ETHICS AND PUBLIC POLICY CENTER

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

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Thank you for the opportunity[1] to provide comments on OIRA's review of the Department of Education's proposed rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance."[2]

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This comment is the latest in a long string of comments we have submitted to the executive branch regarding this proposed rulemaking:

- On March 17, 2022, EPPC fellows Rachel N. Morrison and Mary Rice Hasson met with federal government officials to discuss concerns over an upcoming proposed rule by the Department of Education that would impact Title IX regulations.[3]

- On September 12, 2022, Rachel N. Morrison and Mary Rice Hasson submitted a public comment opposing the same Title IX proposed rule that is the subject of our comments today.[4]

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars' input on this rule. *See* Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.

[2] 87 Fed. Reg. 41390 (July 12, 2022), https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[3] EPPC Comment to OIRA for EO 12866 Meeting on Upcoming Title IX Rule (March 17, 2022), https://eppc.org/publication/eppc-scholars-meet-with-federal-officials-to-discuss-concerns-over-upcoming-title-ix-rule/.

[4] EPPC Comment to Department of Education 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

- On May 15, 2023, Rachel N. Morrison, Mary Rice Hasson, and Eric Kniffin submitted a public comment opposing the Department of Education's Notice of Proposed Rulemaking (NPRM) that would establish a new regulatory standard for athletic participation under Title IX.[5]

For the reasons set out below, and as set out in more detail in our September 12, 2022, public comment to ED, the proposed rulemaking is contrary to law. The 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 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.

Today, we will discuss ten points of particular concern for OIRA.

1. ED failed to establish a need for rulemaking, and *Bostock* does create a need.

- *Purported need.* For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. Federal administrative agencies are required to engage in "reasoned decision making."[6] To justify replacing current regulations, an agency must provide specific evidence as to how the current regulations are causing harm or burdens and how the rule would remedy the alleged defects without causing equal or greater harms and burdens.[7]

- 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."[8]
- 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

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(Sept. 22, 2022), https://eppc.org/publication/eppc-scholars-submit-comments-opposing-proposed-department-of-education-title-ix-rules/

[5] EPPC Comment to Department of Education Opposing Athletics NPRM "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams," RIN 1870-AA19, Docket ID ED-2022-OCR-0143 (May 15, 2023) https://eppc.org/publication/eppc-scholars-submit-comments-opposing-eds-proposed-gender-identity-mandate-in-athletics/.

[6] *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015).

[7] *Id* at 779 (regulation is irrational if it disregards the relationship between its costs and benefits); *Alltelcorp v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("a regulation perfectly reasonable and appropriate in the face of a given problem is highly capricious if that problem does not exist").

[8] 87 Fed. Reg. at 41390.

purpose to "eliminate discrimination on the basis of sex" in "education programs or activities."[9] This is not enough to satisfy the specific evidence standard referenced above.

- *Bostock.* In support of its rule, ED relies heavily on the Supreme Court's decision in *Bostock v. Clayton County.* Indeed, the proposed rule refers to *Bostock* forty-nine times!
- As detailed in our public comment,[10] the Supreme Court's decision in *Bostock v. Clayton County* does not establish a need for Title IX rulemaking because it did not amend Title IX. As we explained in more detail in our comment,
    - *Bostock* is a Title VII case the about employment context, not a Title IX case about the education context.
    - The Court in *Bostock* explicitly said it was not deciding other issues outside the hiring and firing context in Title VII, including sex-specific bathrooms, locker rooms, and dress codes, or other laws.[11]
    - *Bostock* was limited to sexual orientation and transgender status, not gender identity, which is a much broader term.
- Because the administration appears to be committed to ignoring the Court's limits in *Bostock* and we believe others have shared these arguments with OIRA, we will not take the time to repeat these arguments today.

2. The rule's expansive definition of sex discrimination, especially its application to gender identity, is arbitrary and capricious.

- *Title IX prohibits sex discrimination.* 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."[12] While Title IX prohibits discrimination based on sex, it does not mention gender identity.
- *Proposed expansive definition of sex discrimination.*
    - "[T]o 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

[9] *Id.* (emphasis added).

[10] EPPC Public Comment, *supra* n.4, at 5-6.

[11] 140 S. Ct. at 1753. The Court explained that questions about sex-segregated bathrooms, locker rooms, and dress codes 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]." *Id.*

[12] 20 U.S.C. § 1681(a).

- 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").[13]

- Yet at the same time ED declines to define "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."[14] 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.
- Moreover, the list proposed by ED is an arbitrarily chosen set of terms that lack consistent, objective meanings. ED failed to provide the specific evidence on which it relied for its claim that the above five categories fall within the statutory language and legislative intent of Title IX.
- The rule raises other questions as well: 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).
- ED's rule expands the sweep of Title IX 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 define these terms clearly, and fails to provide evidence that this expansion was necessary. This constitutes arbitrary and capricious—and highly politicized—rulemaking.
- 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.'"[15] 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 rulemaking 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.

[13] 87 Fed. Reg. at 41515.

[14] *Id.* at 41531.

[15] *Id.* at 41532.

- 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."[16] 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."[17] None of these additional terms—such as "queer," "asexual," "gender - conforming" or "gender non-conforming"—are defined in the rule. 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 rule puts recipients in an untenable position.

- *Application to gender identity.*
  - While claiming "to clarify the scope of Title IX's prohibition on discrimination on the basis of sex," ED fails to define "gender identity," leading to confusion, not clarity. For instance, 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."[18] 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? Not defining gender identity is arbitrary and capricious.
  - As we explained in our public comment, under Title IX, "sex" is a binary classification and means "biological sex."[19] Yet ED proposed that sex discrimination includes gender identity even though sex and gender identity (however it is defined) are *fundamentally at odds* with each other. Indeed,

[16] *Id*.

[17] *Id*. at 41395.

[18] 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).

[19] EPPC Public Comment, *supra* n.4, at 7-8.

discrimination protections based on gender identity are *incompatible* with discrimination protections based on sex.

- ED's rule leads to absurd results, making it arbitrary and capricious. For example, if a male enters a female locker-room where girls are changing or showering, that constitutes sex discrimination in violation of Title IX, if permitted by the school. But under Ed's rule, if the same male declares that according to his gender identity, he is a woman, a school would be *required* to permit him access to the women's locker room. The only difference between scenario one and scenario two is the subject self-declaration of an individual. This is irrational.
- How is a schools supposed to know how to comply with the Title IX rule when compliance is determined solely on a person's subject self- perception and declaration of identity? How can a school determine whether a person truly believes their identity or is merely claiming an identity to gain access to women's spaces? There is no objective criteria schools can rely on, making it practically and functionally impossible to comply with the rule.

3. It is arbitrary and capricious for ED not to address the impact of its Title IX rule on other sex discrimination laws, especially Section 1557.

- As Justice Alito pointed out in his *Bostock* dissent, "Over 100 federal statutes prohibit discrimination because of sex."[20] Many of these and other statutes also explicitly incorporate Title IX's prohibition against sex discrimination. Of those statutes Alito identified, the following incorporate Title IX:

  Education

  - 20 U.S.C. § 1066c(d) (Historically Black College and University Capital Financing; Limitations on Federal Insurance Bonds Issued by Designated Bonding Authority): "No loan may be made to an institution under this part if the institution discriminates on account of race, color, religion, national origin, **sex** (to the extent provided in title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.])." (Emphasis added).
  - 20 U.S.C. § 1231e(b)(2) (Education Programs; Use of Funds Withheld): This section of the statute allows the Secretary of Education to reduce allotment or reallotment to a state under an applicable (education-based) program based on data concerning compliance to Title IX nondiscrimination.
  - 20 U.S.C. § 7914 (Strengthening and Improvement of Elementary and Secondary Schools; Civil Rights): This section applies Title IX sex nondiscrimination to all elementary and secondary school federal funding.

[20] *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

Employment

- 29 U.S.C. § 206(d)(1) (Equal Pay Act of 1963): This section applies Title IX sex nondiscrimination to fair labor standards, including minimum wage.
- 29 U.S.C. § 3248 (Workforce Development Opportunities; Nondiscrimination): Programs engaging in federal financial assistance under this title are subject to Title IX. The programs under this section are related to employment and training.

Accommodations

- 42 U.S.C. § 290cc–33(a) (Projects for Assistance in Transition from Homelessness): This section supports federal and state programs that assist with housing for those transitioning from homelessness. It applies Title IX sex nondiscrimination to these programs.

Family

- 42 U.S.C. § 5057(a)(1) (Domestic Volunteer Services; Nondiscrimination Provisions): This section applies sex nondiscrimination in Title IX to Domestic Volunteer Services programs that receive federal funding.
- 42 U.S.C. § 10406(c)(2)(B)(i) (Family Violence Prevention and Services; Formula Grants to States): This section applies sex nondiscrimination in Title IX to state grant programs.
- 42 U.S.C. § 12635(a)(1) (National and Community Service State Grant Program; Nondiscrimination): This section incorporates Title IX sex nondiscrimination to apply to national and community service state grant programs.

Health

- 42 U.S.C. §300w–7(a)(2) (Preventive Health and Health Services Block Grants; Nondiscrimination Provisions): This section applies sex nondiscrimination in Title IX to preventative health and health services block grants.
- 42 U.S.C. § 300x–57(a)(2) (Block Grants Regarding Mental Health and Substance Abuse; Nondiscrimination): This section applies sex nondiscrimination in Title IX to block grants regarding mental health and substance abuse.
- 42 U.S.C. § 708(a)(2) (Maternal and Child Health Services Block Grant; Nondiscrimination Provisions): This section applies sex nondiscrimination in Title IX to maternal health and child health services block grants.

- ED must consider the impact of its rule on each of these laws and in each of those contexts.
- *Section 1557.* One law *not* listed in Alito's appendix that incorporates Title IX and of particular concern for us is Section 1557 of the Patient Protection and Affordable Care Act. Section 1557 guarantees that no individual can "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under," any federally run or

federally funded health program "on the ground prohibited under … Title IX."[21] How ED defines the ground of sex discrimination under Title IX in its rule could thus have direct impact for Section 1557 and the health care context.[22]

- As proposed, the Title IX 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."
    - "Gender identity" will likely encompass medical interventions for individuals, including children, seeking to transition. "Termination of pregnancy" will undoubtably be interpreted by this administration to cover elective abortions. Both gender transitions and abortion raise a host of conscience concerns for medical professionals.
    - Further, Section 1557 extends to insurance imposing significant costs, raising additional concerns for employers and small business, and raises federalism concerns especially for state laws protecting unborn human life and prohibiting gender transitions for minors.[23]
- HHS's section 1557 rule is currently under review at OIRA. That rule purports to define the ground prohibited under Title IX in the healthcare context.
- It would be arbitrary and capricious for the administration to issue two different rules on the scope of discrimination prohibited under Title IX without considering them together. ED should jointly consider the proposed rule with HHS's proposed Section 1557 rule as a common rule.
- Moreover, Executive Order 12250 *requires* the Department of Justice to coordinate the implementation of regulations interpreting Title IX's nondiscrimination provisions:
    - 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 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 Title IX.

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[21] 42 U.S.C. § 18116(a) (citing Title IX, 20 U.S.C. § 1681 *et seq*.).

[22] 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/.

[23] These concerns, and others, are detailed in EPPC's comment submitted recently to OIRA as part of its ongoing review of review of HHS's proposed Section 1557 regulations. EPPC Comment to OIRA for EO 12866 Meeting on "Nondiscrimination in Health Programs and Activities" rule (Feb. 2, 2024), https://eppc.org/wp-content/uploads/2024/02/EPPC-Scholars-Comments-for-EO-12866-Meeting-Section-1557-ACA-.pdf.

- 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.
- It its final rule, ED must 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.

4. It is arbitrary and capricious for ED to pretend that its rule does not apply to athletics, and requiring participation in sports based on gender identity undermines Title IX's purpose and imposes significant costs.

- *Title IX is instrumental for female athletic participation.* In an insult to females and especially female athlete across the country, ED released its proposed Title IX rule on the 50th anniversary of Title IX. Title IX has been instrumental to ensuring girls and women have access to educational and athletic opportunities. Educational and interscholastic athletic opportunities for girls and young women skyrocketed in the years following Title IX's enactment. On a national level, ten times as many females now participate in high school sports compared to the pre-Title IX era.[24] In short, Title IX is responsible for increased participation in female sports and educational opportunities for women. Yet ED would turn Title IX on its head and require women to give up their spots on teams, in competitions, at championships, and on the podium.
- *Title IX rule applies to athletics despite ED's suggestion otherwise.*
    - 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."[25]
    - In the Title IX proposed rule, the Department explained that it did not propose (at that time) to change current Title IX regulations.[26] It promised 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."[27] It did just that, yet that rule is not under review by OIRA.
    - Regardless of whether ED finalizes the athletics rule, the Title IX rule clearly applies to athletics.
    - Under the Title IX rule, ED proposes defining 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."[28] Since school

[24] 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.

[25] 34 CFR § 106.41.

[26] 87 Fed. Reg. at 41537.

[27] *Id*.

[28] *Id*. at 41535 (citing proposed § 106.31(a)(2)).

sports are considered "an education program or activity,"[29] *the very text* of the proposed regulations appear to require participation in sports be based on gender identity.[30]

- Indeed, the proposed Title IX rule states that denying access or participation in education programs or activists 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."[31]
- In 2021, well before this rule was proposed, 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.[32] DOJ claimed that the law violates Title IX even without the proposed new regulations under review at OIRA. 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 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.)
- Notably, the proposed rule does not 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. Pretending that the general Title IX rule does not apply to athletics because a subsequent rule addresses the *criteria* for participation is a bait-and-switch. 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.

- *ED must consider the costs of requiring athletic participation based on gender identity.*
  - Sports are usually a zero-sum game. There are limits spots on a team's roster, on the court or field, in championships, and on the podium. Allowing *just one*

[29] *Id*. at 41400.

[30] The proposed rule contemplates that the Title IX Coordinator would ensure athletics comply with Title IX obligations. *Id.* at 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." *Id*. at 41445, 41447.

[31] *Id*. at 41537.

[32] *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.

biological male to join a female sports team has massive implications and harms to *many* females. These include:

- Harm to the female who did not receive a spot on the team.
- Harm to the female(s) who do not receive playing time or a spot to compete.
- Harm to the females on the other team who are at a disadvantage based on the fact that their competitors include a male that has a physiological advantage.
- Harms to the female or another team of females that do not win.
- Harms to the female or another team that does not advance in championships. (*E.g.*, Lia Thomas took the spot of multiple female athletes in NCAA swimming finals depriving them of the opportunity to compete.)
- Harms to the female or another team who does not receive an award or stand on the podium. (*E.g.*, Riley Gaines and Lia Thomas.)
- Harms to the female when a male beats a female record.
- Harms to the females that compete in an unsafe environment. (There have been multiple reports of concussions women have received from male athletes, including in noncontact sports like volleyball.)
- Harms to the female who loses an award or recognition for her achievements. (Lia Thomas was nominated for NCAA female athlete of the year.)
- Harms to the female who loses out of a college scholarship or position on a college team. (University of Washington provided a coveted scholarship and position on its women's volleyball team to a male athlete.)
- Harms to females who are discouraged knowing they can never fairly compete against male athletes and quit sports.
- Harms to females who have to give up their privacy and share a locker room, change, and shower in the presence of a biological male who can see them naked and expose his genitalia. (*E.g.*, Lia Thomas was permitted into multiple women's locker rooms where females were changing and where he was permitted to expose himself to them while changing.)
- Harms to the mental health of female athletes due to all the above.

- In our public comment, we raised the following additional costs, copied below, 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.[33]
- Potential costs of litigations as female athletes seek to defend their sex-based rights in court.

- Importantly, no student is barred from participating in athletics. All students are permitted to participate in accord with their biological sex. Just because some people do not like having sex be the criteria for determining athletic participation under Title IX, does not mean that they are not able to participate.
- Title IX requires participation in athletic based on biological sex. The question is not whether the Department of Education or others thinks sports should instead be based on a self-declared gender identity. The relevant question is what the law requires and under Title IX, it is participation based on biological sex.

5. It would be arbitrary and capricious for the final rule to apply to abortion.

- Notably, the proposed rule was published on July 12, 2022, a few weeks *after* the Supreme Court's decision on June 24, 2022, in *Dobbs v. Jackson Women's Health Organization* overruling *Roe v. Wade*. The Court held that there is no federal constitutional right to abortion and returned the issue of abortion "to the people and their elected representatives."[34]

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[33] 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 Aabram, *Teenager Found Guilty in Loudoun County Bathroom Assault*, Yahoo News (Oct. 25, 2021), https://news.yahoo.com/teenager-found-guilty-loudoun-county-004300075.html.

[34] 142 S. Ct. 2228, 2259 (2022).

- However, post-*Dobbs* the Biden administration is discovering newfound authority in federal law that it claims allows it to promote abortion and preempt state abortion laws.[35]
- ED proposes defining sex discrimination as including discrimination based on pregnancy or related conditions, which it defines 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."[36] "Termination of pregnancy" is not defined in the proposed rule, but some people claim that termination of pregnancy includes abortion.
- As such, we ask at a minimum that the Department to clarify whether abortion is falls within the definition of termination of pregnancy and Title IX's sex discrimination protections.
- There are at least three reasons why Title IX's prohibition against sex discrimination should not apply to abortion.
    - There is no federal constitutional right to abortion and no compelling government interest in promoting abortion.
    - Abortion is not the moral equivalent to pregnancy and childbirth and should not be treated as such.
    - Title IX contains an explicit 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."[37]
- Considering the proposed rule does not mention abortion once, it would be arbitrary and capricious and not a logical outgrowth for ED to use Title IX regulations to promote abortion without opening the rule up for public comment.
- If, however, ED wants to extend Title IX protections to abortion it must clarify whether, consistent with Title IX's abortion neutrality provision and the First Amendment, pro-life speech, speakers, events, etc. are permitted or whether they will be deemed a form of "harassment" based on "termination of pregnancy."

6. The rule violates the major questions doctrine.

- ED's rule raises serious questions under the major questions doctrine. The Supreme Court most recently spoke to this doctrine in *Biden v. Nebraska*, where it expressed its "concerns over the exercise of administrative power"[38] and clarified the criteria courts and federal agencies must use when determining whether Congress has delegated

[35] *See* 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.

[36] 87 Fed. Reg. at 41515.

[37] 20 U.S.C. § 1688.

[38] 143 S. Ct. 2355, 2372 (2023).

authority to a federal agency to address "questions of deep economic and political significance."[39]

- The major questions doctrine is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies."[40] Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration."[41]
- There is no question that abortion, sexual orientation, and gender identity are "questions of deep economic and political significance."
- As such, ED should explain why it believes that it can, consistent with the major questions doctrine, issue these Title IX regulations. If it cannot square its regs with the major questions doctrine, ED must withdraw this rule.
- To the extent that ED relies on *Chevron* deference as legal justification for its expansive Title IX regulations, ED should wait for the Supreme Court's decisions in *Relentless* and *Loper Bright*, in which the continuing validly of *Chevron* is at issue. The Supreme Court just heard oral argument in these cases on January 17, 2024.[42]

7. The final rule should clarify that Title IX federal financial assistance does not include tax exempt status.

- As ED is doubtless aware, two district courts have recently held that a private school that 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:
    - On July 21, 2022, a federal district court judge in Maryland held that the "tax-exempt status of a private school subjects it to the same requirements of Title IX imposed on any educational institution [that receives federal financial assistance]. CPS cannot avail itself of federal tax exemption but not adhere to the mandates of Title IX."[43]
        - Defendant Baltimore Lutheran High School Association has appealed this ruling to the Fourth Circuit, which held oral argument on January 25, 2024.[44]

[39] *Id*. at 2375.

[40] *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc).

[41] S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986).

[42] *See* Amy Howe, *Supreme Court Likely to Discard* Chevron, SCOTUSblog (Jan. 17, 2024), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/.

[43] *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. CV RDB-20-3132, 2022 WL 2869041, at *3 (D. Md. July 21, 2022), reconsideration denied, motion to certify appeal granted, No. CV RDB-20-3132, 2022 WL 4080294 (D. Md. Sept. 6, 2022)

[44] *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. 24-1453 (4th Cir. Oral arg. Jan. 25, 2024).

- Four days later, on July 25, 2022, a federal district judge in the Central District of California held that "Valley Christian's tax-exempt status confers a federal financial benefit that obligates compliance with Title IX."[45]
    - This ruling is not being appealed, as the court approved a settlement agreement between the parties last summer.[46]
- To counsel's knowledge, no other court has followed these two district court judges' lead in this regard.

- While we believe it is clear that these decisions misinterpret Title IX, there is no doubt that they contradict current Title IX regulations, which 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.[47]

- ED does not propose to amend this definition. Indeed, in footnote 2 of the proposed rule *it relies* on this definition, explaining that "'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."[48]

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[45] *E.H. v. Valley Christian Acad.*, 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022).

[46] *E.H. v. Valley Christian Acad*., No. 2:21-cv-07574-MEMF-GJSx, 2023 WL 7474948, at *3 (C.D. Cal. July 25, 2023).

[47] 34 CFR § 106.2(g).

[48] 87 Fed. Reg. at 41392 n.2 (citing 34 C.F.R. 106.2(g)(2) and (3)).

- The ED is in good company: as one Fourth Circuit judge noted at oral argument, regulations from twenty federal agencies have defined "Federal financial assistance" to mean "a grant, a loan, or a contract."[49]
- Moreover, the Supreme Court has already rejected the argument that a school that benefits from a tax deduction or credit is in the same position as a school that receives direct government funding:
    - *Arizona Christian School Tuition Organization v. Winn*[50] involved a challenge to a state program that gave Arizona taxpayers a dollar-for-dollar tax credit for contributions made to school tuition organizations, or STOs. These STOs used these contributions to provide scholarships to students attending private schools, including religious private schools.[51]
    - Respondents, Arizona taxpayers, argued that this program violated the Establishment Clause because the tax credit was effectively a government expenditure supporting religious schools.
    - The court rejected the respondents argument. It noted that while "tax credits and governmental expenditures can have similar economic consequences," they are still fundamental differences "between government expenditures and tax credits."[52]
    - It held that "when the government declines to impose a tax," it merely allows private parties "to retain control over their own funds in accordance with their own consciences."[53]
    - Most importantly here, the Supreme Court rejected respondents' claim "that income should be treated as if it were government property even if it has not come into the tax collector's hands."[54] "Private bank accounts cannot be equated with the Arizona state treasury."[55]
- For all these reasons, we are confident that these district courts have erred: the government's decision to recognize a church or religious school as tax exempt does not subject the religious organization to Title IX.
- Nonetheless, these cases have caused confusion and uncertainty for religious private schools, as can be seen from the associations of religious schools—including the Association of Christian Schools International, American Association of Christian

[49] Oral argument at 21:45, *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. 24-1453 (4th Cir. Jan. 25, 2024), https://www.ca4.uscourts.gov/OAarchive/mp3/23-1453-20240125.mp3.

[50] 563 U.S. 125 (2011).

[51] *Id*. at 129.

[52] *Id*. at 142.

[53] *Id*.

[54] *Id*. at 144.

[55] *Id*.

Schools, Association for Biblical Higher Education, and International Alliance for Christian Education—participating as amici in the pending Fourth Circuit case.[56]

- The confusion is multiplied here, where ED has proposed regulations that claim the authority to impose new radical burdens through Title IX.
- As such, we urge the Department to address this confusion and affirmatively state that under its regulations and under its interpretation of federal law tax-exempt status alone does not subject an entity to Title IX.
- The soon-to-be published Partnerships with Faith-Based Neighborhood Organization rule by nine agencies, including ED, states that: "All of the Agencies have included in their final regulations the definition of 'Federal financial assistance' set forth in Executive Order 13279."[57] E.O. 13279 section 1(a) provides: "For purposes of this order: 'Federal financial assistance' means assistance that non-Federal entities receive or administer in the form of grants, contracts, loans, loan guarantees, property, cooperative agreements, food commodities, direct appropriations, or other assistance, but does not include a tax credit, deduction, or exemption." We ask ED include a similar clarification in its final Title IX rule.

8. ED must conduct a Family Policymaking Assessment.

- Section 654(c) of The Treasury and General Government Appropriations Act of 1999,[58] requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being:

> (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.

[56] Brief of Association of Christian Schools International, et al., as amici curiae supporting Defendant-Appellant and Reversal, *Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, No. 24-1453 (4th Cir. June 12, 2023), https://storage.courtlistener.com/recap/gov.uscourts.ca4.171263/gov.uscourts.ca4.171263.22.1_1.pdf.

[57] *Available at* https://public-inspection.federalregister.gov/2024-03869.pdf (scheduled to be pub. Mar. 4, 2024).

[58] Pub. L. 105-277, 118 Stat. 814.

- As explained in detail in our public comment, this rule would negatively affect family well-being by stripping parents of their fundamental right to direct the upbringing and education of their children.[59]
- The "school-to-clinic" pipeline of pushing children towards social and medical transition, often and intentionally without parental notification, has undermined the parental-child relationship and torn families apart.[60]
- In light of the above, "before" the Department "implement[s]" the "regulations" in the proposed rule, it must conduct a Family Policymaking Assessment that complies with Pub. L. 105-277, § 654(c), 118 Stat. 814 (1999).

9. The final rule must address its religious liberty implications.

- The proposed rule refers to *Bostock* forty-nine times. As detailed above, we strongly disagree with the ED's claim that *Bostock's* interpretation of Title VII applies to Title IX. But if ED is to continue relying on *Bostock* in its Title IX rulemaking, it must also take into account what *Bostock* said about religious liberty.
- The Supreme Court in *Bostock* said that 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."[61] 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"[62];
  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'"[63]; 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."[64]
- 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.
- We applaud the Department for acknowledging in the proposed rule that Title IX has a religious exemption:

> Title IX includes several statutory exemptions and exceptions from its coverage, including for . . . educational institutions that are controlled by a religious organization to the extent that application of Title IX would be

[59] EPPC Public Comment, *supra* n.4, at 15-17.

[60] *See id*. at 17-20.

[61] *Bostock*, 140 S. Ct. at 1754.

[62] 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).

[63] *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

[64] *Id.* (citing 42 U.S.C. § 2000bb-3).

inconsistent with the religious tenets of the controlling organization. 20 U.S.C. 1681(a)(1)–(9).[65]

- However, the proposed rule fails to say anything else about religion or religious liberty.
- That is insufficient given the administration's and this Department's obligations to respect religious liberty—under the Administrative Procedure Act, the Religious Freedom Restoration Act, Title IX's religious exemption provision, and the First Amendment, to name a few.
- At the very least, ED should clearly affirm that religious entities subject to Title IX are not required to submit an application to ED and receive a favorable letter in return in order to claim or benefit from this statutory exemption.

10. The final rule must account for *303 Creative.*

- The final rule must take into account the Supreme Court's recent decision in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), which was pending when ED published its proposed rule.
- *303 Creative* involved a public accommodations nondiscrimination law and freedom of speech, religious liberty, and artistic freedom—issues raised directly by the proposed rule. The Court ruled against the government and in favor of 303 Creative on free speech grounds.
- The Court's decision affirms that opposition to issues such as abortion, same-sex marriage, and gender ideology can have both religious *and free speech* dimensions.
    - Immediately above we have highlighted the ED's obligation to take into account of and make provisions with respect to the proposed rulemaking's impact on religious liberty.
    - It would be arbitrary and capricious for ED to issue a final rule without taking into account what the Supreme Court said in *303 Creative* about the limits of government power to use nondiscrimination law to coerce private parties into communicating messages that contradict their own speech and religious convictions.
- As we have advised previously,[66] ED should open a supplemental comment now that the Court has decided *303 Creative* since its rule raises free speech concerns.

Conclusion

We urge OIRA to ensure that the statutory and regulatory process is upheld, and that Title IX's rule has sufficient legal and economic analysis that reflects ED's obligations under the Constitution, the Administrative Procedure Act, Title IX, federal laws protecting religious liberty, and all other relevant legal authority.

[65] 87 Fed. Reg. at 41,528.

[66] EPPC Public Comment, *supra* n.4, at 30.