

September 12, 2022

**Via Federal eRulemaking Portal**

Miguel A. Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Ave. SW  
Washington, DC 20202

**Re: EPPC Scholars Comment Opposing “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” RIN 1870-AA16, Docket ID ED-2021-OCR-0166**

Dear Secretary Cardona:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong opposition to the Department of Education’s (“ED” or “the Department”) proposed rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (“Proposed Rule”).<sup>1</sup> Rachel N. Morrison is an EPPC Fellow, member of the HHS Accountability Project, and former attorney at the Equal Employment Opportunity Commission. Mary Hasson is the Kate O’Beirne Senior Fellow at EPPC, an attorney, and co-founder of EPPC’s Person and Identity Project, an initiative that equips parents and faith-based institutions to counter gender ideology and promote the truth of the human person.

The Proposed Rule radically rewrites Title IX of the Education Amendments of 1972, landmark federal civil rights law that prohibits sex discrimination in education. As proposed, the rule is arbitrary and capricious, exceeds statutory authority, and is unlawful and unconstitutional. The rationale for the proposed changes is unsupported by substantial evidence. The Proposed Rule contradicts long-standing scientific understandings of the human person and places ideology ahead of sound policy. It turns the clock back on girls’ and women’s rights, tramples parental rights, harms children’s interests, and ignores religious freedom and free speech of students, employees, and religious educational institutions. We urge the Department to withdraw and abandon the Proposed Rule.

**1. ED has failed to provide substantial evidence that a revision of the current Title IX regulations is warranted.**

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.” To justify replacing current regulations, including the 2020 Rule, ED must provide specific evidence as to how those regulations are causing harms or burdens. ED has failed to meet that standard.

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<sup>1</sup> 87 Fed. Reg. 41390.

The Department’s stated purpose in proposing new and amended regulations is “to better align the Title IX regulatory requirements with Title IX’s nondiscrimination mandate;” “to clarify the scope and application of Title IX;” and to clarify “the obligation of all schools . . . and other recipients” of “federal financial assistance . . . to provide an educational environment free from discrimination on the basis of sex” by “responding to incidents of sex discrimination.”<sup>2</sup>

Far from demonstrating need or a factual warrant for proposing new regulations, ED admits that its review of the current regulations, “stakeholder listening sessions,” and public hearings merely “*suggest* that the current regulations do not *best* fulfill” Title IX’s purpose to “eliminate discrimination on the basis of sex” in “education programs or activities.”<sup>3</sup> ED goes on to conclude that “the current regulations do not adequately clarify or specify the scope of sex discrimination prohibited by Title IX, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity”<sup>4</sup> and that the proposed rule changes will “fully” align with Title IX’s anti-discrimination mandate.<sup>5</sup>

The opposite is true: as we explain below, the proposed rules redefine the scope of Title IX in ways that *contradict* Title IX’s clear purpose and plain language, are inconsistent with 50 years of actual practice in the implementation of Title IX, and are unsupported in law (see discussion of *Bostock* below).

In addition, ED cites almost no evidence to support its claim that discrimination on the basis of sex—as reflected in the 2020 (and other current) regulations—remains a “serious problem,”<sup>6</sup> and serious enough to justify the Proposed Rule. ED acknowledges that investigations related to Title IX have decreased, but offers little evidence on the reasons why.<sup>7</sup> It admits that it lacks reliable data regarding the extent of possible Title IX sex discrimination at covered institutions, programs, and activities, relying on “anecdotal” evidence and a 2014 study (which also was relied upon by the 2020 Rule) that “did not address the prevalence of other forms of sex discrimination, including discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”<sup>8</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (emphasis added).

<sup>4</sup> 87 Fed. Reg. 41392.

<sup>5</sup> 87 Fed. Reg. 41393.

<sup>6</sup> 87 Fed. Reg. 41397.

<sup>7</sup> 87 Fed. Reg. 41549.

<sup>8</sup> For example:

“In the absence of a recent, high quality, and comprehensive data source, the Department relies, as it did for the 2020 amendments, on a 2014 report titled Sexual Violence on Campus (2014 Senate Subcommittee Report) issued by the U.S. Senate Subcommittee on Financial and Contracting Oversight. The report included survey data from 440 four-year IHEs regarding the number of investigations of sexual violence that had been conducted during the previous five-year period; however, this report did not address the prevalence of other forms of sex discrimination, including discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” 87 Fed. Reg. 41548.

“The Department has not been able to identify reliable data sources about actions taken by recipients following the promulgation of the 2020 amendments. As a result, it is difficult for the Department to estimate the number of investigations that have occurred since issuance of the 2020 amendments or the number that would likely occur in later years in the absence of the Department’s proposed regulations. This absence of data means the Department could not construct a baseline from which to estimate the likely effects of the proposed regulations.” 87 Fed. Reg. 41549.

Instead, the department is relying on “anecdotal” evidence that “confirms the Department’s 2020 estimate related to the decrease in the number of investigations, it is anecdotal and, as such, does not provide the Department with sufficient evidence on which to revise its 2020 estimate. Further, the Department recognizes that the COVID–

ED appears to lack any substantial evidence on the prevalence to date of alleged discrimination “on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”<sup>9</sup> This raises a critically important question: If there’s little to no hard evidence of the number and kinds of incidents related to “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity,” how can the Proposed Rule’s significant expansion to include these “forms of sex discrimination” be justified?

ED claims that the Proposed Rules are necessary because of “the Department’s identification of sex-based barriers to equal educational opportunity,” but fails to explain what these “sex-based barriers to equal educational opportunity” are, how the Department identified them, and how it measured the supposed impact of these barriers, given the lack of available data.<sup>10</sup> Indeed, from day one, the Biden administration has made no secret of its desire to privilege the concept of “gender identity” over the reality of biological sex.<sup>11</sup> ED employs circular reasoning to justify its proposed rule changes: ED complains that the 2020 regulations fail to eliminate discrimination on the basis of “sex” because the 2020 regulations do not prohibit discrimination on the basis of “gender identity” (a concept inherently at odds with sex-based protections, as discussed below). ED then proposes to solve the problem by “clarifying,” through new regulations, that “discrimination on the basis of sex prohibits discrimination on the basis of “gender identity.”

ED has failed to demonstrate need and a substantial evidentiary basis for the Proposed Rule. This is nothing more than arbitrary and capricious rulemaking by the Department.

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19 pandemic resulted in many LEAs and IHEs operating remotely, which may have reduced the incidence or reporting of sexual harassment, the willingness of students and others to initiate a recipient’s grievance procedures in response to alleged sexual harassment, or both. Again, however, the Department has not identified high-quality research studies to inform its analysis. Therefore, the Department continues to assume that the estimates of the 2020 amendments represent the baseline level of a recipient’s actions to comply with Title IX in future years when considered in the absence of the proposed regulations. The Department invites comment on whether these estimates are reasonable and whether high quality data sources or studies exist regarding recipients’ actions in response to the 2020 amendments.”

“Notwithstanding the estimates used for the 2020 amendments, for recipients that saw reductions in the number of investigations conducted each year under the 2020 amendments, the Department estimates that 90 percent of alleged incidents that were previously classified as sexual harassment under subregulatory guidance documents, but did not meet the definition of “sexual harassment” under the current regulations, were handled by a recipient in other disciplinary processes.” 87 Fed. Reg. 41549.

“[H]arassment based on sexual orientation can be difficult to distinguish from other forms of harassment based on sex. However, the Department also believes it is unreasonable to assume that the express inclusion of sexual orientation and gender identity in the proposed regulations would have no effect on the number of investigations occurring annually. Based on the analysis set out here, the Department estimates that the additional clarity provided by the proposed regulations would result in a 10 percent increase in the number of investigations occurring annually. 87 Fed. Reg. 41551.

<sup>9</sup> 87 Fed Reg. 41571.

<sup>10</sup> 87 Fed. Reg. 41531.

<sup>11</sup> See Rachel N. Morrison, *Gender Identity Policy Under the Biden Administration*, 23 *Federalist Soc’y Rev.* 85 (May 2, 2022), <https://ssrn.com/abstract=4104566>.

## 2. The Proposed Rule’s expansive definition of discrimination “on the basis of sex” is arbitrary and capricious and contrary to law.

Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>12</sup>

ED declines to define the term “sex” because, it argues, “sex can encompass many traits and because it is not necessary for the regulations to define the term for all circumstances.”<sup>13</sup> But “to clarify the scope of Title IX’s prohibition on discrimination on the basis of sex,” ED proposes that discrimination on the basis of sex be expanded to include (“at a minimum”) discrimination on the basis of:

- sexual orientation,
- gender identity,
- sex stereotypes (i.e., “fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex”),
- sex characteristics (including “a person’s physiological sex characteristics and other inherently sex-based traits,” and “intersex traits”), and
- pregnancy or related conditions (defined as “(1) Pregnancy, childbirth, termination of pregnancy, or lactation; (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions”).<sup>14</sup>

The Proposed rule does not define “gender identity” or “termination of pregnancy.”

It is irrational for ED to define what constitutes discrimination “on the basis of sex,” while it refuses to define what “sex” even is. Without knowing what “sex” is, one cannot know what sex discrimination is.

As explained below, “sex” in Title IX is clearly and historically meant to refer to “biological sex.” Nevertheless, the Proposed Rule claims that “[c]ontrary to the assertions made in 2020 and January 2021, the Department does not have a ‘long-standing construction’ of the term ‘sex’ in Title IX to mean ‘biological sex.’”<sup>15</sup> This is a blatant mischaracterization of the Department’s prior positions. ED’s failure to appreciate the degree to which it is effectuating change in sex discrimination under Title IX is arbitrary and capricious.

Indeed, ED’s proposal to expand sex discrimination to include “gender identity” (among other bases) would rewrite the landmark civil rights laws and take away girls’ and women’s rights—the impetus for passing Title IX in the first place. ED’s radical rewriting of Title IX is a major question that raises serious constitutional problems concerning the separation of powers under *West Virginia v. EPA*.<sup>16</sup>

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<sup>12</sup> 20 U.S.C. § 1681(a).

<sup>13</sup> 87 Fed. Reg. 41531.

<sup>14</sup> 87 Fed. Reg. 41515.

<sup>15</sup> 87 Fed. Reg. 41537.

<sup>16</sup> No. 20-1530 (U.S. Jun. 30, 2022).

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

ED relies heavily on the Supreme Court’s decision in *Bostock v. Clayton County*.<sup>17</sup> The Proposed Rule explains that the Department’s “prior position (*i.e.*, that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity) is at odds with Title IX’s text and purpose and the reasoning of the *Bostock* Court and other courts to have considered the issue in recent years—both before and after *Bostock*.”<sup>18</sup> ED claims that its proposed definition is “consistent with *Bostock* and other Supreme Court precedent” because *Bostock* “makes clear that it is ‘impossible to discriminate against a person’ on the basis of sexual orientation or gender identity without ‘discriminating against that individual based on sex,’ even assuming that sex refers only to certain ‘biological distinctions.’”<sup>19</sup>

But *Bostock* was not a Title IX case. Rather, in *Bostock* the Supreme Court held that under *Title VII of the Civil Rights Act of 1964* “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>20</sup> Title VII is the federal law that prohibits sex (and race, color, religion, national origin) discrimination in employment, a completely different context than education and Title IX. Notably, *Bostock*’s Title VII analysis does not apply to Title IX because Title IX has a different sex-specific structure and, unlike Title VII, specifically uses language based on a biological binary, as detailed below.

The Majority in *Bostock* used the term “transgender status,” and did not adopt “gender identity” as a protected class. Thus, HHS cannot rely on *Bostock* to support the inclusion of the term “gender identity” within the definition of “sex discrimination.” The *Bostock* Court premised its decision on the assumption that “sex” refers only to the “biological distinctions between male and female.”<sup>21</sup> The Proposed Rule tries to explain this away: “*Bostock* demonstrated with respect to Title VII, even accepting that definition of ‘sex’ would not preclude Title IX’s coverage of these forms of discrimination.”<sup>22</sup> To be consistent with *Bostock*, ED must assume “sex” refers to “biological distinctions between male and female” (which it does not do) and that “sex” is incompatible with a gender spectrum or fluidity (which is promoted in the Proposed Rule).

Further, *Bostock* was a limited holding. The Supreme Court specifically cabined its decision to the hiring and firing context under Title VII, stating it was not addressing other Title VII issues, such as sex-specific bathrooms, locker rooms, and dress codes, or other laws.<sup>23</sup> While 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,” the Court did not address those concerns.<sup>24</sup> The Court explained that 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].”<sup>25</sup> Likewise, ED should not prejudge those questions the Court left unanswered, especially as it relates to sex-segregated bathrooms, lockers rooms, dress codes, and housing

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<sup>17</sup> 140 S. Ct. 1731 (2020).

<sup>18</sup> 87 Fed. Reg. 41530.

<sup>19</sup> 87 Fed. Reg. 41532.

<sup>20</sup> 140 S. Ct. at 1737.

<sup>21</sup> *Id.* at 1739.

<sup>22</sup> 87 Fed. Reg. 41530.

<sup>23</sup> 140 S. Ct. at 1753.

<sup>24</sup> *Id.* at 1753.

<sup>25</sup> *Id.*

in the education context. The Supreme Court was clear that *Bostock* did not decide any issue beyond hiring and firing under Title VII, and it is arbitrary and capricious for ED to ignore *Bostock*'s limitations and claim *Bostock* requires its regulatory action. As the Sixth Circuit recently put it, “*Bostock* extends no further than Title VII.”<sup>26</sup>

The Proposed Rule state, “Other Federal courts that reviewed the Department’s interpretation found it to be reasonable.”<sup>27</sup> In support, ED cites to a Fourth Circuit case and a couple of district court cases.<sup>28</sup> But the Department fails to acknowledge or address Circuit Court precedent that contradicts its interpretation. In another federal appellate case (formerly relied on by the Biden administration), *Adams v. School Board of St. Johns County*, the Eleventh Circuit granted rehearing en banc and vacated the panel’s 2-1 decision that aligns with the Department’s Proposed Rule.<sup>29</sup> The vacated panel majority had held that *Bostock*’s reasoning that Title VII with its “starkly broad terms” forbids discrimination against transgender people “applies with the same force to Title IX’s equally broad prohibition on sex discrimination.”<sup>30</sup> The dissent, however, pointed out that “any guidance *Bostock* might otherwise provide about whether Title VII allows for sex-separated bathrooms does not extend to Title IX,” since Title IX expressly “permits schools to act on the basis of sex through sex-separated bathrooms.”<sup>31</sup> While the en banc Eleventh Circuit had not issued its opinion,<sup>32</sup> it would be arbitrary and capricious for ED to ignore this impending decision.

The Proposed Rule also repeatedly cites to a 2021 *Bostock* Notice of Interpretation issued by ED (without going through the notice and comment process) purportedly applying *Bostock*’s reasoning to Title IX, even though *Bostock* stated that its implications for other laws were questions for “future cases.”<sup>33</sup> The *Bostock* Notice preemptively stated ED will enforce Title IX to prohibit discrimination based on sexual orientation and gender identity, based on *Bostock*.<sup>34</sup> On July 15, 2022, a federal district court preliminarily enjoined the *Bostock* Notice document for not following the public notice and comment process required under the Administrative Procedure Act.<sup>35</sup> Further, 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.’”<sup>36</sup> Thus, ED’s *Bostock* Notice is neither legally authoritative, and cannot be used as a basis for this rulemaking.

To the extent ED is relying on *Bostock* as the legal impetus for its definition, that basis is deficient. *Bostock* requires no such regulatory action. It is arbitrary and capricious and contrary to law for ED to claim *Bostock* requires ED’s interpretation under Title IX and supports its need for rulemaking.

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<sup>26</sup> *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021).

<sup>27</sup> 87 Fed. Reg. 41531.

<sup>28</sup> 87 Fed. Reg. 41531-32.

<sup>29</sup> *Adams v. Sch. Bd. of St. Johns Cnty*, No. 18-13592 (11th Cir. Aug. 23, 2021).

<sup>30</sup> *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1305 (11th Cir. 2020), *vacated*, No. 18-13592 (11th Cir. Aug. 23, 2021).

<sup>31</sup> *Id.* at 1320 (Pryor, C.J., dissenting).

<sup>32</sup> Oral argument was held February 22, 2022.

<sup>33</sup> See 87 Fed. Reg. 41395, 41530, 41532, 41533.

<sup>34</sup> 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>.

<sup>35</sup> *Tennessee v. Department of Education*, No. 3:21-cv-308 (D. Ten. July 15, 2022)

<https://adfmlegalfiles.blob.core.windows.net/files/TennesseeOrderOpinionPI.pdf>.

<sup>36</sup> 575 U.S. 92, 97 (2015).

## B. Under Title IX, “sex” is a binary classification and means “biological sex.”

ED attempts to justify its expansion of the scope of Title IX’s protections against sex discrimination to include “sexual orientation” and “gender identity,”<sup>37</sup> even though it acknowledges that “the Department has at times articulated a narrower scope of Title IX’s prohibition on sex discrimination,” including “previously stated” determinations that “Title IX does not fully encompass discrimination on the basis of sexual orientation or gender identity” (emphasis added).<sup>38</sup> To overcome these past determinations, ED relies on the *Bostock* decision (discussed above) and a conclusory determination that ED’s “prior position [i.e., that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity] is at odds with Title IX’s text and purpose.”<sup>39</sup> This conclusion—that Title IX’s text and purpose require expansion to include sexual orientation and gender identity—is erroneous.

Title IX prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance.<sup>40</sup> It’s also clear that Title IX and its accompanying regulations repeatedly recognize the fact of biological sexual difference and clearly presuppose “sex” as a binary classification (male or female). As a federal court recently observed, “Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each ‘sex.’”<sup>41</sup> The following select references from the Title IX statute and long-standing regulations illustrate the point:

- Title IX provisions are not to be construed as prohibiting an educational institution “from maintaining separate living facilities for the *different sexes*.”<sup>42</sup>
- Addressing changes in admissions policies for “an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*.”<sup>43</sup>
- 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*.”<sup>44</sup>
- References to “boys’” and “girls’” conferences.<sup>45</sup>
- “[S]eparation of students by sex within physical education classes or activities.”<sup>46</sup>
- “[C]lasses in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for *boys and girls*.”<sup>47</sup>
- “[S]eparate teams for members of *each sex* where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”<sup>48</sup>

Contrary to ED’s claims in the Proposed Rule, Title IX’s specific language communicates an understanding of sex as binary (male or female) and 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. As Justice

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<sup>37</sup> 87 Fed. Reg. 41531, § 106.10.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Office for Civil Rights, U.S. Dep’t Educ., *Title IX and Sex Discrimination* (last modified Aug. 20, 2021), [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>41</sup> *Neese v. Becerra*, 2:21-CV-163-Z, 22 (N.D. Tex. Apr. 26, 2022).

<sup>42</sup> 20 U.S.C. § 1686 (emphasis added).

<sup>43</sup> 20 U.S.C. § 1681(a)(2) (emphasis added).

<sup>44</sup> 20 U.S.C. § 1681(a)(6)(B) (emphasis added).

<sup>45</sup> 20 U.S.C. § 1681(a)(7)(A).

<sup>46</sup> 34 CFR § 106.34.

<sup>47</sup> 34 CFR § 106.34 (emphasis added).

<sup>48</sup> 34 CFR § 106.41 (emphasis added).

Ginsburg wrote in *United States v. Virginia*,<sup>49</sup> laws prohibiting sex discrimination do not prohibit sex-based distinctions that account for the differences between males and females: “Physical differences between men and women ... are enduring. The two sexes are not fungible.” Thus, ED has no grounds for concluding that the current Title IX regulations, which safeguard necessary sex-based distinctions while ensuring equality, fail to “fully” implement Title IX’s anti-discrimination mandate.

Title IX aims to ensure equality while accounting for sexual difference (male and female). Title IX regulations should likewise recognize that “sex” under Title IX means “biological sex,” a binary classification. The Proposed Rule is arbitrary and capricious and contrary to law because it fails to recognize the text of Title IX and the biological and binary classification of “sex.”

### **3. The Proposed Rule expands Title IX’s scope of protection to an arbitrarily selected set of terms, which are poorly defined, not defined at all, or defined as open-ended categories.**

“Sex” is an objective fact, a biological classification of “male” or “female,” linked to the organism’s whole-body design to fulfill one of two reproductive roles. Yet the Proposed Rule disregards decades of clarity regarding the meaning of “sex,” and introduces a new set of arbitrarily selected set of terms, which are poorly defined, not defined at all, or defined as open-ended categories. The proposed change is purportedly to “clarify” Title IX’s scope in prohibiting discrimination on the basis of sex. ED admits that “[t]he statute does not explicitly reference distinct forms of sex discrimination, such as discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity, or discrimination taking the form of sex-based harassment.” Undaunted, ED assumes legislative-style powers and writes its own preferred set of protected characteristics, rather than accepting the limited, historical meaning of “sex” and the current (2020), well-grounded regulations.

Specifically, ED unlawfully extends the scope of Title IX, re-interpreting “sex” to include an arbitrarily chosen set of terms that lack consistent, objective meanings. ED asserts that “[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”<sup>50</sup> Bald assertions are no substitute for evidence. ED needs to specify the evidentiary base on which it relies for its claim that these five categories fall within the statutory language and legislative intent of Title IX. Other questions need attention too: On what basis did ED select *these* categories, and not others? Were other new categories considered, and if so, on what basis were they excluded? What is the nexus between the selected categories and historical evidence of sex discrimination? ED provides no answers, making its definition of sex discrimination arbitrary and capricious.

In fact, nowhere in the Proposed Rule does ED provide evidence supporting its selection of these particular “forms of sex discrimination” (and not others). It attempts to justify the arbitrary inclusion of these new “forms of sex discrimination” by citing to the Supreme Court’s language in *North Haven Board of Education*, which states: “if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language.”<sup>51</sup> However, ED extrapolates beyond the facts of *North Haven Board of Education*, which involved the court’s determination of whether the statutory term “a person” included employees as well as students. In answering that question, the Court considered legislative intent, as well as the plain meaning of the word “person.” For ED’s Proposed Rule, it expands the “sweep” of the regulations far beyond the language and legislative intent of Title IX: ED *adds* new terms and concepts (like “gender identity” and “sex characteristics”), with no legal grounds for doing so, fails to

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<sup>49</sup> 518 U.S. 515, 534 (1996).

<sup>50</sup> 87 Fed. Reg. 41571, proposed § 106.10.

<sup>51</sup> 87 Fed. Reg. 41528 (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)).



define these terms clearly, and fails to provide evidence that this expansion was necessary. This constitutes arbitrary and capricious—and highly politicized—rulemaking.

But that’s not all. In addition to the five new categories listed in the proposed § 106.10, the Proposed Rule explains it also would prohibit discrimination for additional, unknown, and undefined categories: “The Department does not intend that the specific categories of discrimination listed in proposed § 106.10 would be exhaustive, as evidenced by the use of the word ‘includes.’”<sup>52</sup> In other words, ED arrogates for itself an elastic power to expand the potential grounds for discrimination under Title IX. Recipients will face an open-ended threat of failing to identify, address, or remedy forms of sex discrimination that are as yet unnamed. This violates the nature and purpose of the entire rule-making process (which aims to provide clear notice of statutorily based regulatory requirements, potential violations, and expected remedial actions) and is the very definition of arbitrary and capricious.

ED further obscures the scope of Title IX by littering its examples with still more undefined terms, purportedly to show “at a minimum” the kinds of sexual orientation and gender identity labels that will enjoy protected status. ED states that: “Title IX’s broad prohibition on discrimination ‘on the basis of sex’ under a recipient’s education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming.”<sup>53</sup> It is not clear under which of the five new categories each of the listed examples might fall. Nor are the terms in these examples well-defined, or even well-accepted.

Additionally, the Proposed Rule includes a footnote referencing “LGBTQI+,” a term ED describes as referring to “students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way.”<sup>54</sup> None of these additional terms—such as “queer,” “asexual,” “gender - conforming” or “gender non-conforming”—are defined in the Proposed Rule either. These terms reflect ever-shifting identity labels, not immutable characteristics like biological sex. The use of undefined and non-exhaustive terms to describe actionable forms of discrimination under the Proposed Rule puts recipients in an untenable position. ED’s failure under the Proposed Rule to hew closely to Title IX’s statutory text and purpose and to define the terms it intends to include within its expanded scope of protection, renders the Proposed Rule unworkable and unlawful. A few examples illustrate why.

First, the term “cisgender” is used in ED’s example but not defined.<sup>55</sup> The Media Reference Guide from GLADD, an LGBTQ advocacy group, defines “cisgender” as “[a]n adjective used to describe people who are not transgender” or “a person whose gender identity is aligned with the sex they were assigned at birth,” and concludes by saying, “[c]urrently, cisgender is a word not widely understood by most people.”<sup>56</sup> Nevertheless, according to the Proposed Rule, a person’s misuse of such a term might draw an accusation of “discrimination” or sex-based harassment.

Second, ED’s example cites the possibility of a person being discriminated against because they are, or are perceived to be, “non-binary,” but fails to define “non-binary.” GLAAD defines “non-binary” as follows: “Nonbinary is an adjective used by people who experience their gender identity and/or gender expression as falling outside the binary gender categories of ‘man’ and ‘woman.’ Many nonbinary people

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<sup>52</sup> 87 Fed. Reg. 41532.

<sup>53</sup> *Id.*

<sup>54</sup> 87 Fed. Reg. 41395.

<sup>55</sup> 87 Fed. Reg. 41532.

<sup>56</sup> GLAAD Media Reference Guide, <https://www.glaad.org/reference/trans-terms> (last visited Sept. 12, 2022).

also call themselves transgender and consider themselves part of the transgender community. Others do not. Nonbinary is an umbrella term that encompasses many different ways to understand one's gender. Some nonbinary people may also use words like agender, bigender, demigender, pangender, etc. to describe the specific way in which they are nonbinary.”<sup>57</sup> According to GLAAD’s description, “non-binary” is a subjective label that could mean almost anything. How does a recipient identify, prevent, address, and remedy potential discrimination based on such a fluid and subjective label?

Finally, ED fails to define “gender identity.” GLAAD defines “gender identity as “[a] person's internal, deeply held knowledge of their own gender” (but fails to define “gender”), and then boldly claims that “[e]veryone has a gender identity.” In contrast, a psychiatrist at a Dallas children’s gender clinic defends the idea that a child might reject all “gender” labels, in favor of an “agender” identity, meaning a person who is “genderless, without a gender identity.”<sup>58</sup> These confusing, contradictory definitions represent but a few of the many versions potentially used by recipient educational institutions or their students and staff. In the absence of limited terms, each clearly defined, how is a recipient supposed to train staff members, prevent discrimination and harassment, identify and evaluate complaints, and fashion appropriate remedies?

Below, we offer some additional observations and concerns about the specific terms proposed under § 106.10 as the basis for sex discrimination claims.

#### **4. Title IX protects “sex,” not “gender identity,” which is subjective, often fluid, and stands in opposition to the objective nature of “sex.”**

“Gender identity” conceptualizes a person’s desire to assume and express a self-defined identity, based on feelings incongruent with or divergent from the person’s biological sex (objectively male or female).

##### **A. Legislative intent: sex, not gender identity.**

On its face, Title IX clearly permits certain distinctions “on the basis of sex” to take account of biological differences between males and females. These distinctions based on biology are consistent with Title IX’s purpose of advancing equality between the sexes. In an arbitrary attempt to expand the scope of Title IX beyond its legislative intent, ED’s Proposed Rule seeks to inject the undefined category of “gender identity” into the sex-based protections of Title IX.

When Title IX was passed and implemented, no one—not legislators, psychologists, or the average person—would have understood “sex” to mean “gender identity.”<sup>59</sup> As a recent federal court put it, “Congress enacted Title IX in 1972. At that time, ‘sex’ was commonly understood to refer to physiological differences between men and women—particularly with respect to reproductive functions.”<sup>60</sup>

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<sup>57</sup> *Id.*

<sup>58</sup> Vera Papisova, *What it Means to Identify as Agender*, Teen Vogue (Jan. 20, 2016), <https://www.teenvogue.com/story/what-is-agender> (quoting Dr Meredith Chapman of Children’s Health in Dallas, TX).

<sup>59</sup> Judicial opinions interpreting Title IX sometimes used the word “gender” as a synonym for “sex,” although the Title IX legislative history used the term “sex.” See, for example, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). But to date, as described in our discussion on the *Bostock* decision, the Supreme Court has not defined “gender identity” as included within the meaning of “sex,” for purposes of Title IX.

<sup>60</sup> *Neese v. Becerra*, 2:21-CV-163-Z, 22 (N.D. Tex. Apr. 26, 2022) (citing 20 U.S.C. § 1681) (internal citations omitted).

Nor is there any evidence that Congress intended Title IX’s prohibition of discrimination “on the basis of sex” to apply to “gender identity.” In contrast, the notion of “sex stereotypes,” included in later Title IX analyses, was a familiar concept integral to ongoing cultural and political discussions of sex discrimination. The term “gender identity,” however, was largely unknown in 1972 outside the specialized fields of psychiatry and psychology. To the extent “gender identity” entered the public conversation, it denoted the *rejection* of, or *disassociation* from, biological sex (male or female), and the personal expression of a desired, alternative social presentation.

## **B. Logic, language, and medical history: gender identity is not sex.**

It is logically incoherent to claim that a statute that intends to ensure sex-based equality simultaneously protects claims based on “gender identity,” a self-perception that emerges from the *rejection* of one’s sex-based identity.

Historically, the term “gender identity” was coined in 1968 by psychoanalyst Robert J. Stoller to express a person’s psychological self-categorization, *distinct* from sex (male or female).<sup>61</sup> In fact, “gender identity” connotes a psychological feeling of *incompatibility* with the sexed body; the term describes the interior “sense” or experience of a person who feels alienated from the sexed body (male or female) or who experiences a strong desire to present socially as the opposite sex. It was a rare phenomenon (until recently), with prevalence estimated at less than 0.002%.<sup>62</sup>

When Title IX became law, the field of psychiatry regarded a person’s assertion of a “gender identity” incongruent with the person’s biological sex to be a sign of serious mental illness. The pioneering use of surgery to alleviate the extreme mental suffering of adults (mostly males) whose “gender identity” clashed with the reality of the person’s biological sex further emphasizes the historical divergence between “sex” and “gender identity.” These surgeries initially were described as “sex change” surgeries, a term that signals the oppositional dynamic between sex and “gender identity.” The individual who expresses a “gender identity” incongruent with natal sex (a “transgender” identity) and desires “sex change” surgery *repudiates* and seeks to escape the sexed body and natal identity as male or female, in pursuit of a desired but physiological impossible result: a “sex change.”

The first American who gained notoriety for seeking “sex change” surgery was a male named George Jorgenson, who underwent surgical castration in Europe and returned to America as Christine Jorgenson.<sup>63</sup> The initial castration and later surgeries to create a “neo-vagina” changed Jorgenson’s physical presentation and psychologically validated Jorgenson’s expressed social identity but did not “change” Jorgenson’s genetic sex. The truth is that no one can change sex, because, according to the Institute of Medicine, “every cell has a sex,” meaning a person’s sex (male or female) is genetically

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<sup>61</sup> Richard Green., *Robert Stoller’s Sex and Gender: 40 Years On*, 39 Arch Sex Behav. 1457-65 (2010). <https://doi.org/10.1007/S10508-010-9665-5>. John Money, a sexologist, conceptualized the term “gender” and “gender roles” earlier, in the mid-1950s, based on his work with “transsexuals” and patients who suffered disorders of sexual development. He theorized that a person’s social identity need not align with the fact of the person’s sex and believed that a child’s identity as a boy or girl depended on social conditioning rather than biology. He tested his theories on twin boys, one of whom suffered the loss of his penis during circumcision. Under Money’s direction, the parents raised the boy as a girl and Money prematurely declared his experiment a success. It was a failure. The boy later reverted to his masculine identity as a teen, but the psychological damage was immense. He eventually committed suicide. The story was chronicled by John Colapinto in *As Nature Made Him: The Boy who Was Raised as a Girl* (2006).

<sup>62</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Health Disorders* (5th ed. 2013) (“Gender dysphoria” presents in 0.002% of the population.).

<sup>63</sup> Rebecca Poole, *From GI Joe to GI Jane: Christine Jorgensen’s Story* (June 30, 2022), <https://www.nationalww2museum.org/war/articles/christine-jorgensen>.

expressed in every cell of the human body.<sup>64</sup> Modifying the appearance of a person's body and destroying or impairing the natural functions of the sexed body do not "change" the person's sex.

The current field of "gender medicine" no longer describes these medical or surgical interventions as "sex change" or "sex reassignment" procedures (implicitly acknowledging the impossibility of "changing" one's sex). Instead, it describes these interventions as "gender affirming" procedures—procedures that attempt to remedy the *dissonance* between mind and body by modifying the appearance and function of the sexed body to better align with, and validate, the person's psychological self-concept.<sup>65</sup> Put differently, the person seeking "gender-affirming" interventions desires to alter the appearance and function of the body *precisely because* the concrete physical reality of sex *contradicts* the person's inner feelings or self-perception ("gender identity"). The goal of "gender affirming" medical and surgical interventions is to create an *appearance or social presentation* that more closely matches the person's subjective sense of self ("gender identity"), which *diverges* from the objective fact of the person's sexual identity as male or female.

This dissonance between mind and body was long viewed as a mental health disorder, although it wasn't until 1980 that "gender identity disorder" first appeared in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM) of Mental Disorders as an official mental health diagnosis.<sup>66</sup> Subsequent versions of the DSM reinforced the conceptual opposition between a person's natal sex and psychological self-perception (or "gender identity"). DSM-IV described "gender dysphoria" as distress arising out of perceived conflict between "biological sex" and "gender identity."<sup>67</sup> In 2013, the DSM was revised to replace "gender identity disorder" with "gender dysphoria," a diagnosis based on clinical distress arising from the experience of gender *incongruence* (a perceived discordance between the fact of a person's biological sex and the individual's self-perceived identity).<sup>68</sup>

The American Psychological Association's guidance on "gender and sexual orientation diversity in children and adolescents in schools" (promoting a gender-affirming approach to transgender identification) *contrasts* "sex" and "gender identity."<sup>69</sup> It defines "sex" as "a person's *biological* status ... typically categorized as male, female or intersex," while describing "gender identity" as referring "to one's *sense* of oneself as male, female or something else," regardless of the person's biological sex.<sup>70</sup>

Historically, then, the psychological sciences not only consistently distinguished "sex" and "gender identity," but also, in the context of transgender identification, framed them as "incongruent," unharmonious, or incompatible with one another. The American Psychological Association (APA) today describes a person who identifies as "transgender" as one who has a "gender identity and biological sex [that] are not congruent."<sup>71</sup> According to the APA, "transgender" is "an umbrella term ... wherein one's

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<sup>64</sup> *Exploring the Biological Contributions to Human Health: Does Sex Matter?*, Inst. of Medicine 1 (2001), <https://doi.org/10.17226/10028>.

<sup>65</sup> The latest surgical techniques can construct a facsimile of the genitalia of the opposite sex (e.g., a "neo-phallus" or "neo-vagina") but cannot transform a person of one sex into the opposite sex. It is impossible to create fully functioning reproductive organs and genitalia of one sex within the body of the opposite sex, because sex is a "whole body" classification of the organism's design to produce either large gametes (ova) or small gametes (sperm).

<sup>66</sup> Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 261 (3d Ed. 1980).

<sup>67</sup> Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 532-33 (4th Ed. 1994).

<sup>68</sup> Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 452 (5th Ed. 2013).

<sup>69</sup> Gender And Sexual Orientation Diversity in Children and Adolescents in Schools, American Psychological Association (2015) <https://www.apa.org/pi/lgbt/resources/diversity-schools>.

<sup>70</sup> Gender And Sexual Orientation Diversity in Children and Adolescents in Schools, American Psychological Association (2015), <https://www.apa.org/pi/lgbt/resources/diversity-schools>.

<sup>71</sup> *Id.*

assigned biological sex doesn't match their felt identity.”<sup>72</sup> 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 from their sex assigned at birth.”<sup>73</sup> Expressing a transgender “gender identity” *contradicts* (but cannot change) a person’s immutable biological sex.

It’s not clear precisely what “gender identity” is (and ED fails to define the term), but it’s clear what it isn’t: “gender identity” is not the same as “biological sex.” In fact, the only thing that is certain when a person declares a “transgender,” “queer,” or “nonbinary” “gender identity” (or any of the terms listed in the Proposed Rule,<sup>74</sup> is that the person is *rejecting* a sex-based identity, determined by natal or biological sex. Consequently, redefining “sex” (a biological reality) to include “gender identity” (a contradictory self-perception) does violence to the express intent of Title IX and, as discussed below, jeopardizes the rights of the very people—females—it was designed to protect.

### C. Gender identity threatens females’ sex-based rights.

In practical terms, interpreting discrimination protections “on the basis of sex” to privilege “gender identity” effectively guts Title IX of meaningful protections for females and threatens to erase 50 years of women’s sex-based rights under the law. 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). A high-profile incident in Loudoun County, Virginia, illustrates the problem: a male student wearing a skirt went unchallenged into the girls’ restroom and sexually assaulted a female student.<sup>75</sup> When school policies normalize biological males—regardless of how they identify—entering female single-sex spaces, girls (biological females) will be told to ignore their discomfort lest they make a trans-identified student feel uncomfortable or be subject to a Title IX complaint for “harassment.” At the same time, bad actors will take advantage of the situation and girls will be less safe. Concern for the privacy and safety of females has motivated states like Tennessee and Oklahoma to pass laws requiring sex-specific bathroom use in schools (sex determined at birth).<sup>76</sup> Conversely, the ideological claim that gender identity beliefs should be privileged over the reality of biological sex has motivated lawsuits seeking to deny females their rights to sex-specific private spaces.

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. The proposed rules disregard the common-sense, reasonable sex-based restrictions permitted under Title IX by requiring recipients to grant access to single-sex facilities, programs, and activities on the basis of “gender identity.” “Gender identity” also threatens to stall women’s progress and equality in specific arenas, such as interscholastic athletics, where biological differences between the sexes come into play (a topic addressed below).

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<sup>72</sup> *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools*, American Psychological Association & National Association of School Psychologists (2015), <https://www.apa.org/pi/lgbt/resources/diversity-schools?item=3>.

<sup>73</sup> “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 Found., <https://www.hrc.org/resources/coming-out-living-authentically-as-transgender-or-non-binary>.

<sup>74</sup> See 87 Fed. Reg. 41532.

<sup>75</sup> Caroline Downey, *Judge Rules Loudoun County Teen Sexually Assaulted Female Student in Girls’ Bathroom*, Yahoo News (Oct. 26, 2021), <https://news.yahoo.com/judge-rules-loudoun-county-teen-131413442.html>.

<sup>76</sup> Associated Press, *Oklahoma Bathroom Law Challenged in Federal Lawsuit*, FoxNews.com (Sept. 7, 2022), <https://www.foxnews.com/us/oklahoma-bathroom-law-challenged-federal-lawsuit>.

**D. The proposed *de minimis* standard privileges the subjective claim of “gender identity” over the objective reality of “sex” every time.**

According to the Proposed Rule, “a recipient must not carry out any otherwise permissible different treatment or separation on the basis of sex in a way that would cause more than *de minimis* harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity.”<sup>77</sup> The “gender identity” *de minimis* standard tips the scales permanently against females, turning the statutory purpose of Title IX on its head. It means that “gender identity” trumps sex-based rights *every time*.

Under the *de minimis* standard, sex-specific facilities, programs, and activities will no longer be single-sex—simply by ED fiat. ED provides no substantial evidence to show how it weighed the costs and benefits of its *de minimis* standard. Nor does it explain why the desires of some individuals—those who express a “gender identity” at odds with their biological sex—are given absolute priority over the competing claims of females, who seek exactly what Title IX promised them 50 years ago: equality, with respect for sex-based differences (ensuring separate sleeping, toileting, and bathing facilities). Redefining “sex” to mean “gender identity” completely erases the protections females need, and disadvantages females in every encounter with males-who-identify-as-women. Lacking any evidentiary basis of demonstrated need, with no apparent weighing of costs and benefits, or taking into account women’s voices, the *de minimis* standard is a harsh slap in the face to all women who have relied on Title IX protections in education.

**E. Required use of preferred names and pronouns based on gender identity raises First Amendment free speech concerns for students and teacher.**

With increasing numbers of students identifying as transgender, preferred name and pronoun usage is becoming more prevalent in the school context. Multiple teachers have been fired over their refusal, based on their religious beliefs, to use students’ chosen names or pronouns in violation of school policy (even in cases where they opt to not use pronouns altogether to avoid unintentionally giving offense).<sup>78</sup> The Sixth Circuit recently found that a teacher who was disciplined for not using a student’s preferred title and pronouns was able to claim protection under the First Amendment.<sup>79</sup> ED should clarify

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<sup>77</sup> 87 Fed. Reg. 41391.

<sup>78</sup> See, e.g., *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300 (4th Cir. 2021) (affirming rejection of federal court removal of claims under the Virginia constitution and state statutes by high school French teacher who was fired for not abiding by school nondiscrimination policy that required him to use student’s preferred pronouns in violation of his religious beliefs); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 1:19-cv-2462 (S.D. Ind. July 12, 2021) (granting summary judgment for school on Title VII failure to accommodate and retaliation claims by Christian music teacher who was allegedly forced to resign for not complying with school name policy requiring use of students’ preferred names and pronouns in violation of his religious beliefs after school revoked accommodation to use last names only for all students); see also *Cross v. Loudoun Cnty. Sch. Bd.*, No. CL21-3254 (Va. Dec. 1, 2021) (affirming parties’ agreement to permanently enjoin school in case raising free speech and free exercise claims by elementary school teacher who was placed on administrative leave after speaking out against proposed preferred pronoun policy at public school board meeting); *Ricard v. USD 475 Geary Cnty. Schs. Sch. Bd. Members*, No. 5:22-cv-04015 (D. Kan.) (involving First Amendment free speech and free exercise of religion, unconstitutional conditions, Fourteenth Amendment due process and equal protection, and breach of contract claims by middle school teacher who was suspended and reprimanded for harassment and bullying for not using students’ preferred name and denied religious accommodation from using preferred pronouns).

<sup>79</sup> *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (reversing dismissal of First Amendment free speech and free exercise claims by professor disciplined by university for not following university’s gender identity nondiscrimination policy when he refused to address transgender identifying student by student’s preferred title and

that under its proposed Title IX regulations, students and teachers retain free speech protections and it will not be considered discriminatory or harassment based on the sex to choose not to use a person's preferred pronouns based on gender identity.

**5. ED's inclusion of "gender identity" as a protected category under Title IX functions as a mandate to schools to promote gender ideology and strip parents of their fundamental right to direct the upbringing and education of their children.**

**A. Schools and parents' rights.**

For the past year, parents across America have been discovering, and blowing the whistle on, the harmful impact of "gender identity" policies in public schools. With good reason. Five years ago, California parents were stunned to learn that teachers had read their kindergarten children books about transgender-identified children, then conducted a "transgender reveal" for a newly-transitioning classmate—all without parental permission.<sup>80</sup> Today, such stories are commonplace, and parents are outraged. Some have filed lawsuits, and many have fled the public schools.<sup>81</sup>

The Supreme Court has long recognized the fundamental right of parents "to direct the upbringing and education of children under their control."<sup>82</sup> Parents have the right to direct their children's education and to make decisions for them, because parents have a correlative responsibility for their children. The Court also recognizes that the "natural bonds of affection lead parents to act in the best interests of their children."<sup>83</sup> Absent evidence of abuse, abandonment, or neglect, parents have the right to make educational and medical decisions for their children and can be trusted to make decisions for the overall good of the child.

ED's proposed regulations, however, give no hint of recognizing, much less deferring to, parents' constitutional rights to guide their children in education-related matters and personal decisions. Nor does ED acknowledge the tremendous grief, alienation, and upheaval in family relationships too often caused by a school's decision to facilitate a child's "gender transition," without parental knowledge or consent.<sup>84</sup> Consistent with the policies first promoted by ED under the Obama Administration, ED's Proposed Rule embeds gender ideology in public schools by giving privileged status to "gender identity" claims. The consequence of day-after-day, year-after-year promotion of "gender identity" exploration in schools, from pre-K to the university, has a formative influence on impressionable children. The result: a culturally driven, unprecedented rise in self-defined (transgender) identities and identity confusion. Schools are not the only contributing factor (social media and peer relationships play strong roles), but they are a

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pronouns and instead used only student's last name), *settled & voluntarily dismissed sub nom. Meriwether v. Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), *press release available at* <https://adfmedia.org/case/meriwether-v-trustees-shawnee-state-university> (university agreed to pay teacher \$400,000 plus attorneys' fees, and agreed teacher has a right to choose when to use, or avoid using, titles or pronouns when referring to or addressing students, including when student requests preferred pronouns).

<sup>80</sup> Dr. Susan Berry, *Parents Frightened: Kindergartners 'Crying, Shaking' Over Transgender Book Teacher Read*, MicedTimes.com (Aug. 24, 2017), <https://www.mixedtimes.com/news/parents-frightened-kindergartners-crying-shaking-over-transgender-book-teacher-read>.

<sup>81</sup> *Judge Issues Injunction: Madison School District Staff Cannot Lie or Deceive Parents About Gender Transitions*, Wis. Inst. for Law & Liberty (Sept. 29, 2020), <https://will-law.org/judge-issues-injunction-madison-schools-staff-cannot-lie-or-deceive-parents-about-gender-transitions-at-school/>.

<sup>82</sup> *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925).

<sup>83</sup> *Parham v. J. R.*, 442 U.S. 584, 602 (1979)

<sup>84</sup> Bailee Hill, *Florida Mom Filing Suit After Child Transitioned At School Without Her Consent: Happening All Over*, Foxnews.com (May 2, 2022), <https://www.foxnews.com/media/florida-mom-january-littlejohn-lawsuit-transgender-school>.

substantial one. A 2021 study of Pittsburgh high schoolers reported that 9.2% of high schoolers now identify as transgender or gender diverse—a shocking increase in little over a decade.<sup>85</sup>

Every child should be treated kindly and welcomed. But adding “gender identity” to Title IX’s anti-discrimination categories will accelerate efforts by schools to promote gender exploration and the “coming out” process to school children of all ages. GLSEN, for example, the leading promoter of “LGBTQ-inclusive” K-12 schools, tells students that “[g]ender identity is how you identify and see yourself. Everyone gets to decide their gender identity for themselves.... If you don’t feel like a boy or a girl, you might identify as agender, genderqueer, nonbinary or just as a person.... You have a right to identify however you want, and your identity should be respected.” GLSEN, like the schools it serves, says not a word about bodily reality, and the fact that no one can change sex, ever. Instead, GLSEN materials teach students that “sex” is merely a “label” given by the medical community when a child is born. It’s up to the child to decide if the label will stick. Children also are taught that they have “cis-privilege” if their “identities align,” because they “get to move through the world without thinking about gender [or] being misgendered.”<sup>86</sup> This too creates pressure on children to select an identity that helps them fit in with the rainbow school culture.

From Alaska to Florida, Texas to Vermont, and every place in between, schools are vocal promoters of “gender identity” exploration and validating a child’s self-declared identity. In a growing number of states, school districts create a “Gender Support Plan” to facilitate a student’s “gender transition,” often behind the parents’ backs. Under many policies, students themselves are (erroneously) given premature decision-making power by schools, tasked with deciding their own “gender identity” (regardless of the sexed body), whether or not to begin a gender transition (social, medical, or surgical), and whether or not to involve their parents.

To lessen the risk of that a school will be accused of failing to address a “hostile” environment for a trans-identified child, schools will amp up their celebrations of transgender identities, and take pains to undo practices that could be perceived as “cisnormative,” “heteronormative,” or “harassing.”<sup>87</sup> When schools fear the loss of federal funds—such as federal lunch money to feed low-income students—they have a strong incentive to become ideological messengers promoting gender identity, regardless of parents’ wishes or permission.

In practical terms, adding “gender identity” to the protected characteristics under Title IX, means that schools will be forced, upon threat of losing federal funding, to introduce concepts of gender identity, encourage “gender exploration,” insist that other students and staff use “chosen names” and pronouns, validate the expressed “transgender identities” of students and teachers, celebrate “gender identity” “coming out” declarations, use trans-inclusive curricula, and forbid teachers to tell parents what their children are learning or “who” they currently identify as. School culture, much like the youth media culture, is already saturated with LGBTQ themes, curricula, and activist teachers. Under the guise of fostering a safe and inclusive environment for LGBTQ-identified students, school leaders offer faux-science curricula (such as “gender inclusive” puberty education) and police the use of pronouns, sometimes enforcing compliance by threatening disciplinary action (for students) or job loss (for staff). “Gender identity” rules generally also permit males who identify as females to use restrooms, locker rooms, and other private spaces formerly reserved for females. Mental health issues are escalating, and

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<sup>85</sup> Kacie M Kidd, et al., *Prevalence of Gender-Diverse Youth in an Urban School District*, 147 *Pediatrics* e2020049823 (2021). A decade ago, the percent of the adult population identifying as transgender was estimated to be a fraction of a percent (0.002). *Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders* 452 (5th Ed. 2013).

<sup>86</sup> *Gender Terminology Guide*, GLSEN, <https://www.glsen.org/activity/gender-terminology>.

<sup>87</sup> *Gender Terminology*, GLSEN, <https://www.glsen.org/activity/gender-terminology> (last visited Sept. 12, 2022).



test scores are falling, but schools are doubling down on ideological content and goals. Gender identity policies have no place in schools; Title IX cannot protect both sex-based rights and “gender identity” claims at the same time.

## **B. School to clinic pipeline.**

Backed by government support for “gender-affirming care,” schools in some cities are enmeshed with the business side of adolescent gender clinics.<sup>88</sup> Clinicians provide trainings for teachers on “transgender” youth, “gender affirmation,” social transition, and medical/surgical transition. Teachers and school staff, in turn, follow the advice of gender clinicians, validate children’s “gender identities” (no matter how young or troubled), facilitate their “gender transitions” (often behind parents’ backs) and refer them (and sometimes their parents) to gender clinics for medical interventions.

The “gender-affirming” climate in schools, fueled by policies that teach and privilege “gender identity” explorations, has been described by some parents as a school-to-gender-clinic-pipeline. This is another reason why we oppose the injection of “gender identity” into the school environment. Gender-affirming medical and surgical interventions cause serious harm to the developing bodies and vulnerable psyches of children.

Across the globe, gender specialists and whistleblowers have raised alarm over the scant evidence supporting gender-affirming protocols and the mounting evidence that gender affirmation causes harm to minors. In the wake of extensive evidence reviews, several leading European gender clinics recently ended or curtailed gender-affirming interventions for minors. Extensive psychotherapy, open to exploring alternative diagnoses and non-invasive ways of managing gender dysphoria, is emerging as the first-line response to adolescent identity distress.

The number of children and adolescents diagnosed with gender dysphoria or identifying as “transgender” has risen dramatically over the past decade, becoming “an international phenomenon, observed all across North America, Europe, Scandinavia, and elsewhere.”<sup>89</sup> The typical patient profile also has changed markedly: until recently, patients seeking treatment for gender dysphoria were usually either adult males or very young children, mostly boys. Today, the typical patient is an adolescent, usually female.<sup>90</sup>

Alongside the explosive growth in gender-dysphoric or transgender-identified children and adolescents, the worlds of psychology and medicine have witnessed a sea change in the dominant clinical approach towards these issues—changes which raise serious ethical questions.<sup>91</sup> For years, gender dysphoria in children was addressed through “watchful waiting” or with psychotherapy for the child and family. In most (up to 88%) of these situations, the child’s gender dysphoria (identity distress) would resolve by puberty.<sup>92</sup> In contrast, nearly all minors who begin gender-affirming social and medical

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<sup>88</sup> The gender clinics at Lurie Children’s Hospital (IL) and Seattle Children’s Hospital (WA), for example, have collaborative relationships with local public school districts.

<sup>89</sup> Kenneth J. Zucker., *Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues*, 48 Archives of Sexual Behavior 1983, n.3 (2019), <https://link.springer.com/article/10.1007%2Fs10508-019-01518-8>.

<sup>90</sup> *Id.*

<sup>91</sup> Lucy Griffin et al., *Sex, Gender and Gender Identity: A Re-Evaluation of the Evidence*, 45 BJPsych Bulletin 291 (2021), <https://pubmed.ncbi.nlm.nih.gov/32690121/>.

<sup>92</sup> Devita Singh et al., *A Follow-Up Study of Boys with Gender Identity Disorder*, 12 Frontiers in Psychiatry 632784 (2021), <https://www.frontiersin.org/articles/10.3389/fpsy.2021.632784/full>.

transitions today persist in transgender identification.<sup>93</sup> Based on the belief that “gender variations are not disorders, gender may be fluid and not binary,” the gender-affirming approach insists that children and adolescents who identify as transgender should be permitted “to live in the gender that feels most real or comfortable to that child and to express that gender with freedom from restriction, aspersion, or rejection.”<sup>94</sup>

According to gender therapist Laura Edwards-Leeper, gender affirmation means “the gender identity and related experienced asserted by a child, an adolescent, and/or family members” should be accepted as “true” and “the clinician’s role in providing affirming care to that family is to empathetically support such assertions.”<sup>95</sup> Consequently, the gender-affirming model rejects “therapeutic approaches that encourage individuals to accept their given body and assigned gender,” and contends that alternative approaches “may inadvertently cause psychological harm.”<sup>96</sup>

Despite the “absence of empirical data” to support them, the gender affirming model and gender affirming medical and surgical interventions have been heavily promoted by transgender activists, allied clinicians, and several establishment medical organizations.<sup>97</sup> Even so, the rapid swing from the “watchful waiting” therapeutic paradigm to a “gender affirmative” protocol that validates all asserted “gender identities” and puts adolescents on a path towards “gender-affirming” medical interventions is unprecedented. So too is the number of transgender- identified adolescents seeking irreversible “transgender” body modifications—drastic measures that some come to regret.<sup>98</sup>

Clinical concerns over the outcomes of gender affirmation have escalated.<sup>99</sup> Gender affirmation has a domino effect, beginning with psycho-social transition.<sup>100</sup> Although it is not physically invasive, once begun, psycho-social transition is psychologically difficult to walk back. Children who socially transition are more likely to persist in a transgender-identification than children who do not socially transition. This raises serious ethical questions.<sup>101</sup> The Dutch gender-affirming protocol never supported

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<sup>93</sup> See, for example, this study from the Tavistock and Portman NHS Gender Identity Development Service (UK), which found 98% of adolescents who underwent puberty suppression continued on to cross- sex hormones. Polly Carmichael, et al., *Short-Term Outcomes of Pubertal Suppression in a Selected Cohort of 12 To 15 Year Old Young People with Persistent Gender Dysphoria in the UK*, 16 *PLoS one* e0243894 (2021), <https://doi.org/10.1371/journal.pone.0243894>.

<sup>94</sup> Laura Edwards-Leeper et al., *Affirmative Practice with Transgender and Gender Nonconforming Youth: Expanding the Model*, 3 *Psychology of Sexual Orientation & Gender Diversity* 165 (2016), <https://www.apa.org/pubs/journals/features/sgd-sgd0000167.pdf>.

<sup>95</sup> *Id.* at 165.

<sup>96</sup> *Id.* at 166 (citing Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth, Substance Abuse and Mental Health Services Administration (2015), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf>).

<sup>97</sup> *Id.*

<sup>98</sup> Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 *Arch Sex Behav* 3353 (2021), <https://pubmed.ncbi.nlm.nih.gov/34665380/>.

<sup>99</sup> For example, see the following recent publications: William Malone et al., *Puberty Blockers for Gender Dysphoria: The Science Is Far From Settled*, 5 *The Lancet Child & Adolescent Health* e33 (2021), [https://doi.org/10.1016/S2352-4642\(21\)00235-2](https://doi.org/10.1016/S2352-4642(21)00235-2); Kirsty Entwistle, *Debate: Reality Check—Detransitioners’ Testimonies Require Us to Rethink Gender Dysphoria*, *Child & Adolescent Mental Health* (2020), <https://doi.org/10.1111/camh.12380>; Paul W. Hruz, *Deficiencies in Scientific Evidence for Medical Management of Gender Dysphoria*, 87 *The Linacre Quarterly* 34 (2020), <https://doi.org/10.1177/0024363919873762>.

<sup>100</sup> When a minor’s desired identity is affirmed, the minor initiates external “social” changes to express the desired identity (name, pronouns, hair, clothing, etc.).

<sup>101</sup> Kenneth J. Zucker, *The Myth of Persistence: Response to “A Critical Commentary on Follow-Up Studies & ‘Desistance’ Theories about Transgender & Gender Non-Conforming Children” by Temple Newhook et al.*, 19 *Int’l*

social transition for pre-pubertal children, over concerns that it would tip the scales towards persistence in transgender identification.<sup>102</sup> Social transition sets the child on a path toward medical transition before the child is mature enough to appreciate the long-term physical and psychological consequences.

For pre-pubertal children, social transition also creates an impetus for the next step in gender affirming care: puberty blockers. A pre-pubertal child who presents as a member of the opposite sex views puberty with extreme anxiety, as the growth of secondary sex characteristics will reveal the child's true sexual identity. Puberty blockers interrupt the child's natural development and preserve the child's secret, if only for a time.

Puberty is a whole-body developmental process. Preventing its normal course, for an indeterminate time, has unknown long-term consequences beyond the "pause" in development of secondary sex characteristics: The child's social and cognitive maturation (including advances in executive functioning and other brain functions) is suspended along with other developmentally appropriate growth, including bone growth. Stopping the puberty blockers will allow the development of secondary sex characteristics to resume, but the time lost from the unnatural delay in biological maturation cannot be recaptured. No longer described as "fully reversible," puberty blockers have negative effects on bone density, social and emotional maturation, and other aspects of development. Further, puberty blockers generally fail to lessen the child's gender dysphoria and results are mixed in terms of effects on mental health.<sup>103</sup> Long-term effects remain unknown.<sup>104</sup>

Multiple studies show that the vast majority of children who begin puberty blockers go on to receive cross-sex hormones, the next step in gender-affirming care, with life-altering consequences.<sup>105</sup> Blocking a child's natural puberty (preventing maturation of genitals and reproductive organs) and then introducing cross-sex hormones renders the child permanently sterile.<sup>106</sup> Gender clinicians now admit that puberty blocking may impair the child's later sexual functioning as an adult as well.<sup>107</sup> These losses cannot be fully comprehended by a child, precluding the possibility of informed consent.

Cross-sex hormones carry numerous health risks and cause many irreversible changes in adolescents' bodies, including genital or vaginal atrophy, hair loss (or gain), voice changes, and impaired

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J. of Transgenderism 231 (2018). Michael Biggs, *Revisiting the Effect of GnRH Analogue Treatment on Bone Mineral Density in Young Adolescents with Gender Dysphoria*, 34 J. of Pediatric Endocrinology & Metabolism 937 (2021), <https://doi.org/10.1515/jpem-2021-0180>.

<sup>102</sup> Annelou L. C. de Vries, & Peggy T. Cohen-Kettenis, *Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach*, 59 J. of Homosexuality 301 (2012), <https://doi.org/10.1080/00918369.2012.653300>.

<sup>103</sup> Annelou L. C. de Vries et al., *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-Up Study*, 8 J. Sex Med. 2276 (2011), [https://www.jsm.jsexmed.org/article/S1743-6095\(15\)33617-1/pdf](https://www.jsm.jsexmed.org/article/S1743-6095(15)33617-1/pdf).

<sup>104</sup> There are no long-term, rigorous studies on the safety and outcomes of using puberty blockers to disrupt natural puberty in healthy but dysphoric children for an extended time.

<sup>105</sup> Polly Carmichael, et al., *Short-Term Outcomes of Pubertal Suppression in a Selected Cohort of 12 To 15 Year Old Young People with Persistent Gender Dysphoria in the UK*, 16 *PloS one* e0243894 (2021), <https://doi.org/10.1371/journal.pone.0243894>.

<sup>106</sup> Stephen B. Levine, *Ethical Concerns About Emerging Treatment Paradigms for Gender Dysphoria*, 44 J. Sex Marital Ther. 29 (2018), <https://pubmed.ncbi.nlm.nih.gov/28332936/>.

<sup>107</sup> Abigail Shrier, *Top Trans Doctors Blow the Whistle on "Sloppy Care,"* Common Sense (Oct. 4, 2021), <https://bariweiss.substack.com/p/top-trans-doctors-blow-the-whistle>.

fertility. They also increase cardiovascular risks and cause liver and metabolic changes.<sup>108</sup> The flood of opposite sex hormones has variable emotional and psychological effects as well. Females who take testosterone experience an increase in gender dysphoria, particularly regarding their breasts, creating heightened demand for double mastectomies on teens as young as 13.<sup>109</sup> The gender affirming model recommends performing mastectomies on the healthy breasts of adolescent girls in order to address emotional discontent. This is an unethical practice described by psychotherapist Alison Clayton as nothing less than “dangerous medicine.”<sup>110</sup>

The gender-affirming approach continues to push ethical boundaries. The World Professional Association for Transgender Health (WPATH) recently released its proposed “Standards of Care Version 8,” which lower the recommended ages for adolescents to receive cross-sex hormones to age 14, double mastectomy (“chest masculinization”) to age 15, male breast augmentation and facial surgery to age 16, and removal of testes, vagina, or uterus to age 17, with flexibility to provide these gender affirming interventions at even younger ages.<sup>111</sup> This is unethical human experimentation—on *children*. A Swedish teen who underwent medical transition and then de-transitioned after suffering substantial bodily harm describes the “gender affirming” medical protocol this way: “They’re experimenting on young people ... we’re guinea pigs.”<sup>112</sup>

Schools that promote “gender identity” exploration and “gender transitions” are the gateway to medical and surgical “transgender” interventions. Protecting “gender identity” under Title IX, as the Proposed Rule intends, will put countless numbers of children on the transgender assembly line—and lead to irreversible harm.

### C. ED must conduct a Family Policymaking Assessment.

The Treasury and General Government Appropriations Act of 1999 requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being.<sup>113</sup> As explained above, this rule would negatively affect family well-being, requiring ED to provide an assessment of the Proposed Rule’.

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<sup>108</sup> *Gender-Affirming Hormone in Children and Adolescents*, BMJ EBM Spotlight Blog (Feb. 25, 2019), <https://blogs.bmj.com/bmjebmspotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/>.

<sup>109</sup> Johanna Olson-Kennedy et. al. *Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons of Nonsurgical and Postsurgical Cohorts*. *JAMA Pediatr*. 2018 May 1;172(5):431-436. doi: 10.1001/jamapediatrics .2017.5440. PMID: 29507933; PMCID: PMC5875384.

<sup>110</sup> Alison Clayton, *The Gender Affirmative Treatment Model for Youth with Gender Dysphoria: A Medical Advance or Dangerous Medicine?*. *Arch Sex Behav* (2021), <https://doi.org/10.1007/s10508-021-02232-0>.

<sup>111</sup> WPATH Standards of Care, Version 8, Draft for Public Comment, December 2021, “Adolescent” Chapter, p. 3.

<sup>112</sup> Mission: Investigate. *Trans Children (“Trans Train 4”)* (Nov. 26, 2021), <https://www.svtplay.se/video/33358590/uppdrag-granskning/mission-investigate-trans-children-avsnitt-1>.

<sup>113</sup> Pub. L. 105-277 (“(c) FAMILY POLICYMAKING ASSESSMENT.—Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether—(1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.”).

**6. Interpreting “sex” to include “sex characteristics” undermines the binary interpretation of “sex,” has no basis in law, and is not justified by evidence.**

The Proposed Rule prohibits discrimination on the basis of a classification not typically recognized in U.S. civil rights law: “sex characteristics.” The Proposed Rule defines “sex characteristics” in open-ended language, that is, not with finality, stating that sex characteristics “include” (and by implication are not limited to) “a person’s physiological sex characteristics and other inherently sex-based traits” (these “other” traits are undefined) and “would cover, among other things” (additional grounds are not listed) “discrimination based on intersex traits.”<sup>114</sup> ED offers additional guidance on the meaning of “sex characteristics,” explaining that “discrimination based on anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, and hormone function) is inherently sex-based.” The Proposed Rule explains the basis for prohibiting discrimination on the basis of “intersex traits,” as “rooted in perceived differences between an individual’s specific sex characteristics and those that are considered typical for their sex assigned at birth.”<sup>115</sup>

ED’s proposed inclusion of “sex characteristics” under Title IX’s discrimination protections is deeply problematic, for several reasons. The first step of extending civil rights protections is to clearly define who is protected under the law and, if the civil rights protections are based on particular classifications, then to clearly define those classifications, supported by evidence of discrimination (need for protection), and vetted by public debate and hearings. ED has done none of those things with regard to the proposed term “sex characteristics.”

First, if “sex” is understood as a whole-body, binary classification as male or female, then why does the statute—which already protects “sex”—need regulations to cover the separate category of “sex characteristics,” which are clearly a part, or subset, of a person’s sexed body. In fact, ED’s promotion of distinct non-discrimination protections for the term “sex characteristics” serves to further undermine the scientific understanding of “sex,” by appearing to fragment the male or female person into “parts” or “characteristics” disconnected from the person’s whole-body sexual identity as male or female.

“Sex characteristics” are not typically covered as a separate classification in U.S. discrimination law, and for good reason: “sex” (whole body) discrimination is already covered by Title IX. Several paragraphs of the Proposed Rule describe various “intersex” disorders that would be protected under the new classification.<sup>116</sup> But the Proposed Rule uses curious language in giving examples of “intersex” disorders. It describes “intersex” as referring to “people with variations in physical sex characteristics. These variations may involve anatomy, hormones, chromosomes, and other traits that differ from expectations generally associated with male and female bodies. Intersex traits are typically a result of medical conditions.” It is not clear why the Proposed Rule would describe intersex traits as “typically” occurring as the result of a medical condition. This is inaccurate.

The technical name for an “intersex” condition is a “disorder of sexual development” (DSD), a disorder—of male sexual development or female sexual development—that occurs in utero. “Intersex” conditions or DSDs are *always* the result of a medical condition. Although there are dozens of DSDs, they are fairly rare. (Klinefelter’s Syndrome has an incidence rate of 0.092% while classic congenital adrenal hyperplasia has an incidence rate of 0.008%.) Unlike the official categories of “Disorders of Sexual

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<sup>114</sup> 87 Fed. Reg. 41532.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Development,” the “intersex” descriptor in the Proposed Rule is not rigorously or accurately applied and it is unclear what it might include.

Further, given that DSDs are so rare, what is ED’s evidence that discrimination towards persons diagnosed with DSDs is large enough or serious enough to warrant adding a new regulatory term to Title IX? Given that ED’s definition of “sex characteristics” is not exhaustive, ED needs to explain in detail, backed by evidence, what additional circumstances it anticipates might be covered under the term “sex characteristics.”

ED’s true purpose in seeking to add “sex characteristics” to the proposed rule is unclear. Does ED intend to provide protection for a tiny subset of the population (persons diagnosed with disorders of sexual development/intersex conditions)? Or to establish a basis for discrimination complaints for another, as yet undefined, group of persons who might fall within the general description of having “sex characteristics”? (In fact, every person has sex characteristics, such as genitals, gonads, hormones, and hormone function, and they are usually not visible or known. It would seem rare for a DSD to be a cause for discrimination.) On the other hand, a person who has a sexual fetish and has undergone castration (a eunuch), might be positioned under the Proposed Rule to claim discrimination protection on the basis of sex characteristics. Does ED anticipate that a person who seeks voluntary castration as a eunuch needs protection under Title IX? Is so, on what basis? And who else might be protected, and under what circumstances?

As a final note, the term “sex characteristics” was added to the non-binding Yogyakarta Principles +10 in 2017. The Yogyakarta Principles and Yogyakarta Principles +10 are international blueprints, developed by activists, to demand and delineate a wide scope of “rights” under the categories of sexual orientation, gender identity, gender expression, and sex characteristics. Only a few countries in the world have adopted discrimination protections for “sex characteristics,” with Malta leading the way in 2015.<sup>117</sup> Activists who oppose circumcision, or medical interventions for children who are born with disorders of sexual development, often seek protections for “sex characteristics” as the legal basis for preventing parents from deciding the appropriate treatment for their children. In addition, protections for “sex characteristics” under the Yogyakarta Principles aim to secure for children a purported right to “bodily and mental integrity, autonomy and self-determination,” regardless of the rights of parents. The Yogyakarta Principles also assert that states incur the following obligations under anti-discrimination protections for sexual orientation, gender identity, and sex characteristics: States must “prohibit any practice, and repeal any laws and policies, allowing intrusive and irreversible treatments on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including forced genital-normalising surgery, involuntary sterilisation, unethical experimentation, medical display, ‘reparative’ or ‘conversion’ therapies, when enforced or administered without the free, prior, and informed consent of the person concerned.”

If this administration seeks to outlaw circumcision, medical interventions that aim to restore function in a child born with DSDs, or reparative therapies and conversion therapy, then it ought to pursue such a policy openly through legislation, not by stealth through the Title IX regulatory process. If ED has some other aim in mind, then it needs to produce substantial evidence to show the evidentiary basis for seeking to add “sex characteristics.” ED must clarify the definition of “sex characteristics,” and who it intends to protect, specifically whether it is intended to protect persons with Disorders of Sexual Development, or some other (undefined) group of people. In addition, ED needs to produce evidence of

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<sup>117</sup> Morgan Carpenter, *Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles Plus 10*, 23 *Cult Health Sex.* 516 (2021), <https://pubmed.ncbi.nlm.nih.gov/32679003/>.

significant and ongoing discrimination towards the defined subset, sufficient to justify adding a new classification to the regulations.

Perhaps Congress will decide in the future to weigh the merits of making “sex characteristics” (however defined) a protected category under U.S. civil rights law. But Congress has not chosen to do so, and ED has no authority to unilaterally declare the undefined category of “sex characteristics” to be entitled to sex-based protections under Title IX. As written, the Proposed Rule’s expansion to include protection for “sex characteristics” appears to be arbitrary and capricious, extending well beyond the statute’s intent.

## **7. It is arbitrary and capricious for the Proposed Rule to not address and protect female sports.**

### **A. Why female sports are necessary.**

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.”<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup> *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

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<sup>118</sup> Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Medicine* 199 (2021), <https://doi.org/10.1007/s40279-020-01389-3>.

<sup>119</sup> Jill Kochanek, & Daniel Gould, *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, Mich. (2020).

<sup>120</sup> Eduardo Saez-Saez de Villarreal et. al. *Does Plyometric Training Improve Strength Performance? A Meta-Analysis*, 13 *J. Sci. Med. Sport* 513 (2010), <https://pubmed.ncbi.nlm.nih.gov/19897415/>; A. E. Miller, *Sale DG. Gender Differences in Strength and Muscle Fiber Characteristics*. 66 *Eur J Appl Physiol Occup Physiol* 254 (1993), <https://pubmed.ncbi.nlm.nih.gov/8477683/>.

<sup>121</sup> “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.” David J. Handelsman, et. al. *Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance*, 39 *Endocrine Reviews* 803 (2018), <https://doi.org/10.1210/er.2018-00020>.

treatment” to suppress testosterone.<sup>122</sup> 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.

### **B. Title IX is responsible for increased participation in female sports and educational opportunities for women.**

Historically, women had few athletic opportunities in school. But that all changed when Congress passed Title IX in 1972. It has been 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.<sup>123</sup> 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.<sup>124</sup> 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. Title IX is widely lauded for championing women’s sports, and since its implementation, participation by girls and women in athletics have increased more than tenfold.

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.<sup>125</sup> Why should even one female be deprived of the opportunities that come from competing in female-only competitions?

### **C. The Proposed Rule applies to athletics, which means ED will require schools to permit access and participation in athletics on the basis of “gender identity.”**

On the 50th anniversary of Title IX, ED released the Proposed Rule which will require women to give up their spots on teams, in competitions, at championships, and on the podium. Biological men will continue to receive women’s honors and awards in the name of “gender identity” nondiscrimination.

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<sup>122</sup> Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, 51 *Sports Medicine* 199 (2021), <https://doi.org/10.1007/s40279-020-01389-3>.

<sup>123</sup> Charles L. Kennedy, *A New Frontier for Women’s Sports (Beyond Title IX)*, *Gender Issues*, (1-2), 78 (2010), <https://link.springer.com/article/10.1007/s12147-010-9091-y>.

<sup>124</sup> Jill Kochanek & Daniel Gould, *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).

<sup>125</sup> Timothy A. McGuine, et al. *High School Sports During the COVID-19 Pandemic: The Effect of Sport Participation on the Health of Adolescents*, 57 *J. Athl. Train* 51 (2022), <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>.



The Proposed Rule would define discrimination “on the basis of sex” to include discrimination on the basis of “gender identity.” Under the proposed regulations, “preventing any person from participating in an education program or activity consistent with their gender identity would subject them to more than de minimis harm on the basis of sex and therefore be prohibited.”<sup>126</sup> Since school sports are considered “an education program or activity,”<sup>127</sup> the very text of the proposed regulations appear to require participation in sports be based on gender identity.<sup>128</sup>

The Proposed Rule states that denying access or participation in education programs or activities consistent with a person’s gender identity “generally violates Title IX’s prohibition on discrimination, at least to the extent it causes more than de minimis harm and unless otherwise permitted by Title IX or the regulations.”<sup>129</sup> Under current Title IX regulations, schools may “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.”<sup>130</sup>

The Department explains that it does not propose (at this time) to change current Title IX regulations.<sup>131</sup> ED appears to punt on the sports issue, promising to issue separate proposed regulations to address “whether and how” to amend the current regulations on sex-specific athletics and “the question of what criteria, if any, recipients should be permitted to use to establish students’ eligibility to participate on a particular male or female athletics team.”<sup>132</sup>

Inter-scholastic and collegiate athletics are already riven with conflict over the question of biological male athletes who identify as transgender participating in competitions previously reserved for females. The NCAA position is unclear and in a state of flux, as are many policies set by state-level and sports-specific governing bodies.<sup>133</sup> More importantly, the statutory right of females to participate equally in athletics cannot be dependent on the shifting positions of governing bodies of particular sports or schools.

Just last year, the Department of Justice (DOJ) under the Biden administration issued a statement of interest in a federal court case about a state law ensuring only biological females can participate in girls’ and women’s sports.<sup>134</sup> DOJ claimed that the law violates Title IX. It argued that *current* Title IX regulations do not “address how students who are transgender should be assigned to such teams” and do not “require, or even suggest” that schools assign students who identify as transgender to teams based on their biological sex. “[A]ny interpretation of Title IX’s regulations that requires gender identity discrimination would violate the statute’s nondiscrimination mandate,” the statement declares. It doesn’t get much clearer than that. DOJ’s statement exposes the Biden administration’s (and presumably the

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<sup>126</sup> 87 Fed. Reg. 41535 (citing proposed § 106.31(a)(2)).

<sup>127</sup> 87 Fed. Reg. 41400.

<sup>128</sup> The Proposed Rule contemplates that the Title IX Coordinator would ensure athletics comply with Title IX obligations. 87 Fed. Reg. 41424 (“Similarly, a Title IX Coordinator could have designees that oversee compliance with different aspects of the recipient’s Title IX obligations, such as those related to athletics....”). In responding to complaints, Coordinators are to consider the scope of the alleged sex discrimination, including “in connection with a specific athletic team,” and “take steps to repair an educational environment in which sex discrimination occurred, such as within a specific ... athletic team.” 87 Fed. Reg. 41445, 41447.

<sup>129</sup> 87 Fed. Reg. 41537.

<sup>130</sup> 34 CFR § 106.41.

<sup>131</sup> 87 Fed. Reg. 41537.

<sup>132</sup> *Id.*

<sup>133</sup> Transgender Student-Athlete Participation Policy, NCAA, <https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx>.

<sup>134</sup> *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D.W.V. June 17, 2021), <https://www.justice.gov/crt/case-document/file/1405541/download>.

Department's) true legal position: Title IX and current regulations require schools to permit participation in sex-specific sports on the basis of gender identity. (Translation: the sun is setting on female-only sports.)

Nowhere does the Proposed Rule explicitly state that participation in sex-specific sports must (or may) be based on biological sex. Indeed, there is no indication that schools can choose *not* to take gender identity into consideration. Delaying regulations that merely address the *criteria* for participation in athletics is a fake punt by ED, and it is arbitrary and capricious for the Department to ignore comments on the athletics issue when the text of its proposed regulations apply. The Biden administration has already telegraphed in court its legal and policy position: Regardless of current or future regulations, when it comes to athletics, Title IX requires schools to privilege biological-males-who-identify-as-girls over female athletes.

Anything short of an explicit statement by ED that athletes' gender identity does not apply to sex-specific school sports would be patently unfair to female athletes and antithetical to the 50-year legacy of Title IX. The Department's failure to state its position outright in the Proposed Rule is not only politically cowardly, but also arbitrary and capricious.

#### **D. The Proposed Rule must consider the costs of allowing biological males to compete in female athletics based on "gender identity."**

As part of its regulatory impact and economic analysis of the costs, benefits, and transfers of its Proposed Rule, ED must take into consideration the following costs that likely will result if athletic participation under Title IX is no longer based on biological sex but rather gender identity.

- Potential losses in female participation, with consequent reduced health benefits, increased obesity, poorer mental health, and loss of social connection.
- Potential loss of female participation and 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 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 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.<sup>135</sup>
- Potential costs of litigations as female athletes seek to defend their sex-based rights in court.

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<sup>135</sup> 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 (Oct. 25, 2021), <https://news.yahoo.com/teenager-found-guilty-loudoun-county-004300075.html>.

## **8. ED fails to show a genuine need to change its pregnancy regulations.**

In 1975, the Department of Health, Education, and Welfare (the Department of Education’s forerunner) issued regulations prohibiting discriminatory treatment on the basis of “pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom” in the areas of admission (except false pregnancy), recipient programs or activities, and employment. Under the Proposed Rule, “Discrimination on the basis of sex” would include discrimination on the basis of “pregnancy or related conditions” which is defined in regulations as: “(1) Pregnancy, childbirth, termination of pregnancy, or lactation; (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.”<sup>136</sup> ED fails to show concrete evidence sufficient to justify changing the current regulations, making its proposed changes arbitrary and capricious.

### **A. It is appropriate for Title IX regulations to protect biological-based sex distinctions, like lactation.**

We applaud ED’s desire to support pregnant women and mothers, and the desire to accommodate pregnancy, childbirth, and lactation within education. No woman should be pressured to abort her child or leave the educational environment because of pregnancy or childbirth. We support the clarification that women should be accommodated for lactation post-childbirth. Lactation is something unique to being a biological female and falls within the scope of the type of regulations that ED should be promoting.

While we are supportive of lactation spaces, ED has failed to do a proper cost-benefit analysis of the proposal. ED fails to identify the number of schools that do not currently have adequate lactation spaces, and the costs to each school that has to create lactation spaces. It’s unclear how many lactation spaces are needed and what a school would do if one mother is using the space while another needs access. To the extent schools already provide lactation spaces and reasonable modifications for lactation, this is the baseline, which means ED cannot claim it as a benefit. The cost and benefits based on an accurate baseline must be accounted for if and when finalizing the Rule.

### **B. ED cannot use Title IX to promote abortion or preempt state abortion laws.**

“Termination of pregnancy” is not defined in the Proposed Rule and “abortion” is not mentioned once. Neither is the Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization*, overruling *Roe v. Wade* and holding that there is no constitutional right to abortion.<sup>137</sup> Post-*Dobbs* the Biden administration is seeking ways for the federal government to pay for and promote abortion.<sup>138</sup> There is no federal constitutional right to abortion and no compelling government interest in promoting abortion, which is the intentional ending of a child’s life in the womb. Considering the Proposed Rule does not mention abortion, it would be arbitrary and capricious and not a logical outgrowth for ED to use Title IX regulations to promote abortion.

Assuming ED demonstrates sufficient need to change the 1975 pregnancy regulations, the Department should consider the alternative of dropping “termination of pregnancy” or clarifying that “termination of pregnancy” does not cover abortion under Title IX. Abortion is not the moral equivalent to pregnancy and childbirth and should not be treated as such. Moreover, Title IX contains an explicit

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<sup>136</sup> 87 Fed. Reg. 41568.

<sup>137</sup> No. 19-1392 (U.S. Jun. 24, 2022).

<sup>138</sup> Rachel N. Morrison, *The Biden Administration’s Post-Dobbs, Post-Roe Response*, FedSoc Blog (July 13, 2022), <https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-roe-response>.

abortion neutrality provision: Nothing in Title IX “shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion.”<sup>139</sup>

ED must clarify whether (and why) it believes that certain abortion-related activities or acts falls under Title IX’s abortion neutrality provision. ED should make clear that pro-life speech, speakers, events, etc. are permitted and will not be deemed a form of “harassment” based on “termination of pregnancy.” Otherwise, the proposed regulations are contrary to law, by prohibiting protected First Amendment free exercise of religion and free speech and by creating a chilling effect on the exercise of those rights.

We ask that ED clarify the following under the Proposed Rule:

- Do recipient schools have to prohibit pro-life speech, pro-life organizations pro-life events, and pro-life speakers from its educational programs and activities?
- Is there any circumstance in which pro-life speech would be considered “harassment” based on “termination of pregnancy”? If yes, what?
- Does the Proposed Rule restrict education or instruction on abortion in medical or moral contexts that are not “pro-abortion”?
- Would states have to allow abortion access on campuses under the Proposed Rule?
- Are schools or teachers prohibited from notifying parents of a minor child about the child receiving or seeking to receive an abortion?
- Is it the Department’s view that the proposed regulations could preempt a state abortion law?

To the extent ED would say its Title IX regulations preempt certain state abortion laws, it must explain as such in a proposed rule and give states and the American public proper notice so that they can comment on the far-reaching implications of ED’s regulations. The lack of discussion in the Proposed Rule about abortion would make any final rule requiring preemption of state abortion laws arbitrary and capricious and not a logical outgrowth of the proposed rule. Preempting state abortion laws would raise a major question under *West Virginia v. EPA*. It is ludicrous to think that Title IX which was about giving women access to education and athletics and which contains an abortion neutrality provisions all of a sudden preempts state abortion laws.

If ED finalizes a rule that promotes abortion, it must consider the following costs:

- Irreparable loss of life to unborn who are killed via abortion as a result of abortion required or promoted by Proposed Rule.
- Irreparable loss of First Amendment free speech or free exercise of religion rights for: (a) any school employee (counselor) forced to promote or refer for abortion, and (b) any student or employee silenced from speaking out against abortion.
- Unconstitutional chilling of pro-life free speech.

### **C. Requiring “reasonable modifications” requires a more robust analysis of the costs.**

The proposed regulations would require educational institutions to make “reasonable modifications” to policies, practices, or procedures for students “because of pregnancy or related conditions.” ED must consider the costs of such a requirement and weigh them against the purported benefits, including:

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<sup>139</sup> 20 U.S.C. § 1688.

- What reasonable modifications, in addition to lactation spaces and leave, that would be required under the Proposed Rule.
- The financial costs for required reasonable modifications is the school required to undertake.
- Any negative impact or unfairness to other students (grades, participation, etc.) because of any reasonable modification (such as delayed or longer test taking).
- Any reasonable modifications required for parents, or fathers.

## **9. The Proposed Rule raises serious religion freedom concerns.**

### **A. The Proposed Rule must respect religious exercise protections under the First Amendment and RFRA.**

As, the Supreme Court in *Bostock* explained, it is “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution”—a “guarantee” that “lies at the heart of our pluralistic society.”<sup>140</sup> It flagged three doctrines protecting religious liberty it thought relevant to claims of sex discrimination:

1. Title VII’s religious organization exemption, which allows religious organizations to employ individuals “of a particular religion”<sup>141</sup>;
2. The ministerial exception under the First Amendment, which “can bar the application of employment discrimination laws ‘to claims concerning the employment relationship between a religious institution and its ministers’”<sup>142</sup>; and
3. The Religious Freedom Restoration Act (RFRA), which the Court described as a “super statute” that “might supersede Title VII’s commands in appropriate cases.”<sup>143</sup>

Because it is constitutionally and statutorily required and since ED is relying on *Bostock* in the Proposed Rule, ED should recognize the important protections for religious exercise under the First Amendment and RFRA.

### **B. ED should consider this rule in conjunction with the Free Inquiry Rule.**

Title IX contains several statutory exemptions, including a religious exemption under which Title IX 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.<sup>144</sup> The Proposed Rule does not propose any changes to regulations on the religious exemption. But currently under review by the White House is a rule titled “Religious Liberty and Free Inquiry Rule” where ED plans “to propose to rescind certain regulations under 34 CFR parts 75 and 76 that place additional requirements on postsecondary institutions that receive Federal research or education grants as a material condition of the Department’s grant.”<sup>145</sup> To the extent the Free Inquiry Rule will modify which educational institutions qualify for Title IX’s religious exemption, ED should consider that rule in conjunction with this Proposed Rule. To do so at separate times would make the Department’s assurances of protection for religious educational institutions arbitrary and capricious. Religious educational

<sup>140</sup> *Bostock*, 140 S. Ct. at 1754.

<sup>141</sup> 42 U.S.C. § 2000e-1(a). Title VII defines “religion” as “all aspects of religious observance and practice, as well as belief.” *Id.* § 2000e(j).

<sup>142</sup> *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

<sup>143</sup> *Id.* (citing 42 U.S.C. § 2000bb-3).

<sup>144</sup> 20 U.S.C. § 1681(a)(3); 34 CFR § 106.12.

<sup>145</sup> <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1840-AD72>.

institutions that believe they qualify for religious exemptions to certain requirements under the Proposed Rule, should be given fair opportunity to comment on the merits of the Proposed Rule that would apply to them under ED’s anticipated or actual changes to the religious exemption.

**C. The Proposed Rule infringes on the free exercise of religion rights for students.**

In its cost-benefit analysis, ED does not take into consideration the significant costs to religious students in non-religious institutions who will be pressured to violate their religious beliefs.<sup>146</sup> These costs should include students who are no longer able to attend or work at federally funded schools because they would be compelled to violate their sincerely held religious beliefs about marriage, gender, and sexuality. Not taking these irreparable harms into consideration makes the rule arbitrary and capricious. In addition, the Department should make clear that it does not extend Title IX to impose any constitutionally conflicting requirements on religious student groups who meet on or off campus.

**D. The Proposed Rule infringes on free exercise and religious nondiscrimination and accommodation rights for employees.**

ED should also consider its rule in connection with Title VII’s religious nondiscrimination and accommodation requirements. Employers cannot create a hostile work environment based on religion and are generally required to reasonably accommodate an employee’s sincerely held religious belief, observance, and practice. ED should clarify that these regulations would not be the impetus to deny reasonable accommodations for religious staff members by creating an undue hardship on the employer.

**E. The final rule should be held for *303 Creative*.**

The Department should hold finalizing the Proposed Rule until the Supreme Court decides *303 Creative LLC v. Elenis* in the October 2022 term.<sup>147</sup> This case involves a public accommodations nondiscrimination law and freedom of speech, religious liberty, and artistic freedom—issues raised directly by the Proposed Rule. As such, it would be arbitrary and capricious for ED to issue a final rule without input from the Court on issues directly applicable to the proposed regulations. Indeed, one federal court criticized the Department of Health and Human Services (HHS) for issuing a final rule on Section 1557 before the Supreme Court’s *Bostock* decision was issued and said the agency should have halted publication of the rule to consider *Bostock*’s implications.<sup>148</sup> At a minimum, ED should open a supplemental comment period after the Supreme Court’s decision is issued in *303 Creative*.

**10. The Proposed Rule’s purported preemption of state laws is contrary to law.**

Proposed § 106.6(b) states, “*Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement. Nothing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.”<sup>149</sup>

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<sup>146</sup> 87 Fed. Reg. 41547.

<sup>147</sup> No. 21-476 (U.S.).

<sup>148</sup> *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Human Servs.*, 485 F. Supp. 3d 1, 42 (D.D.C. 2020) (“It is sufficient for the Court to determine that *Bostock*, at the very least, has significant implications for the meaning of Title IX’s prohibition on sex discrimination, and that it was arbitrary and capricious for HHS to eliminate the 2016 Rule’s explication of that prohibition without even acknowledging—let alone considering—the Supreme Court’s reasoning or holding.”).

<sup>149</sup> 87 Fed. Reg. 41569

The Proposed Rule explains this language would make “clear in a simple comprehensive statement that the Title IX regulations preempt *any* State or local law with which there is a conflict.”<sup>150</sup> Further, “[t]his clarification would ensure that the proposed regulations appropriately cover the full scope of Title IX while not extending further than the Department’s authority to promulgate regulations to effectuate Title IX.”<sup>151</sup> While we agree state laws do not alleviate a recipient’s burden to comply with Title IX regulations to receive federal funding, Title IX regulations cannot preempt inconsistent or conflicting state laws. Title IX imposes strings on the receipt of federal funding. To the extent that an educational institution is unable to follow Title IX regulations due to oversight, choice, or a conflicting state law requirement, it would be unable to comply with the strings attached to receipt of federal funding. The appropriate response from ED is disallowance of federal funding. ED does not have the power under Title IX to preempt state laws. To the extent ED’s proposed regulations purport to preempt state law, they are “extending further than the Department’s authority” and contrary to law.

The Proposed Rule also states that proposed § 106.6(b) would not “preempt a State or local law that provides greater protections to students and does not conflict with these regulations.”<sup>152</sup> It is unclear what the Department views as “greater protection to students.” State laws that ensure girls and women have access to sex-specific private spaces and sports teams free from biological males, regardless of gender identity, provide greater protection to female students. Similarly, several states have laws that protect minors, including students, from harmful, sterilizing, and irreversible gender transition drugs and surgeries. To the extent the Proposed Rule would preempt or conflict with these protective state laws, it is arbitrary and capricious because these state laws provide “greater protection to students.”

Proposed § 106.6(b) should not be adopted as it is contrary to law.

The Department should also wait for the Supreme Court to issue a decision in the October 2022 term case *Health and Hospital Corporation of Marion County, Indiana v. Talevski*, which involves the scope of authority under Spending Clause legislation.<sup>153</sup>

#### **11. It is arbitrary and capricious for ED not to address the impact of the Proposed Rule on Section 1557 and in the health care context.**

When issuing Title IX regulations, the Department must consider the impact of those regulations on other laws that incorporate Title IX, or explicitly disclaim that its regulations affect those laws and contexts. As Justice Alito pointed out in his *Bostock* dissent, “Over 100 federal statutes prohibit discrimination because of sex.”<sup>154</sup> Many of these and other statutes also explicitly incorporate Title IX’s prohibition against sex discrimination.

For example, Section 1557 of the Patient Protection and Affordable Care Act incorporates Title IX. 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

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<sup>150</sup> 87 Fed. Reg. 41405.

<sup>151</sup> *Id.*

<sup>152</sup> 87 Fed. Reg. 41405.

<sup>153</sup> No. 21-806 (U.S.).

<sup>154</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

“on the ground prohibited under ... Title IX.”<sup>155</sup> 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.<sup>156</sup>

If adopted, the Proposed Rule would greatly expand the scope of what is considered sex discrimination. Perhaps most relevant to the health care context, the Proposed Rule would radically define and expand discrimination “on the basis of sex” to include discrimination based on “gender identity” and “termination of pregnancy” (which presumably would be interpreted by this administration to cover elective abortions). Indeed, recently proposed regulations directly on Section 1557 by the Department of Health and Human Services (HHS) would mirror the definition of sex discrimination in the proposed Title IX regulations.<sup>157</sup> Medical professionals deserve fair notice and opportunity to comment on title IX regulations that could impact them via Section. 1557.

As such, in issuing Title IX regulations, it would be arbitrary and capricious for ED to ignore the impact of its regulations on Section 1557 and the health care context. Changing interpretation and enforcement under Section 1557 would have significant costs, impacts on small businesses, and raise federalism concerns.<sup>158</sup> ED should address the impact of its regulations in the health care context or explicitly disclaim that any of its Title IX regulations should be interpreted to apply to Section 1557 and the health care context. Further, ED should clarify:

- Whether the definition of “pregnancy and related conditions” be incorporated into 1557.
  - If yes, the impact such a definition will have to the extent to which Title IX’s abortion neutrality and religious exemptions are not incorporated (which they should be).
- Whether doctors will be forced to provide or participate in abortions.
- Whether health insurance insurers will be required to cover abortion.
- Whether the insured will be forced to pay for abortion.

ED should jointly consider the Proposed Rule with HHS’s proposed Section 1557 rule as a common rule. Both rules concern interpretation of Title IX’s application to sexual orientation and gender identity, and Title IX and Section 1557 have significant overlap concerning their application to educational institutions that receive health funding. As discussed above, how ED defines the ground of sex discrimination under Title IX in its proposed regulations could have direct impact for Section 1557, its regulations, and the health care context. Inconsistency in implementation of discrimination on the basis of sex across agencies and across programs, such as Title IX and Section 1557, could lead to legal vulnerability and make the varying interpretations arbitrary and capricious.

Under Executive Order 12250, the Department of Justice is required to coordinate the implementation of any regulations implementing nondiscrimination provisions of Title IX or of “[a]ny other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.” Only

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<sup>155</sup> 42 U.S.C. § 18116(a) (citing Title IX, 20 U.S.C. § 1681 *et seq.*).

<sup>156</sup> Rachel N. Morrison, *Why the Medical Community Should Care About Biden’s Proposed Title IX Regulations*, Nat’l Rev. (Aug. 30, 2022), <https://www.nationalreview.com/bench-memos/why-the-medical-community-should-care-about-bidens-proposed-title-ix-regulations/>.

<sup>157</sup> 87 Fed. Reg. 47824 (Aug. 4, 2022), <https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities>.

<sup>158</sup> These concerns, and others, are detailed in EPPC’s comment submitted to OIRA during its pre-rule review of HHS’s proposed Section 1557 regulations. EPPC Comment to OIRA for EO 12866 Meeting on “Nondiscrimination in Health Programs and Activities” rule (Apr. 6, 2022), <https://eppc.org/wp-content/uploads/2022/04/EEPC-Scholars-Comment-for-EO-12866-Meeting-on-Section-1557-Rule.pdf>.



through coordination by the Department of Justice and joint common rules across agencies can the administration as a whole consider the proper interpretation and application of the principles of nondiscrimination.

## **12. ED should clarify that tax exempt status is not federal financial assistance, subjecting an institution to Title IX.**

Current Title IX regulations define “federal financial assistance” as:

- (1) A grant or loan of Federal financial assistance, including funds made available for:
  - (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
  - (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
- (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
- (3) Provision of the services of Federal personnel.
- (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
- (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.<sup>159</sup>

ED does not propose to amend this definition. Indeed, in footnote 2 of the Proposed Rule it explains that “The definition of the term ‘Federal financial assistance’ under the Title IX regulations is not limited to monetary assistance, but encompasses various types of in-kind assistance, such as a grant or loan of real or personal property, or provision of the services of Federal personnel.”<sup>160</sup>

Recently, two district courts have held that a private school which is tax exempt, and did not otherwise receive federal financial assistance, was nevertheless receiving federal financial assistance based on its tax-exempt status and thus subject to Title IX.<sup>161</sup> This is absurd. Under these strained rulings, any organization that Congress does not choose to tax could be subject to all federal spending legislation. ED should clarify that tax-exempt status is not “federal financial assistance” under Title IX.

## **Conclusion**

We urge ED to abandon and withdraw the Proposed Rule.

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<sup>159</sup> 34 CFR § 106.2(g).

<sup>160</sup> 87 Fed. Reg. 41392 n.2.

<sup>161</sup> *E.H. v. Valley Christian Acad.*, 2:21-cv-07574-MEMF, 10 (C.D. Cal. Jul. 25, 2022) (“Accordingly, the Court holds that Valley Christian’s tax-exempt status confers a federal financial benefit that obligates compliance with Title IX.”); *Buettner-hartsoe v. Balt. Lutheran High Sch. Ass’n*, No. RDB-20-3229, 6 (D. Md. Jul. 21, 2022) (“The tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution. CPS cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX.”).

Sincerely,

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