted in numerous physiological differences. All males and females deserve a team on which to play. But the costs to females who are muscled out of positions on “girls” or “women’s” school athletic teams by males who identify as “girls” or “women” are likely to be substantial.

- *Opportunity, physical, and emotional costs on female athletes.* Because of the opportunity to compete in interscholastic sports, millions of female athletes across the country have had the chance to go to college, their educations funded by the athletic scholarships they earned. Countless more were healthier and happier because of their participation in interscholastic sports. As we learned during the COVID pandemic, decreasing opportunities for young people to participate in sports takes a serious toll on mental and physical health of young people.¹⁹ Why should even one female be deprived of the opportunities that come from competing in female-only competitions?
- *Costs of allowing biological males to compete in female athletics.* ED must assess the likely costs that will result if athletic participation under Title IX is no longer on the basis of biological sex but rather gender identity. Those costs must include:
 - Potential losses in female participation, with consequent reduced health benefits, increased obesity, poorer mental health, and loss of social connection.
 - Potential loss of female leadership opportunities, particularly at the high school level, as girls experience displacement by male athletes who identify as transgender and exert leadership based on superior athletic prowess.
 - Potential loss of scholarships and academic opportunities historically facilitated by athletic participation.
 - Costs of retrofitting locker rooms, restrooms, equipment, and facilities to accommodate male bodies competing in women’s categories and to ensure safety and privacy of all participants.
 - Likely administrative and legal costs for school districts, regional athletic organizations, and inter-collegiate athletic organizations in managing rules changes, record-keeping, and participation criteria, and responding to potential legal challenges from displaced female athletes.
 - Likely costs, apart from athletics, of a “gender identity” criteria that results in greater need for retrofitting school and institutional facilities to accommodate student needs for privacy (single stall “all-gender” restrooms and locker rooms instead of multi-user facilities; measures to

¹⁸ Hilton, E. and Lundberg, T, Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage, *Sports Medicine* (2021) 51:199-214. <https://doi.org/10.1007/s40279-020-01389-3>.

¹⁹ Timothy A. McGuine, Kevin M. Biese, Scott J. Hetzel, Alison Schwarz, Stephanie Kliethermes, Claudia L. Reardon, David R. Bell, M. Alison Brooks, Andrew M. Watson; High School Sports During the COVID-19 Pandemic: The Effect of Sport Participation on the Health of Adolescents. *J Athl Train* 1 January 2022; 57 (1): 51–58. doi: <https://doi.org/10.4085/1062-6050-0121.21>; <https://meridian.allenpress.com/jat/article/57/1/51/465818/High-School-Sports-During-the-COVID-19-Pandemic>.

ensure privacy in dormitories and overnight accommodations; and other additional privacy measures, e.g., doors, curtains, and other measures).

- Potential increased costs in monitoring for and preventing any sexual assaults in all-gender restroom and locker room facilities, occasioned by male students gaining unchallenged access to female facilities or in response to female requests to ensure safe access to shared facilities.²⁰
- In addition to the numerous costs of it proposed rule the agency must consider, it must also consider alternatives, including not regulating, and provide that analysis.
- All of these things, and more, must be taken into consideration, and quantified or estimated to the maximum extent possible for a sufficient analysis of impact, costs, benefits, and transfers.

7. The Rule must address its major impact on small entities.

- As you are aware, the Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)), requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities and prepare a regulatory flexibility analysis to describe the impact of the proposed rule on small entities, unless “the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” The Act requires that “the agency shall publish such certification in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a statement providing the factual basis for such certification.”
- It seems clear that the anticipated Title IX rule will have a significant impact on small entities across the country. It will impact educational institutions at every level, including state, private, and religious institutions. Religious educational institutions are small entities for purposes of the RFA. In addition, to the extent the Title IX rule will impact Section 1557, the rule will have an enormous impact on small health care entities.
- ED must explain the impact on small entities, including religious educational institutions, and why it is justified. If, however, ED somehow does not think that the rule will have such a significant impact, the Secretary of Education *must* certify there is no such impact and provide sufficient analysis in the NPRM supporting such a claim.

8. The Rule must address its federalism implications.

- As you are familiar, EO 13132 from the Clinton Administration establishes certain requirements that an agency must meet when it issues a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications.
 - Section 3(c) of the EO states that “with respect to Federal statutes and regulations administered by the States, the national government shall grant the States the maximum administrative discretion possible.”
 - Section 3(d) explains how to implement policies that have federalism implications. Specifically, agencies “shall” (1) “encourage States to develop their

²⁰ See for example, the situation in Loudoun County, Virginia, where a teen male wearing a skirt was unchallenged entering the female restroom and subsequently assaulted a female student. Virginia Abram, “Teenager found guilty in Loudoun County bathroom assault,” *Yahoo News*, October 25, 2021. <https://news.yahoo.com/teenager-found-guilty-loudoun-county-004300075.html>.

own policies to achieve program objectives and to work with appropriate officials in other States,” (2) “where possible, defer to the States to establish standards,” and (3)/(4) consult with States and officials.

- Executive Order 12866 (§ 6(a)(3)(B)) also directs that significant regulatory actions avoid undue interference with State, local, or tribal governments, in the exercise of their governmental functions.
- The impending rule will clearly have federalism implications as it will impact state schools at all levels, and as mentioned above, also likely impact state hospitals, medical facilities, and insurance plans.
- ED must consult with states before issuing a rule that imposes a substantial cost and impact on states.

Conclusion

We urge OIRA to ensure that the statutory and regulatory process is upheld and that any final rule has sufficient legal and economic analysis that is rationale, reasoned, and scientific, not political, rushed, or prejudged.