Public Submission of the

Defense of Freedom Institute for Policy Studies on the

U.S. Department of Education's Notice of Proposed Rulemaking

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Agency/Docket Number: ED-2021-OCR-0166
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Defense of Freedom Institute

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SUBMITTED VIA FEDERAL eRULEMAKING PORTAL
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Dr. Miguel Cardona, Secretary of Education
Attention: Alejandro Reyes
U.S. Department of Education
400 Maryland Ave. SW
PCP-6125
Washington, DC 20202

Re: Comment on the Department's Notice of Proposed Rulemaking
Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
Agency/Docket Number: ED-2021-OCR-0166
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Dear Secretary Cardona:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Our organization is composed of former U.S. Department of Education appointees who are experts in education law and policy, in particular the areas covered by the Department's proposed regulations.

On July 12, 2022, the U.S. Department of Education's ("ED" or "Department") Office for Civil Rights ("OCR") published a Notice of Proposed Rulemaking ("NPRM") "to provide greater clarity regarding the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[1] The Department's proposed regulations purport to act under Title IX's statutory authority, which simply and unambiguously prohibits discrimination on the basis of sex in educational programs receiving federal financial aid.[2]

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[1] 87 Fed. Reg. 41,390 (Jul. 12, 2022) (hereinafter "NPRM").
[2] Education Amendments of 1972, §§ 901-907, 20 U.S.C. §§ 1681–1686 (1976).

With its NPRM, the Department has proposed an unprecedented regulatory scheme that would:

- Misapply the U.S. Supreme Court's *Bostock v. Clayton County* decision and fail to address the Court's decision limiting excessive agency rulemaking in *West Virginia v. EPA*;

- Fundamentally alter Title IX's meaning and purpose by redefining the binary definition of "sex" to include additional protected classes never envisioned by Congress when it enacted Title IX in 1972;

- Impose its policy preferences by redefining "sex" to include gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions, contrary to Title IX's clear requirements;

- Violate the Administrative Procedure Act's ("APA") requirement that the Department's rulemaking not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- Fail to justify its rulemaking with "good reasons" and demonstrate its permissibility under the statute, despite decades of serious reliance interests by hundreds of thousands of American educational institutions;

- Infringe on parental rights, in defiance of the PPRA, FERPA, and the Department of Education Organization Act, and without meeting the requirement that the Department conduct a Family Policymaking Assessment prior to implementing its proposed regulatory scheme;

- Fail to assure the reasonable privacy and safety interests of female students (in the use of restrooms, locker rooms, and other intimate facilities), as ensured by Title IX and various State laws;

- Undermine the rights of female students to compete against other female students in scholastic athletic competitions by requiring that educational institutions facilitate transgender (*i.e.*, biological male) participation in those female-only athletic activities and programs;

- Redefine sexual harassment to include conduct that is evaluated objectively *and* subjectively to determine whether a hostile environment has been created;

- Elevate Title IX Coordinators into all-powerful "Campus Commissars" with the obligation and unchecked authority to unceasingly monitor and prevent any activities or potentially offensive speech that he or she deems to be incompatible with the Department's newly enacted prohibitions;

- Eviscerate the procedural rights of accused students, teachers, and employees in sexual discrimination proceedings by eliminating the right to live hearings and cross-examination of witnesses and restricting access to review the available evidence;

- Severely chill constitutionally protected free speech that may be subjectively offensive to other students;

- Severely diminish fundamental fairness for accused students, teachers, and employees by permitting a return to the "single-investigator" model, allowing the same person to serve as investigator, presider, and decisionmaker in sexual discrimination proceedings;

- Lower the required standard of proof for "conviction" of an accused student, teacher, or employee to a preponderance of the evidence standard;

- Allow the decisionmaker to arbitrarily block any questions that he or she deems to be "unclear" or "harassing";

- Permit a higher standard of proof for an adverse finding against an educational institution's accused employee than that required for "conviction" of an accused student;

- Require the Title IX Coordinator to unilaterally initiate certain sex discrimination investigations without the consent of the aggrieved party; and

- Impose unfair burdens on the accused student, teacher, or employee prior to a finding of "guilt" by the decisionmaker (*i.e.*, elimination of the presumption of innocence).

DFI finds it particularly noteworthy that in expressing the desperate need for additional Title IX protections based on gender identity, sexual orientation, sex stereotypes, and sex characteristics, the Department chose not to define those important terms.

The NPRM is a profound regulatory document that rewrites Title IX's protections in defiance of congressional intent to include protections Congress has declined to enact. To propose the

regulatory enactment of such utterly sweeping changes and deliberately fail to include proposed definitions of key terms suggests that the Department prefers deferring the definition of terms in order to allow broadened elasticity for Title IX Coordinators, decisionmakers, and ultimately, the Department itself as it weights desired outcomes in Title IX proceedings. It deprives the American public of the right to fully consider and comment on the NPRM, in clear violation of the APA (discussed at length in DFI's comment). DFI believes this particular omission reveals a disturbing disingenuousness in the Department's professed commitment to ensuring more just and predictable protections in Title IX investigations and proceedings.

The NPRM is unlawful and against the public policy interests of the American people. The proposed regulations defy unambiguous congressional intent and diminish the procedural rights of accused students, teachers, and employees in violation of basic fundamental fairness embodied in the Department's "2020 Rule."[3]

I. *West Virginia v. EPA* directly undermines the Department's authority to enact the NPRM

On June 30, 2022, the Supreme Court dealt a significant blow to federal agencies that attempt to implement sweeping expansions of regulatory authority, relying on novel interpretations of long-extant statutes, without clear congressional authorization. The ruling directly implicates the legal authority the Department relies on in support of its NPRM.

Yet, arbitrarily and capriciously, the Department failed even to mention or discuss *West Virginia v. EPA*,[4] despite its clear relevance to the NPRM's radical expansion of Title IX and defying the Department's long-extant interpretation of the limits of its Title IX enforcement authority to sex-based discrimination. The factual parallels the Court cited in rejecting the Environmental Protection Agency's ("EPA") unprecedented regulatory expansion closely parallel the Department's transformative proposal to expand the scope of Title IX's sex-based prohibitions to include gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions.[5] Indeed, *West Virginia*'s implications for the Department's authority to enact the NPRM may explain the Department's inexplicable omission of any discussion of the decision.

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[3] 85 Fed. Reg. 30,026 (May 19, 2020) (hereinafter "2020 Rule").
[4] 597 U.S. __ (2022).
[5] In sharp contrast to gender identity, sexual orientation, sex stereotypes, and sex characteristics, pregnancy or related conditions are appropriately and reasonably encompassed by Congress's sex-based protections when it enacted Title IX (although DFI is very concerned with the Department's unclear view of what may constitute "reasonable modifications," pursuant to proposed 34 C.F.R. § 106.40(b)(3)–(4), which would require educational institutions to provide such modifications to their education programs or activities for students [in addition to private lactation stations, separate from restrooms]).

The Department's failure to examine *West Virginia* and offer the public notice and an opportunity to comment on the Department's analysis of the Court's highly relevant opinion—limiting the regulatory deference with which federal agencies promulgate rules of political and economic significance—constitutes sufficient basis for compelling the Department to withdraw the NPRM in its entirety.

Combined with the Department's misleading application of the Court's ruling in *Bostock v. Clayton County*,[6] which it asserts as the legal justification for the President's executive orders to which the NPRM claims to respond,[7] the omission of the Department's analysis of *West Virginia* is particularly vexatious. The Department was certainly aware of *West Virginia*'s significance at the time it published the NPRM.

Despite the significance of the Court's ruling well before the publication of the NPRM, the Department failed to address why *West Virginia* would not preclude imposition of the NPRM, which unmistakably impacts a major political and economic question for which Congress did not provide clear congressional authorization to the Department. The public is statutorily entitled[8] to understand and to make public submissions on the Department's views concerning its legal authority to issue the NPRM in the face of *West Virginia*. The public is also entitled to comment on the Department's views, once expressed, as part of the Department's notice-and-comment rulemaking. The Department's arbitrary and capricious failure to address the implications of *West Virginia* on the NPRM and to provide the public with notice and opportunity to make public submissions concerning the agency's analysis of the impact of *West Virginia* on the proposed rule is arbitrary and capricious, a fatal flaw that requires the Department to withdraw the NPRM in its entirety.[9]

Sections of NPRM Applicability:

ALL PROPOSED CHANGES, including but not limited to:

34 CFR §§ 106.10, 106.11, 106.2, 106.31(a)(2), 106.40(b)(2), 106.40(b)(3)(iii), 106.40(b)(3)-(4), 106.44(a), 106.44(c)(1), 106.44(c)(2), 106.44(c)(2)(iv), 106.44(f)(5), 106.44(f)(6), 106.45(b)(2), 106.45(b)(7)(iii), 106.45(f)(4), 106.45 (h)(1), 106.45(h)(3), 106.45(k), 106.46(e)(6), 106.46(f)(1), 106.46(f)(3), 106.71.

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[6] 140 S. Ct. 1731, 1753 (2020). The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as homosexual or transgender but expressly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."
[7] NPRM at 41,392.
[8] Pub. L. 79-404, 5 U.S.C. § 500 *et seq.* (2018).
[9] 5 U.S.C. § 553.

Applicable Directed Questions:

ALL DIRECTED QUESTIONS

Summary of the Court's ruling in *West Virginia v. EPA*

In *West Virginia v. EPA*, the State successfully challenged the EPA's novel application of a rarely used provision of the Clean Air Act ("CAA") that would have forced a significant shift in electricity production sources from fossil fuels to "renewable" sources such as wind and solar energy. The Court determined that the EPA's proposed regulation implicated the major questions doctrine as it involved a matter of economic and political significance properly determined by Congress and that the EPA had acted impermissibly when, in support of its proposed regulatory scheme, it "claimed to discover an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler."[10]

With its NPRM and attempt to redefine Title IX's applicability, the Department now attempts to do the same.

The EPA first attempted a comparable regulatory transformation when it promulgated the Clean Power Plan[11] rule ("CPP") in 2015, near the end of the Obama administration. In 2016, the Supreme Court stayed implementation of the rule, and, in 2019, finding that the CPP exceeded the CAA's grant of statutory authority and involved a major question to be determined by Congress, the EPA repealed the CPP and replaced it with a more modest emissions rule that it determined fell within the agency's authority unambiguously granted to it by Congress under the CAA. Then, in January 2021, the U.S. Court of Appeals for the District of Columbia Circuit vacated the EPA's 2019 repeal of the CPP,[12] returning the issue to the EPA for further consideration, following which the Court granted the plaintiffs' request to review the appellate court's ruling.

The EPA refused to cede that major consequences would result from its action, "attempt[ing] to *downplay matters*, noting that . . . it will not be 'exorbitantly costly' or 'threaten the reliability of the grid.'"[13] It argued that the CPP-forced changes were reasonable and would not, according to the EPA's assessments, result in major consequences. Major consequences would likely implicate

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[10] *West Virginia*, slip op. at 20.
[11] 80 Fed. Reg. 64,667.
[12] *Am. Lung Ass'n v. Envtl. Prot. Agency*, No. 19-1140 (D.C. Cir. Jan. 19, 2021).
[13] *West Virginia*, slip op. at 24–25 (emphasis added).

the major questions doctrine, requiring a clear statement of congressional intent to delegate such power to the EPA.[14]

The Court noted that the EPA's proposed policies were the subject of an "earnest and profound debate across the country" "mak[ing] the oblique form of the claimed delegation all the more suspect"[15] and that cases where the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress meant to confer such authority.'"[16]

The Court ruled that where an agency action is of economic and political significance, the agency must be able to point to clear congressional authorization for the power it is attempting to assert.[17] The Court noted that with particularly unprecedented agency assertions of power, it is proper to examine whether Congress intended such a sweeping and consequential delegation of power to the agency[18] and that such extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]."[19]

The Court emphasized Congress's previous rejection of legislative proposals[20] that would essentially have imposed the policies then regulatorily proposed by the EPA. It noted the EPA's ongoing attempt to "downplay the magnitude"[21] of its unusual exercise of regulatory power and found little, if any, reason to think that Congress had assigned such consequential decisions to the agency. The Court also examined whether the EPA's assertive regulatory scheme effected a "'fundamental revision of the statute, changing it from [one sort of] . . . regulation' into an entirely different kind"[22] and found that the CPP did amount to a such a regulatory makeover of the statute.

The Court noted the importance of the EPA's previous interpretation of the CAA for the preceding four decades—and its deviation from its consistent interpretive limitations on its rulemaking prior to the CPP.[23]

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[14] *Id.* at 12–13.
[15] *Id.* at 28, quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–268 (2006).
[16] *Id.* at 17, quoting *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 159 (2000).
[17] *Id*. at 19.
[18] *Id.* at 22–23, quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).
[19] *Id.* at 18, quoting *Whitman v. American Trucking Associations, Inc*., 531 U.S. 457, 468 (2001).
[20] *Id*. at 27–28.
[21] *Id*. at 24.
[22] *Id.*, quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*., 512 U.S. 218, 231 (1994).
[23] *Id*. at 31.

The parallels between the EPA's unconstitutional regulatory overreach in *West Virginia* and the Department of Education's proposed overreach in the Title IX NPRM are remarkable:

- The Department's aggressive reinterpretation of Title IX constitutes a regulatory assertion of power in a matter of vast political and economic significance;

- The Department's assertion of the power effectively to redefine "sex" and Title IX's prohibition against discrimination on the basis of sex indicates an assumption of power never delegated by Congress to the Department;

- Title IX's statutory context and overall statutory scheme reveal that Congress did not intend to delegate to the Department the regulatory authority to redefine "sex" and transform Title IX's discriminatory prohibitions;

- The Department's unprecedented interpretation of Title IX represents a novel interpretation of the statute, defying decades of fundamentally different regulatory interpretation by the Department, which would redefine "sex" and Title IX's prohibition against discrimination on the basis of sex;

- The Department asserts vast new authority to redefine "sex" from a fifty-year-old law for which its implementing regulations have never previously indicated such authority;

- The Department denies the magnitude of the NPRM's regulatory assertion over educational institutions, despite its sweeping and consequential effect on educational institutions;

- The Department fails to cite clear congressional authorization or a clear delegation of authority for the sweeping power it now claims; and

- The Department, noting that it is acting pursuant to President Biden's executive orders, has used its regulatory role to substitute its policy preferences for Congress's legislative function.

The NPRM's use of a previously unheralded regulatory power without clear congressional authorization

On July 12, 2022, the Department published the NPRM,[24] proposing an unprecedented reinterpretation of Congress's statutory anti-discriminatory mandate by unilaterally expanding Title IX's protections to include discrimination based on gender identity, sexual orientation, sex stereotypes, sex characteristics (collectively, "gender identity and sexual orientation"), and pregnancy or related conditions.[25] Title IX, by its express terms granted by Congress, is limited to the prohibition of sex-based discrimination involving "any education program or activity receiving Federal financial assistance"[26] and does not include gender identity, sexual orientation, sex stereotypes, or sex characteristics now included in the proposed NPRM's impermissibly expansive scope.

With its NPRM, the Department significantly oversteps and misapplies its regulatory authority under Section 901 of Title IX,[27] which law simply and clearly prohibits discrimination on the basis of sex in educational programs receiving federal financial aid.[28] The Department's proposed amendments to Title IX's implementing regulations[29] would also create entirely new categories of prohibited conduct based on gender identity and sexual orientation, far exceeding Congress's clear delegation of authority to the Department for the prohibition of sex-based discrimination—congressional authorization that the Department had accepted for nearly five decades, as reflected in its guidance and rulemaking (discussed *infra*).

The Department's unilateral interpretation of its authority to add gender identity, sexual orientation, sex stereotypes, and sex characteristics to Congress's statutory mandate for prohibiting sex-based discriminatory conduct not only exceeds its statutory authority granted by Congress under Title IX but also runs counter to the Department's prior policy interpretations regarding its application and enforcement of Title IX. The agency does not cite any legislative support for this change in interpretation. That is because Congress has not expanded the scope of Title IX to include gender identity, sexual orientation, sex stereotypes, and sex characteristics.

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[24] *See* https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.
[25] *See* https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[26] 20 U.S.C. § 1681(a).
[27] Education Amendments of 1972, §§ 901-907, 20 U.S.C. §§ 1681–1686 (1976).
[28] 20 U.S.C. § 1682 authorizes the Department to issue "rules, regulations, or orders of general applicability" to carry out the purposes of Title IX. 20 U.S.C. § 1681(a) provides that Title IX applies to "any education program or activity receiving Federal financial assistance."
[29] *See* https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

Instead, the Department has embarked on an arbitrary and capricious rulemaking effort that exceeds its statutory authority and that implicates major political and economic issues to achieve transformative policies that Congress, even recently, has repeatedly refused to enact. The Department further proposes to do so without a delegation of such power from Congress and in contradiction of the Department's own decades-long interpretation and application of Title IX (despite no commensurate alteration of Title IX's language).

If the Department actually believes that Title IX statutorily permits it to expand the scope of Title IX to include gender identity, sexual orientation, sex stereotypes, and sex characteristics, Congress and the American people would be well-advised to inquire if the Department perceives *any* limitations on its permissible regulatory authority.[30] The Department's arbitrary and capricious misuse of Title IX to expand the scope of Title IX to achieve its policy objectives cannot occur without the Department inserting itself into major political and economic questions inherent in altering Title IX's scope—major questions only properly addressed by Congress.[31]

Title IX's statutory text and the meaning of sex

The *West Virginia* Court noted that "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[32] We now do the same.

Title IX's core prohibition against sex-based discrimination (excepting certain expressly permissible sex-based segregations) remains unchanged by Congress since it became law in 1972:

> 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 . . . [33]

In enacting Title IX, Congress provided federal agencies clear congressional authorization to implement regulations that prevented sex-based discrimination. Nothing in the text or legislative

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[30] In *West Virginia*, the Court quoted Justice Frankfurter, who noted that "'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'" *West Virginia*, slip op. at 21, quoting *FTC v. Bunte Brothers, Inc*., 312 U.S. 349, 352 (1941).
[31] *Brown & Williamson*, 529 U.S. at 159.
[32] *West Virginia*, slip op. at 22, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).
[33] 20 U.S.C. § 1681(a).

history of Title IX indicates that Congress intended to grant the Department the regulatory authority to issue regulations expanding the scope of the statute to include gender identity, sexual orientation, sex stereotypes, and sex characteristics. Such a consequential grant of regulatory authority to the Department could only have been accomplished through a clear and unambiguous statutory statement of Congress's intent to grant such an extraordinary (sex-defining) power.[34] In fact, the history of Title IX and its application by the Department reveals Congress's clear and actual intent that Title IX prohibits only sex-based discrimination.

In Title IX, Congress did not vest the Department or any other federal agency with the regulatory authority to expand the scope of Title IX beyond "sex" according to the executive's policy preferences of the day or to make decisions on significant political and economic issues—issues of serious and profound ongoing public debate (in Congress, the courts, and the media). Congress has not vested such power in the Department over major questions reserved for the legislature,[35] and, in any event, the executive branch is not constitutionally imbued with the power to implement such regulations in the absence of an express grant of authority from Congress.[36]

Notable is the Department's failure to analyze that Congress provided such a grant of congressional authorization for its transformative NPRM.[37] The Department fails to cite its authority to expand the scope of Title IX to include gender identity, sexual orientation, sex stereotypes, and sex characteristics. Either way, had Congress intended a delegation of such consequential political and economic importance, Title IX would expressly indicate as much. It does not.

Title IX includes many references indicating the binary, male and female, meaning of sex

Consideration of the meaning and purpose of a statute "is a holistic endeavor," and context indicates when a term "may or may not extend to the outer limits of its definitional possibilities."[38] The meaning of "sex" as repeatedly used within Title IX demonstrates that Congress intended for Title IX only to prohibit discrimination on the basis of a binary (biological male and biological female) meaning of sex. The Department honored this congressional intent for nearly fifty years.

Title IX is replete with references to persons "of one sex" and "students of both sexes," making no reference to gender identity, sexual orientation, sex stereotypes, sex characteristics, or the innumerable and interchangeable variances associated therewith. Congress was clear that "sex"

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[34] *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).
[35] *Indus. Union Dept., AFL-CIO v. Am. Petroleum Insti.*, 448 U.S. 607, 645–46 (1980).
[36] U.S. CONST. art. II, § 1, cl. 1.
[37] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2019) ("Expect Congress to speak clearly if it wishes to assign an agency decisions of vast economic and political significance.").
[38] *Koons Buick Pontiac GMS, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

referenced binary, biologically male and female distinctions. There is no vagueness or ambiguity regarding Congress's view of what constituted "sex" indicated anywhere in the text of Title IX. Nor is there any indication that Congress intended to grant the Department the authority to make such a determination—then or now.

Far from neglecting to identify the meaning of sex, repeated congressional inclusion of the term reveals what Congress intended Title IX's prohibition to cover. No mystery ensued. For nearly a half century, the Department was never puzzled by Title's IX's use of the word "sex" and understood the statute to prohibit discrimination based on a binary, biologically based understanding of sex. In an arbitrary and capricious manner, the Department now desires to ignore the express statutory text of Title IX and nearly five decades of its guidance and interpretation to create an entirely new scope for Title IX.

To wit:

- In 20 U.S.C. § 1681(a)(2), Title IX expressly provided a temporary exemption ". . . in the case of an educational institution which has begun the process of changing from being an institution which admits only *students of one sex* to being an institution which admits students of *both sexes*."

- In 20 U.S.C. § 1681(a)(5), Title IX clarified that the new requirements "shall not apply to any public institution . . . that traditionally and continually from its establishment has had a policy of admitting only *students of one sex*."

- In 20 U.S.C. § 1681(a)(6)(A), Title IX exempted social fraternities and sororities at colleges and universities.

- In 20 U.S.C. § 1681(a)(6)(B), Title IX exempted certain voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to "persons of *one sex*," including the Boy Scouts, Girl Scouts, Camp Fire Girls, Young Men's Christian Association, and the Young Women's Christian Association.

- In 20 U.S.C. § 1681(a)(7), Title IX provided exemptions for programs or activities undertaken in connection with *girls and boys* state and national conferences.

- In 20 U.S.C. § 1681(a)(8), Title IX provided exemptions for "*father-son or mother-daughter* activities" but required that if such activities were provided for students of "*one sex*" that reasonable comparable activities must be provided for students of the "*other sex*."

- In 20 U.S.C. § 1681(a)(9), Title IX exempted scholarships or other financial assistance awarded to "*one sex only*" which are "based upon a combination of factors related to the personal appearance, poise, and talent of such individual" so long as the pageant is otherwise in compliance with nondiscrimination provisions of federal law.

- In 20 U.S.C. § 1686, Title IX provided that educational institutions could maintain "separate living facilities for the *different sexes*."[39]

Congress did not include a definition of "sex" in Title IX because it presumed that federal agencies understood its ordinary meaning.[40] And for nearly five decades, the Department clearly understood what Congress meant by "sex," as indicated by its Title IX regulations, guidance, and policies.

As identified in Title IX's statutory provisions, *supra*, Congress repeatedly revealed its view of the meaning of "sex" through the exceptions in which differing treatment based on sex was permitted, including "[e]ducational institutions of religious organizations with contrary religious views," "educational institutions training individuals for military services or merchant marine," "public educational institutions with traditional and continuing admissions policy," "social fraternities or sororities" and "voluntary youth service organizations," boys or girls conferences, father-son or mother-daughter activities, and scholarship awards in "beauty" pageants.[41] Title IX's provision for the maintenance of "separate living facilities for the different sexes" also illustrates its understanding of the ordinary meaning of the term "sex"[42] (the ordinary, biologically based meaning of sex should then be similarly applied[43] throughout the statute).

Congress had a binary, biologically male or female, boy or girl, father or son, mother or daughter view of sex. The express statutory text left no doubt of how Congress viewed the meaning of sex. Congress offered not the slightest hint that it intended to include other conceptions of "sex" or "gender" or that it intended to confer upon the executive branch the ongoing power to redefine Title IX's applicability. It provided no such provisional power to the Department. If Congress had intended to delegate its power to provide Title IX anti-discrimination protections based on gender identity, sexual orientation, sex stereotypes, or sex characteristics, it would have done so (and as this raises a major question under *West Virginia*, the Department would need clear congressional authorization to exercise this power). On matters of such major political and economic

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[39] 117 Cong. Rec. 30,407, 39,260, 39,263 (1971); 188 Cong. Rec. 5807 (1972).
[40] *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").
[41] 20 U.S.C. § 1681(a)(1)–(9).
[42] 20 U.S.C. § 1686.
[43] *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

consequence—matters of intense ongoing debate in the public square—a vague or indiscriminate delegation of such power to the Department is not sufficient to confer such power.

Congress neither explicitly nor implicitly vested in the Department the power to entertain whether "sex" involved more than the two biological sexes (*i.e.*, gender identity, sexual orientation, sex stereotypes, or sex characteristics) as the Department now presumes to retain. Rather than continuing the Department's nearly fifty-year policy of enforcing Title IX's plain meaning, the NPRM reveals that the Department seeks to rewrite Title IX in a manner not clearly authorized by the national legislature. If Congress had vested this transformative regulatory power in the Department, it would have been clear in so doing. In Title IX, Congress was not unclear. It was not ambiguous. It was not vague.

Quite simply, no evidence exists to show that Congress intended for the scope of Title IX to cover gender identity, sexual orientation, sex stereotypes, or sex characteristics or that it ever intended to grant the Department the power to interpret Title IX to include gender identity, sexual orientation, sex stereotypes, or sex characteristics. Contrary to congressional intent, the NPRM aggressively transforms the plain and ordinary meaning of Title IX in a way that fundamentally revises its long-accepted meaning and protections.

Legislative context of Title IX

Congress has repeatedly demonstrated that it understands the difference between sex, sexual orientation, and gender identity (and sex stereotypes and sex characteristics), as demonstrated by its consideration of legislative proposals adding anti-discriminatory statutory protections based on sexual orientation, gender identity, and (at times) sex stereotypes. Congress has carefully debated additional protections based on sexual orientation and gender identity (discussed *infra*) contained within legislative proposals that would be unnecessary if the protections had already been legislatively enacted in Title IX. Thus, Congress's understanding then and now reveals that it has not viewed Title IX's protections to encompass sexual orientation and gender identity—additional protections the Department now claims reside in Title IX's original protections.

The *West Virginia* Court noted that "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[44] Vague delegations may not be used by federal agencies to justify broad assumptions of regulatory power in important policy matters. Congress must be clear in order to transfer its authority to a federal agency. The Court affirmed that on matters of political and economic

[44] *West Virginia*, slip op. at 22, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

significance, "'Congress could not have intended to delegate a decision [to the agency] in so cryptic a fashion.'"[45]

The Department's NPRM relies on a radically expanded interpretation of Title IX's scope beyond the ordinary meaning of "sex," even though Congress could not have delegated such an important policy decision without a clear, unambiguous indication that it had meant to do so. Here, there is not even a cryptic delegation.

Congress expressly enacted Title IX to prevent sex-based discrimination, not discrimination based on gender identity, sexual orientation, sex stereotypes, or sex characteristics. To do so, it would have had expressly to include those additional protections or statutory text granting the Department with clear congressional authority to adopt regulations to do so. It did neither, affirming the "outer limits" of its statutory intent.

Congress deliberately prohibits sex-based discrimination to ensure that educational institutions offer men and women equal opportunities. The lack of a definition of sex or a clarification of the statutory scope illustrates that in 1972 Congress did not believe further clarification of the meaning or scope was required and that federal agencies would apply the ordinary meaning of the term "sex" and no more.[46] Title IX provides sex-based protections designed primarily to provide equal educational opportunities for biological men and women and does not authorize the Department's unprecedented proposed transformation of Title IX.

Congress enacted Title IX in 1972 to eliminate barriers for women at educational institutions. Title IX thus prohibits sex-based discriminatory conduct according to the ordinary meaning of sex at the time of passage—that is, binary sex, biologically male and female. Achieving equal protection for women under federal law was a matter of ongoing congressional consideration before, during, and after the passage of Title IX.

The words and legislative actions of key congressional Title IX proponents show that Title IX's sex-based protections are squarely designed to eliminate discrimination against, and to provide equal opportunities for, girls and women at educational institutions receiving federal financial assistance:

- In March 1970, Rep. Martha Griffiths (D-MI) gave the first speech ever on the floor of the U.S. House about employment discrimination against women in federal

[45] *Id.* at 25–26, quoting *Brown & Williamson*, 529 U.S. at 160.
[46] *Id.*

programs.[47] ". . . [I]t is a national calamity that agencies of the Federal Government are violating our national policy, as well as the President's Executive orders, by providing billions of dollars of Federal contracts to universities and colleges which discriminate against women both as teachers and as students."[48] Rep. Griffiths is credited with the important addition of "sex" as another basis of prohibited discrimination under Title VII (H.R. 7152).[49]

- In September 1971, as he introduced a bill in the U.S. Senate that was eventually largely included in Title IX, "father of Title IX"[50] U.S. Senator Birch Bayh (D-IN) succinctly described Title IX's purpose: "The bill I am submitting today will guarantee that *women*, too, enjoy the educational opportunity every American deserves."[51] S. 2552 was called the "Women's Educational Equality Act," and Sen. Bayh's comments concerned unequal treatment of women, noting explicit limitations on the admission of women to state universities, women's employment opportunities in higher education, and the percentage of advanced degrees awarded to men compared to women.[52]

- During a previous attempt to introduce the bill (as S. 2185), Sen. Bayh described Congress's challenge: "To my mind our greatest legislative failure relates to our continued refusal to recognize and take steps to eradicate the pervasive, divisive, and unwarranted discrimination against a majority of our citizens, the *women* of this country."[53] Sen. Bayh urged that the legislation would "narrow the gap between our obligations and our performance by giving to women the benefit of the major civil rights legislation of the last decade" and noted that it would "implement[] the recommendations of the President's Task Force on Women's Rights and Responsibilities."[54]

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[47] Peg Pennepacker, "The Beginning of Title IX—the Bernice Sandler Story," NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS (May 12, 2022), https://www.nfhs.org/articles/the-beginning-of-title-ix-the-bernice-sandler-story/.
[48] 116 Cong. Rec. 6398–6400 (Mar. 9, 1970).
[49] Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997), https://scholarship.law.wm.edu/wmjowl/vol3/iss1/6/.
[50] Akeem Glaspie, *"Father of Title IX" Birch Bayh Leaves Lasting Legacy for Women's Sports*, INDYSTAR, Mar. 14, 2019, https://www.indystar.com/story/sports/2019/03/14/father-title-ix-birch-bayh-leaves-lasting-legacy-womens-sports/3160476002/.
[51] 117 Cong. Rec. 32,476 (Sept. 20, 1971) (emphasis added).
[52] *Id*. at 32,476–32,477.
[53] 117 Cong. Rec. 22,735–22,743 (Jun. 29, 1971) (emphasis added).
[54] *Id*.

- In June and July 1970, the House Special Subcommittee on Education of the House Committee on Education and Labor, "Mother of Higher Education"[55] Rep. Edith S. Green (D-OR), chaired hearings on H.R. 16098, eventually leading to the Education Amendments of 1972 (including Title IX). The hearings were named "Discrimination Against Women."[56] Rep. Green's focus was purely on correcting discriminatory treatment of women: "Many of us would like to think of educational institutions as being far from the maddening crowd, where fair play is the rule of the game and everyone, including women, gets a fair role of the dice. Let us not deceive ourselves—our educational institutions have proven to be no bastions of democracy."[57]

- Speaking in defense of Title IX, Rep. Green noted that "[a]ll that this title does is to ask that a *woman* be considered as a human being, that her qualifications, her high-school work and other qualifications be considered in the same fashion of those of a male applicant."[58]

Despite the Department's conjured contemporary view that in 1972 Congress intended "sex" to encompass its proposed new meanings, other contemporary legislative proposals indicate Congress's ongoing concern with discrimination against women and desire to enact legislative prohibitions through Title IX and other legislation. The Department's current effort to disingenuously rewrite Title IX's legislative history to suit its current policy goals is arbitrary and capricious and exceeds its statutory authority granted by Congress.

Additional legislation to prevent sex-based discrimination against women considered by Congress during the same general period of time included:

- In May 1970, the House and Senate held multiple hearings on and eventually proposed[59] (H.J. Res. 208 and S.J. Res. 61) the Equal Rights Amendment to the

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[55] Bart Barnes, *Former Rep. Edith Green Of Oregon Dead at 77*, WASH. POST, Apr. 23, 1987, https://www.washingtonpost.com/archive/local/1987/04/23/former-rep-edith-green-of-oregon-dead-at-77/4df602fd-5720-43c8-a342-1535185c53d9/.
[56] *Discrimination Against Women: Hearings before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives*, 91st Congress (1970).
[57] SUSAN TOLCHIN, WOMEN IN CONGRESS 32 (1976).
[58] 117 Cong. Rec. 39,259 (Nov. 4, 1971) (emphasis added).
[59] Eileen Shanahan, *Equal Rights Amendment Is Approved by Congress*, N.Y. TIMES, Mar. 23, 1972, https://www.nytimes.com/1972/03/23/archives/equal-rights-amendment-is-approved-by-congress-equal-rights.html.

Constitution ("ERA"), including debating legislation to prevent discrimination against women at American universities.[60]

- In July 1970, Rep. Abner Mikva (D-IL) introduced the Women's Equality Act of 1970, a bill to prohibit discrimination against women in federally assisted programs, government employment, and employment in educational institutions. Rep. Mikva noted that "[i]t is surprising and inexcusable that the quality of life Americans have sought for nearly 200 years is in many ways denied female Americans by law."[61]

- In October 1971, the House Committee on Education and Labor produced House Report No. 92-554 on the Higher Education Act of 1971, which analyzed sex-based discrimination in educational programs and activities receiving federal funds.[62]

- In February 1972, Sen. Bayh introduced an amendment to S. 659 and noted that "[w]hile the impact of this amendment would be far-reaching, it is not a panacea. It is, however, an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work."[63]

- On June 23, 1972, President Richard Nixon signed S. 659 (including Title IX of the Education Amendments of 1972) into law.[64] The legislation largely followed the recommendations of the President's Task Force on Women's Rights and Responsibilities, which was created in September 1969.[65]

In the era surrounding the passage of Title IX, Congress was indisputably engaged in legislative efforts to protect the equal rights of women. It considered and passed various laws to that end. The

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[60] 86 Stat. 1523, 92nd Cong., 2nd Sess. (1972).
[61] 116 Cong. Rec. 22,681–22,682.
[62] H.R. Rep. No. 92-554, 92nd Cong., 1st Sess. (1971).
[63] 118 Cong. Rec. 5808 (Feb. 28, 1972).
[64] Meghan Gunn, *Title IX Timeline: 50 Years of Milestones, Firsts and Notable Achievements*, NEWSWEEK, Jun. 22, 2022, https://www.newsweek.com/title-ix-timeline-50-years-milestones-firsts-notable-achievements-1717443.
[65] The Report of The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (Apr. 1970), https://www.archives.gov/files/research/women/images/task-force-report-1970.pdf.

Department's current efforts would diminish rather than enhance the historical importance and impact of that era's consequential congressional achievements.

Congress has repeatedly considered separate federal legislation prohibiting discrimination based on *sexual orientation*

Congress has considered many legislative proposals that would expressly grant federal agencies the statutory authority the Department seeks to assert in the NPRM regarding gender identity and sexual orientation. If Congress believed those rights were already covered by Title IX's protections, consideration of the proposals would be redundant and unnecessary.

In *West Virginia*, the Court noted that it "cannot ignore" Congress's "consistent[] reject[ion]" of legislative proposals that would have created a program comparable to what EPA's CPP would have created.[66] Here, Congress has considered major legislative proposals to enact the exact federal protections that the Department now insists are already included in Title IX.

Not unlike Title IX's protections to prohibit sex-based discrimination against women, proposed legislative protections based on sexual orientation constitute major policy questions that have been the subject of ongoing serious debate in Congress for decades. If Congress believed that such protections already existed under Title IX, it is highly unlikely that legislative advocates would so forcefully have demanded the addition of legislative protections based on sexual orientation. Instead, congressional advocates would have focused on enforcement and oversight efforts.

The available historic record reveals Congress's long understanding of the protections it had and had not afforded in Title IX (and other civil rights statutes). Congress has repeatedly considered amendments and other legislation that would add other protections (such as those the Department seeks to enact through its rulemaking).

Subsequent legislative proposals have clearly differentiated between Title IX's sex-based protections and protections based on "sexual orientation" or "gender identity," revealing congressional awareness of the distinctions between "sex" and "gender identity" and "sexual orientation," sex stereotypes, and sex characteristics.

Equality Act (1974)

For example, in May 1974, H.R. 14752 (the "Equality Act") would have prohibited discrimination in public education, employment, and access to public accommodations based on "sex, marital

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[66] *West Virginia*, slip op. at 27.

status or sexual orientation."[67] Congress considered adding the same protected classes in June 1974 in H.R. 15692[68] and in July 1974 in H.R. 16200.[69]

Employment Non-Discrimination Act (1994)

In June 1994, the Employment Non-Discrimination Act ("ENDA") was first introduced in the U.S. House (H.R. 4636[70]) and would have prohibited discrimination against employees on the basis of sexual orientation.[71] Its counterpart was introduced in the U.S. Senate (S. 2238) in June 1994.[72] ENDA was reintroduced in the House in June 1995 (H.R. 1863[73]), the Senate in 1996 (S. 2056[74]), the House in June 1997 (H.R. 1858[75]), and, again, in the Senate in June 1997 (S. 869[76]).

After ENDA failed to pass, in 1998 President Bill Clinton signed an executive order that prohibited discrimination based on sexual orientation for federal employees.[77]

Banning workplace discrimination based on sexual orientation, ENDA eventually passed in the U.S. House in 2007. Before passage, in April 2007 H.R. 2015[78] was introduced and would have prohibited discrimination on the basis of sexual orientation *and* gender identity. Ultimately, H.R. 3685[79] (banning discrimination based on sexual orientation) passed after "gender identity" was removed from the previous version of the bill (which had defined "gender identity" as "mean[ing] the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth") (H.R. 2015).[80]

In June 2009, H.R. 3017[81] proposed to ban employment discrimination based on both sexual orientation and gender identity, as did S. 1584[82] in the Senate. Again, in April 2011, ENDA bills

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[67] *See* https://www.congress.gov/bill/93rd-congress/house-bill/14752.
[68] *See* https://www.congress.gov/bill/93rd-congress/house-bill/15692.
[69] *See* https://www.congress.gov/bill/93rd-congress/house-bill/16200.
[70] *See* https://www.congress.gov/bill/103rd-congress/house-bill/4636.
[71] *See* https://www.congress.gov/bill/103rd-congress/house-bill/4636.
[72] *See* https://www.congress.gov/bill/103rd-congress/senate-bill/2238?s=1&r=14.
[73] *See* https://www.congress.gov/bill/104th-congress/house-bill/1863.
[74] *See* https://www.congress.gov/bill/104th-congress/senate-bill/2056.
[75] *See* https://www.congress.gov/bill/105th-congress/house-bill/1858.
[76] *See* https://www.congress.gov/bill/105th-congress/senate-bill/869.
[77] *See* https://www.govinfo.gov/content/pkg/WCPD-1998-06-01/pdf/WCPD-1998-06-01-Pg994-2.pdf.
[78] *See* https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.
[79] *See* https://www.congress.gov/bill/110th-congress/house-bill/3685.
[80] *See* https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.
[81] *See* https://www.congress.gov/bill/111th-congress/house-bill/3017.
[82] *See* https://www.congress.gov/bill/111th-congress/senate-bill/1584.

prohibiting both sexual orientation and gender identity were introduced in the House (H.R. 1397[83]) and Senate (S. 811[84]), as occurred again in April 2013 with H.R. 1755[85] and S. 815,[86] which ultimately gained passage in the Senate in November 2013 but did not become law.

Hate Crimes Prevention Act of 2009

In 2009, Congress created a new hate crimes law which provided *inter alia* that willfully causing bodily injury because of a person's gender, sexual orientation, or gender identity constituted criminal activity.[87]

Violence Against Women Act (2013)

Once more demonstrating that there is a legislative distinction between sex and gender identity, Congress expressly prohibited discrimination on those bases in its 2013 reauthorization of the Violence Against Women Act ("VAWA").[88]

Equality Act (2015)

The "Equality Act" was introduced in the House and Senate in July 2015 (H.R. 3185[89] and S. 1858[90]) and proposed to amend Titles II, III, IV, VI, VII, and IX of the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex (to include a sex stereotype, sexual orientation or gender identity, and pregnancy, childbirth, or a related medical condition), sexual orientation (to include homosexuality, heterosexuality, or bisexuality), and gender identity (to include gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth).

Clearly recognizing that different meanings attach to sex-based discrimination and discrimination based on sexual orientation and gender identity, the Equality Act is replete with proposed statutory language that would enlarge the scope of barred discrimination from sex to sexual orientation and gender identity. Sec. 1101(b)(2) of the most recent version of the Equality Act in the House (H.R. 5[91]) proposes that "[with respect to gender identity] an individual shall not be denied access to a

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[83] *See* https://www.congress.gov/bill/112th-congress/house-bill/1397.
[84] *See* https://www.congress.gov/bill/112th-congress/senate-bill/811.
[85] *See* https://www.congress.gov/bill/113th-congress/house-bill/1755.
[86] *See* https://www.congress.gov/bill/113th-congress/senate-bill/815.
[87] 18 U.S.C. § 249(a)(2).
[88] 42 U.S.C. § 13925(b)(13)(A).
[89] *See* https://www.congress.gov/bill/114th-congress/house-bill/3185.
[90] *See* https://www.congress.gov/bill/114th-congress/senate-bill/1858.
[91] *See* https://www.congress.gov/bill/117th-congress/house-bill/5.

shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity."[92]

Fairness for All Act (2019)

The "Fairness for All Act" was first introduced in December 2019 (H.R. 5331[93]) and, again, in February 2021 (H.R. 1440[94]), and proposed to prohibit discrimination on the basis of sex, sexual orientation, or gender identity, provided exemptions for religious organizations, and would have prohibited sanctions for certain employee speech regarding an employee's religious, political, or moral beliefs in the workplace.

Congress has repeatedly considered separate federal legislation prohibiting discrimination based on *gender identity*

Legislative protections based on gender identity also constitute major policy questions that have been the subject of ongoing consideration and debate in Congress for decades. If Congress believed that these protections already existed under Title IX, it is highly unlikely that legislative advocates would since have so forcefully demanded the addition of these legislative protections based on gender identity. Instead, congressional advocates would have focused on enforcement and oversight efforts.

Employment Non-Discrimination Act (1994)

After the unsuccessful passage of ENDA in every Congress since the original bills were introduced in 1994, ENDA eventually passed in the U.S. House in 2007. Introduced in April 2007, H.R. 2015[95] would have prohibited discrimination on the basis of sexual orientation *and* gender identity. H.R. 3685[96] passed after "gender identity" was removed from the previous version of the bill (which had defined "gender identity" as "mean[ing] the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth") (H.R. 2015).[97]

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[92] *See* https://www.congress.gov/congressional-record/volume-167/issue-36/house-section/article/H633-2.
[93] *See* https://www.congress.gov/bill/116th-congress/house-bill/5331/text.
[94] *See* https://www.congress.gov/bill/117th-congress/house-bill/1440/text.
[95] *See* https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.
[96] *See* https://www.congress.gov/bill/110th-congress/house-bill/3685.
[97] *See* https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.

In June 2009, H.R. 3017[98] proposed to ban employment discrimination based on both sexual orientation and gender identity, as did S. 1584[99] in the Senate. Again, in April 2011, ENDA bills prohibiting both sexual orientation and gender identity were introduced in the House (H.R. 1397[100]) and Senate (S. 811[101]), as occurred again in April 2013 with H.R. 1755[102] and S. 815,[103] which ultimately gained passage in the Senate in November 2013 but did not become law.

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[98] *See* https://www.congress.gov/bill/111th-congress/house-bill/3017.
[99] *See* https://www.congress.gov/bill/111th-congress/senate-bill/1584.
[100] *See* https://www.congress.gov/bill/112th-congress/house-bill/1397.
[101] *See* https://www.congress.gov/bill/112th-congress/senate-bill/811.
[102] *See* https://www.congress.gov/bill/113th-congress/house-bill/1755.
[103] *See* https://www.congress.gov/bill/113th-congress/senate-bill/815.
[104] 18 U.S.C. § 249(a)(2).
[105] 42 U.S.C. § 13925(b)(13)(A).
[106] *See* https://www.congress.gov/bill/114th-congress/house-bill/3185.
[107] *See* https://www.congress.gov/bill/114th-congress/senate-bill/1858.
[108] The Biden administration's support for passage of the Equality Act indicates its awareness that its EOs exceed its current statutory authority: if Title IX already included protections based on gender identity, sexual orientation, sex stereotypes, and sex characteristics, there would be no need for the Equality Act (insofar as the Department's policies are concerned). The President and federal

Recognizing that different meanings attach to sex-based discrimination and discrimination based on sexual orientation and gender identity, the Equality Act is replete with proposed statutory language that enlarges the scope of barred discrimination from sex to sexual orientation and gender identity. Sec. 1101(b)(2) of the most recent version of the Equality Act in the House (H.R. 5[109]) proposes that "[with respect to gender identity] an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity."[110]

Fairness for All Act (2019)

The "Fairness for All Act" was first introduced in December 2019 (H.R. 5331[111]) and, again, in February 2021 (H.R. 1440[112]), and proposed to prohibit discrimination on the basis of sex, sexual orientation, or gender identity and provided exemptions for religious organizations and would have prohibited sanctions for certain employee speech regarding an employee's religious, political, or moral beliefs in the workplace.

As discussed *supra*, it is Congress's role to enact legislation that it believes is appropriate. Title IX is just one example of Congress passing such legislation. Since its inception, dozens of legislative proposals have been introduced in the House and Senate regarding the rights of all or some of the American people. Since the passage of Title IX, Congress approved the Equal Rights Amendment, considered ENDA's prohibition of employment discrimination based on sexual orientation, and more recently has considered the Equality Act and its prohibitions of discrimination based on, among other indicia, gender identity.

If Congress considered these protections to already exist in Title IX, it would be redundant for that body to consider new legislation to provide those protections. Had Title IX truly included these additional discriminatory prohibitions, it would have conducted oversight hearings over the decades to determine why the executive branch was failing to enforce Title IX's protections, particularly during the 116th Congress, which conducted many oversight investigations and hearings during the prior administration. The absence of statutory authorization for the administration's current gender identity policies is better understood by noting the U.S. Senate's

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agencies have made no such argument. Rather, they decry the lack of current statutory protections based on sexual orientation and gender identity in federal law—contradicting the very position that the Department now takes that these protections are already included in Title IX.

[109] *See* https://www.congress.gov/bill/117th-congress/house-bill/5.

[110] *See* https://www.congress.gov/congressional-record/volume-167/issue-36/house-section/article/H633-2.

[111] *See* https://www.congress.gov/bill/116th-congress/house-bill/5331/text.

[112] *See* https://www.congress.gov/bill/117th-congress/house-bill/1440/text.

recent consideration of the "Equality Act"[113] (discussed *supra*), supported by the administration, which would codify discriminatory prohibitions based on gender identity and sexual orientation (by amending Title VI to mandate that federally funded schools be allowed to use sex-segregated facilities and participate in sex-segregated activities consistent with their claimed gender identity). Without passage of the Equality Act or its substantive equivalent, the federal statutory protections advocated by the administration in the NPRM simply do not include gender identity and sexual orientation. If they did exist, the Equality Act would be unnecessary for the protections its express statutory language would clearly require.

Rather, as demonstrated by the additional discriminatory prohibitions contained within subsequent legislation, Congress did not and has not considered gender identity and sexual orientation (and sex stereotypes or characteristics) to be part of Title IX's protections. Accordingly, members continue to introduce legislation to assert new protections for these characteristics, and Congress continues to consider those bills.

Previous interpretation of Title IX by the Department's Office for Civil Rights ("OCR")

The *West Virginia* Court rejected the EPA's "'claim[] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"[114] It also noted that under the "EPA's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source," but that under its newly discovered authority, it could demand far greater emission reductions from States.[115]

In Title IX's entire fifty-year history, neither the Department nor its predecessor agency (the Department of Health, Education, and Welfare, or "HEW") implemented or attempted to implement Title IX regulations that implicitly or expressly expanded the scope of "sex" beyond the plain and ordinary meaning of the term (the statute's clear understanding of sex as a binary matter involving "one" or "the other" sex is plainly and deliberately devoid of further, more subjective definitional additions, as discussed *supra*).

West Virginia quoted Justice Felix Frankfurter, who had noted that "'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'"[116] Examination of the Department's historic assertion and interpretation of its Title IX power is thus warranted and useful in

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[113] *See* https://www.congress.gov/bill/117th-congress/house-bill/5.
[114] *West Virginia*, slip op. at 20, quoting *Utility Air*, 573 U.S. at 324 (citing *Brown & Williamson* and *MCI*).
[115] *Id.* at 24.
[116] *Id.* at 21, quoting *FTC v. Bunte Brothers, Inc*., 312 U.S. 349, 352 (1941).

determining whether it ever viewed Congress as having vested the Department with such power now.

Indeed, the Department's longstanding interpretation of its Title IX regulatory responsibilities, as reflected in its implementing regulations and the vast majority of its policy guidance, adhered to Title IX's references to "sex" as involving a binary choice pertaining to biological men and women. Until now, it had not asserted its previously unheralded regulatory power to expand the scope of the statute and significantly alter Title IX's clear purpose. This "want of assertion of power" demonstrates that the agency is exceeding its statutory authority under Title IX in the NPRM.

The Department notes as much. In the NPRM, it "acknowledges that the proposed regulations deviate from some past agency statements on Title IX's coverage of discrimination based on sexual orientation and gender identity."[117] That gem is a misleading understatement given the fifty-year history of relevant guidance issued by OCR (discussed *infra*).

Clarity regarding interpretations of Title IX's sex-based prohibitions was evidenced early in Title IX's implementing regulations, which provided for schools to have "separate toilet, locker rooms, and shower facilities on the basis of sex."[118] There was no regulatory provision for access to intimate facilities based on what is now known as a student's "gender identity," nor was any historical equivalent to "gender identity" included in the implementing regulations. The implementing regulations simply and correctly applied Congress's unambiguous attempt to end sex-based (binary and biological) discrimination in educational institutions.

Indeed, the Department's interpretive guidance regarding Title IX has been remarkably consistent, excepting the period from May 13, 2016, through February 22, 2017. With the introduction of this NPRM, schools, colleges, and universities are once more on notice of a return, based not in statute but in policymaking executive orders, to OCR's novel interpretation previously announced in its guidance to educational institutions on May 13, 2016.

But the Department's radically transformative reading of Title IX is a recent phenomenon, beginning faintly in 2010, imposed directly in 2016 (mere months before the presidential election), reversed by OCR in 2017, and reimposed in 2021:

- On **October 26, 2010**, OCR issued a Dear Colleague letter which asserted that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[119] OCR also acknowledged in the same

[117] NPRM at 41,391.
[118] 34 C.F.R. § 106.33.
[119] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

sentence that "Title IX does not prohibit discrimination based solely on sexual orientation . . ."[120] Without creating a new prohibited class of victims, OCR simply affirmed that the Title IX's sex-based anti-discriminatory provisions apply to all students—whatever additional characteristics they might possess.

- On **April 4, 2011**, OCR discreetly referenced gender-based protections in a footnote to supplemental guidance: "Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the 2001 Guidance, and in the 2010 Dear Colleague letter on Harassment and Bullying . . ."[121]

- On **April 29, 2014**, OCR issued additional guidance in its "Questions and Answers on Title IX and Sexual Violence" and asserted that Title IX's sex-based prohibitions included "claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."[122] On September 22, 2017, OCR rescinded this guidance, citing the imposition of "regulatory burdens without affording notice and the opportunity for public comment."[123]

- On **May 13, 2016**, OCR (in coordination with the Department of Justice's ("DOJ") Civil Rights Division) issued a Dear Colleague letter[124] instructing schools and universities that Title IX's sex-based prohibitions also included discrimination based on gender identity (which it defined as an "internal sense of gender"[125]). On February 22, 2017, OCR (and DOJ's Civil Rights Division) rescinded this guidance, citing the lack of a notice and comment opportunity and insufficient legal analysis explaining how the newfound protection for gender identity was consistent with Title IX's express language.[126]

- On **February 22, 2017**, OCR (and DOJ) issued a letter withdrawing the guidance it had issued in its May 13, 2016 Dear Colleague letter, while noting that

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[120] *See id*.
[121] See https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html at n.9.
[122] See https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[123] See https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
[124] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[125] *See id*.
[126] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

"withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment."[127]

- On **June 23, 2021**, OCR issued a Notice of Interpretation announcing that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity"[128] (on July 15, 2022, a federal district court preliminarily enjoined the Department from enforcing this guidance in twenty states[129]).

From June 23, 1972, until May 13, 2016, and from February 22, 2017, until June 23, 2021, the Department did not interpret Title IX to include sexual orientation and gender identity. The arbitrary and capricious shift of position taken by the Department in the NPRM reveals that it had somehow miraculously failed, through administrations of both political parties, to discover the additional categories of Title IX protections for nearly five decades. Before June 23, 2022, the Department had not even attempted to promulgate a regulatory scheme to transform Title IX's protections to expand the scope of Title IX in the manner contemplated by the NPRM.[130] Even without a statutory definition of sex in Title IX, the Department had, without controversy, applied an ordinary, binary, biologically based meaning of sex in carrying out Congress's clear statutory intent. Confusion among educational institutions striving to implement Title IX protections did not manifest during the decades when the Department carried out its clear, sex-based, binary, anti-discriminatory legislative mandate.

As noted in the history of OCR's interpretive guidance, *supra*, consistent application of Title IX changed abruptly only when, in its May 13, 2016 guidance (months before the 2016 general election), OCR instructed schools, colleges, and universities that Title IX required that sex-segregated facilities admit students based on gender identity.[131]

Months later, on February 22, 2017, OCR (and DOJ's Civil Rights Division) issued a Dear Colleague letter[132] rescinding the May 2016 guidance, reverting to its previous interpretation of Title IX applied for nearly all of Title IX's history (*i.e.*, not including the anomalous addition of

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[127] *See* https://www.cmu.edu/title-ix/2-22-17-guidance_letter1.pdf.
[128] *See* https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.
[129] *See State of Tenn. et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022).
[130] This includes Title IX interpretation by the Department's predecessor agency, the U.S. Department of Health, Education, and Welfare, which published Title IX's implementing regulations at 45 C.F.R. Part 86, effective July 21, 1975. *See* https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-86.
[131] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[132] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

"gender identity" as a prohibited class of discrimination). By rescinding the May 2016 guidance in February 2017, OCR returned to its decades-long interpretation of Title IX's sex-based requirements.

The NPRM marks the Department's most audacious attempt fundamentally to transform Congress's unambiguous statutory intent to prohibit sex-based discriminatory conduct through Title IX. By so doing, the Department now proposes unlawfully to engage in legislative policymaking—Congress's responsibility—and to do so without clear congressional authorization.

The *West Virginia* Court refused to accept the EPA's novel interpretation of its newfound regulatory authority, noting that "[t]his view of EPA's authority was not only unprecedented; it also effected a 'fundamental revisions of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[133]

Here, as with the EPA's actions in *West Virginia*, the Department's NPRM asserts a newfound authority that would fundamentally revise the Title IX statute to extend its protections to gender identities and sexual characteristics its congressional authors never intended—and the Department itself, until recently, had never asserted.

In *West Virginia*, the Court rejected the EPA's interpretation of its regulatory authority in which it argued that Congress had implicitly tasked the EPA and the EPA alone with "balancing the many vital considerations of national policy . . ."[134] Here, the Department asserts that it possesses the power to expand the scope of Title IX and thus determine the meaning of "sex" (to include gender identity, sexual orientation, sex stereotypes, and sex characteristics)—determinations that have vast national policy implications and which power Congress neither explicitly nor implicitly assigned to the Department.

The Department's evolving gender identity guidance

The *West Virginia* Court noted that there was "little reason to think Congress assigned such decisions to the Agency," despite the EPA's newfound claim of regulatory authority.[135] Here, a history of the Department's evolving guidance indicates that the Department itself did not believe it had such authority for most of Title IX's existence.

Importantly, in guidance OCR issued on October 26, 2010, it correctly stated that "[a]lthough *Title IX does not prohibit discrimination based solely on sexual orientation,* Title IX does protect all

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[133] *West Virginia*, slip op. at 24, quoting *MCI*, 512 U.S. at 231.
[134] *Id.* at 25.
[135] *Id.*

students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[136] OCR had simply affirmed that Title IX's protections applied to all students, regardless of sex, but in so doing, began its unnecessary interpretive meddling with Title IX's boundaries.

Despite its acknowledgement of Title IX's limits concerning sexual orientation, the 2010 letter included examples of non-conforming behavior that didn't constitute sex discrimination as, nonetheless, "gender-based harassment covered by Title IX."[137] For example, in its discussion of a case sample, OCR found that a school had failed to recognize Title IX-prohibited misconduct "[b]ased on the student's self-identification as gay and the homophobic nature of some of the harassment . . . ."[138] OCR even encouraged schools to enforce "anti-bullying policies that go beyond prohibiting bullying on the basis of traits expressly protected by the federal civil rights laws enforced by OCR—race, color, national origin, sex, and disability—to include such bases as sexual orientation and religion."[139] OCR's Title IX extra-statutory mission creep was underway.

The limits of Title IX's prohibitions notwithstanding, OCR had begun its foray beyond the statutory proscriptions enacted by Congress in 1972. OCR's 2010 guidance was perhaps most notable for its boldness in encouraging enforcement efforts it acknowledged were not included in its statutory mandate.

On April 29, 2014, OCR issued further guidance in its "Questions and Answers on Title IX and Sexual Violence," in which it stated that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity" and extended Title IX's protections to "transgender students."[140] On January 7, 2015, OCR interpreted its 2014 guidance to mean that a school must treat transgender students consistent with their gender identity when the school "elects to separate or treat students differently on the basis of sex . . . ."[141]

Then, in its May 13, 2016, Dear Colleague letter, OCR mandated that "[w]hen a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity."[142] To comply with

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[136] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf at 8 (emphasis added).
[137] *See id*.
[138] *See id*. at 7–8.
[139] *See id*. at 1–2.
[140] *See* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf at 5.
[141] *See* https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf.
[142] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf at 3.

OCR's new interpretation of Title IX, schools nationwide would be forced to allow students to use the restrooms and locker rooms based not on the student's biological sex, but on the student's "internal sense of gender" (*i.e.*, gender identity).

In response and indicative of the political significance of OCR's guidance, officials from twenty-two states (led by Texas[143] and Nebraska[144]) filed two federal lawsuits to block the Department from implementing and enforcing its new guidance interpretations.[145]

OCR's remarkable interpretative expansions of Title IX's applicability into the sphere of gender identity occurred without congressional amendment of Title IX to cover more than sex-based discrimination.

Quite simply, OCR's May 2016 regulatory shift amounted to a fundamental revision of Title IX without notice-and-comment rulemaking. OCR's February 2017 rescission of the unlawful May 2016 regulatory foray was entirely consistent with decades of the Department's prior statutory interpretation and regulatory enforcement efforts. OCR had acted without statutory authority to do so in unlawful pursuit of its shifting policy goals, encroaching on Congress's legislative role and violating the APA.

OCR's expanded Title IX prohibitions (May 13, 2016) based on gender identity were then withdrawn by OCR (February 22, 2017), marking a full return to OCR's previously long-held Title IX guidance and limitations. The 2017 rescission marked a return to the Department's recognition that expansions of Title IX's protections were major policy decisions properly addressed by Congress—not OCR.

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[143] Moriah Balingit, *Texas Attorney General Attacks Obama's Directive on Transgender Students*, WASH. POST, Jul. 7, 2016, https://www.washingtonpost.com/local/education/texas-attorney-general-attacks-obamas-directive-on-transgender-students/2016/07/07/d5aa0d24-446d-11e6-88d0-6adee48be8bc_story.html?tid=a_inl_manual.

[144] Moriah Balingit, *Another 10 States Sue Obama Administration over Bathroom Guidance for Transgender Students*, WASH. POST, Jul. 8, 2016, https://www.washingtonpost.com/local/education/another-10-states-sue-obama-administration-over-bathroom-guidance-for-transgender-students/2016/07/08/a930238e-4533-11e6-88d0-6adee48be8bc_story.html.

[145] Joellen Kralik, *School Bathroom Access for Transgender Students*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Vol. 24, No. 26, Jul. 2016), https://www.ncsl.org/research/education/school-bathroom-access-for-transgender-students.aspx.

On June 23, 2021, OCR announced its planned return to its pre-February 2017 unlawful misinterpretation of Title IX's express statutory sex-based discriminatory prohibitions,[146] ultimately culminating in this NPRM.[147]

The lawful policies of thousands of educational institutions regarding sexual orientation and gender identity that were sanctioned by the Department for the vast majority of Title IX's existence would now be the basis for OCR civil rights violation investigations and withholding of federal funds—despite no corresponding change in the law by Congress. The Department's own actions and interpretations underscore that expansion of the scope of Title IX to include gender identity, sexual orientation, sex stereotypes, and sex characteristics is arbitrary and capricious and in excess of ED's statutory authority.

The NPRM usurps Congress's legislative role in issues of major political and economic significance[148]

The *West Virginia* Court rejected the EPA's regulatory power grab, "find[ing] it 'highly unlikely that Congress would leave' to 'agency discretion' the decision [regarding the CPP]" and affirmed that "'[w]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.'"[149] In announcing the NPRM, the Department said it was "*clarify[ing]* that Title IX's prohibition on discrimination based on sex applies to discrimination based on sexual orientation and gender identity" and that it was acting to "[p]rotect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics."[150] Rather than "clarifying," the Department's NPRM arbitrarily and capriciously asserts a unilateral and fundamental revision of Title IX's meaning to include gender identity, sex stereotypes, sex characteristics, and sexual orientation.

The NPRM attempts to redefine the clear, decades-long meaning of Title IX's protections, which do not explicitly or implicitly include a person's "internal sense of gender" (*i.e.*, gender identity).

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[146] *See* https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.

[147] *See* https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[148] The Constitution vests the legislative function of the federal government in Congress (not the executive or judicial branches). U.S. CONST. art. I, § 1.

[149] *West Virginia*, slip op. at 25–26, quoting *Brown & Williamson*, 529 U.S. at 160.

[150] *See* 87 Fed. Reg. 41,930, 41,5392 (Jul. 12, 2022); https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf at 3 (emphasis added).

The executive branch's constitutional authority lies in the enforcement of the laws passed by Congress,[151] not in the exercise of impermissible policymaking through implementation of its regulatory schemes. Through the NPRM, the Department proposes to exercise a power not granted to the executive—engaging in legislative rather than interpretive rulemaking and acting well beyond Congress's statutory intent.

Here, the Department is engaged in a fundamental revision of Title IX as enacted by Congress in redefining the meaning of "sex" to include sexual orientation, gender identity, sex stereotypes, and sex characteristics. This unilateral exercise of power well beyond the express grant of authority in Title IX violates the separation of powers framework designed at the Constitutional Convention of 1787, which aimed to "preclude the exercise of arbitrary power" by any of the three branches of the federal government.[152]

The Department has chosen to defy Congress: if Congress had chosen to expand Title IX's statutory meaning, it would have done so and has had abundant opportunity to do so. That it has not done so does not give license to the Department's restless policymakers to act where Congress has not acted. The Department is not merely acting beyond Title IX's ordinary meaning; the NPRM involves the Department arbitrarily and capriciously acting *contrary* to Title IX's express statutory purpose (stopping sex-based discrimination at educational institutions).

Rather than implementing interpretive regulations that actually fall within Title IX's clear statutory purpose, the Department is now attempting to impose a radical social policy on educational institutions by expanding the scope of Title IX in a manner that Congress has repeatedly declined to do itself.

To carry out its regulatory scheme, the Department will initiate federal civil rights investigations and will seek to eliminate federal funding for schools, colleges, and universities that fail to comply with its NPRM. To achieve these policy ends, the Department relies heavily on President Biden's executive orders ("EOs"),[153] disregarding Title IX's explicit limitations (discussed *supra*) which have not been changed by Congress in a manner corresponding with the NPRM's expanded prohibitions. The Department cites President Biden's 2021 EOs "Guaranteeing an Educational

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[151] U.S. CONST. art. II, § 1.

[152] *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy").

[153] Laura Meckler, *Cardona, Biden's Education Pick, Voices Support for Transgender Athletes*, WASH. POST, Feb. 3, 2021, https://www.washingtonpost.com/education/miguel-cardona-confirmation-hearing/2021/02/03/21d65be8-665c-11eb-8468-21bc48f07fe5_story.html.

Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity"[154] and "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."[155] The "General Provisions" section of each of these EOs states that "[n]othing in this order shall be construed to impair or otherwise effect: (i) the authority granted by law to an executive department or agency, or the head thereof . . . ."[156] In defiance of Congress and this limitation, the Department now proposes a regulatory scheme that fundamentally revises and expands the express language of Title IX.

The Constitution clearly designates the role of Congress *vis-à-vis* the other branches of the federal government: "All legislative Powers herein granted shall be vested in a Congress of the United States."[157] Proposed administrative rulemaking by the executive branch that usurps the congressional role improperly intrudes on the separation of powers, even if the executive branch believes that the policy matter is one that has been neglected or avoided by Congress.

Further, Title IX's use of the term "sex" is not vague. But even if it were vague, the discovery of such statutory vagueness would not in itself provide a lawful basis for the Department to so act unless it had the clear congressional authorization required to embark on rulemaking of such economic and political significance.[158] No matter the seriousness of the policy challenge the federal agency seeks to address through its rulemaking, its authority to do so must be consistent with congressional intent, as expressed through the laws Congress has enacted.[159] This is particularly true where the rulemaking regards a matter of political and economic significance.[160]

The executive branch, through the President and federal agencies, is not vested with the legislative power that the Department now seeks to assert through the NPRM. In so doing, the Department's NPRM would usurp Congress's lawmaking powers.[161] Congress may choose to delegate authority contingent on fact-finding or actions by the executive branch,[162] although the NPRM makes no claim to be exercising any such delegation. In Title IX, Congress made no such fact-finding delegation to the executive branch, particularly regarding the meaning of "sex" And the expansion of Title IX to other categories of persons.

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[154] *See* https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf (Mar. 8, 2021).
[155] *See* https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf (Jan. 20, 2021).
[156] *Id*.
[157] U.S. CONST. art. I, § 1.
[158] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 160 (2000).
[159] *Id*.
[160] *Id*.
[161] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).
[162] *See generally Gundy v. United States*, No. 17-6086, slip op. at 26 (2019).

The NPRM represents an unprecedented, arbitrary, and capricious interpretation of Title IX. As discussed *supra*, OCR's longstanding interpretation of Title IX's meaning and application was almost entirely consistently applied through administrations of both political parties until issuance of the NPRM.

Congress did not delegate to the Department the power to rewrite Title IX

In *West Virginia*, the Court held that transformative expansions in an agency's regulatory authority on major political and economic questions cannot occur absent clear congressional authorization.[163] Such authorization is not present here.

The Department has now discovered unique and transformative protections within the hitherto unambiguous statutory language of Title IX that fit squarely within the executive branch's clear policy priorities. Through its radical re-interpretation of the meaning of Title IX—in defiance of nearly 50 years of almost entirely consistent regulatory interpretation—the Department has embarked on a regulatory scheme that Congress has repeatedly rejected in legislative proposals subsequent to Title IX (discussed *supra*).

The express text and context of Title IX and subsequent anti-discriminatory legislative proposals reveal that Congress was aware of and able to include protections related to gender identity and sexual orientation. It eventually considered, rejected, and, on occasion, passed legislation that clearly referenced discrimination related to gender identity and sexual orientation. That it did so in subsequent legislation strongly indicates Congress's awareness that it had not included such an explicit or implicit expansion of rights in Title IX. The Department has, therefore, now proposed an NPRM that would exceed and distort Congress's intent in passing Title IX.

In addition, if Congress had intended to create a sliding scale for determining an ever-changing meaning of "sex" pursuant to Title IX, it would have included language delegating that responsibility to the Department to make such determinations over the passage of time. No such statutory delegation of sex-defining authority was provided to the Department in Title IX.

The extension of Title IX protections to include gender identity, sexual orientation, sex stereotypes, and sex characteristics are major questions

If Congress believes that a federal agency, such as the Department, should make decisions of vast economic and political significance, it would clearly indicate such an intent. By using the NPRM to insert itself into a question of such vast economic and political significance, the Department acts as if it retains legislative authority that the Constitution reserves for the legislative branch of the federal government. Indeed, the NPRM would transform Title IX's protections from prohibitions

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[163] *West Virginia*, slip op. at 19–20.

of sex-based discriminatory conduct to cover entirely new concepts of gender identity (determined by the person's inner sense of gender) and sexual orientation never included by Congress in its purposeful design of Title IX.

Major questions require clear congressional authorization

In *West Virginia*, the Supreme Court rejected a federal agency's exercise of regulatory power without clear congressional authorization where the agency's regulatory effort concerned a question of vast economic and political significance.[164] The Court firmly rebuffed the EPA's expansive interpretation and application of its regulatory authority in a matter not involving a routine or normal statutory interpretation of the CAA[165] where the agency had assumed a regulatory role in a major question of vast economic and political significance despite the absence of clear congressional authorization for its regulatory action.

The factual and legal parallels between the EPA's unlawful rulemaking and the Department's proposed Title IX rulemaking are eerily similar.

The Court's decision clearly breaches the pre-*West Virginia* rulemaking deference presumed by the Department in proceeding with an NPRM of such consequence and so clearly lacking in congressional authority (to redefine "sex" and fundamentally alter the decades-long purpose of Title IX). It is now fundamentally clear that major policy decisions of heightened political salience are properly determined by Congress, not the executive branch, as Congress must make such "fundamental policy decisions" itself.[166]

Ignoring *West Virginia* and depriving the public of the opportunity to review the Department's views concerning that case and to make public submissions on its applicability to the NPRM, the Department proposes to make fundamental policy decisions with the NPRM. Despite the significance of the Court's ruling, the Department failed to address why the decision would not preclude imposition of the NPRM, which unmistakably impacts a major question upon which Congress did not provide clear congressional authorization to the Department for the sweeping actions proposed in the NPRM. The public is entitled to understand the Department's views concerning *West Virginia* and why, despite the Court's ruling, it believes it has the authority to proceed with the NPRM. The public is also entitled to comment on the Department's views, once expressed, as part of the Department's notice-and-comment rulemaking. The Department's complete failure to address the implications of *West Virginia* for the NPRM is arbitrary and capricious and constitutes an incurable error that requires the withdrawal of the NPRM.

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[164] *Id.* at 13.
[165] 42 U.S.C. § 7401 *et seq*.
[166] *Am. Petroleum Inst*., 448 U.S. at 487.

It is also noteworthy that the Department's NPRM misapplies *Bostock*[167] while completely ignoring *West Virginia*, which is truly on-point to the Department's proposed Title IX rulemaking.

In *West Virginia*, the Court rejected the EPA's attempt to use its authority in a manner effecting a fundamental revision of Congress's intended delegation of power to the agency.[168] The Court noted that "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[169] In *West Virginia*, it found that the EPA discovered "unheralded power" that allowed it to enact a "transformative expansion in [its] regulatory authority"—power that allowed the agency to adopt a regulatory scheme that Congress itself had declined to enact.[170] The Court determined that the EPA had relied on statutory authority that was not designed to achieve the rulemaking end it wanted, an "ancillary provision," "designed to function as a gap filler," that had rarely been used by the EPA since enactment of the CAA.[171]

The *West Virginia* Court found that there was every reason for hesitation "before concluding that Congress" intended to confer on the agency the authority it claimed.[172] Here, as with the EPA's actions in *West Virginia*, there is little room to believe that in Title IX, Congress intended to vest the Department with the authority to redefine sex and to create entirely new categories of protected classes—quite in line with the executive branch's current policy goals.

In *West Virginia*, the Court also held that "common sense as to the manner in which Congress [would have been] likely to delegate" regulatory power made it very unlikely that Congress had actually done so.[173] It noted that "extraordinary grants of regulatory authority" are rarely accomplished through "modest words," "vague terms," or "subtle device[s]."[174] Now the Department seeks to insert significant new protections, as it deems appropriate, based on terms ("sex stereotypes," "sex characteristics," "gender identity," and "sexual orientation") that are undefined in the NPRM. Congress tasked the Department with implementing regulations to prohibit sex-based discriminatory treatment at educational institutions—not arbitrarily and

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[167] *Bostock*, 1731 S. Ct. at 1753. The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as a homosexual or transgender, but explicitly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."
[168] *West Virginia*, slip op. at 19–20.
[169] *Id.* at 16, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).
[170] *Id.* at 4, quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).
[171] *Id.* at 24.
[172] *Id*., quoting *FDA v. Brown & Williamson, Tobacco Corp*., 529 U.S. 120, 159–160 (2000).
[173] *Id*. at 18, quoting *Brown & Williamson*, 529 U.S. at 133.
[174] *Id*., quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

capriciously reimagining without statutory authority the meaning of "sex" to comply with the President's political and social agenda.

Congress did not vest in the Department the regulatory authority to implement policy changes of sweeping economic and political significance affecting millions of students, families, and taxpayers. Undeterred by the lack of clear congressional authorization, the Department proposes to force a decision of vast political and economic significance through a statute that does not grant it the statutory jurisdiction to do so.

If Congress had intended to vest this power in the Department in 1972, it would have so indicated an intent with clear, unambiguous statutory directives, or it would have amended Title IX to so indicate. Congress has never done so.

Vast Economic Significance[175]

According to an analysis of 2017 federal and State fiscal support for postsecondary education (including public, nonprofit, and for-profit higher education institutions but excluding student loans and tax expenditures), federal spending totaled $74.8 billion compared to total State spending of $87.1 billion and $10.5 in local funding, with the relative level of funding by the federal government growing by nearly 24% in real terms between 2000 and 2015.[176] Federally issued student loans ($94 billion in 2018) rose by 26% in real terms between 2007 and 2017.[177] In 2017, federal revenue accounted for 13% of the budgets of public colleges and universities.[178]

The Department estimates that the NPRM will result in a ten-year net savings of $9.8 million to $28.2 million, "[a]lthough the Department cannot quantify, in monetary terms, the benefits of the proposed regulations to those who have been subjected to sex discrimination . . . ."[179]

The Department's wishful estimate arbitrarily and capriciously anticipates only an optimal upside that recognizes little more than training costs. It fails to recognize the likely costs associated with institutional compliance and increased litigation against educational institutions related to the potentially enormous increases associated with liability for various subjective offenses related to gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions.

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[175] NPRM at 41,547.
[176] *See* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding.
[177] *Id*.
[178] *Id*.
[179] NPRM at 41,391.

The NPRM would dramatically broaden the definition of hostile environment harassment[180] in an objective *and* subjective manner. A corresponding surge in subjective-offense related complaints will certainly occur, as will allegations that educational institutions failed to enforce Title IX's dramatic new requirements. Simply put, the areas of Title IX-related compliance requirements will vastly expand under the NPRM and will encourage and result in exponentially more complaints—a goal of the NPRM. Schools, colleges, and universities should expect to be the subject of a tremendous increase of lawsuits alleging enforcement failures.

The NPRM even extends the category of potential victims to include students who were not the target of hostile conduct but whose access to educational programs or activities was limited by the alleged harassment.[181] Again, it is inconceivable that the volume of such alleged ancillary victims will not wildly proliferate.

The Department also utterly fails to recognize the facility construction costs likely to be imposed on educational institutions attempting to comply with the NPRM. Although it arbitrarily and capriciously fails to assess such associated costs, the Department now proposes regulations that would effectively regulate the physical facilities of educational institutions (institutions that provide students, teachers, and employees with sex-segregated restrooms, locker rooms, and related facilities—in compliance with all current and historical Title IX implementing regulations). Facilities of all ages, some designed many decades ago, have been engineered and constructed in configurations that, until now, complied with the Department's regulations—designs almost certainly to be upended by the NPRM's gender identity requirements and conflicting with State and local obligations to protect the personal privacy and safety of students, teachers, and employees. The NPRM also requires private and clean lactation spaces that are not bathrooms. Although the Department fails to provide a realistic estimate of how many such facilities may be needed, it seems highly probable that renovation will be required to provide sufficient private spaces for lactation at hundreds of thousands of educational institutions. Once more, an accurate reflection of this cost does not appear in the NPRM. The Department's failure to confront these costs is arbitrary and capricious.

In requiring that schools, colleges, and universities open up all restrooms, locker rooms, and other traditionally sex-segregated facilities to students claiming a gender identity, the Department presumes that educational institutions have the resources to comply with these burdensome mandates, which are likely to involve the construction of single user restrooms, the redesign of locker rooms to meet the reasonable expectations of privacy, and private lactation spaces. The

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[180] Described in proposed rule 34 C.F.R. § 106.2 as "[u]nwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment) . . . ."
[181] NPRM at 41,422.

burden of these costs on educational institutions will be enormous. Other unidentified "reasonable modifications" would be required for educational institutions to be Title IX compliant. Presumably, such modifications will not be cost-free. In any case, the NPRM arbitrarily and capriciously fails to consider these costs.

The Department also now threatens to impose significant financial sanctions on educational institutions that fail to fully comply with the NPRM. Educational institutions would likely sacrifice other student programs to meet the newly imposed federal burdens in order to avoid threats to critical funding from the Department. In this way, too, the Department will displace the proper role of state and local education administrators by effectively forcing schools, colleges, and universities to bend to sweeping new Title IX federal mandates.

The federal financial role in postsecondary education is substantial and has increased considerably since 2000, almost equaling state spending on postsecondary education. Withholding all or part of federal contributions may be catastrophic for the educational opportunities of students, parents, and the budgets of states, localities, and postsecondary institutions. At the least, programs and services would have to be reduced and, perhaps, eliminated if the Department determined that an educational institution had failed to comply and federal funds were withheld.

As of June 2021, approximately 8% of funding for elementary and secondary public schools in the U.S. originates from the federal government (including the Departments of Education, Health and Human Services (Head Start program), and Agriculture (School Lunch program),[182] with significant further increases in K–12 funding identified in the Department's Fiscal Year 2023 Budget Summary.[183]

The federal financial role in elementary and secondary education remains significant. Withholding all or part of the federal contribution to elementary and secondary schools would likely create considerable hardship to those schools, a decline in services available to students, and would challenge State and local budgets. In requiring that schools, colleges, and universities open up all restrooms and other traditionally sex-segregated facilities to students claiming a parallel gender identity, the Department also presumes that educational institutions have the resources to comply with these burdensome mandates—likely to involve the construction of single user restrooms and the redesign of locker rooms to meet the reasonable expectations of privacy for all students (regardless of "gender identity" assertions).

According to OCR, its role is to "vigorously enforce[] Title IX to ensure that institutions that receive federal financial assistance from the Department comply with the law. OCR evaluates, investigates, and resolves complaints alleging sex discrimination. OCR also conducts proactive

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[182] *See* https://www2.ed.gov/about/overview/fed/role.html.
[183] *See* https://www2.ed.gov/about/overview/budget/budget23/summary/23summary.pdf.

investigations, through directed investigations or compliance reviews, to examine potential systemic violations based on sources of information other than complaints."[184] Through OCR's enforcement efforts, the Department's financial support for elementary and secondary schools and postsecondary institutions may be withheld if OCR determines Title IX compliance failures.

DFI notes that short-term financial savings might occur because of the NPRM's abandonment of certain due process standards currently associated with the Title IX grievance process at postsecondary institutions (although the "savings" would be offset by the tremendous cost in due process consequences for the accused).

Remarkably, proposed 34 C.F.R. § 106.45(b)(2) provides that "[t]he decisionmaker may be the same person as the Title IX Coordinator or investigator." The NPRM's proposed return to the "single-investigator model," while unjust and undermining of the due process rights of the accused, may conceivably result in relatively small financial savings. Although the consequences to the accused may be tremendous, the Department's reduction of the due process requirements that attach to the grievance process will permit bias substantially to interfere with the integrity of investigations and outcomes. These short-term financial savings come at the unacceptably high cost of diminishing the due process rights of the accused.

Similarly, at a steep cost to the due process rights of the accused, proposed 34 C.F.R. § 106.45(g) would eliminate the requirement of live hearings and opportunities for cross-examination of witnesses at postsecondary institutions. Eliminating these critical components of due process may, conceivably, result in additional short-term financial savings—but at what cost to justice and reliable outcomes for the accused?

Far from actually saving financial resources, postsecondary institutions will, as a result of undermining the procedural rights of the accused, ultimately expend far greater financial resources to defend against legal challenges to deficient findings against the accused resulting from the Department's deliberate reduction in its due process standards in the Title IX grievance process.

Vast Political Significance

The President and federal agencies have declared that gender identity and sexual orientation are of paramount political significance, particularly involving the NPRM.

DFI agrees.

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[184] *See* https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html#:~:text=The%20U.S.%20Department%20of%20Education's,that%20receive%20federal%20financial%20assistance.

The "civil rights issue of our time."[185]

- Vice President Joe Biden (speaking to the mother of "Miss Trans New England, 2009"[186]) October 30, 2012

Then-Vice President Joe Biden, speaking just days before the 2012 election, clearly stated his view regarding the political significance of gender identity-related issues in America. The country's current chief executive long ago indicated the political salience of gender identity as a matter of vast political significance. Now, as President, his administration, without clear congressional authorization on a major question of vast political and economic significance, is attempting to expand Title IX's protections to include gender identity, sexual orientation, sex stereotypes, and sex characteristics in accord with his political priorities.

The Department correctly describes Title IX as "landmark civil rights law that has opened the doors for generations of women and girls."[187] The Department's accurate description lends additional executive branch weight to the vast political significance of the NPRM.

Expanding the statutory application of Title IX through implementing regulations, the Department's proposed NPRM would fundamentally revise its application by expanding the scope of Title IX—an extraordinary claim of power properly exercised only by Congress. In doing so, the Department improperly seeks to enact and enforce a fundamental policy decision rather than to interpret Congress's express statutory intent.

Unilateral Executive Branch Actions on Gender Identity and Sexual Orientation

Policies initiated by the executive branch since January 20, 2021, make abundantly clear that President Biden and the executive branch regard gender identity and sexual orientation as issues of major political significance.

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[185] Donovan Slack, *Biden Says Transgender Discrimination "Civil Rights Issue of Our Time*," POLITICO, Oct. 30, 2012, https://www.politico.com/blogs/politico44/2012/10/biden-says-transgender-discrimination-civil-rights-issue-of-our-time-147761.

[186] *See* https://www.northassoc.org/2009/09/07/lorelei-erisis-crowned-miss-trans-northampton-2009-videos/.

[187] On June 23, 2022, the U.S. Department of Education issued a press release on the 50th anniversary of Title IX, which it described as "the landmark civil rights law that has opened doors for generations of women and girls . . ." *See* https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

Executive orders and policy directives indicating the President's view that policies regarding gender identity and sexual orientation are of great political and economic significance

President Biden devoted significant attention to gender identity at the very beginning of his term, issuing EOs 13988,[188] 14004, 14020,[189] and 14021.[190]

On January 20, 2021, the President issued **EO 13988**, misinterpreting *Bostock v. Clayton County*[191] and ordering federal agencies to include gender identity and sexual orientation in their enforcement of sex-based statutory prohibitions of discrimination and to review all existing orders, regulations, guidance documents, policies, programs, or other agency actions for consistency with the President's directive.[192] EO 13988 effectively added gender identity and sexual orientation to the executive branch's enforcement of sex-based anti-discrimination laws, declaring that "[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports."[193] This is inflammatory rhetoric unsubstantiated by reliable independent findings and does not provide suitable grounds on which the NPRM may rely.

On January 25, 2021, the President issued **EO 14004**, requiring the U.S. Armed Forces to admit (and allow to openly serve) transgender individuals and to provide for "medically necessary care" related to their gender identity.[194]

On March 8, 2021, the President issued **EO 14020**, establishing the "White House Gender Policy Council," directing the council to implement a whole-of-government "gender equity" and "gender

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[188] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.
[189] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-establishment-of-the-white-house-gender-policy-council/.
[190] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/.
[191] *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
[192] *Id*. at 1753. The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included an employee's status as a homosexual or transgender person because sex plays a "necessary and undisguisable role" in such termination decisions but did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."
[193] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.
[194] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/.

stereotypes" agenda both domestically and "globally through diplomacy, development, trade, and defense."[195]

On March 8, 2021, six days after Secretary Miguel Cardona became Secretary of Education, **EO 14021** directed him to review Title IX regulations within 100 days for inconsistency with the President's gender identity and sexual orientation policies announced in EO 13988 and to implement rulemaking and take enforcement actions forcing educational institutions to implement the administration's positions regarding gender identity and sexual orientation. EO 14021 ordered Secretary Cardona to immediately consider "suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding" the Department's previous actions that Cardona found to be inconsistent with EO 13988. The Department's proposed NPRM is the product of EO 14021.

On March 31, 2021, the **U.S. Department of Defense** ("DOD") chose the "International Transgender Day of Visibility" to announce new rules ("In-Service Transition For Transgender Service Members") "to [a]lign [w]ith [the] White House" providing "a means to access into the military in one's self-identity gender" and to provide for "medical treatment, gender transition and recognition in one's self-identity gender" to include medical treatment plans "run[ning] the gamut" from "cross-sex hormone therapy" to "surgical intervention."[196] DOD cited EOs 13988 and 14004 as the basis for its new policy requirements.

On June 23, 2021, **Secretary of State Antony Blinken** revealed the expansive reach of the President's gender identity mandates to include U.S. foreign policy in an address to the United Nations Human Rights Council on "Defending the Lives of Transgender People." In his speech, Blinken condemned the U.S. as "no exception" to "[g]overnments around the world continu[ing] to use discriminatory laws, policies, and practices to deny [transgender and gender diverse individuals] access to justice, health, education, and job opportunities."[197] Noting that "diversity makes us stronger," Secretary Blinken told the international audience that "we're working to make our schools free from discrimination—including discrimination on the basis of sexual orientation or gender identity."[198]

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[195] *See* https://www.federalregister.gov/documents/2021/03/11/2021-05183/establishment-of-the-white-house-gender-policy-council.
[196] *See* https://www.defense.gov/News/News-Stories/Article/Article/2557118/dod-revises-transgender-policies-to-align-with-white-house/; https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130028p.pdf.
[197] *See* https://www.state.gov/un-human-rights-council-side-event-defending-the-lives-of-transgender-people/.
[198] *Id*.

On January 5, 2022, the **U.S. Department of Health and Human Services** ("HHS") published a proposed rule ("Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2023")[199] adding gender identity and sexual orientation as protected classes relating to required insurance coverage and proposing that plans that did not include related benefits would be presumptively discriminatory, pursuant to EO 13988. The final rule was published on May 6, 2022, and the coverage requirements appear to include gender transition medical treatments and related procedures, including for minors.[200]

On May 5, 2022, the **U.S. Department of Agriculture's** ("USDA") Food and Nutrition Service announced a policy update (to implement EO 13988) and would begin requiring State and local agencies, including elementary and secondary school recipients of the Supplemental Nutrition Assistance Program[201] ("SNAP"), to update their non-discrimination policies to include gender identity and sexual orientation as part of USDA's "efforts to promote food security."[202]

Without substantiation for its assertion that such discrimination had occurred in, among other venues, school lunch lines, USDA declared that "[n]o one should be denied access to nutritious food simply because of who they are or how they identify."[203] Pursuant to the President's executive actions, educational institutions that fail to adopt the administration's gender identity and sexual orientation policies (*e.g.*, requiring that transgender students be admitted to restrooms, locker rooms, and single-sex sports teams affiliated with the gender the students now assert) would face possible investigative referral to the U.S. Department of Justice or withholding of federal nutrition assistance funds.[204]

In response to the USDA's action, on July 27, 2022, twenty-two state attorneys general filed a lawsuit[205] to block the administration from implementing its new policy. On July 27, 2022, further reflecting widespread national concern over the USDA's new policies, governors from fifteen

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[199] *See* https://www.govinfo.gov/content/pkg/FR-2022-01-05/pdf/2021-28317.pdf.
[200] *See* https://www.govinfo.gov/content/pkg/FR-2022-05-06/pdf/2022-09438.pdf.
[201] 7 U.S.C. § 2011 *et seq*.
[202] *See* https://www.usda.gov/media/press-releases/2022/05/05/usda-promotes-program-access-combats-discrimination-against-lgbtqi.
[203] *Id.*
[204] Valerie Richardson, *22 States Sue to Stop Biden Administration from Linking School Lunches to Gender-Identity Agenda*, WASH. TIMES, Jul. 26, 2022, https://www.washingtontimes.com/news/2022/jul/26/biden-administration-sued-over-effort-link-school-/.
[205] *See* https://content.govdelivery.com/attachments/INAG/2022/07/26/file_attachments/2228235/Lawsuit%20against%20USDA.pdf.

states sent a joint letter to President Biden imploring him reconsider USDA's and the Department of Education's Title IX "reinterpretations."[206]

On July 25, 2022, the **U.S. Department of Health and Human Services** ("HHS") announced a rule to mandate the Affordable Care Act's inclusion of gender identity and sexual orientation-related coverage, pursuant to EO 13988,[207] and to make "clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy or related conditions, including 'pregnancy termination.'"[208]

Recent state responses to the administration's gender identity policies further indicate the political and economic significance of the NPRM.

Other important public responses to the administration's gender identity policies from governors and attorneys general (further indicating the vast political and economic significance of the NPRM's subject matter) include:

- On June 23, 2022, in response to the **U.S. Department of Education's** announcement of the pending Title IX NPRM, eighteen state attorneys general called on Secretary Cardona to abandon its planned transformation of the statute's protections, indicating that "by redefining 'sex' in Title IX to mean little more than whatever gender identity an individual believes himself to be at a particular moment, the [Department] has made a mockery of Title IX's fundamental organizing principle—basic biology."[209]

- On July 27, 2022, in response to the **U.S. Department of Agriculture's** ("USDA") May 5, 2022, policy update (requiring State and local agencies, including elementary and secondary school recipients of the Supplemental Nutrition Assistance Program[210] ("SNAP"), to update their non-discrimination policies to include gender identity and sexual orientation as part of the USDA's "efforts to

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[206] *See* https://www.rga.org/wp-content/uploads/2022/07/Joint-Letter-to-President-Biden-opposing-reinterpretation-of-Title-IX-7.27.2022-new.pdf.
[207] *See* https://www.govinfo.gov/content/pkg/FR-2022-08-04/pdf/2022-16217.pdf.
[208] *See* https://www.hhs.gov/about/news/2022/07/25/hhs-announces-proposed-rule-to-strengthen-nondiscrimination-in-health-care.html.
[209] *See* https://content.govdelivery.com/attachments/MTAG/2022/06/23/file_attachments/2192835/Montana%20Indiana%20Title%20IX%20response%20letter.pdf.
[210] 7 U.S.C. § 2011 *et seq*.

promote food security"[211]), twenty-two state attorneys general filed a lawsuit[212] to block the administration from implementing its new policy. Also on July 27, 2022, governors from fifteen states sent a joint letter to President Biden imploring him reconsider the USDA's and the Department of Education's Title IX "reinterpretations."[213]

Media attention indicating the vast political significance of the Biden administration's gender identity policies and the NPRM

Widespread and diverse national media coverage of the administration's gender identity policies (particularly the NPRM) unquestionably reveal that the proposed policies are a matter of significant national interest and political salience.

The Department's gender identity and sexual orientation policies now poised to impact America's educational institutions through the NPRM are the focus of vast political attention and ongoing debate in the United States, as indicated by press coverage of those policies.

To wit:

- On January 11, 2021, THE WASHINGTON POST, noting the lack of national consensus on Biden's anticipated gender identity and sexual orientation policy agenda, observed that "[t]ransgender rights have become a *lightning rod* in the relentless culture war that has come to dominate American politics, pitting conservative Christians who want their religious views to be accommodated against liberal and secular Americans who think some of those views trample on minority groups' rights."[214]

- On June 23, 2022, NBC NEWS reported that the NPRM would "extend Title IX's prohibition on discrimination based on sex to sexual orientation and gender identity" and were "likely to kick off a heated battle over the obligations of schools

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[211] *See* https://www.usda.gov/media/press-releases/2022/05/05/usda-promotes-program-access-combats-discrimination-against-lgbtqi.
[212] *See* https://content.govdelivery.com/attachments/INAG/2022/07/26/file_attachments/2228235/Lawsuit%20against%20USDA.pdf.
[213] *See* https://www.rga.org/wp-content/uploads/2022/07/Joint-Letter-to-President-Biden-opposing-reinterpretation-of-Title-IX-7.27.2022-new.pdf.
[214] Emily Wax-Thibodeaux, *Biden's Ambitious LGBT Agenda Poises Him to Be Nation's Most Pro-equality President in History*," WASH. POST, Jan. 11, 2021, https://www.washingtonpost.com/politics/2021/01/11/biden-lgbtq-policies/ (emphasis added).

to address sexual misconduct, the balance between the rights of victims and accused students, and the rights of transgender students."[215]

- On June 23, 2022, THE WASHINGTON POST reported that the NPRM would "shield trans students" even as it moves "the battle over transgender rights to the *front lines of the culture war*."[216]

- On June 23, 2022, FOX NEWS reported that the NPRM would expand Title IX's protections to include gender identity and, possibly, undermine scholastic women's sports.[217]

- On June 23, 2022, PBS described the NPRM as the Biden administration's "dramatic overhaul of campus sexual assault rules . . . acting to expand protections for LGBTQ students" and noted that the NPRM "is almost certain to be challenged by conservatives, and it is expected to lead to new legal battles over the rights of transgender students in schools, especially in sports."[218]

- On June 23, 2022, CNN reported that the NPRM would result in new protections for transgender students by the proposed rule's addition of sexual orientation and gender identity to Title IX's sex-based protections.[219]

- On June 24, 2022, THE WALL STREET JOURNAL published "Title IX and the Rise and Fall of Women's Sports: The law was never meant to let boys and men compete

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[215] Tyler Kingkade, *Biden Admin Proposes Sweeping Changes to Title IX to Undo Trump-era Rules*, NBC NEWS, Jun. 23, 2022, https://www.nbcnews.com/politics/biden-admin-proposes-sweeping-changes-title-ix-undo-trump-era-rules-rcna34915.
[216] Moriah Balingit & Nick Anderson, *Sweeping Title IX Changes Would Shield Trans Students, Abuse Survivors*, WASH. POST, Jun. 23, 2022, https://www.washingtonpost.com/education/2022/06/23/title-ix-biden-trans-sexual-assault-college/ (emphasis added).
[217] Hannah Grossman, *Biden Proposes New Rules to Solidify 'Gender Identity' Protections in Schools Under Title IX*, FOX NEWS, Jun. 23, 2022, https://www.foxnews.com/politics/biden-proposes-new-rules-solidify-gender-identity-protections-schools-title-ix.
[218] Collin Binkley, *Biden Administration Proposed New Title IX Protections for Campus Sexual Assault*, PBS NEWS HOUR, Jun. 23, 2022, https://www.pbs.org/newshour/politics/biden-administration-proposed-new-title-ix-protections-for-campus-sexual-assault.
[219] Kate Sullivan, *Biden Proposes Strengthening Title IX Protections for Transgender Students*, CNN POLITICS, Jun. 23, 2022, https://www.cnn.com/2022/06/23/politics/biden-title-ix-protections/index.html.

directly against female athletes," in response to the Department's announcement of the NPRM.[220]

- On July 18, 2022, THE WASHINGTON POST reported that a federal "Judge temporarily block[ed] Biden administration's LGBTQ protections at work, schools," noting the ongoing battle over the Department's guidance related to gender identity and sexual orientation.[221]

- On July 21, 2022, NATIONAL REVIEW, reporting on a federal district court's injunction against the Department's Title IX guidance in twenty states, noted that the Department's Title IX overhaul would "redefin[e] sex to include gender identity" and would move "toward prohibiting schools from having female-only facilities, housing, and sports teams."[222]

Statements of advocacy organizations indicating the vast political significance of the Biden administration's gender identity policies and the NPRM

Also indicative of the ongoing national interest in the Biden administration's executive orders (discussed *supra*) and the NPRM are the statements of support from political advocacy groups that share very similar gender identity and sexual orientation policy agendas.

To wit:

- On January 20, 2021, the Human Rights Campaign's president enthusiastically described Biden's EO 13988 as "*the most substantive, wide-ranging executive order concerning sexual orientation and gender identity ever issued by a United States president*."[223] Following the Department's announcement of the NPRM, the

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[220] Ashley McGuire, *Title IX and the Rise and Fall of Women's Sports: The Law Was Never Meant to Let Boys and Men Compete Directly Against Female Athletes*, WALL ST. J., Jun. 24, 2022, https://www.wsj.com/articles/title-ix-womnen-s-sports-biden-administration-50th-anniversary-lia-thomas-sex-and-gender-discrimination-equal-access-bernice-sandler-11656100244.
[221] Meena Venkataramanan, *Judge Temporarily Blocks Biden Administration's LGBTQ Protections at Work, Schools*, WASH. POST, Jul. 18, 2022, https://www.washingtonpost.com/politics/2022/07/17/biden-transgender-lgbtq-schools-work/.
[222] Madeleine Kearns, *Court Questions Biden Administration's Title IX Overhaul*, NAT'L REV., Jul. 21, 2022, https://www.nationalreview.com/2022/07/court-questions-biden-administrations-title-ix-overhaul/.
[223] HRC Staff, "President Biden Issues Most Substantive, Wide-Ranging LGBTQ Executive Order in U.S. History," HUMAN RIGHTS CAMPAIGN (Jan. 20, 2021), https://www.hrc.org/press-

HRC correctly noted the impact of the rule, including on athletics: "[b]y spelling out protections based on sexual orientation and gender identity, [the administration] will further safeguard a vulnerable population [transgender students] that is all too often preyed upon. The proposed rule is a good first step, and we look forward to seeing an additional strong proposed rule on athletics and final rules that fully encompass needed protections relating to gender identity."[224]

- On January 20, 2021, Lambda Legal, noting the administration's expansion of the meaning of sex-based discrimination to include gender identity and sexual orientation, "applaud[ed] the Biden-Harris administration's swift action in clarifying that LGBTQ people will be protected from discrimination wherever federal law prohibits discrimination because of sex" and submissively promised that "the Biden-Harris administration should know that they have a partner in Lambda Legal . . ."[225]

- On April 4, 2022, a coalition of twenty-six diverse organizations wrote the Assistant Secretary of Education, Office of Civil Rights, urging the Department to refrain from expanding the scope of Title IX to gender identity.[226]

- In May 2022, The Women's Sports Foundation issued a report marking "the landmark legislation that guarantees girls and women equal access and treatment under the law in all areas of education" and noting an "exponential increase in girls' and women's participation in sports [as] perhaps Title IX's most notable achievements and one of the law's most lasting legacies."[227]

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releases/president-biden-issues-most-substantive-wide-ranging-lgbtq-executive-order-in-u-s-history (emphasis added).

[224] Delphine Luneau, "Human Rights Campaign Praises Important Proposed Changes That Would Restore Title IX Provisions Combatting Sexual Assault & Harassment, Reinforce Inclusion of Sexual Orientation, Gender Identity," HUMAN RIGHTS CAMPAIGN (Jun. 23, 2022), https://www.hrc.org/press-releases/human-rights-campaign-praises-important-proposed-changes-that-would-restore-title-ix-provisions-combatting-sexual-assault-harassment-reinforce-inclusion-of-sexual-orientation-gender-identity.

[225] "Lambda Legal Applauds President Biden's Quick Action to Strengthen Antidiscrimination Protections for LGBTQ People," LAMBDA LEGAL (Jan. 20, 2021), https://www.lambdalegal.org/blog/20210120_lambda-applauds-biden-action-strengthen-antidiscrimination.

[226] *See* https://dfipolicy.org/wp-content/uploads/2022/04/UPDATED-FINAL-Title-IX-Coalition-Letter-to-OCR-04.13.2022.pdf

[227] *See* https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/13_Low-Res_Title-IX-50-Report.pdf.

- On June 23, 2022, the National Center for Transgender Equality ("NCTE") described the NPRM as a "groundbreaking proposal to expand Title IX protections to transgender students" and identified Title IX as "the foundation that ensures that our education system is equitable and accessible to people of *all genders*."[228]

- On June 23, 2022, the American Civil Liberties Union ("ACLU"), which acted as counsel to plaintiffs in *Bostock*, lauded the NPRM as a "critical step" "making clear that Title IX bars discrimination on the basis of sexual orientation and gender identity."[229]

State legislative actions concerning gender identity

President Biden used his 2022 State of the Union address to describe State laws intended to preserve Title IX's protections for female students as an "*onslaught* of state laws *targeting* transgender Americans" and demanded that Congress pass the Equality Act.[230] Many of America's governors and state legislative bodies have a starkly different view of the purpose and effect of those very laws.

In 2022, only a handful of legislatures considered legislation regarding gender identity in schools (implicating use of restrooms, locker rooms, use of preferred pronouns, or involving participation in sex-segregated athletics). None of the proposed laws targeted transgender students but, instead, provided continued privacy protections for female students.

- In Oklahoma, S.B. 615 became law on May 25, 2022 and requires that students use school restrooms and changing areas based on their biological sex.[231]

- In Tennessee, H.B. 2633 and S.B. 2777 would have prohibited requiring teachers or other public school employees to use a student's preferred pronoun if the pronoun is inconsistent with the student's biological sex and would have banned civil liabilities and adverse employment action associated with failure to use the student's preferred pronoun.[232]

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[228] *See* https://transequality.org/press/releases/biden-administration-moves-to-protect-transgender-students-under-title-ix (emphasis added).
[229] *See* https://www.aclu.org/press-releases/aclu-statement-proposed-new-title-ix-rules.
[230] *See* https://www.whitehouse.gov/state-of-the-union-2022/ (emphases added).
[231] *See* http://www.oklegislature.gov/BillInfo.aspx?Bill=sb615&Session=2200.
[232] *See* https://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=HB2633&ga=112.

- In Missouri, H.B. 2734 would have established guidelines for student participation in athletic contests organized by sex.[233]

- Notably, preceding President Biden's 2022 "onslaught" remark (*supra*), on June 1, 2021, Florida enacted the "Fairness in Women's Sports Act" (S.B. 1028), which protects the rights of biologically female students to compete against other biologically female students (based on the biological sex listed on the student's birth certificate) in scholastic athletic competitions in public schools.[234]

Indeed, given the primary role of the States in administering their educational institutions demonstrated by these State laws, the NPRM surprisingly, arbitrarily, and capriciously fails to consider the Department of Education Organization Act ("DEOA") and whether its proposed regulations undermine ED's compliance with that statute. Enacted in 1979, the DEOA established the Department as an executive branch department administered under the supervision and direction of the Secretary of Education. It prohibits the Secretary and other officers of the Department from exercising any direction over administration of school districts and State universities and colleges. Framed as a rule of construction, the prohibition states:

> *No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction,* ***administration,*** *or personnel of* ***any educational institution, school, or school system****, over any accrediting agency or association, or over the selection or content of library resources, textbooks, or other instructional materials by any educational institution or school system, except to the extent authorized by law.*

In addition to the direct language limiting the Secretary's and officers' authority in administration, Congress included clear statements in the law that the creation of a new Department of Education does not displace the role of State and local governments in education. Primary authority for education remains with State and local governments, as evidenced by Finding 4 of the DEOA: "[I]n our Federal system, the primary public responsibility for education is reserved respectively to the States and the local school systems and other instrumentalities of the States." In addition, when it created the Department, Congress reaffirmed the limitations placed upon federal involvement in education:

> *It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve control of such governments and institutions over their*

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[233] *See* https://www.house.mo.gov/Bill.aspx?bill=HB2734&year=2022&code=R.
[234] Fla. Stat. § 1006.205.

> *own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and local school systems.*

The legislative history of the DEOA confirms the primary role of State and local governments in education. In testimony before the Senate Governmental Affairs Committee, Mary Berry, the Assistant Secretary for Education of the Department of Health, Education, and Welfare, warned that the federal presence in education "has and must continue to be a secondary role—one that assists, not one that directs local and State governments, which have historically shouldered the primary responsibility for . . . public education." In like manner, Senator David Durenberger stressed the importance of congressional oversight so as to preserve the diversity of state and local approaches to education:

> *The States have a rich mixture of programs to respond to their citizens' educational needs. A centralized approach to education would be fatal to this diversity. . . . If Congress does not exercise proper oversight, State and local jurisdiction over education will be threatened by the federal government regardless of whether education is in a new department or remains a division of an existing department.*

Members of the U.S. House of Representatives also expressed reservations. Representative Leo J. Ryan described the enabling legislation as "the worst bill I have seen . . . . It is a massive shift in the emphasis by the Federal Government from supporting the local efforts of school districts and State departments of education to establishing and implementing a national policy in the education of our children." One can find a strong statement of concern in the Dissenting Views of Representatives John N. Erlenborn, John W. Wydler, Clarence J. Brown, Paul N. McCloskey, Jr., Dan Quayle, Robert S. Walker, Arlan Stangeland, and John E. (Jack) Cunningham: "[T]his reorganization . . . will result in the domination of education by the Federal Government . . . . [The legislation is] a major redirection of education policymaking in the guise of an administrative reorganization—a signal of the intention of the Federal government to exercise an ever-expanding and deepening role in educational decision-making." These members concluded by raising the possibility of the Department becoming a national school board: "If we create this Department, more educational [decision-making] . . . will be made in Washington at the expense of local diversity. The tentacles will be stronger and reach further. The Department of Education will end up being the Nation's super [school board]."

ED fails to confront and analyze whether the NPRM improperly intrudes into each State's administration of their school systems and university systems and colleges in violation of the DEOA. The NPRM also ignores the cost to State taxpayers for increased institutional compliance. This constitutes arbitrary and capricious decision-making by the Department.

Recent federal litigation regarding gender identity issues

Further indication of the political and economic significance of the Department's transformative changes to its Title IX guidance and enforcement policies, particularly regarding gender identity, is the federal litigation it has prompted.

On June 15, 2020, the **U.S. Supreme Court** issued its ruling in *Bostock v. Clayton County, Georgia*—a Title VII ruling upon which the Department improperly relies in its attempt to expand the scope of Title IX in its rulemaking efforts while failing to note that the Court assumed that "sex" refers "only to biological distinctions between male and female" (the parties in *Bostock* even agreed that at the time of the enactment of Title VII in 1964, "sex" referred to the biological distinctions between male and female).[235]

On August 7, 2020, the **U.S. Court of Appeals for the Eleventh Circuit** similarly ruled that a high school had violated Title IX when it refused to allow a biologically female student who had become a transgender "male" to use the school's restrooms for boys (the school board's policies allowed the student to use the gender-neutral restrooms).[236] On August 23, 2021, the opinion was vacated when the Eleventh Circuit granted rehearing en banc.[237]

On August 26, 2020, the **U.S. Court of Appeals for the Fourth Circuit** issued a ruling that a high school had violated Title IX by enforcing sex-segregated restrooms when it refused to allow a biologically female student then claiming to be a transgender "male" to use the school's restrooms for boys (the school board's policies allowed the student to use the gender-neutral restrooms).[238]

On August 30, 2021, in the **U.S. District Court for the Eastern District of Tennessee**, twenty states filed a Complaint for Declaratory and Injunctive Relief ("Complaint")[239] against the Department of Education, the Equal Employment Opportunity Commission ("EEOC"), and DOJ, arguing that federal guidance to the States was procedurally and substantively unlawful. The Complaint argued that the Department (and EEOC) had engaged in an impermissible rewriting of Title IX through a faulty application of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and interpretations of Title IX far exceeding its statutory text, regulatory requirements, judicial precedent, and constitutional permissibility (violating the APA).

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[235] *Bostock*, 140 S. Ct. at 1739 (2020).
[236] *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020).
[237] *Adams v. Sch. Bd. of St. Johns Cnty.*, 9 F.4th 1369 (11th Cir. 2021).
[238] *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).
[239] *See* https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2021/pr21-31-complaint.pdf.

The Complaint was filed in response to the Department's 2021 Notice of Interpretation that Title IX's prohibition on the basis of sex also includes discrimination on the basis of sexual orientation and gender identity. The Complaint sought to block federal enforcement of its expanded application of Title IX's scope, arguing that federal agencies were usurping authority that belongs to Congress, the States, and the people.

The States argued that the Department's guidance misapplied the Court's discrete holding in *Bostock*, which determined that Title VII's employment sex-based discrimination prohibition included the individual's status as a homosexual or transgender because sex plays a "necessary and undisguisable role" in such termination decisions.[240] This decision carefully did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."[241] The States argued that the *Bostock* Court directly refused to "prejudge" how its holding would apply to other federal and State laws, and noted that *Bostock* did not "purport to address bathrooms, locker rooms, or anything else of the kind."[242]

On July 15, 2022, the Eastern District of Tennessee preliminarily enjoined the Department (and EEOC) from enforcing its interpretative guidance (in the plaintiff States) expanding the application of Title IX to include sexual orientation and gender identity issued to the States through the Department's Interpretation, Dear Educator Letter, Fact Sheet, and Technical Assistance Guidance.[243] The court found that the States had demonstrated a likelihood of success on the merits of the claim that the Department's guidance were in fact legislative, not interpretive, rules requiring proper notice and comment opportunities pursuant to the APA. The court also found that the States had demonstrated a likelihood of success on the merits of the claim that the Department "overlooked the caveats expressly recognized by the Supreme Court [in *Bostock*] and created new law" and "expanded the footprint of Title IX's 'on the basis of sex' language."[244] The court found that "Plaintiffs can show that the Department of Education's guidance *creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere* in *Bostock*, Title IX, or its implementing regulations."[245]

The Supreme Court's ruling in *West Virginia* is highly relevant to the NPRM. Arbitrarily and capriciously ignoring *West Virginia*, the Department has thoroughly relied on its misinterpretation of the Court's expressly limited ruling in *Bostock v. Clayton County* to justify its adherence to the president's executive orders regarding gender identity and sexual orientation (discussed *supra*).

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[240] *Bostock*, 140 S. Ct. at 1737 (2020).
[241] *Id*. at 1753.
[242] *Id*.
[243] *See State of Tenn. et al. v. U.S. Dep't of Educ*., No. 3:21-cv-308 2022 WL 2791450, at *40-41 (E.D. Tenn. Jul. 15, 2022).
[244] *Id*. at 40–41.
[245] *Id*. at 41 (emphasis added).

The Department has committed a serious error by not including in the NPRM a discussion of *West Virginia*'s clear applicability to the Department's transformative regulatory scheme. In so doing, it has also denied the public its statutory right to comment on the impact of the Court's ruling on the Department's view of the legality of the NPRM.

Without question, the NPRM regards an unprecedented regulatory assertion in a matter of vast political and economic significance. It does so after decades of consistent interpretations and enforcement to the contrary. The NPRM would radically expand Title IX's statutory application well beyond Congress's clear intent when it enacted the statute, effecting a fundamental revision of Title IX's protections. Congress did not include gender identity, sexual orientation, sex stereotypes, or sex characteristics in Title IX's protections. Its consideration of those additional categories in subsequent legislative proposals (such as the Equality Act, supported by the Biden administration and described *supra*) indicates that Congress did not intend to include those categories in Title IX's protections and does not now believe them to be covered by Title IX. The Department denies the political and economic significance of the NPRM, even claiming a net savings over a ten-year period. It fails to cite a clear congressional directive authorizing its radical new interpretation of Title IX's expanded protections.

The *West Virginia* Court rejected the EPA's justification for its expansive construction of the statute on which it rested its newfound powers as a "wafer-thin reed," given the sheer scope of the claimed authority.[246] Similarly, the Department's confounding justification relies not on clear congressional authorization as required for such a matter of vast political and economic significance, but on a deliberate misapplication of *Bostock* on statutes the Court expressly exempted from that ruling's impact.

Regardless of whether the Department believes its extraordinary expansion of Title IX's protections to include gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions promotes worthy policy goals, the NPRM encompasses matters of vast political and economic significance, and the Department lacks clear congressional authorization to enact these sweeping changes, which defy Congress's intent in its creation of Title IX's prohibitions against discrimination on the basis of sex, which the Congress and the Department (until 2021) understood to be binary, biologically male and female.

In summary, **the Supreme Court's ruling in *West Virginia* directly undermines the Department's regulatory authority to enact the NPRM** given its political and economic significance and the accompanying lack of clear congressional authorization to expand the scope of Title IX to gender identity, sexual orientation, sex characteristics, and sex stereotypes. This defect, coupled with the Department's arbitrary and capricious failure to provide the public with

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[246] *West Virginia*, slip op. at 17, quoting *Alabama Assn. of Realtors v. Department of Health and Human Servs*., 594 U.S. __, __ (2021) (*per curiam*) (slip op., at 6–8).

the opportunity to understand the Department's analysis of how that case impacts the NPRM and to make public submissions on that issue, require the Department to **withdraw the NPRM in its entirety**.

II. The NPRM violates the Administrative Procedure Act

The Administrative Procedure Act ("APA")[247] provides that when the Department's action exceeds its statutory jurisdiction, authority, or limitations, the action is invalid.[248] Section 706(2)(A) provides that agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" shall be held unlawful and set aside. Section 706(2)(C) requires that when the agency action is found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," the action shall be held unlawful and set aside.

With its NPRM, the Department proposes rules that are largely arbitrary, capricious, and an abuse of its discretion (all in violation of Section 706(A)(2)) and that are in excess of statutory jurisdiction, authority, limitations, and short of statutory right (all in violation of Section 706(2)(C)).

In *Central Life Ins. Co. v. Burwell*, the court noted that agencies are not empowered to rewrite laws simply because they disagree with Congress's policy choices.[249] Unlawfully, the Department is now attempting to do exactly that by seeking to impose its policy choices in place of Congress's policy choices through the NPRM. The absence of congressional action to amend Title IX to provide protections based on gender identity and sexual orientation and to pass other distinct legislation that would provide similar anti-discriminatory provisions based on gender identity, sexual orientation, sex characteristics, and sex stereotypes does not enable the Department to enact its policy wishes unilaterally—which is exactly what the NPRM would do.[250]

To the extent that the NPRM proposes to expand the scope of Title IX's long-held and widely understood meaning beyond binary, biological male and female distinctions, to include gender identity, sexual orientation, sex characteristics, and sex stereotypes, it does so in violation of the APA. Furthermore, to the extent that the NPRM would enact the resultant profound changes to its enforcement of Title IX to include this new scope, it acts well beyond its statutory jurisdiction and authority and is in violation of the APA.

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[247] 5 U.S.C. §§ 551–559.
[248] 5 U.S.C. §§ 706(2)(A), (C).
[249] No. 15-5310, at *5 (D.C. Cir. Jul. 1, 2016).
[250] Congress's consideration of separate legislation to enact protections based on gender identity and sexual orientation, including the Employment Non-Discrimination Act, the Hate Crimes Prevention Act of 2009, the Fairness for All Act, and the Equality Act, is discussed at length below in DFI's discussion of gender identity.

In *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, the U.S. Supreme Court described how to determine if an agency had acted in an arbitrary and capricious manner: "[i]f the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of any agency expertise."[251] In light of these factors, the NPRM fares poorly:

- The NPRM fails to consider the reasonable privacy and safety concerns of pre-adolescent, adolescent, and post-adolescent (*i.e.*, adult) females and males;

- The NPRM fails to consider the full impact of the diminished rights of students and faculty accused of sexual misconduct under the NPRM's illusively broad definitions of conduct that would potentially constitute such misconduct (*see* DFI's discussion of the NPRM's due process provisions);

- The NPRM fails to explain how *all* boys and girls and men and women at America's educational institutions are not already protected from sex-based discriminatory conduct under the current Title IX regulations (the "2020 Rule");

- The NPRM fails to consider the liability imposed on educational institutions by directing the school to diminish the procedural rights of accused parties while allowing harm to the accused well before a decision has been reached by the decisionmaker;

- The NPRM fails to describe agency expertise regarding the educational and mental, physical, and emotional health issues regarding a student's gender identity, sexual orientation, sex stereotypes, and sex characteristics.

The agency's failure to define sexual orientation, gender identity, sex stereotypes, and sex characteristics signals its lack of expertise in these areas. Setting aside the lack of statutory authority, this deficiency is particularly harmful, as it unintentionally leaves open the door to arguments and rulings that the terms encompass conduct that the Department clearly does not intend to (and cannot lawfully) protect. If the Department means to expand the scope of Title IX to prohibit discrimination on the basis that a person is straight, gay, lesbian, bisexual, or asexual, then it should simply say so, define those terms, and close the door to harmful arguments and interpretations. Regarding gender identity, the Department clearly has no such expertise, and what

[251] 469 U.S. 29, 43 (1983).

is offered by federal agencies that might be expected to offer sound alternatives is no better. The U.S. Department of Health and Human Service's definition is hardly helpful, despite being issued by the federal government's top medical experts:

> *"Gender identity" is "[o]ne's internal sense of self as man, woman, both or neither."*[252]

This definition is so evasive, vague, and inchoate that no educational institution could be expected to understand and comply with it. The failure to define these terms is a serious deficiency in the NPRM.

Congress was not ambiguous in Title IX's express statutory text

The APA prohibits agencies from issuing rules that are contrary to the unambiguous intent of Congress. If the statute was silent or ambiguous regarding Title IX's intent—here, particularly regarding the NPRM's expansion of the scope of Title IX beyond the term "sex"—the Department may issue regulations consistent with the Congress's statutory purposes.[253]

As discussed *infra*, there was no such statutory ambiguity or gap in congressional intent to be deciphered by the Department, nor has it asserted the existence of one to justify an expansion of Title IX to include sexual orientation, gender identity, sex characteristics, and sex stereotypes. The *Chevron* Court noted that "[i]f a court, employing traditional rules of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[254] Here, the Department is, therefore, bound to follow congressional intent and give effect to it through its regulations.

The Department now proposes to reorient Title IX's applicability and purpose away from prohibiting sex-based discrimination while embracing illusive and undefined characteristics that would diminish and displace the rights championed by Congress in its passage of Title IX.[255] The NPRM would force educational institutions to admit transgender women (*i.e.*, biological men) into women's restrooms, locker rooms, showers, and athletic programs and activities. This

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[252] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf (emphasis added).
[253] *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).
[254] *Id*. at 843 n.9.
[255] Congressional intent in its passage of Title IX is discussed at length in DFI's discussion of *West Virginia v. EPA*.

extraordinary, extra-statutory rulemaking excursion, seemingly designed to thwart congressional intent, is not entitled to deference.[256]

The express text, context, and history of Title IX thoroughly demonstrate Congress's unambiguous intent to prohibit discrimination in educational institutions' programs and activities on the basis of "sex"—not gender identity, sexual orientation, sex stereotypes, or sex characteristics.[257] The NPRM, however, does not merely represent different policy preferences, but twists the statutory purpose of Title IX to meanings quite divergent from those clearly intended by Congress.

As the Department itself clearly understood and so guided educational institutions until unsheathing this novel reinterpretation of Title IX's meaning, Congress was not ambiguous in what it meant by "sex." Indeed, Title IX's express statutory prohibition against sex-based discrimination (excepting certain expressly permissible sex-based segregations) remains unchanged by Congress since it became law in 1972:

> 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 . . . .[258]

The law was designed to prevent discrimination "on the basis of sex" and thereby provide equal opportunities to biological males and females in education programs and activities. Congress believed that "sex" involved a binary, male or female, biologically based distinction—not a student's "inner sense of gender," capable of infinite, unceasing variations. In fact, the terms "gender identity," "sexual orientation," "sex stereotypes," and "sex characteristics" do not appear in the statute.

Title IX includes references to persons of "one sex" and "students of both sexes" but makes no references to "gender identity." Rather, Title IX includes multiple provisions that reveal

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[256] *Holland v. Nat'l Mining Ass'n,* 309 F.3d 808, 815 (D.C. Cir. 2002) ("In reviewing an agency's statutory interpretation under the APA's 'not in accordance with law' standard, we adhere to the familiar two-step test of *Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), provided that the conditions for such review are met.").

[257] In sharp contrast to gender identity, sexual orientation, sex stereotypes, and sex characteristics, pregnancy or related conditions are appropriately and reasonably encompassed by Congress's sex-based protections when it enacted Title IX (although DFI is extremely concerned with the Department's unclear view of what may constitute "reasonable modifications," pursuant to proposed 34 C.F.R. § 106.40(b)(3) – (4), which would require educational institutions to provide such modifications to their education programs or activities for students (in addition to private lactation stations, separate from restrooms)).

[258] 20 U.S.C. § 1681(a) (emphasis added).

Congress's view of "sex" as a binary distinction between boys and girls, men and women, fathers and mothers, and sons and daughters:

- In 20 U.S.C. § 1681(a)(2), Title IX expressly provided a temporary exemption ". . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*."

- In 20 U.S.C. § 1681(a)(5), Title IX clarified that the new requirements "shall not apply to any public institution . . . that traditionally and continually from its establishment has had a policy of admitting only students of *one sex*."

- In 20 U.S.C. § 1681(a)(6)(A), Title IX exempted social fraternities and sororities at colleges and universities.

- In 20 U.S.C. § 1681(a)(6)(B), Title IX exempted certain voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one "sex," including the *Boy* Scouts, *Girl* Scouts, Camp Fire *Girls*, Young *Men's* Christian Association, and the Young *Women's* Christian Association.

- In 20 U.S.C. § 1681(a)(7), Title IX provided exemptions for programs or activities undertaken in connection with *girls and boys* state and national conferences.

- In 20 U.S.C. § 1681(a)(8), Title IX provided exemptions for "*father-son* or *mother-daughter* activities" but required that if such activities were provided for students of "*one sex*" that reasonable comparable activities must be provided for students of the "*other sex*."

- In 20 U.S.C. § 1681(a)(9), Title IX exempted scholarships or other financial assistance awarded to "*one sex only*" which are "based upon a combination of factors related to the personal appearance, poise, and talent of such individual" so long as the pageant is otherwise in compliance with nondiscrimination provisions of federal law.

- In 20 U.S.C. § 1686, Title IX provided that educational institutions could maintain "separate living facilities for the *different sexes*."[259]

[259] 117 Cong. Rec. 30,407, 39,260, 39,263 (1971); 188 Cong. Rec. 5807 (1972).

Simply stated, Congress intended to create equal opportunities for women and men in educational programs and activities. Gender identity, sexual orientation, sex stereotypes, and sex characteristics were not and are not (expressly or an implied) part of Title IX, which does not suffer from a "gap" where such a penumbral emanation might conceivably be found.

Without such statutory ambiguity, the Department's attempt to recast Title IX beyond "sex" to include gender identity, sexual orientation, sex stereotypes, and sex characteristics is fully unwarranted and unlawful under *Chevron*.

The Department is required to demonstrate that it had good reasons for the rulemaking change and that the rulemaking is statutorily permitted

In *FCC v. Fox Television Stations*, the Supreme Court held that an agency must demonstrate "good reasons" for its change to a previous regulation and that the "new policy is permissible under the statute."[260] The *Fox Television* Court also held that an agency may be required to demonstrate a "more detailed justification" for its change in policy when (a) the "new policy rests upon factual findings that contradict those which underlay its prior policy," or (b) where the prior policy has "engendered serious reliance interests that must be taken into account."[261]

The Department has failed to justify its policy with factual findings that demonstrate the inadequacy of its current Title IX regulations in preventing sex-based discrimination at educational institutions. Instead, it has unlawfully expanded Title IX to include various other personal characteristics (beyond binary biological sex) and has declared the current regulations inadequate *vis-à-vis* newfound Title IX protected categories. The Department has also removed due process requirements that seriously impact quasi-criminal proceedings at educational institutions, diminishing the rights of the parties to consider the evidence (not summaries thereof) and confront witnesses and probe witness testimony in proceedings—all rights ensured by the Department in its 2020 Rule.[262]

The Department must enact regulations that are in accord with Congress's intent—not in defiance of it. Here, unable to clear the "congressional intent hurdle," as the NPRM clearly exceeds congressional intent, the Department simply declares and concludes that the current regulations fail to address the new protections. It has not, in any way, established that the current regulations fail to fully enact and enforce Congress's express statutory intent. Nor could it, as the Department does not have sufficient data to conclude that its 2020 Rule, issued only two years ago, is somehow operating ineffectively in fulfilling the mandate of Title IX.

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[260] 556 U.S. 502, 515 (2009).
[261] *Id*. at 515–516.
[262] The impact of the NPRM on due process rights is discussed at length in DFI's discussion on due process.

For decades, America's schools, colleges, and universities have had serious reliance interests on the Department's longstanding interpretation of their Title IX enforcement responsibilities

For nearly half a century, the Department (and its predecessor agency, the U.S. Department of Health, Education, and Welfare) has issued guidance and regulations requiring that educational institutions prohibit sex-based discrimination in their educational programs and activities. With a brief exception initiated in May 2016 and withdrawn months later, the Department's explicit guidance did not add Title IX protections based on gender identity, sexual orientation, sex stereotypes, or sex characteristics. The Department's proposed expansion of Title IX sharply contradicts its own longstanding interpretation of its lawful boundaries.

As noted by the Supreme Court in *Encino Motorcars, LLC v. Navarro*, when there have been "decades" of "reliance" on a prior policy, the agency must present a far "more reasoned explanation" for "why it deemed it necessary to overrule its previous position."[263] Here, the Department has done nothing but express that its preferred policy positions are consistent with President Biden's executive orders—orders that are based on a faulty application of *Bostock v. Clayton County*.[264]

From Title IX's enactment in June 1972 through OCR's May 13, 2016, Dear Colleague letter, the Department, almost without exception, did not provide guidance to educational institutions regarding gender identity.

OCR's historical interpretations reveal that it had somehow failed to discover the additional categories of Title IX protections until nearly forty-five years after Title IX's passage—through administrations of both political parties. Educational institutions across America relied on its consistent guidance, which had not exceeded the express statutory language enacted by Congress

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[263] 136 S. Ct. 2117, 2125 (2016).

[264] 140 S. Ct. 1731, at 1753 (2020). the *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as a homosexual or transgender person, but explicitly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." In *Bostock,* the Court declined to create or adopt "gender identity" as a protected category, indicating that its decision did not rely on whether the definition of sex "captur[ed] more than anatomy" or "reach[ed] at least some norms concerning gender identity and sexual orientation"[264] and indicated that "future cases" would likely determine additional questions involving other federal or state laws prohibiting sex discrimination in various forms. The *Bostock* Court could hardly have been clearer that its decision regarded Title VII and did not extend to the remainder of the Civil Rights Act of 1964, including Title IX. Nonetheless, the Department's NPRM is written as if the *Bostock* Court had not included those explicit limitations regarding the ruling's effect on other civil rights laws.

in 1972. Until this NPRM, the Department had not attempted to promulgate a regulatory scheme to transform Title IX's protections.[265]

Following is a summary of the relatively recent emergence of OCR's radical, recent re-interpretation of Title IX to include extra-statutory characteristics:

- On **October 26, 2010**, OCR issued a Dear Colleague letter which asserted that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[266] OCR also acknowledged in the same sentence that "Title IX does not prohibit discrimination based solely on sexual orientation . . ."[267] Without creating a new prohibited class of victims, OCR simply affirmed that Title IX's sex-based anti-discriminatory provisions apply to all students—whatever additional characteristics they might possess.

- On **April 4, 2011**, OCR discreetly referenced gender-based protections in a footnote to supplemental guidance: "Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the 2001 Guidance, and in the 2010 Dear Colleague Letter on Harassment and Bullying . . ."[268]

- On **April 29, 2014**, OCR issued additional guidance in its "Questions and Answers on Title IX and Sexual Violence" and asserted that Title IX's sex-based prohibitions included "claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."[269] On September 22, 2017, OCR rescinded this guidance, citing the imposition of "regulatory burdens without affording notice and the opportunity for public comment."[270]

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[265] This includes Title IX interpretation by the Department's predecessor agency, the U.S. Department of Health, Education, and Welfare, which published Title IX's implementing regulations at 45 C.F.R. Part 86, effective July 21, 1975. *See* https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-86.
[266] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[267] *See id.*
[268] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html, n.9.
[269] *See* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[270] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

- On **May 13, 2016**, OCR (in coordination with the Department of Justice's ("DOJ") Civil Rights Division) issued a Dear Colleague letter[271] instructing schools and universities that Title IX's sex-based prohibitions also included discrimination based on gender identity (which it defined as an "internal sense of gender"[272]). On February 22, 2017, OCR (and DOJ's Civil Rights Division) rescinded this guidance, citing the lack of a notice and comment opportunity and insufficient legal analysis explaining how the newfound protection for gender identity was consistent with Title IX's express language.[273]

- On **February 22, 2017**, OCR (and DOJ) issued a letter withdrawing the guidance it had issued in its May 13, 2016 Dear Colleague Letter, while noting that "withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment."[274]

- On **June 23, 2021**, OCR issued a Notice of Interpretation announcing that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity"[275] (on July 15, 2022, a federal district court preliminarily enjoined the Department from enforcing this guidance in twenty states[276]).

The Department's failure to overcome the arbitrary and capricious test when decades-long, serious reliance interests by educational institutions are involved and where the Department offers "almost no reasons at all" or only "conclusory statements" as justification for its decision to vastly change course renders the rulemaking unlawful.[277] The NPRM violates the APA. The Department thus must withdraw the NPRM.

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[271] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[272] *See id*.
[273] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.
[274] *See* https://www.cmu.edu/title-ix/2-22-17-guidance_letter1.pdf.
[275] *See* https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.
[276] *See State of Tenn., et al. v. U.S. Dep't of Educ*., No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022).
[277] *Encino Motorcars*, 136 S. Ct. at 2126–27 ("Whatever potential reasons the Department might have given, the agency in fact gave almost no reasons at all.").

Congress never delegated to the Department the power to expand the scope of Title IX beyond a binary, biological understanding of the term "sex"

In *Bowen v. Georgetown Univ. Hosp.*,[278] the Supreme Court observed that "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." In *FDA v. Brown & Williamson Tobacco Corp.*,[279] it declared that an "administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."

The NPRM's attempt to expand Title IX beyond "sex" to include gender identity, sexual orientation, sex stereotypes, and sex characteristics represents the Department acting far beyond the power delegated to it by Congress to effect implementing regulations for the enforcement of Title IX, thereby violating the *Bowen* Court's restraint on agency rulemaking.

The Department's proposed regulatory framework, which dramatically broadens Title IX's applicability, is clearly not grounded in a valid grant of authority from Congress, as required by the Court in *Brown & Williamson*. Congress made no such grant of authority to the Department for Title IX to include protections based on gender identity, sexual orientation, sex stereotypes, and sex characteristics, as the Department now proposes. The NPRM blatantly defies Congress.

In *Thomas Jefferson Univ. v. Shalala*, the Court held that an agency's interpretation of a term within a statute must be consistent with the term's meaning when the official action was taken.[280] The Court also held that "[w]hen terms used in a statute are undefined, we give them their ordinary meaning."[281] In 1972, when Congress enacted Title IX, "sex" meant biological sex—boy or girl, man or woman. The Department has no legal right to graft its current policy preferences onto what Congress meant by sex when Title IX became law.

The NPRM would undermine and subvert the statutory purpose of Title IX—the prohibition of sex-based discrimination in educational programs and activities. Its provisions are arbitrary, capricious, and not in accordance with law. Title IX's express text and statutory context clearly indicate that its purpose was to prohibit discrimination against biologically female students. Subsequent legislation offering additional protections clearly distinguishes between "sex" and the additional, undefined characteristics the Department seeks to include within Title IX applicability—gender identity, sexual orientation, sex stereotypes, and sex characteristics.

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[278] 488 U.S. 204, 208 (1988).
[279] 529 U.S. 120, 151 (2000).
[280] 512 U.S. 504, 512 (1994).
[281] *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

Congress did not cede its power to make law to the Department

"The authority to issue regulations is not the power to make law, and a regulation contrary to a statute is void." *Orion Reserves Ltd. P'ship v. Salazar*.[282] Through its proposed rule, ED would make law with regulations contrary to the clear statutory directives of Congress in Title IX. No matter the wisdom or fairness that may be associated with the Department's policy desire to add Title IX protections based on gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions, only the last of these categories arguably flows from what Congress meant by "sex" in Title IX (*i.e.*, prohibitions on discrimination based on a student's sex status as a male or female). The NPRM is not merely an expression of the Department's policy preferences. Instead, it seeks to legislate protections not included in Title IX that would subvert Title IX's clear statutory purposes (to ensure equal educational opportunities for women and men).

The NPRM relies on illogical and inconsistent reasoning

In *Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Labor Relations Auth*., the court held that an agency fails the arbitrary and capricious test if its proposed rule is the product of "illogical" or inconsistent reasoning.[283] So it is with the NPRM.

It is illogical for the Department to propose that by equating gender identity, sexual orientation, sex stereotypes, and sex characteristics with biological "sex," it will enact protections for currently defenseless people. To the contrary, all people—male and female—are covered by Title IX's clear statutory protections. Any sex-based discrimination, in accord with Congress's intended meaning of that term, is already included in Title IX's anti-discriminatory protections. Special, additional protections are not authorized by Congress (in Title IX or elsewhere) and are unwarranted. The Department's current regulations provide for the proper submission of complaints, the right to view evidence, the right to live hearings and cross-examination, and other due process rights.[284] The Department has not identified a need to which the NPRM responds—other than its apparent political need to oblige the demands of certain of the President's particularly vocal supporters and to fulfill his campaign promises.[285] This is not a valid basis for rulemaking.

With the Department's implementation of the 2020 Rule's due process protections, the rights of complainants, respondents, and recipients were more fully defined, standardized, and ensured. Given the serious interests at stake (quasi-criminal in nature), evidentiary standards were

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[282] 553 F.3d 697, 703 (D.C. Cir. 2009).
[283] 470 F.3d 375, 380 (D.C. Cir. 1993).
[284] Discussed at length in DFI's discussion of due process in this comment.
[285] Discussed at length in DFI's discussion of gender identity and *West Virginia v. EPA* in this comment.

appropriately raised and proceedings became transparent for all sides with favor to none and a presumption of innocence for the accused, while protecting the privacy interests of aggrieved parties. Defying all logic, the Department now seeks to abandon those foundational standards and due process protections which have benefited all parties.

The Department failed to consider and propose less restrictive regulatory alternatives

In *Cin. Bell Tel. Col. v. FCC*, the court held that agency rulemaking decisions that fail to consider "less restrictive, yet easily administered" regulatory alternatives fail to meet the arbitrary and capricious test.[286] The Department, having failed to establish a data-driven or other clearly reasoned need to issue the NPRM, also fails to propose less restrictive alternatives to its drastic, unprecedented proposed expansion of Title IX that seeks to prohibit discrimination on a basis other than "sex."

Without defining actual problems with, for example, the due process protections for all parties enshrined in the 2020 Rule, the Department is now proceeding to gut its own protections for complainants, respondents, and recipients. It attempts to address a problem that simply does not exist. Through its arbitrary and illogical retreat on essential due process protections, it abandons definable standards and empowers the subjectivity of all grievance processes, thereby lowering the reliability of just decisions. The 2020 Rule already represents the least restrictive, most easily administered standards to ensure fair processes and equal application of Title IX's statutory protections.

The NPRM failed to account for important factors that are highly relevant to its decision, such as the privacy and safety concerns of female students and the effect on sex-segregated athletics, as well as the due process rights of accused students and recipient employees

In *Ctr. For Biological Diversity v. U.S. Bureau of Land Mgmt*., the court found that an agency failed the arbitrary and capricious test when it failed to consider important factors relevant to its action, including the policy effects of its decision and important aspects of the problem related to the issue under its consideration.[287]

The NPRM blithely ignores the consequences of what it proposes and blatantly misrepresents others. For instance, a school's failure to allow a transgender female (*i.e*., a biological male) to use the girl's or women's restroom, locker room, and shower facilities in order to accommodate his current gender identity (as an "inner sense of self," it is subject to change and cannot be objectively measured) would constitute a Title IX violation.

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[286] 69 F.3d 752, 761 (6th Cir. 1995).
[287] 698 F.3d 1101, 1124 (9th Cir. 2012).

The Department makes no provision for the reasonable privacy and safety interests of girls and women to use intimate facilities that are currently, statutorily permissible sex-segregated for their privacy and safety. The NPRM would force recipients to admit any biological male asserting that he was a female to the intimate facilities of females (incredibly, the Department has offered no definitions or objective standards for "gender identity"). The Department makes no effort to examine these privacy and safety concerns, not even bothering to mention them.

Regarding the NPRM's impact on the admission of biological males who identify as females into sex-segregated women's athletic competitions, the Department denies any impact of the currently proposed regulations by feigning deferral until a future rulemaking on the subject.[288] That seeming deferral is deceptive in that the current NPRM makes clear that any denial of a student's use of facilities and participation in line with the student's claimed gender identity would constitute more than de minimis harm and would, therefore, be a Title IX violation.

The NPRM also fails to consider the impact of diminished equal protections for students and employees resulting from its reduction in the due process rights of all parties to its grievance processes.[289] Recipient schools will be assigned massive new "monitoring" obligations—searching for and preventing recurrences of offensive conduct. In so doing, the schools are highly likely to abridge the constitutional rights of all students, resulting in recipient liability for damages to parties. Despite the obvious reduction in due process rights ensured by the Department's proposed rules, it makes no effort to explain or respond to the policy ramifications of these changes.

The proposed rule unlawfully substitutes the Department's policy goals for Congress's statutory intent at nearly every juncture in the NPRM. Again, these are not mere policy differences: they defy Title IX's clear statutory purpose and turn it on its head by diminishing its sex-based protections in favor of the undefined concepts of gender identity, sexual orientation, sex stereotypes, and sex characteristics.

The Department has not merely exceeded its statutory mandate, but has acted to thwart it. Through the proposed rule, the Department would act unlawfully because "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*[290] It foists arbitrary and capricious policies on America's educational institutions and would result in diminished constitutional freedoms for students, faculty, and recipient employees. The NPRM reverses decades of departmental guidance to recipients, which have long seriously relied upon that guidance, and so violates the APA, is unreasonable and unlawful, and should be withdrawn in its entirety.

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[288] Discussed at length in DFI's gender identity discussion in this comment.
[289] Discussed at length in DFI's due process discussion in this comment.
[290] 573 U.S. 302, 325 (2014).

With the proposed rule, the Department has neither alleged to have, nor does it have, a basis for asserting that Title IX contains statutory ambiguity necessitating its regulatory action. Accordingly, with regard to the lawfulness of the proposed rule, "that is the end of the matter."[291] ED has no choice but to withdraw its NPRM.

III. Proposed Changes in the Department of Education's 2022 Proposed Rulemaking

A. The Department's unilateral insertion of "gender identity" protections into Title IX

The NPRM[292] rests on an unprecedented, unauthorized reinterpretation of the scope of Title IX's protections to include discrimination based on gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions.[293] The Department relies on a misapplication of the Court's ruling in *Bostock*,[294] which it asserts as the legal justification for the President's executive orders to which the NPRM claims to respond,[295] to broaden the scope of Title IX to encompass gender identity, sexual orientation, sex stereotypes, and sex characteristics.[296]

The NPRM seems to affirm the *inadequacy* of a student's biological sex and promotes a regulatory scheme designed to encourage a student's seeming need for an additional identity form (*i.e.*, gender identity, sexual orientation, sex stereotypes, and sex characteristics). Such a regulatory scheme expresses neither acceptance nor tolerance for the student as he or she is, regardless of the professed underlying intent. Rather, it encourages the student to see himself or herself as physiologically entombed in the "wrong" body. Encouraging such feelings in young students is, very simply, abusive of the need of all students to feel valued and accepted just as they were created. This misplaced encouragement also lies well outside the Department's statutory authority.[297]

A person's "inner sense of gender" is well beyond the proper interests of any school employee, recipient, or the expertise of the Department, other federal agencies, and state and local educational entities. In elementary and secondary schools, it is especially inappropriate for the Department to

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[291] *Chevron*, 467 U.S. at 843.
[292] *See* https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.
[293] *See* https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.
[294] 140 S. Ct. 1731, 1753 (2020).
[295] 87 Fed. Reg. 41,390, 41,392 (Jul. 12, 2022).
[296] Proposed 34 C.F.R. § 106.10.
[297] 20 U.S.C. § 3401 *et seq*.

place adult teachers, Title IX coordinators, and other recipient employees in the position of communicating with pre-adolescent and adolescent children about such private, deeply personal, developmental matters without parental notification and approval.

Contrary to the stated purpose of the NPRM (to prohibit sex-based discrimination, now to include gender identity, sexual orientation, sex stereotypes, and sex characteristics), it will create a regulatory scheme that *disaffirms* the many inherent differences between individual male and female students by creating a Title IX-based role for schools to urge students, in the midst of profound psychological and physiological development, to make determinations as to whether or not they may have been "born in the wrong body" and are, therefore, inadequate in the absence of chemical and, perhaps, surgical treatments. It is wholly inappropriate for the Department to require schools, colleges, and universities (acting at the Department's direction) to engage with students on such matters. The student-teacher relationship is profoundly important to each student's ability to learn. Introducing "gender identity" (and sexual orientation, sex stereotypes, and sex characteristics) into that relationship violates a sacred trust between students and teachers.

Such an interpretation is also well beyond the unambiguous congressional intent of Title IX (as explained in DFI's *West Virginia v. EPA* discussion). The Department's proposed expansion of "sex" for Title IX purposes also sharply contradicts the Department's own longstanding interpretation of its lawful boundaries.

The Department's proposed addition of "gender identity" (and sexual orientation, sex stereotypes, and sex characteristics) unlawfully exceeds Congress's Title IX mandate, violates the public trust, and should be withdrawn in full for the following reasons:

- The NPRM relies on a misapplication of the U.S. Supreme Court's ruling in *Bostock v. Clayton County* and executive orders that similarly misapply the *Bostock* decision;

- The NPRM defies Congress's express statutory intent that Title IX exists to ensure that girls and women have the same educational opportunities as boys and men;

- The NPRM ignores the proper safety, privacy, and dignity of students, sacrificing those concerns to the Department's emerging gender ideology;

- The NPRM requires institutions to allow biological boys and men who identify as girls and women to participate in girls' and women's scholastic athletic programs. Despite its assurances that such changes will not occur until a future rulemaking, the NPRM clearly asserts that denial of a transgender student's participation or access to the sex-segregated sporting teams and intimate facilities consistent with the transgender student's current gender identity would constitute *more than de*

minimis harm to the transgender student. That finding would serve as the basis for a Title IX violation under this NPRM—not a future NPRM;

- The NPRM reverses the Department's own decades-long interpretation of its Title IX regulatory authority, which did not include gender identity, sexual orientation, sex stereotypes, and sex characteristics;

- The NPRM violates other federal statutory requirements, including the Protection of Pupil Rights Amendment and the Family Education Rights and Privacy Act;

- The NPRM mandates that recipients monitor each student's "gender identity" (and sexual orientation, sex stereotypes, and sex characteristics) for potential Title IX misconduct by other students, faculty, and staff (objectively *and* subjectively evaluated), which could include "mis-pronouning," among other new offenses;

- The NPRM inappropriately requires that recipient employees actively consider, affirm, and act according to the student's expressed or implied (and, possibly, ever-changing) self-identifications regarding gender identity, sexual orientation, sex stereotypes, and sex characteristics. Those characteristics involve intensely private, highly personal developmental issues well beyond the expertise or proper interests of adult teachers, Title IX coordinators, recipient employees, and the Department. In addition, the sincerely held, personal beliefs of millions of teachers, administrators, and students regarding whether sex is a binary or fluid concept is well beyond the expertise or proper interests of the Department;

- The NPRM places teachers, Title IX coordinators, recipient employees, and the Department between parents and their children on private, highly personal issues fundamental to each student's psychological and physiological development;

- The NPRM redefines parental rights to include a person acting *in loco parentis* (in place of the parent), which could include teachers, Title IX coordinators, or recipient employees making decisions on behalf of students based on their gender identity, sexual orientation, sex stereotypes, and sex characteristics;

- The NPRM requires schools, without notification to or approval of parents, to assist students with obtaining "gender-affirming care" (such as chemical and surgical castration, mastectomies, hormone treatment, and permanent physical disfigurement and which care has been insufficiently evaluated by independent medical reviewers).

For these reasons, described in greater detail *infra*, DFI calls on the Department to withdraw the NPRM in its entirety.

Misapplying *Bostock v. Clayton County*

The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as a homosexual or transgender person, but explicitly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." In *Bostock,* the Court declined to create or adopt "gender identity" as a protected category, indicating that its decision did not rely on whether the definition of sex "captur[ed] more than anatomy" or "reach[ed] at least some norms concerning gender identity and sexual orientation"[298] and indicated that "future cases" would likely determine additional questions involving other federal or state laws prohibiting sex discrimination in various forms.[299]

The *Bostock* Court could hardly have been clearer that its decision was limited to the context of Title VII and did not extend to the remainder of the Civil Rights Act of 1964, including Title IX. Nonetheless, the Department's NPRM is written as if the *Bostock* Court had not included those explicit limitations regarding the ruling's effect on other civil rights laws. The Department's foundational misapplication of *Bostock* is analogous to the cognitive dissonance described by Abraham Maslow: "[i]f the only tool you have is a hammer, you tend to see every problem as a nail."[300]

The NPRM violates the reasonable privacy interests of students in restrooms, locker rooms, and other intimate facilities

As recognized by the U.S. Supreme Court[301] and several other federal courts,[302] students have certain sex-based privacy rights. By forcing schools to admit students into the restrooms, locker rooms, and showers of students of a different biological sex, the Department would directly

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[298] *Bostock*, 140 S. Ct. at 1739.
[299] *Id*. at 1753.
[300] ABRAHAM HAROLD MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE (1966).
[301] *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).
[302] Federal courts have acknowledged that individuals are entitled to a reasonable expectation of privacy in not having to appear undressed or partially clothed in the presence of the opposite sex. *See Doe v. Luzerne Cnty*., 660 F.3d 169, 176–77 (3d Cir. 2011) (recognizing an individual's reasonable expectation of privacy in their partially clothed body exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd*., 516 F.3d 489, 494 (6th Cir. 2008) (explaining that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (finding a parolee has a right not to be observed producing a urine sample by an officer of the opposite sex).

undermine the reasonable expectations of privacy of the latter students. A perverse result of the NPRM, for instance, might involve a female student objecting to the presence of a biological male identifying as female in the girls' locker room where the former student may be partially or fully unclothed. The female student's objection, if found to be objectively *and* subjectively offensive to the biologically male student who identifies as female, might then constitute sex-based harassment by the objecting female student against the other student, in violation of Title IX. Despite Title IX's clear purpose of assuring equal opportunities in educational programs and activities for female students, the Department's NPRM renders the objecting female student the aggressor and the male student identifying as female the victim. Such a scenario turns Title IX on its head.

The NPRM will require that schools allow a student to use restrooms, locker rooms, and dorm rooms consistent with that student's currently expressed (and undefined) gender identity (which gender identity could change intermittently, without limitation, as expressed by the student and not subject to objective measurements under the NPRM). Despite the Department's current assurances, the NPRM would also require that schools allow transgender athletes to participate and compete in sex-segregated scholastic athletic programs and activities in accordance with the student's professed gender identity. Failure to accommodate the expressed gender identity of the student in any of these circumstances will amount to "*more than de minimis*" harm under the NPRM.[303] These NPRM provisions constitute a frontal attack both on Title IX's basic purpose and express statutory provisions permitting sex-segregated intimate facilities and scholastic athletic participation (discussed *infra*).

What is gender identity?

Given its importance to the NPRM's enforcement, the Department's failure to define gender identity, sexual orientation, sex stereotypes, and sex characteristics is strikingly odd. The failure to define the relevant terms does not appear to be inadvertent, as it would allow OCR to apply its own sense of their meanings as it pursues situational enforcement of the NPRM according to its preferred outcomes. Providing definitions for key phrases in the NPRM's expansion of Title IX's scope beyond the ordinary meaning of the term "sex" would constrain the Department and recipient schools acting pursuant to the NPRM. That the Department chose not to include such definitions in the NPRM also indicates its desire to avoid protracted notice and comment on concepts that seem nearly incapable of objective definition. A more protracted notice and comment period is not a valid reason to refuse to include definitions relating to the proposed fundamental changes in the meaning of regulations. These concerns are particularly troubling regarding the terms "sexual orientation" and "gender identity."

With regard to sexual orientation, the Department unintentionally leaves open the door to arguments and rulings that the term encompasses conduct that the Department clearly does not

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[303] Proposed 34 C.F.R. § 106.31(a)(2) (emphasis added).

intend to (and cannot lawfully) protect. If the Department means to expand the scope of Title IX to prohibit discrimination on the basis that a person is straight, gay, lesbian, bisexual, or asexual, then it should simply say so, define those terms, and close the door to harmful arguments and interpretations. Although the Department would still lack the statutory authority to expand Title's scope to sexual orientation, these changes would at least provide clarity for the public and avoid unwanted misunderstandings about the administration's position on this issue.

To solve the riddle of "gender identity," we look to a variety of federal sources, including the U.S. Department of Health and Human Services ("HHS"), which now defines "gender identity" as "[o]ne's internal sense of self as man, woman, both or neither."[304] It further identifies "[n]onbinary" as describing "a person who does not identify with the man or woman gender binary."[305] Gender identity is, according to HHS, an internal sense of gender—possibly a man, a woman, both, or neither. The Department also offered a preview of its views in the waning days of the Obama-Biden administration in its illegal May 2016 Dear Colleague letter.[306] There, OCR instructed schools, colleges, and universities that Title IX's sex-based prohibitions also included discrimination based on gender identity, which it defined as an "*internal sense of gender*."[307] But none of this is in the proposed regulatory text.

Notably, a person's gender identity is not, apparently, objectively discernible—unlike biological sex which, quite usefully, facilitates societal organization for the benefit of all (not least, pre-adolescent, adolescent, and post-adolescent students). By expanding Title IX to include "gender identity" but failing to define it, the Department knowingly engages in a nihilistic effort to further tear the social fabric that has long provided improved access to equal opportunities for all students, male and female. America's schools are not the place for the Department to conduct social experiments regarding gender identity—a term that is outside the universe of Title IX, that the Department does not (cannot?) even define, and that will only sow confusion and chaos in America's schools, colleges, and universities.

The NPRM's gender identity provisions

The NPRM provides that "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

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[304] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
[305] *Id.*
[306] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[307] *See id.* (emphasis added).

the basis of sex and therefore be prohibited, unless otherwise permitted by Title IX or the regulations."[308]

As discussed *infra*, Title IX provides explicit exceptions that permit sex-segregated facilities and activities and makes no provisions for protections based on "gender identity." In the NPRM, the Department foreshadows an upcoming separate rule regarding whether and how to amend current regulations and to address "what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team."[309]

Despite the Department's outward assurances that the current NPRM does not implicate gender identity-based participation in sex-segregated athletic activities, the current NPRM's clear provision that a school's failure to accommodate a student's proclaimed gender identity will constitute more than *de minimis* harm creates a Hobson's Choice for recipients regarding sex-segregated programs and activities: it declares that failure to accommodate a student's gender identity constitutes more than *de minimis* harm even as it assures recipients that an additional NPRM will be issued to regulate how schools accommodate a student's gender identity, particularly regarding athletics. The *de minimis* harm provision is found in this NPRM; it is not reserved for a future NPRM.

In the NPRM, the Department states that the proposed regulations will not impact athletics (indicating that the Department intends to address the issue of gender identity and athletics in a future rulemaking effort).[310] Yet, the Department's proposed regulatory text does not align with the Department's statements that the expansion of the meaning of "on the basis of sex" to include gender identity will not impact athletics. Indeed, the Department's current enforcement posture and litigation position on these issues also underscore that the Department is already unlawfully pursuing these drastic changes.

A review of the proposed regulatory text supports this view. As discussed, the Department proposes adding a new provision at 34 C.F.R. § 106.10 to "clarify" that the scope of Title IX's prohibition of discrimination on the basis of sex includes gender identity: "Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." Further, as also discussed above, the NPRM would add a new provision at 34 C.F.R. § 106.31(a)(2) that declares that institutional policies or practices that prevent a person from participating in an education program or activity consistent with his or her gender identity subject that person to more than *de minimis* harm on the

[308] Proposed 34 C.F.R. § 106.31(a)(2) (emphasis added).
[309] *See* discussion of Proposed 34 C.F.R. § 106.41.
[310] NPRM at 41,538.

basis of sex—thereby exposing the school to a possible civil rights investigation and potential loss of funding.[311]

Yet, despite its statements in the NPRM that expanding Title IX to encompass gender identity will not affect sports and that the Department will address that issue in future rulemaking, the Department proposes no changes to 34 C.F.R. § 106.41, the longstanding regulation which governs athletics under Title IX and permits segregation of athletic teams based on (biological) sex. That provision states in pertinent part:

> (a) *General.* No person shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(Emphasis added.)

Because the Department's proposed 34 C.F.R. § 106.10 expands the scope of "on the basis of sex" to include gender identity and 34 C.F.R. § 106.41(a) bars discrimination in athletics on that basis, 34 C.F.R. § 106.41(a) by its terms would thus require educational institutions to allow biological males who identify as female to compete in women's and girls' athletics. Nothing in the NPRM's proposed regulatory language limits the scope of proposed 34 C.F.R. § 106.10 only to areas outside of athletics, modifies current 34 C.F.R. § 106.41 to exclude gender identity discrimination from its prohibitions, or specifies that, with regard to sports, precluding athletes from participating consistent with gender identity does not constitute harm prohibited by proposed § 106.31(a)(2).

Other reasons support a skeptical view about the Department's promise that the NPRM does not impact sex-segregated athletics. As an enforcement and litigation matter, the future is now: the Biden administration is already enforcing and litigating its Title IX gender identity policies as they apply to athletics. Indeed, within days of taking office, the Biden Education Department *revoked and dismissed* the prior administration's pending enforcement action against a secondary school athletic conference and six school districts in Connecticut arising from their failure to require segregated sports teams based on biological sex.[312] The Department, together with DOJ, quickly

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[311] 34 C.F.R. § 106.31(a)(2) states in part: "In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm . . . . Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex."

[312] OCR Case No. 01–19– 4025, *Conn. Interscholastic Athletic Conf. et al.* (Aug. 31, 2020).

followed that move with the publication in the *Federal Register* of its (now preliminarily enjoined) Notice of Interpretation on June 22, 2021, declaring that the Department interprets Title IX's prohibition on sex discrimination to encompass discrimination based on gender identity.[313] Further underscoring DFI's concerns, DOJ and the Department filed a Statement of Interest in a federal court case taking the position that Title IX and the Equal Protection Clause of the Fourteenth Amendment do not permit West Virginia to exclude biological males who identify as females from participating in single-sex sports restricted to females.[314]

The Department's proposed Title IX regulatory changes are also intended to preempt State laws that attempt to designate sports categories on the basis of sex rather than gender identity; proposed 34 C.F.R. § 106.6(b) states that "[t]he obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement." Although not directly related to athletics, the Department's response following Florida's March 2022 passage of the "Parental Rights in Education" law[315] is also instructive: Secretary Miguel Cardona threatened[316] the State of Florida with civil rights investigations and tried to intimidate other States by denouncing "a dangerous trend across the country" of States enacting laws designed to prevent the imposition of gender identity agendas in their schools, colleges, and universities. The NPRM's proposed text is clearly a reflection of these priorities.

Under the proposed regulations, a refusal by a school, college, or university to allow a biological male who identifies as a female to use the women's restroom or women's locker room or to compete on the athletic teams associated with his "gender identity" would certainly subject the educational institution to a potential civil rights investigation and loss of federal funding (in addition to other civil penalties).[317] The Department's failure to propose regulatory text shielding sex-segregated athletics from the impact of expanding the scope of Title IX to include gender identity is telling and underscores this concern.

The Department seems to be offering contradictory guidance to recipients, which is quite likely to cause confusion regarding the proposed requirements and what actions by the recipient may trigger

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[313] A federal district court recently issued a preliminary injunction enjoining the Notice of Interpretation. *Tennessee v. U.S. Dept. of Education*, No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022).
[314] *B.P.J. v. West Virginia State Board of Education*, Statement of Interest, 454–475 (S.D. W.V. 2021), https://www.justice.gov/crt/case-document/file/1405541/download.
[315] *See* http://laws.flrules.org/2022/22.
[316] Brooke Migdon, *Education Secretary Says He Will Be "Monitoring" Florida's New "Don't Say Gay" Law for Civil Rights Violations*, THE HILL, Mar. 29, 2022, https://thehill.com/changing-america/respect/equality/600210-education-secretary-says-he-will-be-monitoring-floridas-new/.
[317] Laura Meckler, *New Title IX Rules Set to Assert Rights of Transgender Students*, WASH. POST, Mar. 30, 2022, https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/.

a Title IX investigation. In that sense, it dooms schools to failure even as they attempt to comply as they are extremely likely to follow the path of least immediate friction by presuming the Department will not enforce gender identity policies under this NPRM that will require admission of students to the sex-segregated athletic teams and competitions associated with the student's current "inner sense of gender."

The NPRM is defective in other ways. The proposed rule provides that harassment found to be sufficiently severe or pervasive, based on the totality of the circumstances and evaluated subjectively and objectively, and denying or limiting a person's ability to participate in or benefit from education program or activity, constitutes an impermissible hostile environment.[318] Using pronouns that correspond to the student's biological sex, if subjectively offensive to the student, may constitute a Title IX violation under the NPRM. The impact on the free speech rights[319] of other students, teachers, and other school employees is clear: it will be diminished and such misconduct may serve as a basis for civil and criminal investigations.

Notably, despite its many provisions regarding increased mandatory reporting notifications of behavior that may constitute harassment,[320] the NPRM's complainant autonomy provisions go to great lengths to effectively block the traditional rights of parents to be aware of the alleged discriminatory conduct.[321] By expanding the involvement of recipient employees regarding the "inner sense" of a student's gender, the NPRM impermissibly diminishes the proper role of parents, family, and the value system of the student's parents and family.[322]

Title IX's text and Congress's unambiguous intent

Title IX's express statutory prohibition against sex-based discrimination (excepting certain expressly permissible sex-based segregations) remains unchanged by Congress since it became law in 1972:

> 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 . . . .[323]

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[318] Proposed 34 C.F.R. § 106.2.
[319] The First Amendment protects the right to ascribe pronouns to others based on their sex. *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).
[320] Proposed 34 C.F.R. § 106.44(c).
[321] Proposed 34 C.F.R. §§ 106.2, 106.8(d), 106.44(a)–(e).
[322] DFI strongly believes in protections for students who have experienced abusive parental or familial environments, and the current rules fully protect their interests.
[323] 20 U.S.C. § 1681(a) (emphasis added).

The law was designed to prevent discrimination "on the basis of sex" and thereby provide equal opportunities to biological females in education programs and activities. Title IX, by its express terms, is limited to the prohibition of sex-based discrimination involving "any education program or activity receiving Federal financial assistance"[324] and does not include gender identity (or sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions[325]).

The Department now proposes to reverse nearly fifty years of its own regulatory interpretation, having made the belated discovery of the additional legislative protections—despite Congress's clear intent to limit Title IX's prohibitions to discrimination based on sex (discussed in detail in DFI's *West Virginia v. EPA*[326] section of this comment and analysis). The *West Virginia* Court noted that "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[327] Vague delegations may not be used by federal agencies to justify broad assumptions of regulatory power in important policy matters. Congress must be clear in order to transfer its authority to a federal agency. The Court affirmed that on matters of political and economic significance, "'Congress could not have intended to delegate a decision [to the agency] in so cryptic a fashion.'"[328] Congress was not ambiguous in identifying Title IX's clear purpose and intent. Further, there is no vague statutory delegation requiring the Department to attempt to ascertain its meaning and application.

What did Congress mean by "sex" in Title IX?

The express statutory text and context of Title IX reveal that Congress believed that "sex" involved a binary, male or female, biologically based distinction—not a distinction based on a student's "inner sense of gender," capable of infinite variations.

Title IX includes instructive references to persons of "one sex" and "students of both sexes" but makes no references to "gender identity." Rather, Title IX includes multiple provisions that reveal

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[324] *Id.*
[325] In sharp contrast to gender identity, sexual orientation, sex stereotypes, and sex characteristics, pregnancy or related conditions are appropriately and reasonably encompassed by Congress's sex-based protections when it enacted Title IX (although DFI is extremely concerned with the Department's unclear view of what may constitute "reasonable modifications," pursuant to proposed 34 C.F.R. § 106.40(b)(3)–(4), which would require educational institutions to provide such modifications to their education programs or activities for students [in addition to private lactation stations, separate from restrooms]).
[326] 597 U.S. __ (2022).
[327] *West Virginia*, slip op. at 22, quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).
[328] *Id.* at 25–26, quoting *Brown & Williamson*, 529 U.S. at 160.

its view of "sex" as a binary distinction between boys and girls, men and women, fathers and mothers, and sons and daughters:

- In 20 U.S.C. § 1681(a)(2), Title IX expressly provided a temporary exemption ". . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*."

- In 20 U.S.C. § 1681(a)(5), Title IX clarified that the new requirements "shall not apply to any public institution . . . that traditionally and continually from its establishment has had a policy of admitting only students of *one sex*."

- In 20 U.S.C. § 1681(a)(6)(A), Title IX exempted social *fraternities and sororities* at colleges and universities.

- In 20 U.S.C. § 1681(a)(6)(B), Title IX exempted certain voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of *one sex*," including the Boy Scouts, Girl Scouts, Camp Fire Girls, Young Men's Christian Association, and the Young Women's Christian Association.

- In 20 U.S.C. § 1681(a)(7), Title IX provided exemptions for programs or activities undertaken in connection with *girls and boys* state and national conferences.

- In 20 U.S.C. § 1681(a)(8), Title IX provided exemptions for "*father-son or mother-daughter* activities" but required that if such activities were provided for students of "one sex" that reasonable comparable activities must be provided for students of the "other sex."

- In 20 U.S.C. § 1681(a)(9), Title IX exempted scholarships or other financial assistance awarded to "*one sex only*" which are "based upon a combination of factors related to the personal appearance, poise, and talent of such individual" so long as the pageant is otherwise in compliance with nondiscrimination provisions of federal law.

- In 20 U.S.C. § 1686, Title IX provided that educational institutions could maintain "separate living facilities for the *different sexes*."[329]

[329] 117 Cong. Rec. 30,407, 39,260, 39,263 (1971); 188 Cong. Rec. 5807 (1972).

Simply stated, Congress intended to create equal opportunities for biological women as for biological men in educational programs and activities.

Congress unambiguously manifested its view of the meaning of "sex" through the exceptions in which differing treatment based on sex was permitted, including "[e]ducational institutions of religious organizations with contrary religious views," "educational institutions training individuals for military services or merchant marine," "public educational institutions with traditional and continuing admissions policy," "social fraternities or sororities" and "voluntary youth service organizations," boys or girls conferences, father-son or mother-daughter activities, and scholarship awards in "beauty" pageants.[330] Title IX's provision for the maintenance of "separate living facilities for the different sexes" is also highly indicative of Congress's view of the ordinary meaning of sex at the time of the law's passage[331] (the ordinary, biologically based meaning of sex should then be similarly applied throughout the statute).

Congress did not include a definition of "sex" in Title IX because it presumed that federal agencies understood its ordinary meaning.[332] And for nearly five decades, the Department did quite clearly understand what Congress meant by "sex," as indicated by its Title IX guidance and policies. The Department's reinterpretation of Title IX appears to have occurred pursuant to its decision to manipulate the meaning of sex to fulfill the Biden administration's policy objectives.

"Gender identity" appeared not once in Title IX's express statutory provisions, which are, however, replete with references to "sex."

The express statutory text left no doubt that Congress viewed "sex" as a binary, male or female, boy or girl, father or mother, son or daughter concept. And it offered not even the slightest hint that it intended to include other conceptions of "sex" or "gender identity" or that it intended to confer upon the executive branch the power to redefine Title IX's applicability to include "gender identity." If Congress had intended to delegate its power to provide Title IX anti-discrimination protections based on gender identity, it would have done so.

Congress neither explicitly nor implicitly vested in the Department the power to entertain whether "sex" involved more than the two biological sexes (*i.e.*, sexual orientation, sex stereotypes, sex characteristics, or an endless variety of inwardly sensed, ever-evolving gender identities) as the Department now presumes to exercise. Rather than continuing to enforce Title IX's plain meaning, the NPRM's excesses reveal that the Department is now purporting to assume a lawmaking role, vastly exceeding the authority delegated to it in Congress's Title IX directives.

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[330] 20 U.S.C. § 1681(a)(1)–(9).
[331] 20 U.S.C. § 1686.
[332] *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

If Congress had vested this transformative regulatory power to the Department (or any other federal agency), it would have been clear in so doing. In Title IX, Congress was not unclear. It was not ambiguous. It was not vague. Title IX was created to prevent sex-based discrimination and to provide equal educational opportunities for women and men. Title IX did not include or anticipate subjective notions of "gender identity" as characteristics to be included within Title IX's protections.

Congress passed Title IX to create and protect equal opportunities for America's girls and women at its schools, colleges, and universities. Adding gender identity to the protections diminishes rather than serves the letter and spirit of Title IX's provisions. It places the rights associated with a student's "gender identity" ahead of the sex-based rights protected by Title IX. In so doing, the Department now acts in defiance of congressional intent and its own longstanding interpretation of Title IX's statutory requirements. In this bold new assertion of policymaking power, the Department fails to cite a delegation of corresponding authority from Congress to add gender identity to Title IX's protections—because no such delegation has occurred.

If the Department actually believes that Title IX, as written, statutorily permits it to expand the meaning of "sex" to include "gender identity," Congress and the American people may wish to inquire if the Department perceives *any* limitations on its permissible regulatory authority.[333]

Congress has frequently distinguished between "sex" and "gender identity" in its legislative considerations

Congress has repeatedly considered separate legislative proposals prohibiting discrimination based on "gender identity." If it had intended to include gender identity protections in Title IX or to have amended Title IX to include such protections, it could have done so. It has not.

Moreover, if Congress believed that "gender identity" protections were already included in Title IX, most of the subsequent legislative proposals designed to offer gender identity protections would have been superfluous. As revealed by Congress's frequent consideration of "gender identity" protections in subsequent legislation, Congress has not viewed gender identity protections to be included in Title IX.

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[333] In *West Virginia*, the Court quoted Justice Frankfurter, who noted that "'just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'" *West Virginia*, slip op. at 21, quoting *FTC v. Bunte Brothers, Inc*., 312 U.S. 349, 352 (1941).

Consider the recent history of Congress's contemplation of such legislation regarding "gender identity":

Employment Non-Discrimination Act (1994)

After the unsuccessful passage of ENDA in every Congress since the original bills were introduced in 1994, ENDA eventually passed in the U.S. House in 2007. Introduced in April 2007, H.R. 2015[334] would have prohibited discrimination on the basis of sexual orientation *and* gender identity. H.R. 3685[335] passed after "gender identity" was removed from the previous version of the bill (which had defined "gender identity" as "mean[ing] the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth") (H.R. 2015).[336]

In June 2009, H.R. 3017[337] proposed to ban employment discrimination based on both sexual orientation and gender identity, as did S. 1584[338] in the Senate. Again, in April 2011, ENDA bills prohibiting both sexual orientation and gender identity were introduced in the House (H.R. 1397[339]) and Senate (S. 811[340]), as occurred again in April 2013 with H.R. 1755[341] and S. 815,[342] which ultimately gained passage in the Senate in November 2013 but did not become law.

Hate Crimes Prevention Act of 2009

In 2009, Congress created a new hate crimes law which provided *inter alia* that willfully causing bodily injury because of a person's gender, sexual orientation, or gender identity constituted criminal activity.[343]

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[334] *See* https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.
[335] *See* https://www.congress.gov/bill/110th-congress/house-bill/3685.
[336] *See* https://www.congress.gov/bill/110th-congress/house-bill/2015?s=1&r=8.
[337] *See* https://www.congress.gov/bill/111th-congress/house-bill/3017.
[338] *See* https://www.congress.gov/bill/111th-congress/senate-bill/1584.
[339] *See* https://www.congress.gov/bill/112th-congress/house-bill/1397.
[340] *See* https://www.congress.gov/bill/112th-congress/senate-bill/811.
[341] *See* https://www.congress.gov/bill/113th-congress/house-bill/1755.
[342] *See* https://www.congress.gov/bill/113th-congress/senate-bill/815.
[343] 18 U.S.C. § 249(a)(2).

Violence Against Women Act (2013)

Once more demonstrating that there is a legislative distinction between sex and gender identity, Congress expressly prohibited discrimination on the basis of sex in its 2013 reauthorization of the Violence Against Women Act ("VAWA").[344]

Equality Act (2015)[345]

The Equality Act[346] was first introduced in the House and Senate in July 2015 (H.R. 3185[347] and S. 1858[348]) and proposed to amend Titles II, III, IV, VI, VII, and IX of the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex (to include a sex stereotype, sexual orientation or gender identity, and pregnancy, childbirth, or a related medical condition), sexual orientation (to include homosexuality, heterosexuality, or bisexuality), and gender identity (to include gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth).

Recognizing that different meanings attach to sex-based discrimination and discrimination based on sexual orientation and gender identity, the Equality Act is replete with proposed statutory language that enlarges the scope of barred discrimination from sex to sexual orientation and gender identity. Sec. 1101(b)(2) of the most recent version of the Equality Act in the House (H.R. 5[349]) proposes that "[with respect to gender identity] an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity."[350]

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[344] 42 U.S.C. § 13925(b)(13)(A).

[345] The Biden administration's support for passage of the Equality Act indicates its awareness that its EOs exceed its current statutory authority: if Title IX already included protections based on gender identity, sexual orientation, sex stereotypes, and sex characteristics, there would be no need for the Equality Act (insofar as the Department's policies are concerned). The President and federal agencies have made no such argument. Rather, they decry the lack of current statutory protections based on sexual orientation and gender identity in federal law—contradicting the very position that the Department now takes that these protections are already included in Title IX.

[346] Equality Act, H.R. 5, 117th Cong. § 9(2) (2021); Equality Act, S. 393, 117th Cong. § 9(2) (2021).

[347] *See* https://www.congress.gov/bill/114th-congress/house-bill/3185.

[348] *See* https://www.congress.gov/bill/114th-congress/senate-bill/1858.

[349] *See* https://www.congress.gov/bill/117th-congress/house-bill/5.

[350] *See* https://www.congress.gov/congressional-record/volume-167/issue-36/house-section/article/H633-2.

Fairness for All Act (2019)

The "Fairness for All Act," first introduced in December 2019 (H.R. 5331[351]) and, again, in February 2021 (H.R. 1440[352]), proposed to prohibit discrimination on the basis of sex, sexual orientation, or gender identity, provided exemptions for religious organizations, and would have prohibited sanctions for certain employee speech regarding an employee's religious, political, or moral beliefs in the workplace.

As discussed *supra*, it is Congress's role to enact legislation that it believes is appropriate. Title IX is just one example of Congress passing such legislation. Since its inception, dozens of legislative proposals have been introduced in the House and Senate regarding the rights of the American people. Since the passage of Title IX, Congress approved the Equal Rights Amendment, considered ENDA's prohibition on employment discrimination based on sexual orientation, and more recently has considered the Equality Act and its prohibitions on discrimination based on, among other indicia, gender identity.

If Congress considered these protections to already exist in Title IX, it would be very unlikely to redundantly assert the protection in new legislation. It would have conducted oversight hearings to determine why the executive branch was failing to enforce Title IX's protections—had Title IX included the additional discriminatory prohibitions based on sexual orientation and gender identity. The absence of statutory authorization for the administration's current gender identity policies is better understood by noting the U.S. Senate's recent consideration of the "Equality Act"[353] (discussed *supra*), supported by the current administration, which would codify discriminatory prohibitions based on gender identity and sexual orientation (by amending Title VI to mandate that federally funded schools allow individuals to use sex-segregated facilities and participate in sex-segregated activities consistent with their claimed gender identity). Without passage of the Equality Act or its substantive equivalent, the federal statutory protections advocated by the administration in the NPRM simply do not include gender identity and sexual orientation. If they did exist, the Equality Act (and the administration's vigorous support for it) would be unnecessary.

Rather, as demonstrated by the additional discriminatory prohibitions contained within subsequent legislation, Congress did not and has not considered gender identity (or sexual orientation, sex stereotypes, or sex characteristics) to be part of Title IX's protections. Accordingly, members continue to introduce legislation to assert new protections for these characteristics, and Congress periodically continues to consider those legislative proposals.

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[351] *See* https://www.congress.gov/bill/116th-congress/house-bill/5331/text.
[352] *See* https://www.congress.gov/bill/117th-congress/house-bill/1440/text.
[353] *See* https://www.congress.gov/bill/117th-congress/house-bill/5.

It is Congress's constitutional role to consider whether to implement such protections, not the executive branch's role.[354] Moreover, the Department's unilateral exercise of power well beyond the express language of Title IX violates the separation of powers framework, which was designed to "preclude the exercise of arbitrary power" by any of the three branches of the federal government.[355]

The Department seeks to legislate with its NPRM, and the proposed rule is an illegal attempt by the executive branch to usurp Congress's legislative role.

Creating confusion where it did not exist

From Title IX's enactment in June 1972 through OCR's May 13, 2016, Dear Colleague letter, the Department, almost without exception, did not interpret Title IX to go beyond an ordinary meaning of the term "sex," exclusive of sexual orientation, gender identity, sex stereotypes, and sex characteristics. Through administrations of both political parties, OCR's interpretations over the decades reveal that it had somehow failed to discover the additional categories of Title IX protections until nearly forty-five years after Title IX's passage. The Department's clear interpretative guidance and enforcement efforts had not exceeded the express statutory language enacted by Congress in 1972, and the Department had not, until this NPRM, attempted to promulgate a regulatory scheme to transform Title IX's protections.[356]

Following is a summation of the slow, recent emergence of OCR's radical reinterpretation of Title IX to include extra-statutory, post-sex characteristics, including "gender identity":

- On **October 26, 2010**, OCR issued a Dear Colleague letter which asserted that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[357] OCR also acknowledged in the same sentence that "Title IX does not prohibit discrimination based solely on sexual

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[354] U.S. CONST. art. II, § 1.
[355] *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy").
[356] This includes Title IX interpretation by the Department's predecessor agency, the U.S. Department of Health, Education, and Welfare, which published Title IX's implementing regulations at 45 C.F.R. Part 86, effective July 21, 1975. *See* https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-86.
[357] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.

orientation . . .”[358] Without creating a new prohibited class of victims, OCR simply affirmed that Title IX’s sex-based anti-discriminatory provisions apply to all students—whatever additional characteristics they might possess.

- On **April 4, 2011**, OCR discreetly referenced gender-based protections in a footnote to supplemental guidance: “Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the 2001 Guidance, and in the 2010 Dear Colleague Letter on Harassment and Bullying . . .”[359]

- On **April 29, 2014**, OCR issued additional guidance in its “Questions and Answers on Title IX and Sexual Violence” and asserted that Title IX’s sex-based prohibitions included “claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity.”[360] On September 22, 2017, OCR rescinded this guidance, citing the imposition of “regulatory burdens without affording notice and the opportunity for public comment.”[361]

- On **May 13, 2016**, OCR (in coordination with the DOJ’s Civil Rights Division) issued a Dear Colleague Letter[362] instructing schools and universities that Title IX’s sex-based prohibitions also included discrimination based on gender identity (which it defined as an “internal sense of gender”[363]). On February 22, 2017, OCR (and DOJ’s Civil Rights Division) rescinded this guidance, citing the lack of a notice and comment opportunity and insufficient legal analysis explaining how the newfound protection for gender identity was consistent with Title IX’s express language.[364]

- On **February 22, 2017**, OCR (and DOJ) issued a letter withdrawing the guidance it had issued in its May 13, 2016 Dear Colleague letter, while noting that

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[358] *See id*.
[359] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html, n.9.
[360] *See* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[361] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
[362] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[363] *See id*.
[364] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

"withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment."[365]

- On **June 23, 2021**, OCR issued a Notice of Interpretation announcing that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity"[366] (although on July 15, 2022, a federal district court preliminarily enjoined the Department from enforcing this guidance in twenty states[367]).

"Gender identity" as an electoral and political imperative

President Biden's campaign promises indicate that he didn't believe that "gender identity" (or sexual orientation) fell within Title IX's protections. Accordingly, as a presidential candidate, Mr. Biden promised to add statutory protections based on gender identity and sexual orientation to the 1964 Civil Rights Act.[368] His campaign endorsed the Equality Act (discussed *supra*), which would codify federal civil rights protections for gender identity and sexual orientation and define gender identity as gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual's designated sex at birth.

Choosing not to wait for Congress to consider passing legislation to amend the 1964 Civil Rights Act, President Biden issued multiple executive orders requiring federal agencies to implement his campaign promises regarding gender identity and sexual orientation.

Executive orders on gender identity since January 20, 2021

President Biden devoted significant attention to gender identity at the very beginning of his term, issuing EOs 13988,[369] 14004, 14020,[370] and 14021.[371]

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[365] *See* https://www.cmu.edu/title-ix/2-22-17-guidance_letter1.pdf.
[366] *See* https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.
[367] *See State of Tenn. et al. v. U.S. Dep't of Educ.*, No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022).
[368] *The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, JOE BIDEN FOR PRESIDENT: OFFICIAL CAMPAIGN WEBSITE, https://joebiden.com/lgbtq-policy/.
[369] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.
[370] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-establishment-of-the-white-house-gender-policy-council/.
[371] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/.

On January 20, 2021, the President issued **EO 13988**, misinterpreting *Bostock v. Clayton County*[372] and ordering federal agencies to include gender identity and sexual orientation in their enforcement of sex-based statutory prohibitions of discrimination and to review all existing orders, regulations, guidance documents, policies, programs, or other agency actions for consistency with the President's directive.[373] EO 13988 effectively added gender identity and sexual orientation to the executive branch's enforcement of sex-based anti-discrimination laws, declaring that "[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports"[374]—inflammatory rhetoric unsubstantiated by reliable independent findings.

On January 25, 2021, the President issued **EO 14004**, requiring the U.S. Armed Forces to admit (and allow to openly serve) transgender individuals and to provide for "medically necessary care" related to their gender identity.[375]

On March 8, 2021, the President issued **EO 14020**, establishing the "White House Gender Policy Council," directing the council to implement a whole-of-government "gender equity" and "gender stereotypes" agenda both domestically and "globally through diplomacy, development, trade, and defense."[376]

On March 8, 2021, six days after Secretary Miguel Cardona became Secretary of Education, **EO 14021** directed him to review Title IX regulations within 100 days for inconsistency with the President's gender identity and sexual orientation policies announced in EO 13988 and to implement rulemaking and take enforcement actions forcing educational institutions to implement the administration's positions regarding gender identity and sexual orientation. EO 14021 ordered Secretary Cardona to immediately consider "suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding" the Department's previous actions that Cardona found to be inconsistent with EO 13988. The Department's proposed NPRM is the product of EO 14021.

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[372] *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
[373] *Id*. at 1753. The *Bostock* Court stated that its ruling did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."
[374] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.
[375] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/.
[376] *See* https://www.federalregister.gov/documents/2021/03/11/2021-05183/establishment-of-the-white-house-gender-policy-council.

On June 25, 2021, the President issued **EO 14035**, directing that federal agencies implement "diversity, equity inclusion, and accessibility" for the federal workforce and providing that those federal employees "should be able to openly express their sexual orientation, gender identity, and gender expression, and have these identities affirmed and respected, without fear of discrimination, retribution, or disadvantage."[377]

Notwithstanding the absence of clear congressional authorization or amendments to Title IX, the executive branch has engaged in legislative, not interpretive, rulemaking in its bid to create civil rights based on "gender identity."

Parental rights and the collection and evaluation of gender identity information from students

On issues that have long been the province of parental responsibilities, the NPRM places school employees and Title IX Coordinators between students and their parents in matters implicating the values, viewpoints, and rights of parents. The NPRM necessarily involves the solicitation and evaluation of information regarding the sex behavior or attitudes of students by its placement of "gender identity" as a Title IX protected class (albeit an undefined one).

Without qualification, federal law prohibits the collection, evaluation, and analysis of the information upon which the NPRM proposes to rely for its enforcement efforts (*i.e.*, sex behavior or attitudes of the student). Quite simply, the NPRM relies on the collection and consideration of information proscribed by federal law—proscriptions the Department appears to view as little more than historical niceties.

The NPRM's novel addition of "gender identity" as a basis for the Department's Title IX anti-discriminatory protections violates the Protection of Pupil Rights Amendment ("PPRA"), which forbids the collection by State and local education agencies of certain information without parental consent (for educational institutions that are recipients of the Department's funds).[378]

The PPRA provides that, without prior parental consent, "[n]o student shall be required . . . to submit to a survey, analysis, or evaluation that reveals information concerning (1) political affiliations or *beliefs of the student or the student's parent*; (2) *mental or psychological problems of the student or the student's family*; (3) *sexual behavior or attitudes*; (4) illegal, antisocial, self-incriminating, or demeaning behavior; (5) critical appraisals of other individuals with whom the student has close family relationships; (6) legally recognized privileged or analogous relationships, such as those with lawyers, physicians, and ministers; (7) *religious practices, affiliations, or beliefs*

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[377] *See* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/.
[378] 20 U.S.C. § 1232h.

of the student or student's parent; or (8) income level (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program)."[379] The PPRA is clear that public schools must obtain parental consent for a student to participate in any "evaluation" that reveals "sexual behavior or attitudes."

The Department's addition of "gender identity" (and sexual orientation, sex stereotypes, and sex characteristics) to information upon which a school's enforcement of a student's Title IX rights relies will intrinsically require the collection and evaluation of that information by the recipient—no matter how the information is collected. The solicitation of that information is clearly forbidden by the PPRA, and yet schools will, by necessity in complying with the proposed rule, be required to evaluate information expressly protected by the PPRA.

For example, the NPRM mandates that elementary and secondary school employees monitor student and employee behavior for possibly discriminatory conduct and notify the Title IX Coordinator of such behavior that may constitute violations of the Department's proposed interpretations of Title IX's protections.[380] Pursuant to that monitoring and reporting requirement, recipient employees would be required to maintain an awareness of a student's "inner sense of gender" and promptly to report possible violations to the coordinator. This puts recipient employees in the unenviable position of being obligated to attempt to decipher the student's "inner sense of gender" and, if the student expresses that inner sense verbally or non-verbally, observing the student's treatment by other students and recipient employees for possibly discriminatory treatment. In this and other ways, the NPRM mandates the evaluation of information regarding sexual behavior or attitudes, possible mental or psychological problems of the student or student's family, and religious practices, affiliations, or beliefs of the student or student's parent (all in violation of the PPRA).

Recipient employees cannot be simultaneously required to monitor student and employee behaviors for possible discriminatory treatment based on the employee's views of the student's "inner sense of gender" (and sexual orientation, sex stereotypes, and sex characteristics) without also somehow cataloguing and otherwise tracking the student's objectively undefined gender identity. For the recipient employee to do anything less would likely be a violation of the NPRM's reporting requirements. In addition to violating the PPRA and FERPA[381] (discussed *infra*), this aspect of the NPRM is utterly nonsensical and would rightly confound teachers and other recipient employees genuinely seeking to comply with the new regulations and the PPRA and FERPA.

The NPRM's reliance on information regarding a student's "gender identity" directly flaunts the PPRA's prohibition on the collection, analysis, and evaluation of information regarding the

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[379] *Id*. (emphasis added).
[380] Proposed § 106.44(c)(1).
[381] 20 U.S.C. § 1232g.

"beliefs of the student of the student's parent," "mental or psychological problems of the student or the student's family," "sexual behavior or attitudes," and the "religious practices, affiliations, or beliefs of the student or student's parent." The Department's adherence to the PPRA's clear requirements is not merely optional for OCR, notwithstanding the NPRM's remarkable defiance of the PPRA's provisions.

The Department must explain the legal basis, if any, for the NPRM's direct violation of the letter and spirit of the PPRA, and any failure to do so would be arbitrary and capricious and a violation of the APA. The NPRM is notable for its failure to mention the PPRA's existence and its conflict with the PPRA's express statutory prohibitions.

The Department has already demonstrated its hostility to the PPRA by its revised CRDC

The NPRM employs Title IX to expand the role of school employees into the "inner sense of gender" of children. Notably, a critical component of this expansion is embedded in the Department's new mandatory Civil Rights Data Collection ("CRDC"),[382] providing important insights into the Department's views on its role *vis-à-vis* the parental role.

The Department's current willingness to insert itself and its recipient proxies (by its directives) into the parental role was revealed by the CRDC's new requirement that all public school districts and their schools collect information from K–12 students inquiring of the students if they identify as "male," "female," or "nonbinary," with the CRDC's stated purpose of "advanc[ing] equity," "inform[ing] ongoing decisions regarding additional support that schools, educators, and students need to succeed," and "assist[ing] OCR in meeting its mission to ensure schools and districts are complying with civil rights laws."[383]

The collection of this data by federal officials far exceeds legitimate subject areas for Department officials "to collect or coordinate the collection of data *necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights*"[384]; asking children if they are "nonbinary" necessarily places the questioner (the recipient employee) into the private lives of minor students and does so at an outrageously young age. The CRDC's extension of its inquiry beyond Title IX's abundantly clear binary statutory view of sex appears intended to feed data into the Department to create new, extra-statutory protections based on "gender identity." Probing the minds and developing perceptions of pre-adolescent and adolescent students vastly exceeds the

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[382] 86 Fed. Reg. 70,831 (Dec. 13, 2021).
[383] *See* https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-civil-rights-data-collection-2021-22-school-year.
[384] 20 U.S.C. § 3413(c)(1) (emphasis added).

Department's legal justification for collecting information necessary to ensure compliance with Title IX's prohibition of discrimination "*on the basis of sex*."[385]

The Department will, no doubt, apply the information it collects to undermine congressional intent in creating exceptions to protect sex-segregated scholastic athletic opportunities for biological females (*i.e.*, forcing schools to permit biological males who identify as female into female athletic programs, discussed *supra*).

The NPRM fails to assure parental access to private student education records

The Family Educational Rights and Privacy Act ("FERPA") provides for the statutory rights of parents to inspect and review students' education records maintained by schools receiving federal funding from the Department.[386] FERPA provides parents the right to inspect and review their child's education records, the right to request that a school correct records the parent(s) believes to be inaccurate or misleading, and the right to a formal hearing regarding the contested information.

The Department notes that there are certain very specific exceptions when a school may release information from a student's education record without the written permission of the parent,[387] none of which justifies denial of the right of parents to access the student education records.

Who are "parents" in the NPRM?

The NPRM fails to include additional regulatory rights for parents regarding the education records of their children. It does, however, take an extraordinary step in its definition of "parental status" to include a person acting "*in loco parentis*" with respect to the minor student.[388] That term refers to someone acting in place of a parent[389] and could, under the NPRM, include school district employees and other recipient staff.

In light of the NPRM's dramatic regulatory expansions concerning a student's "inner sense of gender," it is foreseeable that many parents may make decisions with which recipient employees (*e.g.*, teachers) may have very different views. The NPRM, without a specific provision clarifying otherwise, makes it possible for a recipient employee to act in place of a parent regarding the student's gender identity—unconstitutionally displacing the parent(s)[390] at the behest of the radical

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[385] 20 U.S.C. § 1681(a) (emphasis added).
[386] 20 U.S.C. § 1232g.
[387] 34 C.F.R. § 99.31.
[388] 87 Fed. Reg. 41,390, 41,516 (Jul. 12, 2022).
[389] BLACK'S LAW DICTIONARY (11th ed. 2019).
[390] *Gruenke v. Seip*, 225 F.3d 290, 307 (3d Cir. 2000).

new regulatory scheme. Here, where the recipient employee already has a supervisory role over students, the extension of those powers to include far more personal matters of students (*i.e.*, gender identity, sexual orientation, sex stereotypes, sex characteristics) warrants heightened public and parental concern over this proposed show of force (in support of the Department's radical social agenda as expressed through its proposed expansion of the applicability of Title IX beyond the historical, ordinary meaning of "sex" as binary and biological). The Department should welcome the preservation of parental rights rather than seek to usurp them through regulatorily unlimited *in loco parentis* status.

In light of the NPRM's usurpation of statutorily protected rights of parents (discussed *supra*), the proposed elevation of someone acting *in loco parentis* on behalf of a student alongside the rights of a biological parent, an adoptive parent, a foster parent, a stepparent, or a legal custodian or guardian is troubling. The NPRM fails to exclude school employees from acting *in loco parentis*, which provides a gaping hole through which the recipient could exercise parental authority over a child.

The NPRM establishes a regulatory scheme with tremendous implications for the innermost, hitherto private interests of students by extending Title IX to a student's gender identity (*i.e.*, one's "inner sense of gender"). The NPRM utterly fails to demonstrate why this change is needed, what problem it proposes to address, or properly to limit the potential for abuse by self-interested recipients, which can then dispense with the rights properly reserved to parents (including biological parents, adoptive parents, foster parents, stepparents, and legal guardians or custodians). The NPRM sacrifices parental rights in order to grant school employees a shocking degree of authority over the child in a manner that far exceeds the agency's statutory authority granted by Congress under Title IX.

The Department must perform a Family Policymaking Assessment

Federal law requires that, prior to implementing any policy or regulation that "may affect family well-being," the Department must evaluate its proposed rule in light of 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."[391] As there is no question that, at the very least, the provisions of the rule prohibiting

[391] Public Law 105–277, 112 Stat. 2681–529 (Sec. 654(c)).

discrimination based on gender identity and sexual orientation will have broad impacts on family well-being, the Department must assess its proposed rule in light of the seven factors listed in the law in order to avoid acting in an arbitrary and capricious manner. Any failure to do so would be arbitrary and capricious and a violation of the APA.

The slippery slope of gender identity affirmations by teachers and recipient employees

Despite the lack of statutory authority under Title IX, the NPRM would require teacher, Title IX Coordinator, or recipient employee communications with students regarding gender-affirming care. The NPRM goes to extraordinary lengths to insert a student's "inner sense of gender" into Title IX's protections and the Department's (and recipients') peculiar set of interests and newfound enforcement authorities. As discussed *supra*, elementary and secondary school employees would be obligated to monitor for and report any possible violation, objectively *and* subjectively considered, of a student's Title IX rights—now to include gender identity (and sexual orientation, sex stereotypes, and sex characteristics). The Department's proposed grant of parental authority, quite possibly to a recipient employee, such as a teacher, acting *in loco parentis* on behalf of a student, discussed *supra*, presents further concern regarding recipient advocacy of gender-affirming care for a student whose "inner sense of gender" seemed to the recipient employee (acting *in loco parentis*) to warrant the care. Recipient employees, including the Title IX Coordinator, may genuinely come to believe—having considered a young student's apparent "inner sense of gender"—that psychological or even physiological treatment is warranted. The NPRM includes no prohibition on such considerations by recipient employees, even as it assumes many parental roles regarding the student's developmental attributes.

Admiral Rachel Levine,[392] the biologically male Assistant Secretary of Health at the U.S. Department of Health and Human Services ("HHS") who identifies as a woman, maintains an official biography that emphasizes a focus "on the intersection between mental and physical health, treating children, adolescents, and young adults."[393] Admiral Levine has long expressly advocated the provision of puberty blockers, cross-sex hormones, mastectomies, and castrations for sex reassignment "transitions" for youth.[394] Of particular note, during the Admiral's confirmation hearings, Levine refused to answer whether "minors are capable of making such a life-changing decision as changing one's sex" and whether the government should be permitted to "override the

[392] *See* https://www.hhs.gov/about/leadership/rachel-levine.html.
[393] *Id*.
[394] *See* Rachel Levine, Address at Franklin & Marshall College, "It's a Transgeneration: Issues in Transgender Medicine" (Jan. 19, 2017), *available at* https://www.fandm.edu/common-hour/common-hour-archive/2017/01/30/it-s-a-transgeneration-issues-in-transgender-medicine.

parent's consent [in order] to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia."[395]

HHS recently issued guidance, "Gender-Affirming Care and Young People," that states that "[g]ender-affirming care is a supportive form of healthcare" and "may include medical, surgical, mental health, and non-medical services for trans gender and nonbinary people."[396] It advocates that "*early gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent* to focus on social transitions and can increase their confidence . . ."[397] HHS includes elementary and secondary school students as part of the intended audience for this guidance.

In the absence of contrary directives in the NPRM, the public is right to assume that the Department follows the directives of President Biden's public health experts at HHS, led by Admiral Levine, who believe and have publicly stated that children and adolescents should receive "gender-affirming care" at the earliest possible point in life.[398] The Department has arbitrarily and capriciously failed to explain in the NPRM whether the NPRM requires or authorizes school district employees and other recipients to override parental refusal to provide "gender-affirming care" for their children.

Other administration officials have parroted Admiral Levine's approach. On March 31, 2022 (the "Transgender Day of Visibility"), U.S. Secretary of State Antony Blinken equated the denial of gender-affirming care with "violence."[399] With slightly less subtlety, on the same date, HHS declared that "[t]ransgender and gender nonbinary adolescents are at increased risk for mental health issues, substance abuse, and suicide."[400] On April 7, 2022, White House Press Secretary Jen Psaki called gender-affirming care "medically necessary, lifesaving healthcare for [kids]."[401] Secretary Cardona, in announcing the NPRM, blamed the absence of additional Title IX protections based on gender identity (and sexual orientation, sex stereotypes, sex characteristics,

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[395] Madeleine Kearns, *The Absurd Criticism of Rand Paul's Rachel Levine Questioning*, NAT'L REV., Feb. 26, 2021, https://www.nationalreview.com/2021/02/the-absurd-criticism-of-rand-pauls-rachel-levine-questioning/?gclid=CjwKCAjwx7GYBhB7EiwA0d8oewgUsxWiD8lk5iSpuLpRFefGRxksoc3QtYyuI7ZOhdWjMlxY3Xn-ZRoC-wsQAvD_BwE.
[396] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
[397] *Id.*
[398] *Id*.
[399] *See* https://www.state.gov/on-transgender-day-of-visibility-2/.
[400] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
[401] *See* https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/07/press-briefing-by-press-secretary-jen-psaki-april-7-2022/.

and pregnancy or related conditions) on "higher rates of anxiety, depression, and suicide" among "LGBTQ youth."[402]

The Biden administration's enthusiasm for gender reassignment surgery is at odds with the findings of the Obama administration's Centers for Medicare and Medicaid Services, which, in 2016, determined that the surgery would not be covered[403] by plans because of insufficient evidence ("evidence gaps") that it benefits patients.[404] In contrast, the Biden administration has a clear, indignant message: adopt our rules and provide gender-affirming care or students will die.

The long-term effects of "gender-affirming care" advocated by HHS have been insufficiently evaluated

Beyond the administration's inexcusable hyperbole, reliable evidence actually indicates a higher rate of suicide among young people in jurisdictions that have increased access to "gender-affirming" care. A recent comprehensive study of the impact of such care found that "young people may also experience significant and irreversible harms from such medical interventions" and concluded that "[r]ather than facilitating access by minors to these medical interventions without parental consent, states should be pursuing policies that strengthen parental involvement in these important decisions with life-long implications for their children."[405]

Relevant "medical treatments" such as puberty blockers and cross-sex hormones among adolescents "did not exist in the United States prior to 2007 and [were] extremely rare before 2010."[406] Provision of these treatments in the U.S. is quite recent, and "[t]he effects of puberty blockers and cross-sex hormones as medical intervention for adolescents . . . has never been subjected to a large-scale randomized controlled trial (RCT), like the kind that it typically required for approval of new medications."[407]

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[402] *See* https://www.ed.gov/news/speeches/secretary-cardonas-remarks-us-department-educations-release-proposed-amendments-title-ix.
[403] *See* https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=N&NCAId=282&bc=ACAAAAAAQAAA&.
[404] Ryan T. Anderson, *Sex Change: Physically Impossible, Psychosocially Unhelpful, and Philosophically Misguided*, PUB. DISCOURSE, Mar. 5, 2018, https://www.thepublicdiscourse.com/2018/03/21151/.
[405] Jay Greene, Ph.D., *Puberty Blockers, Cross-Sex Hormones, and Youth Suicide*, HERITAGE FOUNDATION, Jun. 13, 2022, https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide.
[406] *Id*.
[407] *Id*.

Another recent analysis of a post-surgical transgender population study (published in the AMERICAN JOURNAL OF PSYCHIATRY in October 2019)[408] found that "transitioning" procedures failed to improve mental health struggles or to bring the other promised mental health benefits for patients suffering from gender dysphoria.[409] The study also found "no [mood or anxiety disorder] benefits to hormonal transition."[410]

Nonetheless, the Biden administration's medical, education, and political leadership insist these experimental treatments are requisite to saving lives, contrary to the public good with which they have been temporarily entrusted. The politicization of a person's inner sense of gender may, indeed, have tremendous medical costs resulting from the continued promotion of "gender-affirming" care. As the Biden administration promotes what can only be described as experimental gender-affirming care, in July 2022 England's National Institutes of Health ("NIH") announced closure of its child gender identity clinic following an independent review determined that its care was "leaving young people 'at considerable risk' of poor mental health and distress."[411]

The Cass Review,[412] led by former President of the Royal College of Paediatrics and Child Health, Dr. Hilary Cass,[413] noted that further examination of other mental health and cognitive issues in children should occur prior to treatment and that ". . . brain maturation may be temporarily or permanently disrupted by puberty blockers, which could have significant impact on the ability to make complex risk-laden decisions, as well as possible longer-term neuropsychological consequences." The report noted the "lack of [medical] consensus and open discussion about the nature of gender dysphoria and therefore about the appropriate clinical response," the need to "know more about the population being referred and outcomes," and that routine and consistent data collection had not occurred, undermining the ability to track outcomes.[414]

One reporter recently noted:

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[408] *See* https://ajp.psychiatryonline.org/doi/full/10.1176/appi.ajp.2019.19010080.
[409] Ryan T. Anderson, "*Transitioning" Procedures Don't Help Mental Health, Largest Dataset Shows*, DAILY SIGNAL, Aug. 3, 2020, https://www.dailysignal.com/2020/08/03/transitioning-procedures-dont-help-mental-health-largest-dataset-shows/?_gl=1*1wt7dl8*_ga*MTY2OTI1NDM0NC4xNjYxODA4MjQw*_ga_W14BT6YQ87*MTY2MTgyMjEwOC4yLjAuMTY2MTgyMjEwOC42MC4wLjA.
[410] *Id*.
[411] Jasmine Andersson & Andre Rhoden-Paul, *NHS to Close Tavistock Child Gender Identity Clinic*, BBC NEWS, Jul. 28, 2022, https://www.bbc.com/news/uk-62335665.
[412] *See* https://cass.independent-review.uk/publications/interim-report/.
[413] *See* https://cass.independent-review.uk/about-the-review/the-chair/.
[414] *Id*.

> As the Biden administration continues to try to use its regulatory powers to force a "gender-affirming" approach to children who question their sex, in other countries the rubber-stamping of a gender-dysphoric child's belief and the prescribing of puberty-blocking drugs are under serious reconsideration. *The U.K., Sweden, Finland, and France—not exactly Bible Belt countries—are all pulling back from the rush to transition children*.[415]

Iran: a world leader in gender reassignment surgeries

In fact, gender reassignment surgeries have historically been performed far more often in countries where homosexuality is illegal and may be punished with death.

Iran, for example, is an international hub for gender reassignment surgeries.[416] Iran's late spiritual and political leader, Ayatollah Khomeini, issued a religious decree calling for gender reassignment surgeries "after being moved by a meeting with a woman who said she was trapped in a man's body."[417] According to a 2021 Country Report produced by the U.S. State Department, "NGOs reported that [government] authorities pressured LGBTQI+ persons to undergo gender reassignment surgery" and that these medical "procedures disregarded psychological and physical health . . ."[418] The State Department reported that "the number of private and semigovernmental psychological and psychiatric clinics allegedly engaging in 'corrective treatment' or reparative therapies of LGBTQI+ persons continue[s] to grow."[419]

Homosexuality in Iran is a crime punishable by death, and gender reassignment surgeries are thus the preferred option—making Iran, where transsexuality was legalized in 1987, the second-leading provider in the world of such surgeries.[420] Differing from the gender reassignment procedures advocated by Admiral Levine (discussed *supra*), Iran also uses electric shock in addition to hormone treatments and "strong psychoactive medications," according to a United Nations report

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[415] Wesley J. Smith, *U.K. Transgender Clinic to Close after Damning Report: "Not Safe" for Children*, NAT'L REV., Jul. 28, 2022, https://www.nationalreview.com/corner/u-k-transgender-clinic-to-close-after-damning-report-not-safe-for-children/ (emphasis added).
[416] *Why Iran Is a Hub for Sex-reassignment Surgery: It Is Not Because the Regime Is Liberal*, ECONOMIST, Apr. 4, 2019, https://www.economist.com/middle-east-and-africa/2019/04/04/why-iran-is-a-hub-for-sex-reassignment-surgery.
[417] Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC NEWS, Nov. 5, 2014, https://www.bbc.com/news/magazine-29832690.
[418] *See* https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/iran.
[419] *See id.*
[420] JERUSALEM POST Staff, *Homosexuals in Iran Are Having Sex Reassignment Surgery to Avoid Execution*, JERUSALEM POST, Mar. 6, 2020, https://www.jpost.com/middle-east/iran-news/homosexuals-in-iran-having-sex-reassignment-surgery-to-avoid-execution-619968.

on human rights violations in Iran.[421] According to reports from prominent Iranian-born LGTB activist Shadi Amin, "[t]he government believes that if you are a gay man your soul is that of a woman and you should change your body."[422]

In the People's Republic of China ("PRC"), gender-affirming treatments are also on the rise where, according to a report by the CCP-owned CHINA DAILY, gender reassignment doctors are "[h]elping women find their inner man" through surgeries,[423] and where, according to Amnesty International, gender incongruence is still treated as a mental health disorder under Chinese law.[424] The PRC permits corrective surgeries in order to treat what Chinese law considers a mental health disorder.

The Department must withdraw the NPRM in its entirety

The NPRM ignores the proper safety, privacy, and dignity of female students. It does so despite Title IX's clear purpose of guaranteeing equal educational opportunities for female students and in defiance of the Department's own long-term guidance regarding the meaning of "sex" for Title IX purposes. With its promise of future rulemaking on the matter of sex-segregated sports, the Department claims to set aside for the moment an issue of considerable ongoing national debate; however, the regulatory text does not reflect the Department's contention that the NPRM is not intended to impact women's and girls' athletics. The NPRM's expansion of Title IX to gender identity includes no limiting language to preserve sex-segregated athletics; the proposed rule states quite clearly that failure of a recipient to respond to the demands imposed by a student's gender identity ("inner sense of self") will automatically constitute more than *de minimis* harm—thereby indicating a violation of Title IX. The NPRM does not shield sex-segregated sports from this element of the rule.

The NPRM violates the PPRA and FERPA through the monitoring and reporting requirements imposed on recipient employees by the NPRM. Those statutory requirements are simply ignored by the Department as it pursues its unprecedented reach into the sexual behavior or attitudes of students, religious practices, affiliations, or beliefs of the student or student's parent, mental or psychological problems of the student or the student's family, and the political affiliations or

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[421] Benjamin Weinthal, *Iran's Use of "Electric Shocks" on Gay Children Is Torture, Says UN Report*, JERUSALEM POST, Feb. 12, 2021), https://www.jpost.com/middle-east/iran-news/irans-use-of-electric-shocks-on-gay-children-is-torture-says-un-report-658727.
[422] Mark Hodge, *Sexual "Cleansing" Iran Is Forcing Thousands of Gay People to Have Gender Reassignment Surgery Against Their Will or Face Execution*, SUN UK, Feb. 19, 2020, https://www.thesun.co.uk/news/10998169/iran-gay-people-gender-reassignment-surgery/.
[423] Xu Junqian, *Helping Women Find Their Inner Man*, CHINA DAILY, Mar. 24, 2017, https://www.chinadaily.com.cn/china/2017-03/24/content_28660710.htm.
[424] *See* https://www.amnestyusa.org/wp-content/uploads/2019/05/Barriers-to-gender-affirming-treatments-for-transgender-people-in-China.pdf.

beliefs of the student or student's parents. By introducing gender identity (and sexual orientation, sex stereotypes, and sex characteristics) into Title IX's protections in defiance of Congress and Title IX's unambiguous, sex-based anti-discriminatory requirements, the Department mandates the collection, evaluation, and study of personal information protected by the PPRA and FERPA.

The NPRM involves recipients in matters inordinately beyond their expertise: gender identity, sexual orientation, sex stereotypes, and sex characteristics, as well as issues of "gender affirming care." The Department offers no justification to require educational institutions to delve into the highly personal inner thoughts and feelings of students. Given the lack of reasoned explanations in the NPRM on this issue, DFI urges the Department to reject the view that "gender-affirming" advocacy and referrals for experimental chemical treatments and gender reassignment surgeries on students without parental approval should ever be required of educational institutions as a Title IX condition of federal funding. Nothing in Title IX authorizes the Department to impose such requirements, particularly where, as here, Title IX is not ambiguous and the Department has failed to provide a reasoned explanation for this element of the NPRM.

For these reasons and others outlined in this comment, the Department must withdraw the NPRM in its entirety.

B. Chilling Speech and Academic Freedom Through a Broad Standard of What Constitutes Prohibited "Sex-based Harassment"

The Department's NPRM threatens to turn back the clock to the era of the Obama administration's Dear Colleague letters, when vague, sweeping OCR guidance pressured colleges and universities to shut down campus debate and police offensive speech. It jeopardizes the gains made by the Department's 2020 Rule with regard to freedom of speech on campus and would put in its place a Federal Civility Code that neglects the unique benefit the free and open exchange of ideas offers to all stakeholders in educational institutions. The Department should withdraw its proposed replacement of the term "sexual harassment" with "sex-based harassment," which it defines to include a broad swathe of constitutionally protected speech, and retain its sensible and constitutional regulations requiring recipients to respond to complaints of "sexual harassment" under Title IX.

1. Background

In its 1999 decision in *Davis v. Monroe County Board of Education*, the U.S. Supreme Court held that a school can be held liable for monetary damages on the basis of student-on-student sexual harassment, but only if "the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect . . . ."[425] It based

[425] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 647, 652 (1999).

its decision on the fact that "schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. . . . Indeed, at least early on, students are still learning how to interact appropriately with their peers."[426]

In 2001, OCR issued Revised Sexual Harassment Guidance that, in part, interpreted Title IX in accordance with the Supreme Court's decision in *Davis* two years earlier and sought to ground its enforcement of the law in strong First Amendment protections for students and employees at educational institutions. The 2001 Guidance concluded that "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. OCR recognizes that the offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a sexually hostile environment under Title IX."[427] It firmly prohibited the restriction of constitutionally protected speech and academic freedom in the name of Title IX enforcement: "in regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX (*e.g.*, in responding to harassment that is sufficiently serious as to create a hostile environment), a school must formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights."[428]

In contrast to these strong protections for free speech and academic freedom, the Department's 2011 Dear Colleague Letter ("2011 DCL") combined an emphasis on restricting due process protections for respondents in adjudicating Title IX sexual harassment proceedings (see discussion below) with no emphasis on protecting academic freedom or free speech in educational settings. The letter placed both speech and conduct in the same category as prohibited "sexual harassment," and, as explained by the American Association of University Professors, "the letter does not include any statements or warnings about the need to protect academic freedom and free speech in sexual-harassment cases, including those involving hostile-environment allegations."[429] This letter was a harbinger of the Obama administration OCR's sweeping requirements for recipients of federal financial assistance ("recipients") to restrict speech on campus, as demonstrated in its compliance letter to the University of Montana requiring the analysis of whether speech constitutes sexual harassment using a "severe *or* pervasive" standard (the standard used in the Title VII employment discrimination context).[430] These requirements led to widespread criticism in the academic community and beyond, in addition to calls for the Department (or Congress) to tie enforcement of Title IX's prohibition of sexual harassment to the Supreme Court's standard in *Davis*.[431]

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[426] *Id.* at 651 (citation omitted).
[427] *See* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf at 22.
[428] *Id.*
[429] *See* http://www.aaup.org/file/TitleIXreport.pdf at 77.
[430] *Id.* at 78 (emphasis added).
[431] *See, e.g.*, http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf at 5 ("Lawmakers should enact legislation to replace the Education Department's

Prompted by this criticism and the constitutional mandate to protect free speech and academic freedom, in 2020 the Department issued a rule ("2020 Rule") making OCR's administrative enforcement of Title IX's sexual harassment prohibition consistent with Supreme Court precedent, while departing from the Supreme Court's standard in the case of conduct-based sexual harassment to ensure the full protection of students' and employees' equal access to educational programs and activities under Title IX.[432] The 2020 Rule, which the Department now seeks to change, defined sexual harassment to include "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[433] The Department reasoned that including the *Davis* definition within its definition of sexual harassment "helps ensure that Title IX is enforced consistent with the First Amendment,"[434] and it included the "reasonable person" standard to

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overly broad harassment definition with a narrower formulation. For example, it could codify the more limited definition found in the *Davis v. Monroe* decision, defining sexual harassment as unwelcome conduct aimed at victims based on their sex that is 'severe, pervasive, and objectively offensive' enough to interfere with access to an education." (footnote omitted)); https://www.thefire.org/open-letter-to-ocr-from-fire-coalition/ ("To provide much-needed definitional clarity, while simultaneously recognizing an institution's twin obligations to protect free speech and prevent harassment, we once again urge OCR to make clear that institutions satisfy Title IX by adopting no more and no less than the definition of prohibited harassment in the educational context set forth by the Supreme Court of the United States in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999)."); http://www.aaup.org/file/TitleIXreport.pdf at 77 ("The 2011 'Dear Colleague' letter broadly defines sexual harassment under Title IX as ranging from the most serious conduct of 'sexual violence' (including rape, sexual assault, sexual battery, and sexual coercion) to a hostile environment based on speech. Further, while the 2011 letter focuses on student-on-student sexual violence, it adds that the same principles of enforcement will apply to all types of sexual-harassment cases, which include speech or conduct of a sexual or nonsexual (but gender-based) nature. Yet the letter does not include any statements or warnings about the need to protect academic freedom and free speech in sexual-harassment cases, including those involving hostile-environment allegations. With this conflation of sexual violence (which is also criminal conduct) and sexual harassment (including a hostile environment based on speech), concerns about the need to protect academic freedom and free speech seem to have been relegated to the background or ignored completely." (footnotes omitted)); *id.* at 78 ("[T]he OCR's expanded definitions of sexual harassment and hostile environment have had a negative impact on academic freedom.").

[432] Such conduct includes *quid pro quo* harassment (*e.g.*, a professor offers a student a better grade in return for sex) and sexual assault, which the rule properly does not require to be "severe, pervasive, and objectively offensive" to rise to the level of prohibited sexual harassment. 34 C.F.R. § 106.30(a).

[433] *Id.*

[434] 2020 Rule at 30,033.

reinforce the concept that the conduct was not to be judged merely on the basis of the "individualized reaction" of the complainant.[435]

2. The Department's Proposed Change

Current Rule: "*Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following: . . . (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity . . . ." 34 C.F.R. § 106.30.

Proposed Rule: "*Sex-based harassment* prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is: . . . (2) *Hostile environment harassment*. Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:

(i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;

(ii) The type, frequency, and duration of the conduct;

(iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;

(iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and

(v) Other sex-based harassment in the recipient's education program or activity." Proposed 34 C.F.R. § 106.2.

The preamble to the Department's proposed rule states that identifying "hostile environment harassment" requires "analyzing the conduct and its effect on the complainant to draw distinctions between conduct that creates a hostile environment and conduct that does not rise to that level."[436] It proposes to subjectify sexual harassment, asserting that "[a] hostile environment may manifest

[435] *Id.* at 30,144.
[436] NPRM at 41,416.

itself in different ways for different complainants."[437] It defines "hostile environment" broadly to include anyone who may witness or overhear harassment taking place, even when they are not the subject of the harassment.[438] It includes not only conduct that "denies" a person's equal access to educational programs or activities, but conduct that "limits" such equal access, sweeping more broadly to include an unpredictable range of conduct.

This proposal arbitrarily and capriciously severs the link between OCR's administrative enforcement rules and the Supreme Court's free speech- and academic freedom-oriented *Davis* standard in a way that once again subjects recipients to two competing rules in complying with one statutory command. It also threatens the ability of students and faculty, especially in the higher education context, to engage in free speech and debate on and off campus.[439]

3. Policy Analysis

(i) ED's Proposed "Sex-based Harassment" Definition Will Encourage the Investigation of Any Allegation of Harassment, No Matter the Conduct

As recipients confront these sweeping standards, which go well beyond the guardrails set out in the Supreme Court's *Davis* decision, they will feel compelled to launch an investigation of any complaint, no matter how minor the conduct at issue is, for fear of being targeted by an OCR investigation and, subsequently, a loss of federal funding. Campus authorities will once again feel compelled under Title IX to police "micro-aggressions" and "lack of a safe space."[440] Merely asking for consent to have sex could become the target of a university investigation if the person being asked considers such conduct to be "unwelcome."[441]

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[437] *Id.*

[438] *Id.* at 41,417 ("A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant. For example, if a group of students or a teacher regularly directs sexual comments toward a student, a sex-based hostile environment may be created for others in the classroom.").

[439] For a discussion of how the proposed rule purports to regulate off-campus and extraterritorial conduct in violation of the plain prohibition of such enforcement in Title IX's text, see the separate section on this issue *infra*.

[440] *See* http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf at 3 ("In the wake of these [OCR] directives and enforcement actions, many universities feel obligated to investigate virtually any allegation of harassment, regardless of its objective merit. These complaints are often cloaked in language such as 'micro-aggressions' or a 'lack of safe space.' By virtue of their vague and subjective nature, these allegations are not amenable to being disproven in any legal sense.").

[441] *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 901–902 (2016) ("Query whether a verbal or nonverbal act that is seeking explicit agreement to have sex would not be 'unwelcome conduct of a sexual nature' if a person to whom that act is directed 'did not

Following the Department's issuance of its 2011 DCL and enforcement actions prescribing the "severe or pervasive" standard for sexual harassment, commentators, litigators, and academics published the following examples (not hypotheticals) of the kind of speech that has been subjected to disciplinary proceedings by recipients that will now be required to enforce a very similar standard:

- a Muslim student privately objecting to a professor's promotion of a film about a lesbian relationship[442];
- a student posting a flyer in a dormitory suggesting that freshman women lose weight by taking the stairs[443];
- a professor including a hypothetical in his exam of a woman seeking an abortion who was thankful that a physical attack on her resulted in the death of the fetus[444];
- a professor writing an essay critical of a university's sexual harassment policies[445];
- a professor screening a documentary about the adult film industry[446];
- a professor having students act out roles involving the prostitution industry in a course on deviance[447]; and

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request or invite it' and 'regarded the conduct as undesirable.' This may seem far-fetched because it is hard to imagine that one such act could create a hostile environment. But in a letter to the University of Montana, OCR wrote that rather than limit sexual harassment claims to unwelcome conduct of a sexual nature that creates a hostile environment, the university should define sexual harassment 'more broadly' as 'any unwelcome conduct of a sexual nature.' Defining 'sexual harassment' as 'a hostile environment' leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.").

[442] *See* https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/.

[443] *Id.*

[444] Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J. COLL. & UNIV. L. 385, 392 (2009).

[445] Nadine Strossen, Law Professor and former ACLU President, 2015 Richard S. Salant Lecture on Freedom of the Press at Harvard University (Nov. 5, 2015), https://shorensteincenter.org/nadinestrossen-free-expression-an-endangered-species-oncampus-transcript/.

[446] *Id.*

[447] *Id.*

- a professor requiring students to write essays defining pornography.[448]

DFI requests that the Department specifically consider each of these examples under its "severe or pervasive" analysis and clearly advise whether a postsecondary institution would be required to investigate each of these scenarios to ensure that it prevents Title IX sex discrimination in its programs and activities.[449] Any failure to do so would constitute arbitrary and capricious decision-making by the Department.

Facing the choice of losing federal funding or aggressively targeting offensive speech, recipients have shown that they much prefer the latter and will fulfill what they perceive (because of the spirit and letter of the Department's guidance) to be their legal duties with gusto.[450] Universities have formed "bias response teams" to monitor and investigate the online activity of professors and students.[451] Students, often at the forefront of attempts to use the university's coercive authority

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[448] *Id.*

[449] *See also* https://dfkpq46c1l9o7.cloudfront.net/pdfs/be5df1a71d0eae6b7b840a2ecdb01bb9.pdf?direct ("Courses like 'The Literature of HIV/AIDS,' 'Human Sexuality,' and gender studies courses that directly address sex and sexuality can make some students uncomfortable. Even a first-year writing class that discusses a topic like female genital mutilation or other controversial topic can create discomfort. Any training for faculty, staff, and students should explain the differences between educational content, harassment, and 'hostile environments,' and a faculty member's professional judgment must be protected. Women's studies and gender studies programs have long worked to improve campus culture by teaching about issues of systemic gender inequity, sex, and sexuality. 'Dear Colleague' should encourage discussion of topics like sexual harassment both in and outside of the curriculum, but acknowledge that what might be offensive or uncomfortable to some students may also be necessary for their education.").

[450] See José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL'Y REV. 345, 358 (2017) ("In the fight against incivility, university officials too easily morph into monitors of acceptable speech—and, ultimately, into the unhappy role of 'Civility Police.' At the same time, various campus dramas conflate offensive speech with truly dangerous behavior. For instance, the broad rubric of 'sexual misconduct' now encompasses everything from sexual assault to a passing remark that a woman is beautiful or a joke deemed to be prurient or insulting. Campuses can be rendered 'unsafe' not only by actual threats of violence, but also by unexpected personal offense at controversial ideas or passing remarks.").

[451] *Id.* ("As a result, in some universities, the 'Civility Police' have started to adopt the tactics of the real police—to fight speech, not to fight crime.").

to silence expression that they deem offensive, will double down on their efforts to restrict speech on campuses under ED's proposed rules.[452]

(ii) ED's "Severe or Pervasive" Approach Will Chill Constitutionally Protected Speech

Recipients' eagerness to enforce the Department's proposed Title IX "sex-based harassment" prohibition to avoid an OCR investigation and potential loss of funding would have the predictable effect of chilling constitutionally protected speech on campuses, especially in postsecondary institutions. In its 2020 rulemaking, the Department found "widely available" evidence that recipient anti-harassment policies infringed on speech protected under the First Amendment and academic freedom and reasoned that such broadly worded policies have the harmful impact of encouraging students and faculty to avoid debate and stay silent rather than express controversial ideas.[453] At that time, the Department crafted its current standard "to ensure that Title IX's nondiscrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom, and that recipients are not held responsible for controlling every stray, offensive remark that passes between members of the recipient's community."[454]

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[452] *See* Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 744 (2017) ("Recently, students have been in the vanguard, demanding that offensive speech be silenced. Students ask to be protected from hurtful words, sentiments, even gestures, and inadvertent facial clues or rolling eyes that communicate dismissal. They seek the coercive power of authority to enforce laudable social norms—respect, dignity, and equality regardless of race, ethnicity, gender, gender identity, and so forth. Meritorious as these proclaimed goals are, the rules and penalties some students lobby for would suppress the expressive rights of others including students, faculty, and invited guests, a particularly disturbing prospect at an institution devoted to the academic enterprise.").

[453] 2020 Rule at 30,164–30,165 ("[E]vidence that broadly and loosely worded anti-harassment policies have infringed on constitutionally protected speech and academic freedom is widely available. The fact that broadly-worded anti-harassment policies have been applied to protected speech 'leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas.'" (footnotes omitted)). *See also* Majeed, *supra*, at 397 ("Of course, sexual and racial harassment policies, regardless of the terms in which they are drafted, are oftentimes applied against protected speech, which again leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment. . . . The unfortunate result, then, is that students have a strong incentive to refrain from saying anything provocative, inflammatory, or bold and to instead cautiously stick to that which is mundane or conventional. This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas.").

[454] 2020 Rule at 30,154.

By contrast, the Department's "severe or pervasive" framework will lead to an OCR-imposed Federal Civility Code[455] that shuts out "unacceptable" views on college and university campuses and motivates recipients' administrators to issue lists of things students are and are not allowed to say. Recipients should have discretion to allow their students and employees to report unwelcome, harassing behavior under their own codes of conduct, and the current regulations do not restrict institutions from doing so.[456] But the Department goes much further in its current rulemaking, imposing under Title IX a broad, federally mandated requirement for recipients to police civility on campuses, effectively deputizing these institutions to crack down on stray comments, rude gestures, and provocative essays. Congress never intended for Title IX to lay the basis for such naked federal overreach into campus speech and debate, and there is no express or implied statutory basis for the Department's unwarranted intrusion at this time. In this respect, the NPRM exceeds its statutory authority.

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[455] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) ("These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' . . . Properly applied, they will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.") (internal quotation marks and citations omitted); *Davis*, 526 U.S. at 684 (Kennedy, J., dissenting) ("[T]he majority seeks, in effect, to put an end to student misbehavior by transforming Title IX into a Federal Student Civility Code."); Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 Tulane L. Rev. 387, 407 (2002) ("Although the Court adopted different standards for institutional liability under Titles VII and IX, several themes serve as [leitmotifs], running through the cases regardless of the technical differences. Neither Title VII nor Title IX is construed as a federal civility statute; the Court does not want entities to be obliged to litigate cases where plaintiffs have been subjected to 'minor' annoyances and insults." (footnote omitted)); 2020 Rule at 30,161 ("[T]he Supreme Court has cautioned that while Title VII and Title IX both prohibit sex discrimination, neither of these Federal civil rights laws is designed to become a general civility code. . . . The *Davis* Court acknowledged that while misbehavior that does not meet that standard may be 'upsetting to the students subjected to it,' Title IX liability attaches only to sexual harassment that does meet the *Davis* standard.").

[456] 2020 Rule at 30,154 ("The Department does not believe that evaluating verbal harassment situations for severity, pervasiveness, and objective offensiveness will chill reporting of unwelcome conduct, because recipients retain discretion to respond to reported situations not covered under Title IX. Thus, recipients may encourage students (and employees) to report any unwanted conduct and determine whether a recipient must respond under Title IX, or chooses to respond under a non-Title IX policy."); *id.* at 30037–30038 ("Recipients may continue to address harassing conduct that does not meet the § 106.30 definition of sexual harassment, as acknowledged by the Department's change to § 106.45(b)(3)(i) to clarify that dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient's own code of conduct.").

The Department's proposed mandate that recipients focus on tracking and then suppressing potentially offensive speech under the "severe or pervasive" standard will inevitably strain the administrative resources of these institutions, especially smaller colleges and universities, and draw their attention away from conduct, including sexual assault and *quid pro quo* harassment, that should be their priority for enforcement under Title IX.[457] And such harmful conduct may be even more prevalent under this proposed rule, as overbroad regulations would cut off speech that some observers view as a "safety valve" permitting students to express ideas and engage in debate instead of resorting to violence and other hateful conduct.[458] Instead of allowing students and faculty to be exposed to "offensive" speech and have the opportunity to filter it into constructive dialogue,[459] the Department would force recipients to shield students and employees from such speech and stifle the "marketplace of ideas" on campuses across the country.

(iii) The Department's New Standard Destroys All Constraints to the Scope of Title IX Harassment Enforcement

It is worth noting the truly unlimited reach of the Department's proposed changes to the standard of speech that recipients must prohibit under Title IX, as these proposals go beyond the wording of Title IX's text and prohibit harassing conduct that "denies *or limits* a person's ability to participate in or benefit from the recipient's education program or activity."[460] This proposed language would provide to OCR yet another basis on which to take recipients to task for failing to police even the most minor speech and conduct. For instance, consider whether a stray sentence or slide in a university professor's lecture on "human sexuality" could make a student feel uncomfortable. Has that professor "limited" the student's ability to participate in or benefit from the university's education program? To avoid OCR scrutiny and potential loss of federal funding, must recipients be primed to launch an investigation of this professor's lecture and, quite likely,

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[457] *See, e.g.*, http://www.aaup.org/file/TitleIXreport.pdf at 81–82 ("Further, by focusing attention on speech, administrators undermine efforts to address serious issues of actual sexual misconduct.").

[458] *See* Majeed, *supra*, at 398 ("Furthermore, one of the benefits of providing breathing room for such expression is that it allows the speaker to espouse his or her views through constructive dialogue rather than act out of frustration by committing acts of violence or hate crimes. This outlet has been labeled the 'safety valve' function of speech.").

[459] *See id.* at 398–399 ("By exposing the real ugliness of prejudice, ignorance and hate, such speech can reach and convince people in ways that polite conversation never could. Moreover, ignorant or misguided speech, though seemingly possessing little value or merit on its own, often has the 'downstream' effect of leading to constructive discussion and debate which would not have taken place otherwise. Consequently, the initial expression greatly benefits the marketplace of ideas and enriches students' understanding of important issues by increasing the potential for real and meaningful debate on campus.").

[460] Proposed 34 C.F.R. § 106.2 (emphasis added).

many of this professor's other lectures and activities both in and out of the classroom? DFI asks the Department to answer these questions. Any failure to do so by the agency would constitute arbitrary and capricious decision-making by the Department.

(iv) The Department Would Inappropriately Impose the Standard of Enforcement in the Workplace Context upon Educational Institutions

By proposing to move to a "severe or pervasive" standard for alleged harassment under Title IX, the Department seeks to improperly apply the standard of enforcement under Title VII harassment in the employment context to educational institutions.

As an initial matter, this proposal would create a confusing framework of conflicting rules, as recipients would be subject to administrative enforcement under the "severe or pervasive" standard and liable for monetary damages in the courts under the "severe, pervasive, and objectively offensive" standard under the same statute. Forcing such institutions to apply these two very different standards—particularly when it comes to students, who are not subject to Title VII employment harassment standards—will strain the resources of institutions and will inevitably create conflicts between how the law is applied in the courts and in the administrative context, contributing to unpredictability in application of the law.

Moreover, as a policy matter, the Department in 2020 concluded that the Title VII harassment framework is inappropriate for the education context.[461] To put it simply, in proposing to evaluate

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[461] 2020 Rule at 30,037 ("Similarly, an institution of higher education differs from the workplace. In this regard, these final regulations are consistent with the sense of Congress in the Higher Education Act of 1965, as amended, that 'an institution of higher education should facilitate the free and open exchange of ideas.' The sense of Congress is that institutions of higher education should facilitate the free and robust exchange of ideas, but such an exchange may prove disruptive, undesirable, or impermissible in the workplace. Moreover, workplaces are generally expected to be free from conduct and conversation of a sexual nature, and it is common for employers to prohibit or discourage employees from engaging in romantic interactions at work. By contrast, it has become expected that college and university students enjoy personal freedom during their higher education experience, and it is not common for an institution to prohibit or discourage students from engaging in romantic interactions in the college environment."); *id.* ("The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments."). *See also* Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 Rutgers L. Rev. 563, 568–569 (1995) (explaining how Title VII case law restricts speech by incentivizing employers to "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked).

educational institutions under a "hostile environment" framework, the Department ignores the fact that, unlike in workplaces, Title IX is not predicated on regulating the behavior of adults in a professional setting where the "free exchange of ideas" and wide-ranging discussion and romantic coupling is common and perhaps encouraged. The law pertaining to employment discrimination reasonably does not expect companies to maintain a "marketplace of ideas" where employees can grow intellectually from constructive debate and dialogue, as students are expected to do in educational institutions. Imposing workplace-like restrictions on students, especially, would deny the constitutionally protected academic freedom that should be at the heart of the higher education system and that is inapplicable to the employment context.

4. Legal Analysis

Even if the Department chooses to ignore the harms it would do to free speech and academic freedom by vastly expanding its definition of what counts as sexual harassment, it is still constrained under the First Amendment to the U.S. Constitution, which prohibits the application of the Department's proposed standard to postsecondary institutions.

In adopting a modified *Davis* standard just two years ago, the Department reasoned that the use of such a standard was necessary to comply with constitutionally mandated protections of academic freedom.[462] Numerous U.S. Supreme Court decisions recognize the need for the free exchange of ideas in the higher education context and that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[463] Public universities are bound to abide

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[462] 2020 Rule at 30,159 n.692 ("The Supreme Court has recognized academic freedom as protected under the First Amendment. *See, e.g.*, Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) ('Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, (rather) than through any kind of authoritative selection.') (internal quotation marks and citations omitted)."); *id.* at 30,155 ("Though not specifically in the Title IX context, the Supreme Court has noted that speech and expression do not lose First Amendment protections on college campuses, and in fact, colleges and universities represent environments where it is especially important to encourage free exchange of ideas, viewpoints, opinions, and beliefs." (footnote omitted))

[463] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506–507 (1969), *quoted in Healy v. James*, 408 U.S. 169, 180–181 (1972) ("At the outset we note that state colleges and universities are not enclaves immune from the sweep of the First Amendment. . . . Of course, as Mr. Justice Fortas made clear in *Tinker*, First Amendment rights must always be applied 'in light

by the protections of the First Amendment via application of the Fourteenth Amendment's due process clause, and OCR, as a federal actor, is not permitted to override constitutional protections in enforcing Title IX.[464]

Courts have made it clear that merely being bothered by conduct, even reasonably so, cannot give rise to punishment under federal law because such punishment would violate the First Amendment.[465] The courts have, therefore, imposed thresholds expressive conduct must reach before becoming actionable under civil rights law.[466] But the Department's proposed rule sweeps

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of the special characteristics of the . . . environment in the particular case.' And, where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.") (internal citations omitted)).

[464] 2020 Rule at 30,155 n.680 ("The Department is obligated to interpret and enforce Federal laws consistent with the U.S. Constitution. *E.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 574–575 (1988) (refusing to give deference to an agency's interpretation of a statute where the interpretation raised First Amendment concerns) . . . ." (citation omitted)).

[465] *See* Brett A. Sokolow et al., *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RIGHTS 19 (2011) ("The *Tinker* standard is comparable to the *Davis* standard, which places the threshold for harassment at the point where conduct 'bars the victim's access to an educational opportunity,' in that speech can be restricted only when the educational process is substantially impeded. In other words, when reviewing school policies, and the implementation thereof, it is critical to ensure students are being disciplined as a result of the objective impact of their speech, and not solely based on its content and/or the feelings of those to whom that speech is targeted.").

[466] *See* 2020 Rule at 30,163 ("By requiring threshold levels of serious interference with work or education environments before sexual harassment is actionable, the Supreme Court standards under *Meritor* (for the workplace) and *Davis* (for schools, colleges, and universities) prevent these nondiscrimination laws from infringing on speech and academic freedom, precisely because non-discrimination laws are not 'categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content.'") (citing Sokolow at 20) ("[S]chool regulations and actions that impact speech must be content and viewpoint neutral and must be narrowly tailored to fit the circumstances. These regulations must be clear enough for a person of ordinary intelligence to understand, or courts will find them unconstitutionally void for vagueness. They cannot overreach by covering both protected and

aside all such thresholds and requires action by a recipient when, for instance, a single offensive remark is uttered (*i.e.*, severe) or flyers with mildly offensive language are spread throughout campus (*i.e.*, pervasive). The Department offers no limits to the application of this standard, and recipients are left to determine what speech they must police to avoid being subject to a withdrawal of federal funding. This is a recipe for restrictions on constitutionally protected speech and denial of academic freedom, and they should be struck down as outside of the Department's regulatory authority and unconstitutional under the First Amendment. The Department must explain why the proposed rule does not raise grave questions involving the constitutionality of its enforcement and why the Department should be entitled to deference from the courts in these circumstances.[467] In the face of these constitutional, statutory, and regulatory considerations, the Department must also explain how this element of the NPRM lies within the statutory authority granted by Congress to the Department under Title IX. Failure to answer these inquiries would constitute arbitrary and capricious decision-making by the agency in violation of the APA.

5. The Proposed Rule's Procedural Defects

(i) The Department's Proposed Rule Invents a Problem to Solve

The Department argues that its proposed rule is necessary because recipients must redress sex discrimination in their programs. But, at the same time, the Department defines sex discrimination to include "sex-based harassment," which is broader than the sexual harassment standard the Department adopted in 2020. The Department is creating the problem it says it is trying to solve by expanding the definition of sex discrimination beyond any previous regulatory definition. This circular logic and lack of a sufficient explanation for why the scope of sex discrimination must be expanded in this way is arbitrary and capricious.

(ii) The Department Fails to Explain Why It Imports the Title VII Harassment Requirement to the Title IX Context

The Department argues that it is adopting a Title VII-based "severe or pervasive" analysis to examine recipients' responses to "sex-based harassment" in the Title IX context to streamline recipients' responses to multiple civil rights statutes. However, the proposed rule forces institutions to engage in a fact-specific analysis to determine whether sex discrimination has occurred, which includes evaluating how a student versus an employee reasonably perceives the

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unprotected speech or courts will find them unconstitutionally overbroad. The regulation cannot act to preemptively prevent students from exercising their right to freely express themselves because the courts will find the prior restraint of speech presumptively unconstitutional.").

[467] *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574–575 (1988) (declining deference to the interpretation of a statute by the agency because such an interpretation raised concerns under the First Amendment).

environment. Thus, under the proposed rule, schools are forced to perform a different analysis for students as they do for employees, so it is unclear what, if any, benefits in terms of consistency might accrue from the importation of the Title VII standard to the Title IX context. Failure by the Department to resolve this question would constitute arbitrary and capricious decision-making.

C. Eviscerating the Due Process Rights of Students and Employees Accused of "Sex-based Harassment" and Other Sex Discrimination

On May 19, 2020, the Department issued regulations under its Title IX rulemaking authority that, for the first time, recognized that sexual harassment (including sexual assault) is a form of sex discrimination prohibited by Title IX, required recipients of federal education funding to respond to reports of sexual harassment by offering supportive measures to alleged victims ("complainants"), and outlined a grievance process for investigating and evaluating complaints of sexual harassment under Title IX that is carefully calibrated to require recipients to offer equitable procedural protections to both complainants and those accused of such harassment ("respondents"). The issuance of the 2020 Rule came nearly 18 months after the Department's publication of its proposed rules ("2018 NPRM") and involved the painstaking review of and response to over 124,000 comments from the public[468] that resulted in nearly 550 pages of explanation, analysis, revisions, and justification of the rule's provisions.

Although the 2020 Rule has only been effective since August 2020, the NPRM now abruptly shifts course to sweep away in a single stroke the balanced and important protections the 2020 Rule offered complainants and respondents in sexual harassment proceedings merely two years after their issuance. In some cases, as with the return of the "single investigator" model, the NPRM would simply turn back the clock and pretend that the 2020 Rule never happened, discounting any reliance interest recipients placed on the clear path set out by the previous administration. In other cases, as with live hearings and access to evidence, the Department's proposed rule either eliminates or waters down the rights protected in the 2020 Rule to the extent they are meaningless, often citing the need for discretion among recipients but ignoring the fact that the critical due process rights that benefit both complainants and respondents should be beyond the reach of such discretion.

The NPRM delivers the ultimate blow to the 2020 Rule's due process protections by *instructing* recipients to use a "preponderance of the evidence" standard—the lowest standard commonly offered in the U.S. justice system—for sexual harassment complaints unless it uses a higher standard in all other "comparable proceedings," thus all but ensuring that recipients will use the lower standard.

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[468] 2020 Rule at 30,055.

As described below, the proposed rule would turn Title IX sexual harassment proceedings into mere theatre, impose needless suffering on complainants and respondents in these proceedings, and result in costly uncertainty for recipients about what is required in such proceedings, all of which conflict with sound principles of common-sense and experience, as well as the constitutional and legal obligations of recipients toward their students and employees. In short, the Department should withdraw its proposed rule, allow recipients to continue to implement the requirements of the 2020 Rule, and abandon its planned assault on the due process rights of those involved in Title IX sexual harassment proceedings.

1. Background

The text of Title IX, which prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance,"[469] does not explicitly refer to sexual harassment as a form of sex discrimination and contains no reference to the procedures educational institutions ("recipients") must use to guarantee a fair process to resolve complaints of sex discrimination under education programs or activities. However, since the original regulations adopted by its predecessor agency in 1975, the Department has required recipients to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part."[470] Moreover, federal law requires that institutions of higher education participating in federal programs must provide a basic degree of due process to parties in cases of alleged sexual assault, including "a prompt, fair, and impartial investigation and resolution,"[471] the right of parties to be accompanied to proceedings by an advisor of their choice,[472] and the right of parties to receive written notice describing the outcome of the proceeding.[473]

The Department's characterization of recipients' obligations to create grievance procedures to adjudicate Title IX sex discrimination claims operates against a backdrop of federal court jurisprudence recognizing, in Title IX and other cases, that schools, colleges, and universities must afford their students and employees due process before they are disciplined, terminated, or expelled. In the landmark case *Dixon v. Alabama State Board of Education*,[474] the U.S. Court of Appeals for the Fifth Circuit held that the interests of students at a public college in continuing to attend that college require the college to offer them due process rights under the Fourteenth Amendment to the U.S. Constitution before they are expelled. The U.S. Supreme Court accepted

[469] 20 U.S.C. § 1681.
[470] 45 C.F.R. § 86.8(b) (now, as modified, at 34 C.F.R. § 106.8(c)).
[471] 20 U.S.C. § 1092(iv)(I)(aa).
[472] 20 U.S.C. § 1092(iv)(II).
[473] 20 U.S.C. § 1092((iv)(III)(aa).
[474] 294 F.2d 150 (5th Cir. 1961).

this reasoning fourteen years later in *Goss v. Lopez*,[475] where it held that public elementary school students are entitled to Constitution-based due process rights before they are disciplined. It specifically identified the right to notice of the "specific charges," the opportunity to be heard, and the opportunity to present evidence.[476] The Court indicated that more serious charges, such as those potentially resulting in prolonged suspensions or expulsions, could require greater due process protections.[477] Therefore, in regulating the procedures offered to students and employees for adjudicating Title IX sex discrimination complaints, OCR must work within the clear bounds of the law by not forcing (or coercing) recipients to abandon procedures guaranteeing such students and employees their constitutionally mandated due process rights.[478]

Federal courts have extended narrower but still meaningful due process protections to students at private schools, colleges, and universities, finding that these institutions must comply with basic contract rules in complying with their rules and procedures before disciplining students and that discipline decisions must not be "arbitrary and capricious" or violate "basic fairness."[479] Despite

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[475] 419 U.S. 565 (1975).
[476] *See* http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf at 1 (citing *Goss v. Lopez*, 419 U.S. 565 (1975)).
[477] Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 79 (2013).
[478] Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. J. 487, 511 (2012) ("Admittedly, the OCR is tasked with enforcing Title IX, not with ensuring that students accused of sexual assault are provided appropriate due process. But because public institutions must also ensure that students' due-process rights are constitutionally protected, Title IX must operate within constitutional limits and may not mandate a more expeditious proceeding than the Constitution would require. Without affirmative guidance on how to balance these competing obligations, the OCR's views on Title IX will remain ineffectual, thereby endangering victims, increasing the probability of liability on the part of the institution for denial of due process, and jeopardizing the accused student's due-process rights.").
[479] http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf at 1 (citing *Coveney v. Pres. of Coll. of the Holy Cross*, 388 Mass. 16, 19-20, 445 N.E.2d 136 (Mass. 1983); *Schulman v. Franklin & Marshall College*, 538 A.2d 49, 52, 371 Pa. Superior Ct. 345, 351 (Pa. Super. Ct. 1988); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 432 Mass. 474, 481 (Mass. 2000); *Fellheimer v. Middlebury College*, 869 F. Supp. 238, 244 (D. Vt. 1999); *Ahlum v. Adm'rs of the Tulane Educ. Fund*, 617 So.2d 96, 98-99 (La. Ct. App. 1993); *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983)); Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 BOSTON COLL. L. REV. 653, 663–664 (2001) (describing how courts have been more lenient to private schools on DP issues and review under an arbitrary and capricious or basic fairness standard); Triplett at 504 (describing the outcome of *Corso v. Creighton University*, where a "court declined to give deference to an institution's adjudication of academic infractions and instead found that the institution had breached its contractual

the broader discretion courts have traditionally granted private institutions regarding their responsibilities to provide basic due process protections to students, federal courts have in recent years overturned disciplinary decisions against students at private universities in light of procedural unfairness.[480]

Furthermore, OCR, as a federal government actor, is not permitted to force private actors, including private recipients, to violate the due process rights of their students or employees by restricting those private recipients from granting participants in grievance processes their basic due process rights prior to imposing discipline. As one legal expert puts it, "[W]hen the government forces a private institution to do something that would violate due process if done by a government institution, that does violate the due process clause."[481] This rule finds support in cases like *Merritt v. Mackey*,[482] where the U.S. Court of Appeals for the Ninth Circuit held that an employee of a nonprofit contractor that partnered on projects with the federal government could pursue a property interest claim against the government after it mandated that he be removed from his employment as a condition of the contractor's retaining federal funding.[483] In this case, OCR is a federal agency demanding the utilization of certain diminished procedures and standards by public and private recipients, such as the use of a "preponderance of the evidence" standard, under pain of withdrawal

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promise of due process). At least one commentator has called for courts to review disciplinary decisions against private university students under a "heightened standard of scrutiny" to protect due process rights, including the right to written notice of charges and evidence, a presumption of innocence, a minimum standard of proof, the right to an impartial hearing, and the right to a transcript or recording of the proceeding and to an appeal. *Id.* at 685–686, 687–689.

[480] Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. OF LAW & PUB. POL'Y 533, 551–552 (2016) (describing *Doe v. Rector & Visitors of George Mason Univ.*, 179 F. Supp. 3d 583 (E.D. Va. 2015), in which "[t]he federal court ruled that the university violated due process because the student was not given an opportunity to defend himself when the school failed to notify him of the other charges, and noted the problematic fact that the dean had 'made up his mind so definitively that nothing the accused student might have said could have altered his decision,'" and *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016), in which "[t]he court held that Brandeis University failed to provide sufficient notice of the charges against the accused student and did not allow him to cross-examine the complainant or his witnesses," along with allowing a former OCR attorney to serve as "prosecutor, judge, and jury" in the case).

[481] *See* https://libertyunyielding.com/2015/09/30/no-ocrs-april-4-2011-dear-colleague-letter-not-entitled-deference/.

[482] 827 F.2d 1368 (9th Cir. 1987).

[483] *Id.* at 1372 ("It is clear on the facts before us that Merritt was the actual and intended victim of the agents' coercive dealings with KADA. Merritt therefore states a claim under section 1983 that he was deprived of his property interest in continued employment when the state and federal agents intentionally coerced KADA to fire him.").

of federal funding. Therefore, these procedures and standards must comply with constitutional guarantees of due process.[484]

Prior to 2011, OCR offered recipients a great deal of discretion in developing their procedures relating to sexual harassment. In its 2011 DCL, OCR adopted a radically divergent approach to its previous deference, demanding that schools evaluate sexual harassment complaints under a "preponderance of the evidence" standard[485] and casting doubt on other procedural protections institutions offered students and employees accused of sexual harassment, including by discouraging cross-examination by the parties and warning that constitutional due process requirements must not stand in the way of a prompt grievance process.[486]

By interfering with recipients' Title IX grievance processes and forcing them to tilt the standard of proof to give complainants a higher likelihood of success with the "preponderance of the evidence" standard, the 2011 DCL spurred hundreds of students to file complaints with OCR alleging that their schools did not provide them with a fair and equitable grievance process[487] and led to a sharp increase in lawsuits from over 200 accused students against colleges and universities

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[484] *See also* Cory J. Schoonmaker, *An "F" in Due Process: How Colleges Fail When Handling Sexual Assault*, 66 SYRACUSE L. REV. 213, 237 (2016) (asserting that ED has violated students' due process rights with its 2011 DCL because it forces colleges to violate the due process rights of their students); 2020 Rule at 30,051 ("The Department, as an agency of the Federal government, is subject to the U.S. Constitution, including the Fifth Amendment, and will not interpret Title IX to compel a recipient, whether public or private, to deprive a person of due process rights." (footnote omitted)). *But see* Gersen & Suk, *supra*, at 911 (explaining that courts have not yet accepted the "plausible argument that the government's defunding threat coerces adoption of its preferred procedures and therefore constitutes state action to which due process requirements attach," leading to the lamentable outcome of "the offloading of government responsibility to new mini-bureaucracies inside schools has made it more difficult to subject the federal sex bureaucracy to judicial scrutiny.").

[485] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf at 11 ("Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).").

[486] *Id.* at 12 ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing."); *id.* ("Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."); *id.* ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint.").

[487] 2020 Rule at 30,048 (citing a graph in the Chronicle of Higher Education, Title IX: Tracking Sexual Assault Investigations showing a significant increase in the number of OCR Title IX investigations following the 2011 DCL.).

asserting that, in disciplining them for sexual misconduct, their institutions failed to abide by their due process rights,[488] with 72 schools losing such challenges as of December 2017.[489] The 2011 DCL generated an outcry from many in the academic community, including criticism that the policies described in the letter "unlawfully expanded the nature and scope of institutions' responsibility to address sexual harassment, thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding"[490] and "has undermined the neutrality of many campus investigators and adjudicators by forcing them to consider the broader financial impact of their actions," forcing innocent students into "'academic and professional limbo'" and "relegating them to a lifetime of diminished income and social stigmatization as sexual offenders."[491]

In light of the damage the 2011 DCL inflicted on parties to Title IX sexual misconduct proceedings and the costly litigation surrounding responsibility determinations whose legitimacy recipients were forced to undercut, the Department withdrew the letter in 2017 and in 2020 issued the first-ever regulations standardizing due process protections recipients must provide to parties to Title IX sexual harassment proceedings. As the Department explained, "While due process of law is a flexible concept, at a minimum it requires notice and a meaningful opportunity to be heard, and the Department has determined that with respect to sexual harassment allegations under Title IX, both parties deserve procedural protections that translate those due process principles into meaningful rights for parties and increase the likelihood of reliable outcomes."[492]

As noted above, the Department's issuance of the rule in May 2020 followed a detailed review of over 124,000 public comments.[493] In addition to its groundbreaking regulatory recognition of sexual harassment (including sexual assault) as a violation of Title IX's prohibition of sex

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[488] 2020 Rule at 30,048 (citing Taylor Mooney, *How Betsy DeVos Plans to Change the Rules for Handling Sexual Misconduct on Campus*, CBS NEWS (Nov. 24, 2019) ("Prior to 2011, the number of lawsuits filed against universities for failing to provide due process in Title IX cases averaged one per year. It is expected there will be over 100 such lawsuits filed in 2019 alone.").
[489] *See* https://academicwonderland.com/2017/12/08/pomona-the-courts-basic-fairness/.
[490] *See* http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf at 1.
[491] *Id.* at 4 (quoting http://www.bostonglobe.com/metro/2015/05/29/amherst/4t6JtKmaz7vlYSrQk5NDyJ/story.html and http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts). *See also* https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures ("The AAUP advocates the continued use of 'clear and convincing evidence' in both student and faculty discipline cases as a necessary safeguard of due process and shared governance. The committee believes that greater attention to policy and procedures, incorporating practices we have suggested here, is the more promising direction.").
[492] 2020 Rule at 30,364.
[493] *See, e.g., id.* at 30,044.

discrimination and requirement to offer supportive measures to complainants (whether or not they file a formal complaint initiating a grievance process), the 2020 Rule carefully and painstakingly balanced the due process rights of complainants and respondents involved in the Title IX sexual harassment complaint process, along with the need for discretion in light of the broad variety of regulated recipients, by requiring grievance processes that do the following:

- Treat complainants and respondents equitably and, when they include rules voluntarily adopted by the recipient, ensure that those rules are applied equally to the parties;
- Objectively evaluate all relevant evidence and require those in charge of the proceedings to be free from conflicts of interest and bias;
- Place the burden of gathering evidence on the recipient;
- Provide the parties an equal opportunity to review evidence and the recipient's investigative report summarizing the relevant evidence, as well as present evidence and fact and expert witnesses;
- Presume the innocence of the respondent until the end of the grievance process;
- Provide written notice to the parties of the formal, signed complaint required to start the grievance process; any dismissal of such a complaint; any requested or expected participation by the parties in meetings, hearings, or interviews; and the determination of responsibility and explanation of the determination at the end of the grievance process;
- Include reasonably prompt time frames;
- Notify the parties of important information about the grievance process;
- Protect legally recognized privileges;
- Permit the parties to choose an advisor to assist them in the grievance process;
- In the context of college and university proceedings, hold a live hearing permitting the parties' advisors (but not the parties personally) to conduct cross-examination;
- In the context of non-postsecondary institutions, hold a live hearing *or* give parties an equal opportunity to submit written questions for other parties and witnesses;

- Require that the decisionmaker in a proceeding not be the Title IX Coordinator or the person who investigated the complaint;

- Offer appeals on an equal basis to each party on specified bases;

- Require the decisionmaker to use the same standard of evidence (either the preponderance of the evidence or the clear and convincing evidence standard) as the recipient prescribes for all formal complaints of sexual harassment to reach a determination of responsibility; and

- Require recipients to maintain records relating to sexual harassment reports and proceedings.[494]

Just over two years after the issuance of these carefully crafted requirements for universities to provide fundamental procedural protections to complainants and respondents in Title IX sexual harassment proceedings, the Department abruptly and summarily proposes to change its mind and seeks to turn back the clock to the uncertain, costly, and harmful era of the 2011 DCL letter, when the Department instructed schools to tilt the benefits of due process away from respondents. This about-face does not help complainants or respondents in sexual harassment proceedings and certainly does not help recipients attempting to comply with constitutional, statutory, and regulatory requirements to provide a fair process to parties to such a proceeding. Below, we review the specific ways in which the NPRM falls woefully short of providing due process to everyone involved in a sexual harassment proceeding, but first it is worth considering the benefits of broad due process protections to educational communities and the importance of the procedural protections to complainants, respondents, and recipients that ED now proposes to abandon.

2. Policy Benefits of Ensuring Due Process Protections

In *McNabb v. United States*,[495] Justice Felix Frankfurter noted, "The history of liberty has largely been the history of observance of procedural safeguards."[496] Broadly speaking, the due process protections enshrined in the 2020 Rule that are under threat through the current rulemaking are rooted in the traditions of American liberty, a tradition that the proposed rule transparently attempts to downplay, evade, or even outright oppose.[497] In its preamble, the 2020 Rule referred to the U.S. Supreme Court's elegant formulation of constitutional guarantees of due process in *Rochin v.*

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[494] 2020 Rule at 30,053–30,054.
[495] 318 U.S. 332 (1943).
[496] *Id.* at 347, *quoted in* Tenerowicz, *supra*, at 682.
[497] *See, e.g.*, NPRM at 41,507 (discussing the benefits of an inquisitorial system of justice as opposed to an adversarial system that includes the right to cross-examine witnesses).

California,[498] where the Court recognized that the requisite "standards of justice are not authoritatively formulated anywhere as though they were specifics" but are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "implicit in the concept of ordered liberty."[499] The Department, consistent with its priorities in 2020, based its rules in such "'standards of justice' fundamental to notions of 'decency and fairness,'" even in the case of "heinous offenses" like sexual assault, implicit in the idea of ordered liberty in America.[500] The NPRM seeks to tear down this tradition-infused structure and plot a path toward a brave new world based on the supremacy of the investigator and decisionmaker over the interests of the parties.

Likewise, with its NPRM, ED now ignores the importance of the search for the truth in educational communities. As one commentator has written, and as is particularly applicable in the college and university context, "the institution itself has often demonstrated a commitment to the discovery of truth in all aspects of the educational environment, and this mission would be furthered by implementing additional process requirements."[501] The NPRM completely fails to take into account the increased costs it will impose on recipients by forcing them to decrease confidence in the outcome of the proceedings by eliminating consistent due process protections. As the 2020 Rule noted, "'Research demonstrates that people's views about their outcomes are shaped not solely by how fair or favorable an outcome appears to be but also by the fairness of the process through which the decision was reached. A fair process provided by a third party leads to higher perceptions of legitimacy; in turn, legitimacy leads to increased compliance with the law.'"[502] By doing away with critical protections of the 2020 Rule, including the right to cross-examination by the advisors of both parties and requirement that the decisionmaker be different from the ultimate investigators, the NPRM would drastically decrease the confidence of students, parents, and employees in the legitimacy of Title IX proceeding outcomes.

The NPRM fails to consider the fact that the 2020 Rule applies important due process protections *to all parties* to a grievance proceeding.[503] The procedures prescribed by the 2020 Rule "ensure

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[498] 342 U.S. 165 (1952).
[499] 2020 Rule at 30,050 (quoting *Rochin* at 169 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).
[500] *Id.*
[501] Triplett, *supra*, at 515 (footnote omitted).
[502] 2020 Rule at 30,050 (quoting Rebecca Holland-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2084 (2017). *See also* Tenerowicz, *supra*, at 684–685 ("Procedural safeguards benefit the entire school community by serving to legitimize the exercise of disciplinary authority, thereby fostering a sense of justice, fairness and community on campus. These values, in turn, create an effective educational environment.").
[503] For instance, as explored below, current 34 C.F.R. § 106.45 requires recipients to allow both complainants and respondents to have their advisor ask questions of the other party and witnesses. In cases like sexual assault cases that often revolve completely around credibility of

that Title IX is enforced consistent with both constitutional due process, and fundamental fairness, so that . . . the student has the benefit of a consistent, transparent grievance process with strong procedural protections regardless of whether the student is a complainant or respondent."[504] "[F]actually accurate" and reliable outcomes are important both to respondents and complainants,[505] especially when an inaccurate outcome or procedural failing, such as bias by the decisionmaker, could lead to litigation that requires the complainant to continue to relive and answer questions about the conduct at issue. Moreover, a fair process that leads to a more reliable outcome places the recipient in a better position to know, at the conclusion of the proceeding, what disciplinary measures, if any, are needed for the respondent and what remedies must be granted to the complainant to ensure he or she is no longer deprived of equal educational access.[506]

The NPRM fails to consider the life-altering consequences the faulty and biased procedures it either permits or mandates will have on students and employees who are more likely under the procedures to be falsely found responsible for heinous sexual conduct, such as sexual assault. Students who are expelled or dismissed from an educational institution, especially at the postsecondary level, may not be able to gain admission to another institution to earn their degree, will thereby find it more difficult to obtain a job or be admitted to a graduate or professional school, and may experience permanent reputational injury.[507] Given the likely damages to student-

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the witness, a live hearing with cross-examination offers complainants and respondents alike with the opportunity to question the other party's (or a witness's) version of events. *See* Triplett at 513 ("[W]hen witness credibility is essential, oral evidence and cross-examination are very important because, without such evidence, the risk of erroneous deprivation of liberty is high. Most campus sexual-assault cases fall into this area of disputed facts. A verdict will often turn on the disciplinary panel's view of witness credibility, rather than on debates between experts.).

[504] 2020 Rule at 30,047.

[505] *Id.* at 30,051 ("Both parties, as well as recipients, benefit from a process geared toward reaching factually accurate outcomes. The § 106.45 grievance process prescribed in the final regulations is consistent with constitutional due process guarantees and conceptions of fundamental fairness, in a manner designed to accomplish the critical goals of ensuring that recipients resolve sexual harassment allegations to improve parties' sense of fairness and lead to reliable outcomes, while lessening the risk that sex-based bias will improperly affect outcomes.").

[506] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,472 (Nov. 29, 2018) (hereinafter "2018 NPRM") ("Only when an outcome is the product of a predictable, fair process that gives both parties meaningful opportunity to participate will the recipient be in a position to determine what remedies and/or disciplinary sanctions are warranted.").

[507] *See* Tenerowicz, *supra*, at 683 ("Because a university degree is generally required for employment in technologically sophisticated fields and for admission to graduate and professional school, and because students with university degrees often earn higher salaries than students who are not university graduates, an erroneous expulsion may foreclose future

respondents, schools will certainly incur increased costs associated with civil lawsuits alleging school liability resulting from the school's diminished procedural safeguards in its grievance processes. To lower due process standards in this area will result in more erroneous findings of responsibility, and the Department must account for the costs (both economic and intangible) of this inescapable outcome of its proposed rule.

This is especially true when it comes to the potentially disproportionate impact on minority students of the evisceration of due process protections. OCR's Civil Rights Data Collection has shown that "African-American students . . . are more than three times as likely as their white peers . . . to be expelled or suspended" in elementary and secondary schools,[508] and OCR has asserted that "the substantial racial disparities . . . are not explained by more frequent or more serious misbehavior by students of color."[509] Given OCR's position that "racial discrimination in school discipline is a real problem,"[510] it must recognize that its proposed rule removing students' due process protections can only make matters worse by subjecting African-American male students to life-altering discipline without procedural fairness and could hamper its enforcement of Title VI, which prohibits racial discrimination in education.[511]

3. Proposed Changes in 2022 NPRM

(i) Return of the Single-Investigator Model

Current Rule: "The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility." 34 C.F.R. § 106.45(b)(7)(i).

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economic opportunities for that student. Thus, the economic wound inflicted by an expulsion could remain with the student for the rest of life. In addition, in some instances the wound can run deeper and permanently damage the student's good name, reputation and integrity."); *Triplett* at 512–513 ("[C]ompared to the effects of other types of infractions such as academic dishonesty, the implications of being found responsible for sexual assault by a judicial panel can endure throughout one's lifetime. Some of the more extreme cases, including the Duke lacrosse scandal and the University of the Pacific gang-rape case, demonstrate how college sexual-assault proceedings have resonance with the national media. Although not every sexual-assault case will garner such far-reaching publicity, many offenses do attract local media coverage and can provoke significant discussion and controversy among the student body.").

[508] Gersen & Suk, *supra*, at 943 (quoting http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf).

[509] *Id.* (quoting http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf).

[510] *Id.* (quoting http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf).

[511] 42 U.S.C. 2000d *et seq.*

Proposed Rule: "The decisionmaker may be the same person as the Title IX Coordinator or investigator; . . ." Proposed 34 C.F.R. § 106.45(b)(2).

In the process culminating in the 2020 Rule, the Department came to the common-sense conclusion, ingrained in the idea of due process in America, that "the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person (or team of persons each of whom performed all those roles)."[512] Therefore, the Department prohibited recipients from using a decisionmaker who is also the Title IX Coordinator, who takes in harassment reports and complaints, or the investigator of the formal complaint.

Two years later, in an abrupt about-face and based on the naïve idea that such an arrangement will not result in bias and unfairness because people involved in recipients' Title IX grievance processes are well-meaning, the Department proposes to allow the Title IX Coordinator, investigator, and decisionmaker to be the same person. As with its other due-process related changes in its NPRM, the Department prioritizes the supremacy of recipients' discretion in Title IX complaints to the detriment of complainants, respondents, and the fundamental principles of justice.

The basic flaw in the single-investigator model is that it decreases the reliability and accuracy of outcomes. "Combining the investigative and adjudicative functions in a single individual may decrease the accuracy of the determination regarding responsibility, because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome."[513] Title IX Coordinators and investigators will have access to a substantial amount of evidence, including communications with the complainant upon the intake of the complaint and evidence that is not relevant or directly related to the allegations, upon which a decisionmaker, under a fair process, would not base his or her finding at the conclusion of the proceedings.[514]

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[512] 2020 Rule at 30,367.
[513] *Id.*
[514] *Id.* at 30,370 ("At each phase, the person responsible for the recipient's response likely will receive information and have communications with one or both parties, for different purposes. For example, the Title IX Coordinator must inform every complainant about the availability of supportive measures and coordinate effective implementation of supportive measures, while the investigator must impartially gather all relevant evidence including party and witness statements, and the decisionmaker must assess the relevant evidence, including party and witness credibility, to decide if the recipient has met a burden of proof showing the respondent to be responsible for the alleged sexual harassment. Placing these varied responsibilities in the hands of a single individual (or even team of individuals) risks the person(s) involved improperly relying on

These positions require their occupants to seek information for vastly different purposes—the Title IX Coordinator as a resource for the complainant in offering supportive measures, the investigator to access a broad universe of evidence from parties and witnesses to develop an initial opinion on what occurred, and the decisionmaker to consider relevant evidence and its characterization by the parties in coming to responsibility determination—making it inevitable that information obtained in one role would bleed into the person's decision in another role and ultimately taint his or her view of the evidence. Bias is the predictable outcome, and the Department provides no evidence to support a contrary view and ignores the many cases involving schools using the single-investigator model that have been found liable in favor of student-respondents.

Permitting the same person to serve in these roles will only serve to decrease the legitimacy of the Title IX grievance process in the eyes of the recipient's community, resulting in plummeting trust in the accuracy of outcomes paired with rocketing numbers of OCR complaints and lawsuits from parties claiming an unfair grievance process.[515] This Department measure, purportedly aimed at increasing discretion and reducing costs of Title IX discrimination proceedings, will do the opposite, as recipients will be subject to costly court battles that will likely force them, on the basis of fundamental due-process principles, to offer new proceedings to the parties. Indeed, the Department ignores the many cases where institutions have been found liable for failure to provide minimum due process safeguards—circumstances aggravated by the use of the single-investigator model. The Department's inexplicable proposal, decreasing the reliability of grievance proceedings in the name of efficiency, will have dramatic, life-altering impacts, especially for students and employees subject to the most serious allegations related to sexual assault and others requiring expulsion from the recipient's education program. As seen with the 2011 DCL, it will also increase liability risk and costs for educational institutions.

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information gleaned during one role to affect decisions made while performing a different role. For example, a Title IX Coordinator may have a history of communications with the complainant before any formal complaint has been filed (for instance, due to implementing supportive measures for the complainant), which may influence the Title IX Coordinator's perspective about the complainant's situation before the Title IX Coordinator (if allowed to be the 'decisionmaker') has even spoken with the respondent. Similarly, an investigator may obtain information from a party that is not related to the allegations under investigation during an interview with a party, and if the investigator also serves as the decisionmaker, such unrelated information may influence that person's decision making, resulting in a determination that is not based on relevant evidence. Separating the roles of investigation from adjudication therefore protects both parties by making a fact-based determination regarding responsibility based on objective evaluation of relevant evidence more likely.").

[515] *Id.* at 30,367 ("Commenters correctly noted that separating the investigative and decision-making functions will not only increase the overall fairness of the grievance process but also will increase the reliability of fact-finding and the accuracy of outcomes, as well as improve party and public confidence in outcomes.").

After relying on these powerful arguments to formulate a truly equitable, sensible, and constitutionally sound policy only two years ago, the Department now chooses to "reweigh[]" the comments it received in the last rulemaking and argues that because it continues to require recipients to offer "equitable treatment" to the parties, mandates that they train decisionmakers and prohibits them from being biased, requires recipients to evaluate evidence "objectively," and offers some procedural rules to the parties, a person's role as Title IX Coordinator or investigator will not taint that person's later finding of responsibility or non-responsibility in a Title IX proceeding.[516] That the Department actually believes the mere words of the Title IX regulations prohibiting bias would be sufficient to prevent confirmation bias and reliance on evidence that is not relevant beggars belief.

The Department offers no reasoned explanation or supporting data as to why its grievance process "provisions would reinforce each other in protecting the overall fairness and accuracy of the grievance procedures," when the Department's proposed procedure is a race to the bottom in terms of due process protections, eliminating the requirement for a live hearing and cross-examination, restricting access to the evidence, and effectively requiring a lower burden of proof in responsibility determinations, among other changes discussed below. Of course, regardless of whether the Department has a change of heart and decides to keep the important due process protections it created two years ago, resurrecting the single-investigator model alone would indelibly taint the legitimacy and reliability of the Title IX grievance process.

The Department offers a further, unconvincing explanation for bringing back the single-investigator model: "In conducting an investigation and reaching a determination, the recipient's responsibility is to gather and review evidence with neutrality and without bias or favor toward any party. That is, the recipient is not in the role of prosecutor seeking to prove a violation of its policy. Rather, the recipient's role is to ensure that its education program or activity is free of unlawful sex discrimination, a role that does not create an inherent bias or conflict of interest in favor of one party or another."[517]

But the Department fails to explain how prosecutors—or police officers, for that matter—are any different from investigators in Title IX proceedings. Are these public officials not simply committed to upholding the rule of law and punishing and deterring the commission of a crime in

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[516] NPRM at 41,467 ("After reweighing the facts and circumstances, including but not limited to the feedback received through listening sessions and the June 2021 Title IX Public Hearing, it is the Department's current view that the single-investigator model, when implemented in conjunction with the other proposed measures designed to ensure equitable treatment of the parties as required throughout proposed § 106.45, and if applicable proposed § 106.46, can offer recipients an effective option for resolving complaints of sex discrimination in a way that ensures fair treatment of all parties and enables compliance with Title IX.").
[517] *Id.*

each individual criminal case? If so, why not save public resources by permitting them to serve as judges and juries in these cases? Of course, the correct answer is that prosecutors and police officers are not permitted to serve as a judge or on the jury of a case in which they were involved because they would be biased due to facts they gleaned and opinions they adopted in their other roles, and their serving in all of these roles would destroy public confidence in the integrity of the justice system.

The Department needs to give a reasoned explanation and supporting data as to why Title IX Coordinators, investigators, and decisionmakers are so much more committed to the ideals of eliminating discrimination in education in an even-handed way than are police, prosecutors, judges, and juries in upholding the rule of law that the former can be trusted with combined roles while the latter cannot. It also needs to provide clear explanations and data as to why their combination would not harm the educational community's view of the legitimacy of the Title IX grievance process in a similar manner to how the combination of law-enforcement, prosecutorial, and adjudication functions would reduce confidence in the justice system.

The Department offers another wholly unpersuasive argument in favor of the single-investigator model: "If a recipient has a small school or campus community, a requirement that increases the number of employees involved in the grievance procedures also increases the likelihood of the parties having to interact with those employees in the regular course of their participation in the recipient's education program or activity."[518] We ask that the Department point to any data, survey results, or any other information it has gathered indicating that students or employees at schools, colleges, or universities would prefer to have their claims adjudicated in an inherently unreliable process that involves investigator, judge, and jury all being the same person, leading to unjust results and potentially lifelong stigma in the case of sexual assault findings, than be granted fundamental due process protections but be more likely to encounter an employee who was involved in that process after it has concluded. When presented with these choices, the vast majority of students and employees would certainly opt for the latter.

The Department should abandon its provision that would permit the single-investigator model and leave in place the current provision (106.45(b)(7)(i)) prohibiting recipients from designating the same person as Title IX Coordinator, investigator, and decisionmaker in the same proceeding.

(ii) Elimination of Live Hearing and Cross-examination Requirements for Postsecondary Institutions

Current Rule: "For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those

[518] *Id.*

challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. . . . Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other." 34 C.F.R. § 106.45(b)(6)(i).

Proposed Rule: "A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing." Proposed 34 C.F.R. § 106.45(g).

In 2020, the Department asserted that "postsecondary-level adjudications with live hearings and cross-examination will increase the reality and perception by parties and the public that Title IX grievance processes are reaching fair, accurate determinations, and that robust adversarial procedures improve the legitimacy and credibility of a recipient's process, making it more likely that no group of complainants or respondents will experience unfair treatment or unjust outcomes in Title IX proceedings (for example, where formal complaints involve people of color, LGBTQ students, star athletes, renowned faculty, etc.)."[519] In 2022, the Department wrote, "The Department's tentative view is that any benefit that adversarial cross-examination may have over other methods of live questioning is not sufficient to justify mandating that all postsecondary institutions permit adversarial cross-examination in every case, either as a matter of due process or fundamental fairness or of effectuating Title IX's nondiscrimination mandate, in light of the considerable costs imposed by adversarial cross-examination, particularly in the context of allegations of sex-based harassment."[520]

In its NPRM, ED cites no research published since the issuance of the 2020 Rule to justify its withdrawal of the right to a live hearing and to cross-examination. The most recent literature it cites in support of the new rule is a law review article published in 2014. In support of its final rule, the Department must provide social science literature published since the issuance of the 2020

[519] 2020 Rule at 30,314.
[520] NPRM at 41,507.

Rule in support of its proposition that cross-examination is not the most effective truth-seeking method in campus adjudicatory proceedings, especially in sexual assault cases and cases whose maximum penalty is expulsion. The Department must also reconcile this aspect of the proposed rule that conflicts with case law requiring live hearings and cross-examination as a matter of due process in Title IX disciplinary matters. Failure to do so for either issue would constitute arbitrary and capricious decision-making by the agency.

Of course, whether or not the Department chooses to admit this in its final rule, it is patently obvious that the sole reason for the Department's rapid change of heart on the requirement of a live hearing and cross-examination, after reviewing the same evidence to which it had access two years ago,[521] is that its political leadership changed in 2021. The relevant constitutional norms ensured by the 2020 Rule certainly have not changed. But, beyond the obvious implication and fundamental unfairness of withdrawing such a basic due process protection from those accused of sexual misconduct in Title IX proceedings, the Department fails to consider this decision's cost to predictability in the proceedings for complainants and respondents. With the proposed rule, we have truly entered an era of regulatory ping-pong where a change in administration will lead to changes in the basic due-process obligations of educational institutions toward their students and employees—even though applicable constitutional due process requirements remain unchanged.[522] This situation does nothing to contribute to fairness or predictability, which are hallmarks of equitable proceedings and the rule of law. And it treats those who are or will be involved in Title IX grievance proceedings as pawns in a political game in which they have no control and cannot predict the rules with any modicum of certainty.

Once again, it is clear that, in the priorities underlying its decision-making but without reasoned explanations or supporting data, surveys, or scientific literature the Department is improperly subordinating the rights and interests of complainants and respondents to its political policy preferences and to recipients' interests in perceived efficiency (the latter of which is almost certain to be illusory as civil lawsuits challenging damages related to diminished procedural protections in grievance processes are sure to increase the workload of university counsel).[523] This is not an acceptable situation.

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[521] *See id.* (citing Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 711 (2014)).
[522] *See* Robert S. Eitel, *Biden Revives the Title IX Menace*, NAT'L REV., Jul. 19, 2022, https://www.nationalreview.com/2022/07/biden-revives-the-title-ix-menace/.
[523] *See* NPRM at 41,505 ("This proposed approach would provide a recipient with reasonable options for how to structure its grievance procedures to ensure that they are equitable for the parties while accommodating each recipient's administrative structure, education community, the applicable Federal and State case law, and State or local legal requirements . . . .").

At the heart of the cross-examination requirement is the need for reliability of outcomes in Title IX proceedings and a search for the truth that should be embedded in the culture of our education system.[524] Cross-examination is "a tool for testing competing narratives" that "serves an important truth-seeking function in a variety of types of misconduct allegations . . . ."[525] The need for this tool to underpin the legitimacy and reliability of the grievance process does not depend on the proportion (whatever this proportion is) of false allegations to truthful allegations; it offers both respondents *and* complainants a method of testing the narrative of the other party and offering their competing narrative.[526] The right to do so "improves the reality and perception that recipients' Title IX grievance processes are fair and legitimate."[527] Indeed, the right to participation in a live hearing generally is intended "to promote the societal interest in just outcomes"[528] but also to

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[524] *See* 2020 Rule at 30,316-30,317 ("[B]efore allegations may be treated as fact (*i.e.*, before a complainant can be deemed a victim of particular conduct by a particular respondent), a fair process must reach an accurate outcome, and in situations that involve contested allegations, procedures designed to discover the truth by permitting opposing parties each to advocate for their own viewpoints and interests are most likely to reach accurate outcomes based on facts and evidence rather than assumptions and bias.").

[525] *Id.* at 30,325–30,326.

[526] *Id.* at 30,359 ("The final regulations recognize the importance of due process principles in a noncriminal context by focusing on procedures that apply equally to complainants and respondents and give both parties equal opportunity to actively pursue the case outcome they desire.").

[527] *Id.* at 30,333 (citing H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the Greatest Legal Engine Ever Invented*, 27 CORNELL J. OF L. & PUB. POL'Y 145, 172 (2017) ("[O]ur judicial system and constitutional law jurisprudence have selected cross-examination as the best legal innovation for approximating perfect procedural parity. The ability of the accused to participate in the proceedings against him prevents the accused from becoming merely the subject of a trial where inquisitors determine his fate. Similarly, endeavoring for procedural parity between adversaries increases institutional legitimacy in the eyes of the accused and society, which some maintain is a value in and of itself.") (internal citations omitted); *id.* at 173 (cross-examination contributes to both the fairness and accuracy of a hearing because of its ''ability to expose errors and contextualize evidence'').). *See also* 2020 Rule at 30,359 ("With respect to 'the idea of individual autonomy—that each of us should have the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways [—] . . . empirical studies that have been done suggest, again, a preference for the adversary system over the inquisitorial.'" (quoting Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 87 (1998)); *id.* at 30,360 ("Studies conducted to determine 'whether a litigant's acceptance of the fairness of the actual decision is affected by the litigation system used' have concluded that 'the perception of the fairness of an adversary procedure carries over to create a more favorable reaction to the verdict . . . regardless of the outcome.'" (quoting Freedman at 89)).

[528] David L. Kirn, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STANFORD L. REV. 841, 847–49 (1976), *quoted in* 2020 Rule at 30,359 n.1375.

ensure "that the individual is not being treated as a passive creature, but rather as a person whose dignitary rights include an interest in influencing what happens to his life."[529] While the Department now cites studies lauding the supposed benefits of an "inquisitorial" system that is alien to traditions of justice that are embedded in our nation's Constitution and laws,[530] just two years ago the Department countered comments containing such studies by noting that "'the research that has been done provides no justification for preferring the inquisitorial search for truth or for undertaking radical changes in our adversary system.'"[531] The Department fails to explain or provide evidence from the past two years justifying such a radical departure from this country's traditions; nothing has changed since the 2020 Rule to allow the agency to question the fundamentals of our adversarial justice system, as the Department now seems eager to do.

The Department justifies this departure in part on the vulnerability of victims of sexual violence to suggestion and other factors that supposedly disadvantage them during cross-examination.[532] It ignores, however, that the Department took concerns about the vulnerability of complainants into account just two years ago in crafting carefully balanced requirements for a live hearing. Beyond the requirement that parties themselves must never conduct cross-examination,[533] the 2020 Rule requires recipients to honor a request by either party to hold the hearing with each party in a separate room using technology to enable questioning.[534] It restricts cross-examination to relevant questions and requires the decisionmaker, prior to the response to any question, to determine whether the question is relevant and, if not, to explain why it is not, thus naturally slowing the tempo of questioning and reducing the impacts of suggestibility on responses.[535] It requires recipients to exclude questions about a complainant's sexual predisposition or prior sexual behavior except in narrow circumstances.[536] The Department in 2020 took a thoughtful,

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[529] Kirn, *supra*, at 847–849, quoted in 2020 Rule at 30,359 n.1375.
[530] NPRM at 41,507 (citing studies suggesting that inquisitorial procedures, which consist of information-gathering in individual meetings, are more capable of revealing the truth than adversarial procedures, where parties participate in a live hearing).
[531] 2020 Rule at 30,360 (quoting Freedman, *supra*, at 80). *See also* 2020 Rule at 30,321–30,322 ("While commenters contended that some studies cast doubt on the effectiveness of cross-examination in eliciting accurate information, many such studies focus on cross-examination of child victims as opposed to adult victims and in any event that literature has not persuaded U.S. legal systems to abandon cross-examination, particularly with respect to adults, as the most effective—even if imperfect—tool for pursuing reliable outcomes through exposure of inaccuracy or lack of candor on the part of parties and witnesses." (footnote omitted)).
[532] *See* NPRM at 41,507 (citing Rachel Zajac & Paula Cannan, *Cross-Examination of Sexual Assault Complainants: A Developmental Comparison*, 16 Psychiatry, Psych., & L. S36, S38 (2009)).
[533] 34 C.F.R. § 106.45(b)(6)(i).
[534] *Id.*
[535] *Id.*
[536] *Id.*

deliberative approach to balancing the interests of the parties to Title IX proceedings in a fair, reliable hearing that avoids retraumatizing victims of sexual violence[537]; the Department in 2022, by contrast, is taking a sledgehammer approach in leveling the right to a fair hearing in the interest of recipients' efficiency and lack of respect for American traditions of due process enshrined in our Constitution.

In destroying the right to a live hearing in Title IX grievance processes, the Department ignores the importance of cross-examination particularly in cases, like sexual assault cases, where the decisionmaker's finding is largely based on whose account of events she or he finds to be more credible.[538] In 2020, the Department recognized "that cross-examination serves the interests of complainants, respondents, and recipients, by giving the decision-maker the opportunity to observe parties and witnesses answer questions, including those challenging credibility, thus serving the truthseeking purpose of an adjudication."[539] It acknowledged the point made in the Department's current rulemaking that "academic disciplinary proceedings are not co-extensive with civil or criminal trials"[540] but determined that this was outweighed by the fact that cross-examination is a "valuable tool for resolving the truth of serious allegations such as those presented in a formal complaint of sexual harassment."[541] This truth-seeking function is not only based on observation of body language and demeanor with respect to determining credibility, but on factors such as "specific details, inherent plausibility, internal consistency, [and] corroborative evidence."[542] The use of cross-examination in any system used to determine the truth with regard to allegations of sexual assault—whether criminal, civil, or in the context of campus disciplinary proceedings—is not based on the implication that sexual assault allegations are more suspect than any other type

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[537] *See* Triplett, *supra*, at 521 ("Although these methods [directing questions to an accuser through the panel, video cross-examination, witness shielded from view while being questioned] may increase the administrative burden on the institution, . . . they are already in common use and are an appropriate compromise between exposing the victim to unbridled stress and not allowing the accused to confront his accuser.").
[538] *See id.* at 520 ("Particularly in the context of accusations of sexual assault, witness credibility may be the determinative factor; a student's legal defense—and academic and professional future—may turn on the ability to cross-examine the accuser." (citing *Donohue v. Baker*, 976 F. Supp. 136, 146–7 (N.D.N.Y. 1997))); *id.* at 522 ("[A]ccused students must be given the opportunity to cross-examine their accusers because in this special context the entire proceeding often turns on witness credibility."); Tenerowicz, *supra*, at 690 ("In situations in which the fact of intercourse is not in dispute and consent is the sole contested issue, the importance of cross-examination is magnified. These cases resolve themselves into problems of credibility and the hearing board must choose to believe either the accused student or the alleged victim. A reliable determination of the issues is essential to a fundamentally fair process . . . .")
[539] 2020 Rule at 30,313.
[540] NPRM 41,505 (citation omitted).
[541] 2020 Rule at 30,313.
[542] *Id.* at 30,321.

of allegation; "rather, wherever allegations of serious misconduct involve contested facts, cross-examination is one of the time-tested procedural devices recognized throughout the U.S. legal system as effective in reaching accurate determinations resolving competing versions of events."[543]

In its current rulemaking process, the Department ignores the fact that cross-examination benefits both parties to a proceeding. As the Department stated in its 2020 rule, "[C]ross-examination is as powerful a tool for complainants seeking to hold a respondent responsible as it is for a respondent, and that a determination of responsibility reached after a robust hearing benefits victims by removing opportunity for the respondent, the recipient, or the public to doubt the legitimacy of that determination."[544] Cross-examination performed by the complainant's advisor offers an equal opportunity as that of the respondent "to question and expose inconsistencies in the respondent's testimony and to reveal any ulterior motives."[545] Such an opportunity "levels the playing field by giving a complainant as much procedural control as a respondent, regardless of the fact that exertion of power and control is often a dynamic present in perpetration of sexual assault."[546]

Without supporting data, surveys, or statistical information, the Department refers in its current rulemaking to the need to "minimize chilling effects on the reporting of sex-based harassment and on participation in the recipient's grievance procedures."[547] But the Department in 2020 recognized that the "sensitive, personal matters" involved in sexual harassment allegations, particularly allegations of sexual assault, *heighten* the need for parties to be granted the right to participate in a live hearing and ask questions through an advisor aligned with their position, "so that each party may fully, meaningfully put forward the party's viewpoints and beliefs about the

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[543] *Id.* at 30,330. *See also id.* at 30,325 ("The Department understands commenters' concerns that [Sarah Zydervelt, et al., *Lawyers' Strategies for Cross-examining Rape Complainants: Have we Moved Beyond the 1950s?*, 57 BRITISH J. OF CRIMINOLOGY 3 (2016)] indicates that misconceptions about rape and sexual assault victims permeate cross-examination strategies and tactics in the criminal justice system. However, this study indicates that to the extent that misconceptions or negative stereotypes about sexual assault affect cross-examination in rape cases, the problem lies with societal beliefs about sexual assault and not with cross-examination as a tool for resolving competing narratives in sexual assault cases.").
[544] *Id.* at 30,314.
[545] *Id.* at 30,325. *See also id.* at 30330 ("The Department notes that § 106.45(b)(6)(i) grants the right of cross-examination equally to complainants and respondents, and cross-examination is as useful and powerful a truth-seeking tool for a complainant's benefit as for a respondent, so that a complainant may direct the decision-maker's attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility in the respondent's statements.").
[546] *Id.* at 30,325.
[547] NPRM at 41,505.

allegations and the case outcome," given the "high stakes and long-lasting consequences for both parties."[548]

The need for an advisor aligned with the party's interest to ask the questions of the other party and witnesses is particularly crucial because it allows the recipient to remain a neutral fact-finder in the process. "To require a recipient to step into the shoes of an advocate by asking each party cross-examination questions designed to challenge that party's plausibility, credibility, reliability, motives, and consistency would place the recipient in the untenable position of acting partially (rather than impartially) toward the parties, or else failing to fully probe the parties' statements for flaws that reflect on the veracity of the party's statements."[549] This procedural requirement makes it more likely that parties will view the proceeding as a legitimate one with an unbiased decisionmaker.[550] And while the Department attempts to reassure the public that parties would be allowed to ask questions of the other party through the decisionmaker in its inquisitorial system,[551] this arrangement erases the benefits of cross-examination by a party's advisor at a live hearing because the relevant questions submitted to the decisionmaker will likely not be the same questions that are actually posed to the party.[552]

The Department should withdraw the NPRM's provision giving postsecondary institutions the option of eliminating the requirement to hold a live hearing and permit cross-examination in sexual harassment proceedings and leave in place the current provision (34 C.F.R. § 106.45(b)(6)(i)) requiring such live hearings and cross-examination subject to limitations and with accommodations at the request of one of the parties.

(iii) Prohibition of "unclear" and "harassing" questions

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[548] 2020 Rule at 30,316.
[549] *Id.* at 30,330.
[550] *See id.* at 30,316 ("[T]he reason cross-examination must be conducted by a party's advisor, and not by the decision-maker or other neutral official, is so that the recipient remains truly neutral throughout the grievance process. To the extent that a party wants the other party questioned in an adversarial manner in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, and not by the recipient. Thus, no complainant (or respondent) need feel as though the recipient is 'taking sides' or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.").
[551] *See* NPRM at 41,508.
[552] *See* 2020 Rule at 30,313 ("[T]he Department agrees with commenters that in too many instances recipients who have refused to permit parties or their advisors to conduct cross-examination and instead allowed questions to be posed through hearing panels have stifled the value of cross-examination by, for example, refusing to ask relevant questions posed by a party, changing the wording of a party's question, or refusing to allow follow-up questions.").

Current Rule: "For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." 34 C.F.R. § 106.45(b)(6)(i).

Proposed Rule: "If a decisionmaker determines that a party's question is relevant and not otherwise impermissible, then it must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the party being questioned. A postsecondary institution may also impose other reasonable rules regarding decorum, provided they apply equally to the parties." Proposed 34 C.F.R. § 106.46(f)(3).

In its current rulemaking, the Department proposes to prohibit decisionmakers from permitting "unclear" or "harassing" questions at live hearings. It attempts to justify this restriction by referring to the likelihood that such questions are not likely to contribute to the reliability of proceedings or help the decisionmaker assess a party or witness's credibility. The Department fails to define "harassing," but it says a question would be "unclear if it is vague or ambiguous such that it would be difficult for the decisionmaker or the party being asked to answer the question to discern what the question is about."[553]

The current regulations give institutions discretion to impose rules of decorum on parties to a proceeding as long as those rules apply equally to each party.[554] The Department's imposition of a broad mandate for decisionmakers to exclude "unclear" or "harassing" questions raises the concern that recipients, to avoid running afoul of the Department's mandate, will broadly exclude relevant questions in a proceeding, particularly on the basis that they are "harassing." For instance, would a question be "harassing" if it inquired about a party's previous sexual conduct, even if the question fit within the scope of the narrow exception for evidence proving consent or that someone else committed the offense? Would a question be "harassing" if it inquired about *any* sexual matters relating to the party that the party could find offensive or hurtful? Since the provision refers specifically to questions that are "harassing of the party being questioned," must "harassing" questions of witnesses who are not parties be excluded? If so, what is the basis on which the Department would exclude harassing questions of parties but not exclude harassing questions in general? The Department must sufficiently define the scope of the term "harassing" to give

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[553] NPRM at 41,510.

[554] 34 C.F.R. at § 106.45(b) ("Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties."). In the case of an "unclear" question, it seems likely that a decisionmaker would either exclude such a question because he or she would not be able to "discern what the question is about" or would simply ask the questioner to rephrase the question so it is possible to understand it and determine whether it is relevant.

recipients notice of what kind of questions they must allow or exclude, or it is acting in an arbitrary and capricious manner.

Because the Department declines to define "harassing," it is difficult to know whether this provision excludes questions that might go to the heart of the proceeding or whether it is simply referring to the conduct of the questioner, for instance, by raising her or his voice at the party or repeatedly asking a question. If it is the former, of course, this provision sweeps well beyond where it should go and could nullify any benefits of cross-examination when it is offered by recipients. If it is the latter, then the rule is not needed because recipients can already prohibit such conduct through rules of decorum. The proposal further empowers subjective judgments as to what questions are "unclear" or harassing" within the single-investigator framework, where the proposed rule would install a decisionmaker with vast, unchallenged powers. The Department should simply withdraw this provision to avoid confusion and spurring postsecondary recipients to reduce the value of Title IX grievance proceedings relating to sexual harassment.

The Department should withdraw its proposed rule requiring postsecondary recipients to prohibit "unclear" and "harassing" questions of parties at live hearings.

(iv) Prohibiting decisionmakers from relying on statements made in support of a party's position in cases where cross-examination is offered and the party does not submit to questions

Proposed Rule: "If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position." Proposed 34 C.F.R. § 106.46(f)(4).

The Department seeks to prohibit decisionmakers from relying on "statement of [a] party that supports that party's position" when a live hearing is offered and the party refuses to submit to questions regarding credibility. This provision is directly subject to the same criticism the Department itself found persuasive only two years ago: The decisionmaker in Title IX grievance proceedings will likely not be an attorney and will likely find it difficult to parse out whether a statement "supports" a party's position or does not support it. In cases with complex facts and allegations, it may be difficult for such decisionmakers to know whether a statement supports or opposes a party's position. At the very least, it will require extra training (and cost) from recipients to help decisionmakers understand the meaning of this provision. Its benefits therefore outweigh its costs, and the Department should withdraw this element of its proposed rule.

(v) Allowing recipients to exclude evidence from expert witnesses

Current Rule: "*Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must— . . . (ii) Provide an equal opportunity for the

parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence . . . .” 34 C.F.R. § 106.45(b)(5).

Proposed Rule: “*Complaint investigation.* When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution’s grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution: . . . . (4) Has discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties . . . .” Proposed 34 C.F.R. § 106.46(e).

Without explanation beyond prioritizing the discretion of recipients over the interests and needs of the parties to Title IX grievance proceedings, the Department’s proposed rule would eliminate the requirement that recipients allow expert witnesses to present relevant evidence on behalf of either party. Such a limitation on the rights of the parties would unnecessarily restrict the universe of relevant evidence that could be presented and considered and could result in the exclusion of important expert contributions shedding useful light on the facts and allegations. This determination would cut against respondents *and* complainants in the name of expediency for the recipient. The Department’s failure to appropriately balance the interests of the parties to these proceedings against the interests of recipients is arbitrary and capricious.

The Department should withdraw its proposal to make the presentation of expert witnesses discretionary for recipients and should retain the provision within the current rule permitting the parties to present expert witnesses.

(vi) Elimination of Any Meaningful Requirements for Credibility Determination Outside “Sex-based Harassment” Procedures in Postsecondary Institutions

Current Rule: “For recipients that are elementary and secondary schools, and other recipients that are not postsecondary institutions, the recipient’s grievance process may, but need not, provide for a hearing. With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party. . . . The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.” 34 C.F.R. § 106.45(b)(6)(ii).

Proposed Rule: “A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.” Proposed 34 C.F.R. § 106.45(g).

Following a familiar pattern from other provisions of its proposed rule, the Department proposes to prioritize expediency and reduce costs for educational institutions at the expense of the due process rights of complainants and respondents by eliminating any meaningful requirements for recipients to evaluate credibility outside of Title IX grievance procedures relating to "sex-based harassment" involving a student at a postsecondary institution. In these sundry matters, the Department would simply abdicate any responsibility to protect the due process rights of parties and leave the recipients with unlimited discretion regarding whether and how they will allow parties a meaningful opportunity to be heard regarding allegations that will often result in the most serious consequences, such as expulsion. The Department's attempt to relinquish its role in guarding the due process rights of students and employees is inappropriate and bad policy.

The Department's 2020 Rule properly recognized that students at elementary and secondary institutions are not similarly situated in all respects with young adults attending and employees serving at postsecondary institutions, especially with regard to maturity level and the ability to cope with questioning about the sensitive issues involved in sexual harassment. Therefore, the Department took the limited step of granting non-postsecondary institutions discretion over whether to hold a live hearing with cross-examination when a formal complaint of sexual harassment is filed while still requiring important safeguards, including the ability of parties to submit relevant questions to be asked by the decisionmaker of the other party or witnesses. Such a solution properly permits elementary and secondary schools to shield children from questioning of credibility while granting both parties a meaningful right to be heard and test the other party's narrative.

The Department's proposed rule would do away with this opportunity to be heard for elementary and secondary school students by not requiring decisionmakers in this context to permit any of their questions to be asked. This unreasonably broad standard would also apply to all Title IX discrimination proceedings offered by postsecondary institutions that do not involve a student or do not involve "sex-based harassment" allegations under the Department's definition of this term. The vagueness of this standard, without any procedural protections for the parties in the assessment of credibility, essentially would make recipients the judges of whether their own processes are sufficient and is arbitrary and capricious. Such a standard would place "foxes in charge of the hen house" and would serve neither the complainant nor the respondent.

The Department's abdication of its role in ensuring due process protections for such a large category of students, employees, and proceedings would also lead to increased litigation and intervention by the courts in requiring Title IX grievance protections.

ED should withdraw its proposed rule that would eliminate the requirement for recipients to offer parties to a Title IX sexual harassment proceeding the opportunity to have the decisionmaker ask

questions of the other party and witnesses and should retain this provision of the current regulations.

(vii) Restrictions on Access to Evidence by Parties to Sexual Harassment Proceedings

Current Rule: "*Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must— . . . .

(vi) Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response." 34 C.F.R. § 106.45(b)(5).

Proposed Rule: "A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must: . . . (4) Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond." Proposed 34 C.F.R. § 106.45(f).

"When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution's grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution: . . . (6) Must provide each party and the party's advisor, if any, with equitable access to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§ 106.2 and 106.45(b)(7), in the following manner:

(i) A postsecondary institution must provide either equitable access to the relevant and not otherwise impermissible evidence, or to the same written investigative report that accurately summarizes this evidence. If the postsecondary institution provides an investigative report, it must further provide the parties with equitable access to the relevant and not otherwise impermissible evidence upon the request of any party;

(ii) A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence as provided under paragraph (6)(i) of this section prior to the determination of whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing . . . ." Proposed 34 C.F.R. § 106.46(e).

U.S. Supreme Court Justice William Brennan once explained that the process of discovery is important because it "helps develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case."[555] Recognizing the importance of a discovery process to the ability of both parties to develop their arguments in the context of Title IX sexual harassment proceedings, the Department in 2020 required recipients to give both parties to such proceedings the same access to evidence "directly related to the allegations raised in a formal complaint" before the investigation concludes. Parties then must have at least 10 days to submit a written response to the evidence for consideration in an investigative report, upon which the parties must have at least 10 days to comment prior to a live hearing, if required. Such a process, the Department explained, carefully "balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence."[556]

Without any reasoned explanation or supporting data or studies, the Department now recklessly jettisons this balance to favor, as in other parts of its proposed rule, the recipient. In the first place, outside of "sex-based harassment" proceedings involving a student at a postsecondary institution, the Department would demolish the right of parties to any access to evidence, only requiring a description of such evidence, oral or written, to be given to each party. It explains that this

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[555] Triplett, *supra*, at 523–524 (quoting *Taylor v. Illinois*, 484 U.S. 400, 425 (1988) (Brennan, J., dissenting)).
[556] 2020 Rule at 30,303. *See also id.* at 30,305 n.1178 (citing Kirn, *supra*, at 847–48).

requirement "would streamline the investigation process,"[557] thus once again placing the priorities of recipients above the rights of parties to a fair proceeding. The Department weighed these values differently just two years ago, concluding that although the prescribed evidentiary procedures "have the potential to generate modest burden and costs, but believes that the financial costs and administrative burdens resulting from the provisions are far outweighed by the due process protections ensured by these provisions," and "sacrificing procedures important to concepts of due process and fundamental fairness is not an acceptable means of alleviating administrative burdens."[558] The Department replaces this well-considered, balanced conclusion (which considers the interests of the parties over expediency for recipients) with an arbitrary move that eviscerates the due process rights of students and employees.

The Department attempts to tie its proposed rule to the U.S. Supreme Court's holding in *Goss v. Lopez* that elementary school students in proceedings that might result in a temporary suspension are entitled, among other due process protections, to "an explanation of the evidence the authorities have . . . ."[559] The Department arbitrarily and capriciously ignores the fact that students facing "sex-based harassment" allegations, which includes complaints alleging sexual assault, are subject to far weightier discipline than a "temporary suspension," and the Supreme Court in *Goss* explicitly indicated that such allegations could require more substantial due process protections.[560] The Department's proposed rules destroying the right to access evidence constitute a race to the bottom providing no differentiation between the due process rights of students subject to discrimination complaints that might result in mild disciplinary consequences and students in elementary and secondary schools accused of crimes like sexual assault that could result in expulsion and lifelong stigma. The Department must retain its current standards, which recognize the need of students facing any sort of discipline, but especially those facing the most serious discipline, to access the evidence related to the grievance process.

Second, the proposed rule would allow all recipients to deny parties the right to provide input on the evidence for inclusion in the investigative report, and deny parties the opportunity to comment on the investigative report prior to any live hearing the recipient would now be able to choose whether or not to offer. This provision further cuts the parties out of the process and makes the proceedings less reliable and accurate. The current regulations require the investigator to consider the perspectives of the parties on the relevant evidence in drafting the investigative report, thus providing a more fulsome evaluation of how the evidence relates to the allegations. It also gives the parties the important opportunity to respond to the investigative report prior to the hearing in light of the investigator's decision about what evidence is relevant, which will give the decisionmaker a broader understanding of the parties' views of the evidence prior to the

[557] NPRM at 41,482.
[558] 2020 Rule at 30,307.
[559] *Goss*, 419 U.S. at 581.
[560] *Id.* at 584.

examination of the parties' and witnesses' credibility. This is a far more beneficial situation that gives a meaningful opportunity for both parties to be heard regarding the evidence and should be retained to aid the decisionmaker in making a finding on responsibility and to uphold the due process rights of the parties.

Third, the proposed rule would allow all recipients to withhold relevant evidence in favor of offering an investigative report summarizing relevant evidence, with parties only allowed to access evidence described in such a report at the discretion of the decisionmaker, thus forcing parties to rely on the description by the investigator (who may also be the decisionmaker) of the relevant evidence to decide whether they should request access to it. The Department explains that it "tentatively views the requirement to convey the same universe of evidence in two different formats (an investigative report and access to the evidence) as unnecessary for ensuring that grievance procedures are implemented equitably and effectively, and as increasing costs, burden, and delay without providing a meaningful benefit to the parties."[561]

This explanation arbitrarily and capriciously fails to identify the critical benefit of the current regulations in this area: parties have the right to examine the evidence themselves and make their own judgment on how it relates to the argument they will make in the proceedings. Without this right, parties must rely on the investigator's characterization of the evidence to the extent the decisionmaker provides the parties with access to that characterization of the evidence, which will lead to a different and less-considered judgment by both parties in how they plan to present their arguments. The current regulations place a key check on the decision of the investigator about what to include and not include in the investigative; the decisionmaker is more likely to receive a full picture of the evidence and not solely rely on the views of the investigator about what should and should not be considered relevant.

Fourth, the proposed rule cuts out the current rule's sensible provision of a 10-day time frame for parties to review evidence and a 10-day time frame for parties to comment on the investigative report in sexual harassment proceedings, opting instead for a vague provision requiring "reasonable opportunity" to respond to the investigative report and, if requested, evidence prior to the "sex-based harassment" determination. This provision only applies in the context of such complaints involving students at postsecondary institutions; parties to other proceedings would have no right to such a "reasonable opportunity" for review. The proposed rule would compromise the predictability that is the key value of the 10-day time frames in the current regulations, as recipients would be permitted to determine on a case-by-case basis how much time to give students to review and comment on the evidence or investigative report—thereby introducing yet another opportunity for a subjective judgment by the decisionmaker on an important procedural concern. Given the cost of longer proceedings to recipients and their desire to be seen by OCR and others as swiftly resolving complaints, especially those of sexual harassment, it is reasonable to assume

[561] NPRM at 41,500.

that recipients will be incentivized to shorten the window for review of the evidence as much as possible, thus further trampling on the rights of parties to fundamental fairness.

All of these restrictions would deny parties to Title IX grievance processes their right to a fair hearing in accord with due process. The Department should withdraw its proposed rule and maintain its commitment to an equitable process in which parties have the right to examine evidence directly related to sexual harassment allegations.

(viii) Exclusion of Evidence Related to "Sexual Interests" of Complainant from Review by Respondent and Presentation at Hearing

Current Rule: "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent." 34 C.F.R. § 106.45(b)(6)(i).

Proposed Rule: "*Basic requirements for grievance procedures.* A recipient's grievance procedures must: . . . (7) Exclude the following types of evidence, and questions seeking that evidence, as impermissible (*i.e.*, must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant: . . . (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent." Proposed 34 C.F.R. § 106.45(b).

DFI agrees, in line with federal rape shield laws and the Department's 2020 rule, that it is extremely important to ensure that the determination of responsibility in sexual harassment cases, many of which involve the most sensitive details about parties' personal lives, not rely on evidence of the sexual predisposition of or past sexual conduct by the complainant except, in the case of past sexual conduct, in narrowly circumscribed situations where such evidence is relevant to the alleged misconduct at issue in the Title IX proceedings, *i.e.*, to prove that someone else committed the misconduct or to prove consent by the complainant. The current regulations properly exclude such evidence from inclusion in the investigative report[562] and consideration by the decisionmaker in Title IX sexual harassment proceedings.

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[562] 2020 Rule at 30,353–30,354 ("[T]he investigative report must summarize ''relevant'' evidence, and thus at that point the rape shield protections would apply to preclude inclusion in the investigative report of irrelevant evidence. The Department believes these provisions work consistently and logically as part of the § 106.45 grievance process, under which all evidence is

The Department's proposed rule would continue properly to exclude evidence of past sexual behavior from the investigative report and the decision-making process other than in the same, narrowly circumscribed situations, but it would replace the term "sexual predisposition," which tracks the terminology of the Federal Rules of Evidence,[563] with "sexual interests." The proposed rule arbitrarily and capriciously does not define "sexual interests."

DFI opposes this change because it results in uncertainty as to what must be excluded from consideration in recipients' decision-making process; the current rule has the benefit of allowing recipients to look to federal proceedings to know what is permitted and what is excluded. "Sexual interests" may (perhaps, though we do not know due to its lack of definition) vastly broaden the scope of evidence that must be excluded from proceedings. For this reason, the Department should simply use the term "predisposition," but if it chooses to use the term "sexual interests," it should define this term to have the same meaning as "sexual predisposition" in the Federal Rules of Evidence.

The current regulations permit parties to access evidence "directly related to the allegations raised in a formal complaint," language intended to sweep more broadly than the "relevant" evidence that can be included in the investigative report and in the proceeding and include evidence of the complainant's sexual predisposition and previous sexual conduct. The new rule eliminates parties' access to such evidence except for use in the narrow circumstances described above. In 2020, the Department weighed the interests involved differently, concluding that "it is important that at the phase of the investigation where the parties have the opportunity to review and respond to evidence, the universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant."[564] The Department's proposed rule would improperly give the investigator control over whether to include evidence related to sexual predisposition or past sexual conduct based on the investigator's determination of how that evidence might be used in the proceeding (*i.e.*, whether it can be used to prove that someone else committed the misconduct or that the complainant consent to the conduct at issue). This puts the investigator in the inappropriate position of forecasting the arguments the parties might make with regard to the evidence in the proceedings, a decision that only the parties can plausibly be in a position to make.

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evaluated for whether it is directly related to the allegations, evidence summarized in the investigative report must be relevant, and evidence (and questions) presented in front of, and considered by, the decision-maker must be relevant.").

[563] *See* Fed. R. Evid. 412(a)(2).

[564] 2020 Rule at 30,304.

In the end, the sensitivity of the details about sexual predisposition or past sexual behavior must be weighed against the need for a full and fair examination of the universe of evidence by each party in accordance with fundamental due process principles. The Department properly balanced these interests two years ago by permitting parties to have access to evidence directly related to the allegations but excluding a portion of this evidence from the investigative report and from the decision-making process. The Department should retain this current balance and allow both parties to access the evidence they need to make the arguments they wish to make in Title IX sexual harassment grievance proceedings.

The Department should withdraw its proposed rule excluding evidence of complainant's "sexual interests" or past sexual behavior that is directly related to the allegations at issue in the proceedings from access by the respondent and retain the current rule's protections prohibiting such evidence from inclusion in the investigative report or consideration in the decision-making process except in narrow circumstances relating to the allegations in question.

(ix) Removal of Requirements for Complaints, Notifications, Dismissals, and Determinations to Be Provided in Written Form in Title IX Grievance Procedures

Current Rule: "*Notice of allegations*—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A) Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B) Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. . . . The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process." 34 C.F.R. § 106.45(b)(2).

"Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties." 34 C.F.R. § 106.45(b)(3)(iii).

"*Investigation of a formal complaint.* When investigating a formal complaint and throughout the grievance process, a recipient must— . . . . (v) Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate . . . ." 34 CFR § 106.45(b)(5).

"*Determination regarding responsibility.* (i) The decision-maker(s) . . . must issue a written determination regarding responsibility. . . .

(ii) The written determination must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must provide the written determination to the parties simultaneously. . . ." 34 C.F.R. § 106.45(b)(7).

Proposed Rule: "The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient initiate its grievance procedures: . . . ." Proposed 34 C.F.R. § 106.45(a)(2).

"Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known." Proposed 34 C.F.R. § 106.45(c).

"A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons: . . . ." Proposed 34 C.F.R. § 106.45(d)(1).

"Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must: . . . . (2) Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable; . . . ." Proposed 34 C.F.R. § 106.45(h).

In *Goss v. Lopez*, the U.S. Supreme Court held that the Fourteenth Amendment to the U.S. Constitution entitles elementary and secondary school students, prior to discipline (in the *Goss* case, temporary suspension), to notice and an opportunity for a hearing "appropriate to the nature of the case."[565] In 2020, the Department concluded that "providing written notice of allegations, containing details of the allegations that are known at the time, after a formal complaint has triggered a recipient's obligation to investigate and adjudicate sexual harassment constitutes an important procedural protection for the benefit of all participants in the grievance process, and increases the likelihood that the recipient will reach an accurate determination regarding responsibility, which is necessary to hold recipients accountable for providing remedies to victims of Title IX sexual harassment."[566]

Just over two years later, the Department now arbitrarily and capriciously changes its mind, once again prioritizing expediency for recipients over the rights and interests of the parties to Title IX grievance proceedings by proposing that parties to such proceedings in elementary and secondary schools (and at postsecondary institutions, outside of "sex-based harassment" allegations involving a student) are not entitled to written notice of allegations, or, in fact, any other written notice, including of the dismissal of a complaint, the need to appear before an investigator or decisionmaker, or the outcome of the grievance proceeding. This proposed change is arbitrary and capricious because it is insupportable (and not supported by the agency) and will harm parties to sexual harassment proceedings under Title IX.

The Department required written notice of formal complaints, determinations, and other aspects of Title IX proceedings in 2020 to promote the important objectives of predictability and consistency for the parties to such proceedings. Written notice of the allegations helps to ensure that the respondent understands what specific conduct he or she is being accused of, and written decisions, including the rationale for these decisions, helps impart to both parties why the decisionmaker came to the conclusions he or she did and could bring closure to a contentious

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[565] *Goss* at 578–579, *quoted in* 2020 Rule at 30,284 n.233.
[566] 2020 Rule at 30,284.

process.[567] The predictability and consistency in written notice requirements in this way help to prevent dissatisfied parties from resorting to litigation against their schools over what they believed to be a lack of transparency in process.[568] Even when such litigation (or an appeal) takes place, written notice of allegations and a written explanation of the determination is critical for the decisionmaker hearing the appeal or a court to clearly understand the nature of the allegations and why the decisionmaker reached the conclusions he or she made. At its core, the interest in written notice from recipients to the parties is transparency and consistency, thus enhancing the legitimacy of the process in the eyes of the educational community.[569]

In an arbitrary and capricious "flip-flop" from its views just two years ago, the Department now proposes to leave whether to provide written notice to the discretion of elementary and secondary schools "because doing so may limit a recipient's ability to respond promptly and in an age- and developmentally appropriate way when a student complains of sex discrimination."[570] It offers the unavailing argument that the current written notice requirements "would limit a recipient's ability to respond to an incident when it occurs, even though such a prompt response can be a valuable

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[567] Written notice of the various phases of the grievance process are likewise important to both parties in helping them prepare for the presentation of their case, as ED explained in its 2020 Rule: "Because the stakes are high for both parties in a grievance process, both parties should receive notice with sufficient time to prepare before participating in interviews, meetings, or hearings associated with the grievance process, and written notice is better calculated to effectively ensure that parties are apprised of the date, time, and nature of interviews, meetings, and hearings than relying solely on notice in the form of oral communications. For example, if a party receives written notice of the date of an interview, and needs to request rescheduling of the date or time of the interview due to a conflict with the party's class schedule, the recipient and parties benefit from having had the originally-scheduled notice confirmed in writing so that any rescheduled date or time is measured accurately against the original schedule." *Id.* at 30,299–30,300.

[568] *See id.* at 30,389 ("Requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility for Title IX sexual harassment. We agree that requiring a written determination (sent simultaneously to both parties) is an important due process protection for complainants and respondents, ensuring that both parties have relevant information about the resolution of allegations of Title IX sexual harassment.").

[569] *See id.* at 30390 ("These requirements promote transparency and consistency so that both parties have a thorough understanding of how a complainant's allegations of Title IX sexual harassment have been resolved. We believe these requirements are reasonable, and that the cost or burden associated with compliance with this provision is outweighed by the benefit of promoting a consistent, transparent Title IX grievance process, including in elementary and secondary schools, and in institutions of a smaller size.").

[570] NPRM at 41,473.

teaching moment,"[571] even though the Department knows that its current regulations provide no impediment to teachers and administrators immediately responding to an incident (in fact, the rule *requires* such schools to immediately respond to an incident by offering supportive measures to a complainant). It is only when a formal complaint is filed under the current rules that schools must launch the Title IX grievance process.[572]

In its current rulemaking, the Department "proposes that the written determination requirement would not be necessary in the broader context of all sex discrimination complaints and, in some educational environments, may function as an impediment to addressing sex discrimination in a recipient's program or activity."[573] But the problem the Department conjures here is one that is entirely of its own making. The Department proposes to extend the Title IX grievance process established by the 2020 Rule to all complaints of sex discrimination, then worries that the key component of written notice included in that grievance process would be too cumbersome to extend to all discrimination complaints, using this concern as a basis for removing it. If the Department wishes to avoid the problem that its rule would create, then it should simply leave the current rules as they are and only require recipients to launch a grievance process in cases of sexual harassment—allowing them in all other cases to respond in an "equitable" fashion. The Department tumbles into an argument against its own proposed rule—underscoring the agency's arbitrary and capricious conduct in proposing this provision.

The Department unconvincingly attempts to assure the public that its removal of the written notice requirement for elementary and secondary schools will have no negative impacts on the parties: "In all cases, . . . the proposed regulations would require the notice of the allegations to be clear so that a respondent and complainant both understand the alleged conduct the recipient intends to

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[571] *Id.* ED's example is confusing and potentially misleading because it appears to propose to permit elementary and secondary schools to discipline students who are alleged to have sexually harassed another student or employee immediately, without any right to an equitable proceeding, as a "teaching moment." Does ED anticipate that its rule would allow elementary and secondary schools to immediately discipline a respondent accused of sexual harassment in violation of Title IX, without any of the protections it retains in the proposed rule, such as to a description of the evidence and the opportunity for a decisionmaker to assess credibility? The agency's failure to answer this question fully and completely would be arbitrary and capricious conduct.

[572] *See* 2020 Rule at 30,284 ("The Department reiterates that the recipient need not provide the written notice of allegations under § 106.45(b)(2) unless a formal complaint has been filed; this should reduce commenters' concerns that elementary and secondary schools will be inundated with the need to generate written notices whenever any conduct termed 'sexual harassment' is reported or that elementary and secondary school administrators will need to send out written notices concerning 'vague' or 'unspecific' reports of conduct that may or may not constitute sexual harassment.").

[573] NPRM at 41,488.

investigate."[574] But the Department arbitrarily and capriciously fails to indicate how, without documentation, OCR will be aware of the precise notice of allegations or of outcome that was given to the parties, as what the notice contained will no longer be recorded and will turn into a disputed fact. The Department therefore has nothing to gain, and everything to lose, in proposing to end the requirement that elementary and secondary schools provide written notice of allegations, participation in events such as hearings, dismissal of complaints, and determination of responsibility.

The Department should withdraw its proposal to eliminate requirements for written notice of allegations, participation in various stages of the process, dismissal of complaints, and determination of responsibility in Title IX proceedings outside of sexual harassment allegations involving a student at a postsecondary institution and retain its current rules requiring that all such notices be in writing.

(x) Elimination of Right to Appeal Outcomes of Grievance Proceedings Outside of Sexual Harassment Allegations Involving a Student at a Postsecondary Institution

Current Rule: "*Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter." 34 C.F.R. § 106.45(b)(8).

Proposed Rule: "*Determination of whether sex discrimination occurred.* Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must: . . . . (2) Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable . . . ." Proposed 34 C.F.R. § 106.45(h).

In yet another example of arbitrarily and capriciously failing to properly consider the interests of the parties to Title IX proceedings, the Department proposes to eliminate any right to appeal the

[574] *Id.* at 41,473.

determination of a decisionmaker in proceedings outside of those based on "sex-based harassment" allegations involving a student in a postsecondary institution. This decision will sweep away important protections for students and employees, particularly at elementary and secondary schools, who feel that their educational institution refused to offer them a fair and unbiased process and leave them no recourse.

Considering this very issue two years ago, the Department found compelling the need for a right of appeal from all sexual harassment proceedings because the ability to appeal determinations in such proceedings "will make it more likely that recipients reach sound determinations, giving the parties greater confidence in the ultimate outcome."[575] While the Department now arbitrarily and capriciously only considers the expediency for recipients in proceedings involving less serious forms of sex discrimination under Title IX,[576] the Department in 2020 properly considered the harmful impacts of removing the right to appeal on parties in proceedings that could result in the most serious consequences, recognizing the potential "life-altering consequences" of such proceedings for both respondents and complainants.[577]

Recipients also have an interest in the fundamental fairness involved in requiring that appeals be offered to both parties because the truth-seeking functions of educational institutions should lead them to desire to expose factual inaccuracies and biases that may have tainted proceedings and because parties who do not have trust in the legitimacy of such proceedings would, under the proposed rule, have no other recourse other than to resort to OCR complaints or litigation, costly both for parties and for recipients, to correct the wrongs they perceive in the process.[578] The Department must consider such interests, or it is acting in an arbitrary and capricious manner.

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[575] 2020 Rule at 30,396.
[576] *See* NPRM at 41,489 ("For example, in some elementary school and secondary school settings involving complaints related to less serious conduct, the delay associated with an appeal could impair a recipient's ability to manage the school environment while sex-based harassment may be ongoing.").
[577] 2020 Rule at 30,396 ("Complainants and respondents have different interests in the outcome of a sexual harassment complaint. Complainants 'have a right, and are entitled to expect, that they may attend [school] without fear of sexual assault or harassment,' while for respondents a 'finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to [the student's] educational and employment opportunities[.]' Although these interests may differ, each represents high-stakes, potentially life-altering consequences deserving of an accurate outcome." (footnote omitted)). *See id.* at 30398 ("The stakes are simply too high in the context of sexual misconduct for appeals not to be part of the grievance process; as many commenters pointed out, a recipient-level appeal gives the recipient an opportunity to ensure factual accuracy in determinations by permitting either party to bring to the recipient's attention improper factors that affected the initial determination.").
[578] *See id.* at 30,398 ("Appeals enable recipients to correct errors in the adjudicative process, and may also reduce parties' reliance on OCR or private litigation to challenge the outcomes thereby

As discussed above, to the extent the Department is concerned that the right to an appeal will burden the resolution of relatively "minor" sex discrimination complaints, the Department is to blame for expanding grievance processes to *all* sex discrimination complaints (and wildly broadening the definition of hostile environment), rather than leaving them cabined to sexual harassment complaints, as it wisely decided to do in 2020. The Department's preferred approach to this problem appears to be stripping appeal rights from parties to proceedings involving the most heinous allegations of sexual conduct and potentially the most severe consequences. It makes absolutely no sense, is arbitrary and capricious, and should be withdrawn in favor of the 2020 approach of offering fair grievance procedures in accordance with due process principles, including the right to appeal determinations on the basis of procedural irregularities, new evidence, or conflicts of interest or bias, to all parties in Title IX sexual harassment proceedings.[579]

(xi) Requirement that the Recipient "Clarify" Allegations with the Complainant Before Dismissing a Complaint

Current Rule: "*Dismissal of a formal complaint*—(i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct." 34 C.F.R. § 106.45(b)(3).

Proposed Rule: "A recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons: . . . .(iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Prior to dismissing the complaint under

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yielding just outcomes more quickly than when a party must seek justice in a process outside the recipient's own Title IX grievance process.").

[579] It is worth noting the inherent unfairness of ED's approach to respondents, as ED's proposed rule does not require an appeal from a determination of responsibility but *does* require all recipients to offer an appeal from their dismissal of a complaint. *See* NPRM Proposed 34 C.F.R. § 106.45(d)(3). In this way, the rule tilts the playing field toward complainants and away from respondents by requiring elementary and secondary schools to offer certain appeals to complainants but not requiring them to offer appeals to respondents. Such a disparity shows that ED is not really interested in providing an "equitable" proceeding but appears to be more interested in pressuring institutions to accept the validity of complainants' sex discrimination allegations and find against respondents, without giving these respondents any recourse to a review of the proceedings.

this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant." Proposed 34 C.F.R. § 106.45(d)(1).

In a biased, arbitrary, and capricious effort to tilt grievance procedures against respondents in favor of complainants, the Department proposes to require recipients to "clarify the allegations with the complainant" prior to their dismissal on the basis that, even if proven, the allegations would not constitute sex discrimination. Such a requirement would result in utterly inappropriate *ex parte* communications between the recipient and the complainant after a complaint has been filed and the recipient has launched its grievance procedures. This proposal includes no requirement that the respondent remain privy to such communications or be advised that they occurred and would be highly subject to abuse by recipients—for instance, by granting the complainant the right, in consultation with the recipient, to shape their allegations in a way that would constitute a valid complaint under the recipient's grievance procedures. But that is clearly the prejudicial goal of the proposed rule.

The proposed rule would contain no requirement that any such consultation be recorded or made available to the respondent, decisionmaker, or any appellate authority, so it could be impossible for any of these people to know whether or not there was any improper coaching of the complainant to coax her or him to shift the allegations favorably to their interests. This requirement thus violates the fundamental principle in our system of justice that each party should be present for and able to object to communications made to the other party in a proceeding. Under the proposed procedures, the respondent would have no right to even know that such communications had occurred—let alone the substance of the communications. The Department's failure to consider these issues and to provide sound, reasoned explanations supported by data and the like is arbitrary and capricious.

This improperly opaque communication channel, excluding the accused party, also inherently blurs the proper role of the decisionmaker, as the respondent is barred from critical communications regarding the allegations. The Department must consider this issue, or it is acting in an arbitrary and capricious manner.

The Department should withdraw its rule requiring recipients to clarify the allegations with the complainant before dismissal on the basis that, even if proven, the complaint would not allege sex discrimination and leave in place the current rules requiring dismissal in such an instance.

(xii) Mandated Use of the Preponderance of the Evidence Standard of Proof Except in Highly Unlikely Circumstances

Current Rule: "*Basic requirements for grievance process*. A recipient's grievance process must— . . . . (vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints

against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment . . . .” 34 C.F.R. § 106.45(b)(1).

Proposed Rule: “Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must: (1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. . . .” Proposed 34 C.F.R. § 106.45(h).

As described above in the description of the background and basis of Title IX due process protections, the Department upended the protections offered by many recipients in Title IX sexual harassment (including sexual assault) proceedings[580] by publishing its 2011 DCL purporting to require recipients to use a “preponderance of the evidence” standard of proof (*i.e.*, more likely than not that the misconduct occurred) to adjudicate such claims, as opposed to a “clear and convincing evidence” standard.

Facing an explosion of OCR complaints, recognizing the massive increase in litigation targeting recipients’ use of this language, and of course addressing the fact that nothing in the statutory language of Title IX indicates that recipients must use the lower standard of proof, the Department appropriately chose in its 2020 Rule to offer discretion to recipients regarding whether they choose to use the preponderance of the evidence standard or the clear and convincing evidence standard to adjudicate complaints alleging sexual harassment in violation of Title IX, so long as recipients used the same standard for all Title IX sexual harassment complaints. The Department recognized at that time that recipients could reasonably conclude that the use of the grievance procedures the Department prescribed in its 2020 Rule for Title IX sexual harassment grievance procedures

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[580] *See* Baker, *supra*, at 549 (explaining that many universities used the clear and convincing evidence standard prior to the 2011 DCL because “[t]he consequence of expulsion and the accompanying publicity can cause wrongfully condemned students to lose employment prospects and suffer irreparable reputational and psychological damage. . . .”); Gersen & Suk, *supra*, at 901–902 (“OCR’s monitoring [as explained in the 2011 DCL] extends to what standard of evidence schools use to evaluate complaints . . . . The ‘preponderance of the evidence’ standard had not appeared in Title IX, any Title IX regulation, or the 1997 or 2001 Guidance documents. It was an invention of the purportedly nonbinding 2011 DCL. Nevertheless, dozens of OCR investigations into whether the procedures at various schools were complying with requirements introduced in the DCL soon followed. In a scramble to be considered compliant and stave off or resolve OCR investigations, schools rushed to rewrite their policies and procedures to satisfy the DCL’s commands, including, most prominently, the ‘preponderance of the evidence’ standard.”); 2020 Rule at 30,382 (“[R]ecipients have historically used either the preponderance of the evidence standard or the clear and convincing evidence standard for a variety of student and employee misconduct proceedings, under a variety of rationales for choosing one or the other.”).

provide sufficient due process protections for parties that a preponderance of the evidence standard is appropriate.[581]

Now, ED arbitrarily and capriciously proposes to turn back the clock by only requiring that recipients use the preponderance of the evidence standard in adjudicating all Title IX sex discrimination complaints unless they use the clear and convincing evidence standard in "in all other comparable proceedings, including proceedings relating to other discrimination complaints" that are enforced under Title IX and even under other statutes. The obvious intent of this proposal is that it would effectively require recipients to either adopt the lower standard of proof, as every recipient uses a preponderance of the evidence standard in at least some proceedings OCR would consider to be "comparable," or raise the standard of proof in all other comparable proceedings to the clear and convincing evidence standard, which they would be extremely unlikely to do. The Department is thus offering recipients no choice at all: recipients will invariably use the preponderance of the evidence standard because the Department's limitations on their use of the higher standard makes it completely unrealistic that they would do so.[582] And, as discussed below, in the unlikely event that a recipient did choose to change all of their standards of proof to the higher standard, the Department arbitrarily and capriciously fails to consider potential impacts of these changes on its enforcement of laws outside of the Title IX context, such as Title VI and throughout recipients' codes of conduct. Such a sweeping influence of this rulemaking beyond the confines of Title IX is improper and unlawful in a regulatory process focused on enforcement specifically under Title IX.

One particularly indefensible—and thus arbitrary and capricious—portion of the Department's proposal effectively to require recipients to judge all Title IX discrimination complaints using a preponderance of the evidence standard is that it combines this requirement with the evisceration of procedural protections the Department put in place for parties to Title IX sexual harassment proceedings just two years ago. Had the Department decided to increase the amount of due process protection by requiring institutions to fashion their Title IX sexual harassment proceedings more

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[581] *See, e.g.*, 2018 NPRM at 61,477 ("[T]he Department believes that in light of the due process and reliability protections afforded under the proposed regulations, it could be reasonable for recipients to choose the preponderance standard instead of the clear and convincing standard, and thus, it is appropriate for the Department to give them the flexibility to do so.").

[582] DFI requests from ED whether it has information indicating that *any* recipients would be permitted to adopt the preponderance of the evidence standard based on the standards they now use in "comparable" proceedings, and, if so, what the proportion of recipients that use such a standard in all "comparable" proceedings is to recipients that do not use such a standard in all "comparable proceedings." If ED does not have such information, it should withdraw its proposed change in the requirement of a standard of proof because it does not have sufficient information to effectively regulate under the APA. The agency's failure to evaluate this data and respond to this inquiry would constitute arbitrary and capricious rulemaking by the Department.

in the mold of civil litigation, where the lower standard is routinely used because of the due process protections offered, it may have appropriately decided correspondingly to lower the standard of proof required in these proceedings. But, as we have seen in numerous instances above, the Department consistently proposes to do just the opposite to favor complainants and recipients: it destroys the meaningful protections the Department just put in place in its 2020 Rule, including by allowing the single-investigator model, no longer requiring a live hearing or cross-examination, restricting parties' access to evidence, and no longer requiring written notice of allegations or outcome or the opportunity to appeal an adjudication in the elementary and secondary school context.

The Department's proposed rule contemplates Title IX grievance proceedings that much more closely resemble "kangaroo courts" and "star chambers" than civil litigation, and its decision to reduce rather than raise the required standard of proof is manifestly irrational, particularly in cases where respondents alleged to have committed serious misconduct and crimes like sexual assault are at grave risk of the destruction of their academic opportunities and future careers.[583]

By requiring all discrimination claims to be adjudicated using the same standard (which, as discussed above, will effectively be the preponderance of the evidence standard), the Department argues that it is striving for consistency but is actually arbitrarily and capriciously ignoring the massively disparate impacts of some proceedings in comparison to others in educational settings. The primary reason for the use of a more searching standard of proof in proceedings involving serious misconduct, sometimes including criminal activity, is the potential impact of the adjudication on the respondent.[584] And in the case of sexual assault and other sexual harassment

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[583] *See, e.g.*, http://www.aaup.org/file/TitleIXreport.pdf at 79 ("Enforcement of civil rights laws in the courts provides the parties with many due-process protections that seek to ensure fair and reliable proceedings, including public pleadings, motions, hearings, trials, and appeals; the right to an attorney acting in a full representative capacity; the right to confront and cross-examine witnesses; extensive discovery processes; rules of evidence; and the right to a jury trial. In campus hearings, many of these due-process protections do not exist or are provided only in very limited forms. Using a heightened standard of proof of clear and convincing evidence, therefore, can help overcome the lack of the full scope of due-process protections that guard against erroneous findings of sexual harassment and sexual assault.").

[584] A simple example of how different standards are used in the justice system suffices to expose ED's faulty reasoning. When an alleged victim of robbery presses charges against the alleged perpetrator of that robbery, the alleged perpetrator is granted the highest standard of proof known to our justice system, *i.e.*, "beyond a reasonable doubt." When an alleged victim of robbery, either in addition to or instead of pressing charges, sues the alleged perpetrator of the robbery in civil court under state tort law, the alleged perpetrator is granted a lower standard of proof, *i.e.*, preponderance of the evidence. The reason for the difference in standard is not any distinction between what is alleged to have happened to the victim—in this example, there is no distinction. It is the fact that our society has deemed the consequences of a criminal conviction to be far

complaints, the impacts of a finding against the respondent are severe indeed, including monetary damages, removal from university housing, the termination of educational opportunities, the end of one's professional career or career prospects, lifelong reputational injury involved in being labeled a sex offender, and psychological trauma.[585] It stands to reason that when such life-

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more severe for the alleged perpetrator than the consequences of a civil judgment. In failing to consider the reasoning behind the use of a higher standard in some adjudications rather than others, ED completely misunderstands the nature of due process protections and engages in arbitrary and capricious rulemaking in violation of the APA.

[585] 2020 Rule at 30,381 ("Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life may affect educational and employment opportunities down the road. When a finding of responsibility is erroneous, such consequences are unjust. At the same time, when a respondent is found not responsible for sexual harassment, the complainant receives no remedy restoring the complainant's equal access to education, with immediate and lasting impact on the complainant's life, which may affect educational and employment opportunities down the road. When the finding of non-responsibility is erroneous, such consequences are unjust. A complainant deserves a reliable, accurate outcome as much as a respondent." (internal quotation marks and footnotes omitted)); Baker, *supra*, at 560 (""The new procedures [of many universities] accord the accused party almost none of the protections he or she would enjoy in civil litigation under Title IX, and they can lead to expulsion, the termination of a professional career, and lasting psychological trauma."); *id.* at 560–561 ("At the very least, the standard of proof should be higher because, especially in an age of social media and inevitably decreased privacy, the consequences of being expelled can have lifelong effects on a student's reputation, career prospects, and relationships. In a case with ambiguous facts and with witnesses testifying about things that happened months earlier when they were intoxicated, an adjudicator only has to find that it was more likely than not that sexual misconduct happened. This thought is certainly unsettling." (footnote omitted)); Schoonmaker, *supra*, at 235–236 (describing the reputational damages and stigma associated with sexual assault cases); https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/ ("Given the unequivocal value of a college education to an individual's prospects for personal achievement and intellectual, professional, and social growth, OCR's insistence that schools reduce procedural protections for those students accused of sexual harassment and sexual violence is deeply troubling. Because of the seriousness of these charges, virtually all institutions will punish those students found guilty with lengthy suspensions, if not immediate expulsion. The interest held by both the accused student and society at large in ensuring a correct and just result is therefore far greater than that implicated by a simple 'monetary dispute,' and a higher standard of proof is demanded. It is unconscionable, given the prospect of life-altering punishment, to require only that those accused of such serious violations be found merely 'more likely than not' to have committed the offense in question." (footnotes omitted)); Ashley Hartmann, *Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability*, 48 WASH. UNIV. J. OF L. & POL'Y 287, 306 (2015) (describing consequences of a finding of responsibility for sexual assault to include fines, removal from university housing, suspension, or expulsion).

changing consequences are involved, recipients should be granted a meaningful choice whether to employ a clear and convincing evidence standard that does not depend on their use of that standard in contexts where such consequences are not at issue, especially when an institution lacks the resources to perform an adequate investigation or adjudication of the Title IX complaint[586] and the use of the lower standard will engender distrust in the reliability of outcomes in the recipient's disciplinary process.[587] When the Department issues regulatory requirements governing quasi-

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[586] *See* Ellis, *supra*, at 75–76 (2013) ("The [2011 DCL] mandate signaled the abandonment of OCR's individualized approach to its review of school grievance procedures and instead saddled all federally funded colleges with the burden of having to make potentially life-altering determinations of guilt or innocence on little more than a hunch, using our justice system's lowest standard of proof—even in cases involving allegations of sexual assault. OCR's mandate no longer allows investigators to consider the individual circumstances of an institution, such as whether or not it has the necessary resources or personnel to accurately adjudicate sexual harassment and assault charges under a preponderance of the evidence standard or whether the school has other procedures in place that might provide prompt and equitable resolution of claims without using a preponderance of the evidence standard. Despite its well-intentioned attempt to ensure that all colleges promptly and equitably resolve discrimination complaints, critics argue that OCR ignores the possibility of grossly inequitable outcomes if charges as serious as sexual assault must be adjudicated using society's least certain standard of proof, even at institutions lacking the resources to ensure the accuracy of their judgments."); *see id.* at 81 ("While some major universities might have the resources and investigative capacities to ensure accurate disciplinary hearings under the lower preponderance of the evidence standard, other institutions are not as well-endowed and should be afforded the discretion to craft a disciplinary hearing policy that aligns with their educational goals and fiscal realities. OCR's April 4 'Dear Colleague' letter takes a one-size-fits-all approach to campus sexual harassment adjudication and seeks to constrain universities where they once had a great deal of freedom."); https://www.thefire.org/open-letter-to-ocr-from-fire-coalition/ at 2 ("Given the divergence in quality and competency of school disciplinary hearings and the potential for life-altering punishment, it is unconscionable to require that those accused of such serious violations be found merely 'more likely than not' to have committed the offense in question. If OCR is to mandate an evidentiary standard for the adjudication of allegations of sexual harassment and sexual assault, it must be no less protective of the rights of the accused than the 'clear and convincing' standard.").

[587] *See* https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/ ("Requiring a lower standard of proof does not provide for the "prompt and equitable" resolution of complaints regarding sexual harassment and sexual violence. Rather, the lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by

criminal proceedings conducted by recipients, it should be obligated to include long-accepted procedural safeguards. That it proposes to do the opposite is highly disconcerting and arbitrary and capricious, particularly in light of the agency's failure to cite to studies, surveys, cases, and statistics that support its abrupt "about face" on such a controversial topic.

Finally, nothing in Title IX authorizes the Department to direct educational institutions to use a specific standard of proof in connection with Title IX proceedings or, for that matter, to leverage Title IX regulations to push schools to use the same evidentiary standard "in all other comparable proceedings" as used in Title IX matters. This provision simply exceeds the Department's statutory authority granted by Congress.

Given this lack of statutory authority and that the proposed rules would roll back the most important due process protections offered to parties to Title IX sexual harassment proceedings in the current regulations, the Department should retain the current regulations' protection of due process rights and continue to grant recipients discretion over the standard of proof used to adjudicate allegations of sexual harassment under Title IX.

> (xiii) Allowing a Higher Standard of Proof for Recipients' Employee Respondents than for Student Respondents

Current Rule: "Basic requirements for grievance process. A recipient's grievance process must— . . . . (vii) State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment . . . ." 34 C.F.R. § 106.45(b)(1).

Proposed Rule: "Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must: (1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other *comparable* proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. . . ." Proposed 34 C.F.R. § 106.45(h) (emphasis added).

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the campus judiciary, both the accuser and the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack of faith in the judicial process that such uncertainty will likely engender should be of great concern to OCR and recipient institutions.").

Belying its principle of consistency in the standard of proof recipients must use to adjudicate claims of sex discrimination in an arbitrary and capricious way, the Department proposes to permit recipients to offer accused employees a higher standard of proof ("clear and convincing evidence") than they offer to students accused of exactly the same misconduct.[588] The Department offers no relevant supportive reason for this other than expediency for recipients to allow them to avoid renegotiating collective bargaining agreements that offer employees accused of misconduct the clear and convincing evidence standard.[589] The ease with which the Department is willing to arbitrarily and capriciously compromise its stated principle of consistency to satisfy public employee education unions is disturbing, to say the least, and a stunningly transparent betrayal of students accused of serious sexual misconduct and who are less capable than an employee's union representative of advocating for their rights.[590]

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[588] *See* 2022 NPRM at 41,486–41,487 ("The Department's current view, informed by the input of stakeholders, is that allegations regarding sex discrimination by a student are comparable to allegations of other types of discrimination by a student, and that allegations of sex discrimination by an employee are comparable to allegations of other types of discrimination by an employee. Therefore, under the proposed regulations a recipient would be able to apply a different standard of proof to allegations of student misconduct than it would to allegations of employee misconduct.").

[589] *See id.* at 41,487 ("[R]ecipients may have collective bargaining agreements or State laws mandating certain standards of proof for evaluating employee conduct allegations and may want to select a different standard of proof for student conduct allegations or may have State laws requiring them to use a different standard of proof for students. The Department now believes that requiring the same standard of proof for complaints against students and employees is not necessary because of the difference in the relationships and obligations recipients have vis-à-vis students as compared to employees."). The Department's claimed reticence to upset state laws in this area is puzzling, because other parts of this proposed rule would boldly sweep aside many state laws and policies on the basis that they do not contemplate discrimination on the basis of "gender identity." Proposed 34 C.F.R. § 106.6(b). Given the Department's general willingness (unconstitutionally) to preempt state priorities in this other area, it is far more likely that the Department's favorable treatment of due process rights of employees over those of students is a symptom of its desire to please public employee unions.

[590] The Department indicates that, under its proposed rule, recipients would be able to offer a certain "subset" of employee a different standard of proof than it offers to other employees. NPRM at 41,487. What standards, if any, would OCR permit recipients to use in granting some employees greater protection than others? For instance, would a public secondary school be permitted to offer classroom teachers the protections of clear and convincing evidence standard while subjecting janitors and lunchroom workers to the preponderance of the evidence standard? Could they differ between unionized and non-unionized employees? If so, on what reasonable basis could such distinctions be made by recipients in a predictable, transparent manner? Failure by the agency to answer these questions with reasoned explanations supported by data, statistics, surveys, and the like would constitute arbitrary and capricious rulemaking.

In 2020, the Department considered this very issue and rejected the unfair, irrational approach the Department proposes in its current rulemaking. As the Department stated in 2020, "The Department believes that recipients should carry the same burden of proof, weighing relevant evidence against the same standard of evidence, with respect to any complainant's allegations of Title IX sexual harassment. The Department believes that complainants in a recipient's educational community should face the same process, including the same standard of evidence, in a Title IX grievance process regardless of whether the respondent who allegedly sexually harassed the complainant is a student, employee, or faculty member."[591] The Department soundly recognized that, in forcing a complainant to face a higher hurdle in holding responsible, say, a member of the faculty for alleged sexual harassment than in holding responsible a student for the same alleged conduct, a recipient could aggravate the perceived power differential between students and faculty members and decrease the legitimacy of the Title IX grievance process.[592]

This reasoning is just as sound as it was two years ago. The Department should accept it once again and not permit recipients to use a different standard of proof for evaluating sexual harassment claims against employees than they use to evaluate the same claims against students. Moreover, nothing in Title IX authorizes the Department to make such distinctions.

4. The Unconstitutional and Unlawful Provisions of the 2022 NPRM Related to the Process Accorded to Parties to Title IX Grievance Procedures

(i) *Mathews v. Eldridge* Factors

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[591] 2020 Rule at 30,376.

[592] *Id.* at 30,377 ("Regardless of the relative strength of 'bargaining power' of employees and students, the Department believes that a recipient must implement a fair grievance process for all complainants that does not use a different standard of evidence based on whether the complainant alleges sexual harassment against an employee, or against a student. Complainants (especially students) who allege sexual harassment against an employee already face the possibility that the respondent, as an employee, may be in a position of actual or perceived authority over the complainant, and the Department does not wish to encourage recipients to exacerbate that power differential by treating some complainants (*i.e.*, those who allege sexual harassment against a recipient's employee) differently from other complainants (*i.e.*, those who allege sexual harassment against a recipient's student) by requiring the former group of complainants to navigate a grievance process that will apply a higher standard of evidence than complainants in the latter group of complainants. Complainants should know that their school, college, or university has selected a standard of evidence (representing the 'degree of confidence' that a recipient requires a decision-maker to have in the factual accuracy of the determination regarding responsibility) that will apply regardless of the identity, status, or position of authority of the respondent.").

As explained previously, in mandating the procedural protections recipients must grant to those accused of sexual harassment, the Department must operate within a framework of constitutionally mandated due process protections established by the courts. Even private universities must treat parties to grievance procedures with a minimum level of fairness, and OCR itself is bound to operate within the bounds of the Constitution and federal law by refraining from requiring that recipients violate individuals' constitutional rights. With this proposed rule, the Department would require recipients to violate the law; therefore, the Department is acting outside of its lawful regulatory authority granted by Title IX.

In *Mathews v. Eldridge*,[593] the U.S. Supreme Court required lower courts to perform a three-factor analysis of the constitutionally required scope of due process in a particular context:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[594]

As examined above, the private interests affected by recipients' grievance processes for sexual harassment allegations, including those involving sexual assault, are extremely weighty. Complainants not only seek redress of the alleged harms inflicted on them by the respondent; they seek restoration of their equal opportunity to access the recipient's educational program or activities so they can continue with their lives. Respondents face expulsion, a ruined reputation, the removal of their opportunity to receive the education or career they desire, and harmful impacts extending to their future personal relationships. Such interests of both complainants and respondents in a reliable and accurate outcome cannot be overstated.

The risk of erroneous deprivation of these interests under the Department's proposed procedures is high. As described above, the Department seeks to withdraw not one but several due process protections from parties to Title IX sexual harassment grievance proceedings, and all of these removals serve to degrade the reliability and accuracy of the outcomes of the process. The rules would stoke bias by allowing the decisionmaker to be the same person as the investigator or Title IX Coordinator, would no longer require a live hearing or cross-examination for postsecondary institutions to adjudicate sexual harassment complaints, and would restrict parties' access to evidence. The reliability of such proceedings would severely drop in the elementary and secondary education context, where the proposed rule would remove any requirement of written notifications or access to evidence, eliminate any meaningful guardrails on the credibility determination process, and destroy the opportunity to appeal an outcome. And as a final blow in all sexual

[593] 424 U.S. 319 (1976).
[594] *Id.* at 335.

harassment proceedings, the Department would require institutions, except in certain narrow circumstances, to adopt the lowest standard of proof commonly used in America's justice system, the preponderance of the evidence standard. These procedural failings of the proposed rule drastically increase the risk of erroneous deprivation of the student and employee interests at issue.

The key government interest at stake is ensuring that recipients of federal educational funding do not deprive students or employees of equal opportunities in their education programs and activities on the basis of sex. By degrading the accuracy of sexual harassment proceeding outcomes in withdrawing procedural protections from parties to these proceedings, the Department does nothing to further this interest, as erroneously depriving students and employees of their relevant interests is not helpful to ensuring that discrimination does not take place. In fact, the imposition of unjust outcomes on a broad class of students and employees could constitute the very harm that the Department claims to be trying to prevent—sex discrimination. Any argument involving recipients' interest in efficiency and the cost of compliance is unavailing because recipients were required to implement the Department's mandated procedures for sexual harassment proceedings as of 2020; there is no additional cost to them in the continued implementation of these procedures at this time. To the contrary, additional net costs will be borne by recipients attempting to decipher and implement the Department's proposed radical changes undermining the integrity of and constitutional safeguards in the Title IX grievance process.

All of these *Mathews v. Eldridge* factors align in favor of retaining the Department's current regulations regarding due process protections in Title IX sexual harassment proceedings. Based on this analysis, the Department should abandon its attempt to overwrite these regulations with unconstitutional procedures that would make these processes less reliable. The Department must consider the *Mathews v. Eldridge* factors and explain why its proposed rule does not violate parties' constitutional right to due process under that case's framework; otherwise, it is acting in an arbitrary and capricious manner.

(ii) Recipients Must Permit a Live Hearing and Cross-Examination in Title IX Sexual Harassment Cases

The Department arbitrarily and capriciously fails to acknowledge that cross-examination is permitted in analogous contexts in the U.S. justice system and even required by the Federal Circuit in military-discharge proceedings.[595] In the context of public colleges and universities, and even arguably as an element of "basic fairness" discussed above in private higher-education institutions, the U.S. Constitution demands the basic due process right to a live hearing offering the opportunity of a respondent to cross-examine witnesses. The U.S. Supreme Court has stated that "[i]n almost

[595] Triplett, *supra*, at 522 (noting that cross-examination is required in the APA, 5 U.S.C. §§ 551–559, 701–706 (2006) and in military-discharge proceedings, citing *Doe v. United States*, 132 F.3d 1430 (1997)).

every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[596] As one scholar has recognized, disciplinary proceedings at postsecondary institutions over sexual assault allegations clearly fit this description: "Such allegations clearly turn on questions of fact, and indeed nearly always involve a 'he said, she said' dispute. Because resolution of sexual assault allegations depends on the credibility of witnesses testifying to disputed facts, sufficient procedural due process must include the opportunity for the accused to cross-examine the accuser."[597]

In *Donohue v. Baker*,[598] a federal district court agreed with this assessment, finding that a student facing expulsion at a public university was entitled under the Due Process Clause of the Fourteenth Amendment to a right to cross-examine his accuser, since the "case [was] one of credibility" pitting his testimony against that of the other party.[599] More recently, the U.S. Court of Appeals for the Sixth Circuit recognized this right to cross-examination in Title IX proceedings, concluding that "[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives. . . . Nor can the fact-finder observe the witness's demeanor under that questioning. . . . For that reason, written statements cannot substitute for cross-examination. . . . Instead, the university must allow for some form of live questioning in front of the factfinder . . . ."[600] And multiple federal courts of appeals have recognized the constitutionally mandated requirement for schools, colleges, and universities to allow accused students and employees to challenge party and witness testimony.[601]

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[596] *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (holding that cross-examination is required in cases involving temporary suspension of welfare payments), *quoted in* Barclay Sutton Hendrix, *Note: A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 615–616 (2013).
[597] *Id.* (footnote omitted) (citing *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997)).
[598] 976 F. Supp. 136 (N.D.N.Y. 1997).
[599] *Id.* at 147.
[600] *Doe v. Baum*, 903 F.3d 575, 582–583 (6th Cir. 2018), *quoted in* 2020 Rule at 30331 n.1286
[601] *See Doe v. Univ. of the Scis*., 961 F.3d 203, 215 (3d Cir. 2020) (holding that a private university's "contractual promises of 'fair' and 'equitable' treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers"); *Nash v. Auburn Univ*., 812 F.2d 655, 664 (11th Cir. 1987) (stating that, while the academic disciplinary proceedings involved in the case did not require cross-examination, "disciplinary proceedings involving more serious charges may necessitate the right to confront one's accuser."); *Cloud v. Trs. of Bos. Univ*., 720 F.2d 721, 725 (1st Cir. 1983) (holding that a school had properly complied with due process requirements in a sexual misconduct hearing when it allowed the accused student to cross-examine a witness against him while keeping the witness out of his view); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) ("cross-examination of witnesses might [be] essential to a fair hearing" when the outcome of a college disciplinary hearing hinges on matters of credibility); 2020 Rule at 30,313 ("The Department

In its current rulemaking, the Department cites numerous instances of federal district courts applying the Sixth Circuit Court of Appeals' cross-examination requirement,[602] but arbitrarily and capriciously waves them away with the assertion that they are "unclear" whether party-submitted questions asked by the decisionmaker would satisfy constitutional due process requirements. As we have seen in the policy discussion above, however, such decisionmaker-led questioning simply cannot substitute for direct, live, adversarial questioning by an individual affiliated with the party and degrades the recipients' ability to remain neutral in the proceeding.[603]

Instead of waving off this strong and growing jurisprudence finding that both public and private recipients must provide the right of cross-examination to parties to sexual misconduct proceedings, and providing for the uneven enforcement of such rights—largely to allow recipients located within jurisdiction of the Sixth Circuit Court of Appeals to enforce such a right—the Department must recognize the right of all parties to Title IX sexual harassment proceedings to a live hearing and cross-examination as a right under the Fifth and Fourteenth Amendments to the U.S. Constitution.

(iii) The Department Cannot Constitutionally Require Recipients to Adopt a Preponderance of the Evidence Standard Unless They Use a Clear and Convincing Evidence Standard for All "Comparable" Proceedings

As noted above, the Department proposes to combine its debasement of procedural protections for parties to Title IX sexual harassment proceedings with the effective requirement that recipients adopt a preponderance of the evidence standard of proof to evaluate the most serious allegations students and employees can face. This is not only bad policy; it would require public and arguably private universities to violate their students' and employees' constitutional due process rights. As

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agrees with commenters who observed that several appellate courts over the last few years have carefully considered the value of cross-examination in high-stakes student misconduct proceedings in colleges and universities and concluded that part of a meaningful opportunity to be heard includes the ability to challenge the testimony of parties and witnesses. The Department agrees with commenters who noted that this conclusion has been reached by courts both in the context of constitutional due process in public institutions and a fair process in private institutions.").

[602] NPRM at 41,505–41,507.

[603] The Department also ignores the fact that it has removed any ability of elementary or secondary school students to submit questions to the other party or to witnesses. Given the substantial number of cases it cites requiring *at least* the ability to have the other party answer questions involving credibility, the Department must explain why allowing elementary and secondary schools to deny this precise right to its students and employees is constitutionally permissible. (In short, it is not.)

a federal governmental department, the Department has no authority to facilitate and direct this degradation of constitutional rights.

In *Addington v. Texas*, the U.S. Supreme Court reviewed the use of the clear and convincing evidence standard and determined that it was required in a proceeding involving the indefinite and involuntary civil commitment of an individual to a state mental hospital.[604] The Court found that courts have required the use of such a standard in cases involving interests that are "more substantial than mere loss of money," including those "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[605] The Court reasoned that the use of the standard "reduce[s] the risk to the defendant of having his reputation tarnished erroneously."[606] In *Santosky v. Kramer*, the U.S. Supreme Court held that the use of the preponderance of the evidence standard is "inconsistent with due process" where "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight . . . ."[607]

Other types of proceedings in which the clear and convincing evidence standard is applied include cases involving deportation, denaturalization, "actual malice" findings in certain libel suits, terminating parental rights, and granting an incompetent individual's wish to end medical treatment.[608]

Specifically in the education context, in *Goss v. Lopez*, the U.S. Supreme Court held that constitutional due process protections require "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school" when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him . . . ."[609] And at least one federal court has found that the constitutional guarantee of due process may prohibit educational institutions from using the preponderance of the evidence standard in certain disciplinary proceedings: "Given the nature of the charges and the serious consequences of conviction," which

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[604] 441 U.S. 418, 427 (1979).
[605] *Id.* at 424, *quoted in* Hendrix, *supra*, at 611–612.
[606] *Id.*, *quoted in* Hendrix, *supra*, at 611–612.
[607] 455 U.S. 745, 758 (1982), *quoted in* https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/. Note that the Court employs the *Mathews v. Eldridge* framework, as discussed above in the context of the full panoply of the Department's proposed due process abdications, in the context of determining the appropriate standard of proof.
[608] Schoonmaker, *supra*, at 229–230.
[609] *Goss*, 419 U.S. at 574, 580, *quoted in* https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/.

resulted in a two-year suspension, "the court believes the higher standard of 'clear and convincing evidence' may be required."[610]

This comment has outlined the severe consequences for both parties involved in recipients' responsibility determinations in Title IX sexual harassment proceedings, which include the evaluation of allegations of sexual assault. It has also outlined how ED's proposals would remove many key procedural protections offered to both parties in the current regulations, thus exposing students and employees to responsibility determinations that are disturbingly less accurate. The Department argues in its current rulemaking that the preponderance of the evidence standard is appropriate because it is the standard used in civil litigation, including litigation involving alleged violations of civil rights law.[611] But this comparison is inapposite, and thus arbitrary and capricious, because Title IX grievance processes lack many features that make civil litigation outcomes more reliable, including the right to participation by counsel, a robust discovery process, and subpoena power, among other things,[612] and the most severe individual sanction imposed in such civil cases is monetary damages. As the Department pointed out in its latest Title IX rulemaking process just two years ago, "where a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career, a higher standard of proof can be warranted."[613]

In 2020, the Department reasonably concluded that recipients should have the discretion to adopt either the preponderance of the evidence standard or the clear and convincing evidence standard in Title IX sexual harassment proceedings due to the strengthened procedural safeguards it required, accruing to the equal benefit of complainants and respondents. By eviscerating these procedural safeguards, the proposed rule arbitrarily and capriciously places parties involved with allegations of serious sexual misconduct at the mercy of defective processes at their educational institutions; therefore, as a constitutional matter, recipients that do not continue to implement the procedures mandated in the current regulations must evaluate such allegations using a clear and

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[610] *Smyth v. Lubbers*, 398 F. Supp. 777, 799 (W.D. Mi. 1975), *quoted in* Ellis, *supra*, at 79.
[611] NPRM at 41,485.
[612] *See* 2018 NPRM at 61,477 ("Although it is true that civil litigation generally uses preponderance of the evidence, and that Title IX grievance processes are analogous to civil litigation in many ways, it is also true that Title IX grievance processes lack certain features that promote reliability in civil litigation. For example, many recipients will choose not to allow active participation by counsel; there are no rules of evidence in Title IX grievance processes; and Title IX grievance processes do not afford parties discovery to the same extent required by rules of civil procedure.").
[613] *Id.* at 61,477 (citing *Nguyen v. Washington Dept. of Health*, 144 Wash. 2d 516 (2001) (requiring the use of the clear and convincing evidence standard in a medical doctor's professional disciplinary proceeding involving sexual misconduct allegations); *Disciplinary Counsel v. Bunstine*, 136 Ohio St. 3d 276 (2013) (applying clear and convincing evidence standard in sexual harassment proceedings against a lawyer)).

convincing evidence standard. In forcing institutions into the false choice of using the preponderance of the evidence standard to evaluate such allegations or using the clear and convincing evidence standard for all claims of discrimination, the Department would violate the constitutional guarantee of due process.

In its final 2020 Rule, the Department removed a provision permitting recipients to use a preponderance of the evidence standard only if they used a preponderance of the evidence standard to evaluate allegations of non-sexual misconduct that carries the same maximum punishment, reasoning that such a restriction "may have had the unintended consequence of pressuring recipients to choose a standard of evidence for non-Title IX misconduct situations, potentially exceeding the Department's authority to effectuate the purpose of Title IX."[614]

By requiring recipients to use the preponderance of the evidence standard unless it uses the clear and convincing evidence standard in all other "comparable" proceedings (including those brought under other civil rights statutes), the Department is engaged in the same arbitrary and capricious behavior here that it found problematic two years ago. The Department would now force schools that employ the preponderance of the evidence standard in any discrimination (or other "comparable") proceedings into the choice of using the preponderance of the evidence standard in Title IX sex discrimination proceedings or ratcheting up the standard of proof in all other proceedings. The impacts of this proposal, which the Department does not consider, would sweep well beyond Title IX to affect recipients' compliance with other civil rights statutes and potentially to disciplinary proceedings outside of the Department's enforcement authority.

The Department's failure even to consider the broad sweep of its proposed rule outside of its Title IX enforcement authority is arbitrary, capricious, and unlawful because Title IX grants no such regulatory authority to the Department.

5. The Department's Proposed Rule Is Arbitrary and Capricious Under the Administrative Procedure Act

(i) The Department's Reinstatement of the Single-Investigator Model

As noted above, the Department indicates its trust in the single-investigator model of adjudication in Title IX grievance proceedings by arguing that, unlike prosecutors, "the recipient's role is to ensure that its education program is free of unlawful sex discrimination, a role that does not create an inherent bias or conflict of interest in favor of one party or another." This reasoning is flawed and inadequate, and the NPRM's reliance on it is arbitrary and capricious.

[614] 2020 Rule at 30,374.

As the Department knows, recipients have powerful incentives, including the threats of federal investigation and losing federal funding, to root out discrimination where it is alleged, whereas they have less weighty incentives to find for the respondent. Recipients are likely, therefore, to be more biased against respondents in Title IX sexual harassment proceedings than prosecutors are against defendants in criminal proceedings. The Department fails to recognize that the very fact of allowing the same person to serve in these very different roles, with very different purposes, in the grievance process would taint the process with bias. The Department's reliance on this reasoning is arbitrary and capricious.

(ii) The Department's Removal of the Right to Access Evidence from Parties to Title IX Sexual Harassment Proceedings in Elementary and Secondary Schools

The Department proposes to remove the right of parties to sexual harassment proceedings in elementary and secondary schools to access evidence, finding that a mere description of the evidence "would likewise provide the parties with sufficient information about the relevant evidence to meaningfully prepare arguments, contest the relevance of evidence, and present additional evidence." It fails to engage with or even address the fact that requiring parties to rely on the interpretation of the evidence by such schools rather than the evidence itself will severely compromise the ability of parties to develop their cases in Title IX proceedings. The Department's failure to address this argument is arbitrary and capricious.

(iii) The Department's Effective Requirement of the Preponderance of the Evidence Standard

In proposing to require recipients to use the lower preponderance of the evidence standard of proof unless they use the clear and convincing evidence standard in all other "comparable" proceedings, including (but apparently not limited to) those based on other discrimination complaints, the Department argues that "a singular imposition of a higher standard for sex discrimination complaints would impermissibly discriminate on the basis of sex." But it would allow recipients to set a lower standard for sex discrimination complaints than they set for other discrimination complaints, including of racial discrimination.

The Department argues that the preponderance of the evidence standard is preferable in sex discrimination proceedings because it treats parties equally by "giving equal weight to the evidence of each party." This reasoning is flawed because it mischaracterizes the function of an evidentiary standard. Under the clear and convincing standard, the decisionmaker is still required to give "equal weight to the evidence of each party"; he or she must rather decide that the balance of evidence meet the higher standard when making a determination. And the Department's argument in favor of the lower standard based on the fact that "all parties have an equal interest in the

outcome of the proceedings" is irrelevant, as this is also true of parties in proceedings where tribunals are obligated to use the clear and convincing evidence standard.

The Department broadly fails to explain how it reached a different conclusion just two years ago about the standard of proof that may be used in Title IX sexual harassment proceedings, as the Department in 2020 found that recipients could use the preponderance of the evidence standard specifically due to the new procedural requirements mandated under the rules. Now, the Department reverses course without explanation, saying but not explaining why those additional procedural protections were not needed to permit recipients to use the preponderance of the evidence standard.

The Department's reasoning is flawed and lacking; therefore, its reliance on that reasoning is arbitrary and capricious.

(iv) The Department's Elimination of the Right to Appeal Responsibility Determinations in Elementary and Secondary Schools

As described above, the Department proposes to remove the requirement in the current regulations that elementary and secondary schools offer parties the right to appeal the outcome of a Title IX grievance process. However, the Department proposes to add a right of the complainant to appeal the dismissal of his or her complaint. This unequal treatment of complainants and respondents is in direct contradiction with other parts of the rule requiring equitable treatment of the parties and is arbitrary and capricious.

(v) The Department's Removal of Right to Present Expert Testimony

The Department proposes to remove the right in the current regulations for parties to a Title IX sexual harassment proceeding to offer evidence from an expert witness. It asserts that recipients will be best-situated to determine whether expert evidence will be useful in a particular case, but one thing an expert can help explain is how her or his testimony is relevant in situations where the recipient may not believe it is relevant. The Department expresses concern that expert evidence may result in protracted Title IX proceedings, but rather than allow recipients to deny expert evidence, a more advantageous option for the parties would be to allow such expert evidence on the condition that it does not result in protracted Title IX proceedings. Because the Department does not consider this alternative, its reasoning is arbitrary and capricious.

(vi) The Department's Failed Redefinition of "Relevant" as Related to Access to Evidence

In 2020, the Department decided to require recipients to offer parties access to evidence "directly related" to the allegations to help them prepare for Title IX sexual harassment proceedings,

reasoning that recipients should not be gatekeepers of the evidence that parties could find useful in making their case. In its current rulemaking, the Department proposes to offer parties in a Title IX "sex-based harassment" proceedings involving a student at a postsecondary institution access to "relevant" evidence, though it claims to address the Department's previous concern by defining "relevant" to "encompass all evidence related to the allegations."

But, in fact, the Department defines "relevant evidence" as evidence that "may aid a decisionmaker in determining whether the alleged sex discrimination occurred." This definition creates the exact problem the Department in 2020 was attempting to avoid: parties will only have access to evidence based on the recipient's judgment about its usefulness in the proceedings. The Department's failure to justify this redefinition is arbitrary and capricious.

(vii) The Department's Flawed Analysis with Regard to Certain Procedural Costs in Sex Discrimination Grievance Proceedings

In multiple instances described above, the Department removes procedural rights of parties contained in the current regulations with respect to Title IX sexual harassment proceedings based on the fact that extending such procedural protections to all Title IX sex discrimination proceedings would be too costly and time-consuming for some or all recipients. The Department ignores the fact that it is creating this problem by proposing a vast expansion of the scope of Title IX grievance procedures to all sex discrimination proceedings. In discussing these cost and efficiency problems, the Department fails to consider the more reasonable alternatives of continuing to require the full range of procedural protections contained in the current rules while maintaining or extending a less-cumbersome process to sex discrimination complaints outside of sexual harassment. The agency also fails to consider how its broadening of the definition of sexual harassment imposes additional costs on institutions in the form of increased liabilities and efforts to cabin those liabilities in the form of additional staff training, compliance controls, legal counseling, and litigation defense. The Department's failure to consider the more reasonable alternatives and new costs is arbitrary and capricious.

D. Imposing on Recipients an Open-ended Requirement to Police Alleged Discrimination in Their Programs and Activities

Departing from Supreme Court precedent, the structure of Title IX, its longstanding approach to interpreting Title IX enforcement, and any sense of modesty in its authority to impose regulatory obligations on recipients, the Department's NPRM would hold recipients responsible for *any* discrimination that occurs in their educational activities and programs (broadly construed), whether or not they have notice that such discrimination took place and whether or not "in the United States" as commanded by the clear text of the statute, and force them to make the recipient's Title IX Coordinator a roving "campus commissar" to root out alleged discrimination and ensure that it never recurs.

These obligations would be costly, both in terms of the resources required to police all potential instances of sex discrimination in their educational activities and programs and in terms of the speech and academic freedom that would be chilled in the process. No matter the added cost involved, recipients would zealously carry out the broad responsibilities foisted upon them in this proposed rule rather than risk losing their federal funding.

1. Background

In its 1979 decision in *Cannon v. University of Chicago*,[615] the U.S. Supreme Court reasoned that the purposes of Title IX are two-fold: first, to "avoid the use of Federal resources to support discriminatory practices" and second, to "provide individual citizens effective protection against those practices."[616] In 1998, in *Gebser v. Lago Vista Independent School District*,[617] the Court held that a school was liable for monetary damages under Title IX for an employee's sexual harassment of a student when the school had "actual knowledge" of the harassment and responded with "deliberate indifference" to this knowledge.[618] In 1999, the Court in *Davis* (see elsewhere a discussion of this case's implications for this proposed rule's restrictions on speech) extended its reasoning to student-on-student harassment, still requiring "actual knowledge" and "deliberate indifference to such knowledge," but also requiring that the harassment be so "severe, pervasive, and objectively offensive" that it denies equal access to education.[619] It also held that liability would not attach in such cases if the school's response to the conduct was not "clearly unreasonable."[620]

In limiting the liability of recipients under Title IX to cases where they are aware of conduct and make the intentional decision not to address it, the Court took a contractual approach to recipients' obligations under Title IX,[621] "analogous to the way that the Title IX statute provides that a school's federal financial assistance is terminated by the Department only after the Department first advises the school of a Title IX violation, attempts to secure voluntary compliance, and the

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[615] 441 U.S. 677 (1979).
[616] *Id.* at 704, *quoted in* 2020 Rule at 30,028
[617] 524 U.S. 274 (1998).
[618] 2020 Rule at 30,032.
[619] *Id.*
[620] Davies, *supra*, at 405 (quoting *Davis*, 526 U.S. at 648).
[621] *Id.* at 401 ("The Court differentiated Title IX's Spending Clause origins and the contractual nature of the entity's promise of nondiscrimination from Title VII's outright prohibition of discrimination and express private right of action." (footnotes omitted); *id.* at 402 ("The Court concluded that a funding recipient's contract with the federal government encompassed only a promise not to discriminate, not an agreement to be held liable when employees discriminate.").

school refuses to come into compliance."[622] In light of the relatively narrow purpose of Title IX (to protect individuals from discrimination by entities receiving federal funds) as compared to that of Title VII (to protect individuals from discrimination across the economy), the Court concluded that the doctrines of constructive notice and *respondeat superior* it had recognized in the latter context are inappropriate.[623] By refusing to hold recipients liable where their response to harassment was not clearly unreasonable, the Court gave discretion to institutions and directed that courts should not simply substitute their judgment for the recipient's about the necessary response.

In its 2020 Rule defining recipients' obligations to respond to reports of sexual harassment, the Department adopted a modified version of the *Gebser*/*Davis* standard requiring recipients with actual knowledge of sexual harassment to respond in a manner that is not deliberately indifferent. It defined actual knowledge as notice of the harassment to any employee of an elementary or secondary school and notice of the harassment to the Title IX Coordinator of a postsecondary institution. Like the U.S. Supreme Court, the Department reasoned that Congress's enactment of Title IX under its Spending Clause authority imposed contract-like obligations on recipients to take action when they are aware of discrimination within their program but does not hold them responsible for any and all discrimination that occurs under theories such as vicarious liability.[624] The Department also concluded that it would be preferable to cover recipients with a single framework regarding their obligations to respond to sexual harassment under Title IX, rather than subjecting recipients to one standard in the administrative enforcement context and another in the context of private litigation.[625]

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[622] 2020 Rule at 30,032–30,033. *See also* Davies, *supra*, at 402 ("The Court reasoned that if a statute's express enforcement mechanism requires notice to the funding recipient, it would be unsound and anomalous to permit judicially implied enforcement actions to impose substantial liability, possibly in excess of the federal grant, without a similar requirement.").

[623] Davies, *supra*, at 401 (quoting *Gebser*, 524 U.S. at 285).

[624] *See, e.g.*, 2020 Rule at 30,046 ("The mandatory obligations imposed on recipients under these final regulations share the same aim as the Department's guidance (*i.e.*, ensuring that recipients take actions in response to sexual harassment that are reasonably calculated to stop harassment and prevent recurrence of harassment); however, these final regulations do not unrealistically hold recipients responsible where the recipient took all steps required under these final regulations, took other actions that were not clearly unreasonable in light of the known circumstances, and a perpetrator of harassment reoffends. Recipients cannot be guarantors that sexual harassment will never occur in education programs or activities, but recipients can and will, under these final regulations, be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness.").

[625] *Id.* at 30,149 ("The Department agrees that aligning the Title IX sexual harassment definition in administrative enforcement and private litigation contexts provides clear, consistent expectations for recipients without letting recipients 'off the hook.'").

2. ED's Proposed Changes

Current Regulations: "(c) *Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. . . . (d) *Application outside the United States*. The requirements of paragraph (c) of this section apply only to sex discrimination occurring against a person in the United States." 34 C.F.R. § 106.8.

"*General response to sexual harassment*. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." 34 C.F.R. § 106.44(a).

"*Grievance process.* For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process must comply with the requirements of this section. . . ." 34 C.F.R. § 106.45(b).

Proposed Rule: "Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States." Proposed 34 C.F.R. § 106.11.

"(a) *General.* A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. To ensure that it can satisfy this obligation, a recipient must comply with this section."

(b) *Monitoring.* A recipient must:

(1) Require its Title IX Coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX; and

(2) Take steps reasonably calculated to address such barriers. . . .

(f) *Title IX Coordinator requirements.* A recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX: . . . (6) Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant." Proposed 34 C.F.R. § 106.44.

"For purposes of addressing complaints of sex discrimination, a recipient's prompt and equitable grievance procedures must be in writing and include provisions that incorporate the requirements of this section." Proposed 34 C.F.R. § 106.45(a).

"Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must: . . . (3) If there is a determination that sex discrimination occurred, as appropriate, . . . require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(6) . . . ." Proposed 34 C.F.R. § 106.45(h).

3. Policy Analysis

(i) The Department Proposes to Make Recipients Responsible for *Any* Sex Discrimination that Has Occurred, Regardless of Notice or Reasonableness of Actions Taken to Prevent It

Discarding the reasonable framework established by the Supreme Court in *Gebser* and *Davis* and adapted by the Department to the administrative enforcement context in 2020, the Department now proposes to create an impossibly broad, strict liability standard by which to judge recipients' actions related to all sex discrimination. By requiring recipients to "take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects," regardless of recipients' knowledge of whether such discrimination has taken place, the Department would encourage recipients to divert a massive amount of resources to policing past, present, and future discrimination and go beyond the text of Title IX, whose contract-like obligations do not contemplate holding an institution responsible for discrimination of which it has no knowledge.

As the Department noted in 2020, "Because Title IX is a statute designed primarily to prevent recipients of Federal financial assistance from using the funds in a discriminatory manner, it is a recipient's own misconduct—not the sexually harassing behavior of employees, students, or other third parties—that subjects the recipient to liability in a private lawsuit under Title IX, and the recipient cannot commit its own misconduct unless the recipient first knows of the sexual harassment that needs to be addressed."[626] There is no reason why this reasoning in the context of

[626] 2020 Rule at 30,038 (internal quotations and footnotes omitted).

private litigation does not hold true in the area of administrative enforcement. And, by proposing to jettison the "deliberate indifference" standard the Department adopted in 2020 to judge the actions of recipients in response to sexual harassment, the Department fails to provide any guideposts as to the reasonableness of a recipients' response to all types of sex discrimination. Instead, it simply says that such recipients must act to rid their programs and activities of all sex discrimination. In addition to the inconsistency and confusion caused by this application of a dueling standard that differs widely from the standard used in the litigation context, this standard will encourage recipients to police a much wider range of conduct and speech than they do under the current regulations, resulting in increased costs and broad restrictions of academic freedom and constitutionally protected speech.

This imposition of strict liability in place of a viable standard for the response of recipients to prohibited harassment goes beyond the bounds of Title IX's statutory text and violates the principle of separation of powers embedded in the U.S. Constitution. As discussed above, the Supreme Court set out the actual knowledge and deliberate indifference standard in its *Gebser* and *Davis* decisions because the structure of Title IX, as a Spending Clause statute, made the nature of the recipients' obligations a contractual one that relied on their own misconduct and released them from liability for conduct of which they were not aware and did not have an opportunity to respond. The Court relied particularly on key distinctions between this framework and Title VII, where broad restrictions on employment discrimination did not depend on whether the employers received funding from the federal government and employers were thus held liable for constructive notice of discrimination that occurred within their work environments.

In setting a strict liability standard, the Department arbitrarily and capriciously fails to engage with this reasoning, finding that the paramount interest of preventing all sex discrimination in education programs trumps a reasonable limit on recipients' subjection to administrative enforcement. Whatever importance the Department attaches to this interest, however, it cannot trump the plain meaning and structure of the Title IX statute by giving the Department the authority to impose on recipients the responsibility to address every possible instance of sex discrimination, no matter whether recipients received notice of the discrimination or whether such discrimination denied equal access of the complainant to a program or activity, and stop it from recurring. Congress spoke clearly when it provided the nexus in the statutory language to an "education program or activity receiving Federal financial assistance"; the Department cannot simply decide to ignore this nexus by holding institutions responsible for conduct they are not aware is occurring and by rejecting as insufficient a recipient's response to such conduct if the response does not end all recurring discrimination in the activity or program.

Even if it were true that the statute is not clear on this point, the Department's use of this text to force recipients to eliminate any and all discrimination, whether they have notice of it or not, is a fantasy and manifestly unreasonable. It goes beyond the bounds of the Department's statutory authority under Title IX and violates the APA.

(ii) The Department's Proposal to Require Recipients to Address Conduct Outside Their Activities and Programs and Outside the U.S. Is Unlawful

The text of Title IX states that "[n]o 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*."[627] In its 2020 rulemaking, the Department properly interpreted its Title IX enforcement responsibilities in line with the statutory text, finding that "Title IX does not authorize the Department to regulate sex discrimination occurring anywhere but only to regulate sex discrimination in education programs or activities."[628]

Now, as a pernicious effect of its move to a "hostile environment" analysis, the Department proposes to reverse course and force recipients to respond to conduct that occurs outside of the recipient's educational program or activity, and even outside the United States, if such conduct creates a hostile environment within the recipient's program or activity. The Department's imposition of such a requirement on institutions is unnecessary to ensure a proper response to sex discrimination that is in violation of the statute. If the Department does seek to regulate conduct outside the bounds of what Title IX prohibits, it is acting outside the bounds of the Title IX statute[629] and contrary to the principle of the separation of powers embedded in the Constitution.

Specifically, the Department's NPRM explains, "Proposed § 106.11 would . . . recognize that even when an act of sex-based harassment occurs outside the recipient's education program or activity, or outside the United States, that conduct could contribute to a hostile environment based on sex under the recipient's education program or activity, or otherwise exclude a person from participation in, deny them the benefits of, or subject them to sex discrimination under the recipient's education program or activity in the United States. If such sex discrimination occurs, the recipient must address it."[630] The NPRM gives two hypothetical examples involving a recipient's students being sexually assaulted, one in a "travel soccer program" and the other in a study abroad program, and then subjected to mocking, intimidation, or sexually suggestive

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[627] 20 U.S.C. § 1681(a) (emphases added).
[628] 2020 Rule at 30,196.
[629] *Id.* ("The Department's authority to regulate sexual harassment depends on whether sexual harassment occurs in 'any education program or activity' because the Department's regulatory authority is co-extensive with the scope of the Title IX statute. Title IX does not authorize the Department to regulate sex discrimination occurring anywhere but only to regulate sex discrimination in education programs or activities. Congress, in the Title IX statute, provided definitions of 'program or activity' that are reflected in the Department's current Title IX regulations.").
[630] NPRM at 41,401.

comments upon their return to the recipient's U.S.-based education program, depriving the victims of equal access to the programs.[631] In both cases, the NPRM states that the conduct outside of the recipient's program or outside the United States has created a hostile environment within the recipient's program, so the recipient would be required to take action under Title IX.[632]

To the extent the Department is attempting to address sexual harassment within recipients' programs or activities in the United States, the current regulations are more than sufficient to do so, with the key benefit that, by applying the Supreme Court's *Gebser*/*Davis* framework rather than "hostile environment" analysis, recipients are far less likely to prohibit constitutionally protected speech. For instance, the current regulations would require a recipient to take action to protect a student who has been sexually assaulted from the taunts and insults of the perpetrator and his or her friends (*i.e.*, behavior causing that student to be deprived of equal access to the program). As long as such verbal attacks were so severe, pervasive, and objectively offensive that they deprived the complainant of equal access, a recipient would be required to respond to a report of such behavior with supportive measures and, upon the filing of a formal complaint, launch the Title IX sexual harassment grievance process.

Moreover, the current Title IX regulations offer no impediment to institutional codes of conduct addressing behavior that occurs outside recipients' programs or outside the United States.[633] Recipients are free to investigate and punish behavior that occurs in such settings as study-abroad programs; they are just not required to do so under Title IX. So, in the case of another example ED gives in its NPRM, where a student complains that she has lost her scholarship because a professor in her study-abroad program discriminated against her in grading,[634] Title IX may have nothing to say on the issue because the conduct occurred in another country, but no federal law would prevent the university from investigating and remedying the alleged discrimination.

The Department arbitrarily and capriciously fails to recognize that it is restrained by Title IX's text and by a longstanding canon of statutory construction limiting the application of federal laws to activity that occurs within the United States. Two recent cases reinforcing this canon are *Kiobel v. Royal Dutch Petroleum*[635] and *Morrison v. National Australian Bank*,[636] in the latter of which the Court referred to the "longstanding principle of American law that legislation of Congress, unless

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[631] *Id.* at 41,417.
[632] *Id.*
[633] *See* 2020 Rule at 30,038 n.108 ("[N]othing in these final regulations prevents a recipient from addressing conduct that is outside the Department's jurisdiction due to the conduct constituting sexual harassment occurring outside the recipient's education program or activity, or occurring against a person who is not located in the United States.").
[634] NPRM at 41,403–41,404.
[635] 567 U.S. 967 (2012).
[636] 561 U.S. 247 (2010).

a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,"[637] and stated that, "[w]hen a statute gives no clear indication of extraterritorial application, it has none."[638] In 2020, the Department agreed with the rationale of a federal district court in *Phillips v. St. George's University*,[639] where the court held that Title IX does not apply to study-abroad programs because the statute's plain language indicated that Congress had no intention of making it applicable to extraterritorial conduct.[640] If Congress wishes to apply Title IX to conduct occurring outside of recipients' programs and outside the United States, it could do so, but until that time, ED has no statutory authority to force its proposed extraterritorial requirements on recipients.

Beyond its "hostile environment" analysis, the Department's NPRM offers another baseless—and thus arbitrary and capricious—requirement for recipients to enforce Title IX beyond the scope of their programs and activities, in violation of the plain text of the statute, by proposing to force recipients to address off-campus sex discrimination when they have unrelated provisions in their codes of conduct addressing "interactions . . . between students off campus."[641] The Department

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[637] *Id.* at 255, *quoted in* 2020 Rule at 30,474.
[638] *Id.*, *quoted in* 2020 Rule at 30,474. Of course, in the case of this Title IX statute, the plain language of the law in fact indicates the opposite, *i.e.*, that it only applies to discrimination against persons who are "in the United States."
[639] No. 07–CV–1555, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007).
[640] *See* 2020 rule at 30,206. *See also id.* ("We further note that the Supreme Court acknowledges that where Congress intends for its statutes to apply outside the United States, Congress knows how to codify that intent. When Congress has codified such intent in other Federal civil rights laws, Congress has addressed issues that arise with extraterritorial application such as potential conflicts with foreign laws and procedures." (footnotes omitted)). In its 2020 rulemaking, the Department explained, "As a practical matter, we also note that schools may face difficulties interviewing witnesses and gathering evidence in foreign locations where sexual misconduct may have occurred. Recipients may not be in the best position to effectively investigate alleged sexual misconduct in other countries. Such practical considerations weigh in favor of the Department looking to Congress to expressly state whether Congress intends for Title IX to apply in foreign locations." 2020 Rulemaking at 30,206. The Department must note that recipients would not be well-placed to investigate allegations of misconduct that occurred outside the U.S. but contributed to a "hostile environment" within their programs or activities and account for the costs that recipients must incur to properly investigate such conduct that allegedly occurred abroad. The proper choice, of course, is to abide by the plain meaning of the statute and allow recipients to continue to have discretion over the investigation of such conduct in their codes and policies.
[641] NPRM at 41,402 ("[S]ome schools have codes of conduct that address interactions, separate from discrimination, between students that occur off campus. If a school has such a code of conduct, then it may not disclaim responsibility for addressing sex discrimination that occurs in a similar context.").

does not have the authority to bootstrap the responsibilities of recipients under Title IX, which is specifically limited to conduct *within* a recipient's education programs and activities, based on what the recipients prohibit off-campus through their codes of conduct. These codes are not subject to the same restraints as Title IX and are therefore unrelated to recipients' enforcement responsibilities in the federal statutory and regulatory context. The Department goes far beyond its Title IX statutory authority with this proposed requirement, particularly to the extent that such a requirement would influence behavior outside of the Title IX context, such as persuading a recipient to limit its code of conduct related to off-campus behavior between students to reduce its exposure to OCR investigations of off-campus behavior. The Department must consider and address this possibility that its requirement that recipients address sex discrimination occurring outside of their educational program and activities will influence their codes of conduct in this way, or it is behaving arbitrarily and capriciously.

In short, the Department's proposed interpretation of Title IX to apply to conduct that occurs outside of recipients' education programs or activities, including those programs or activities outside of the United States, is arbitrary and capricious and goes beyond the clear bounds of the law. The Department should withdraw the portion of the proposed rule that would require recipients to prohibit such conduct and should retain the current regulations' sensible and statutorily imposed limits on the scope of its jurisdiction under Title IX.

(iii) The Department's Proposed Rule Envisions that Title IX Coordinators Would Take on the Role of "Campus Commissars"

DFI is especially troubled by the prospective interplay among three aspects of the Department's proposed rule, the first two of which are discussed above: (1) the sweeping expansion of the regulations to cover a broad swathe of speech protected by the First Amendment; (2) the decision to hold recipients responsible for addressing *any* discrimination that occurs within their programs or activities, whether or not they have any notice that it is occurring, and prevent its recurrence; and (3) the requirement that Title IX Coordinators monitor recipients' programs and activities for and address any reporting barriers and ensure that discrimination does not recur within recipients' programs. DFI fears that these policy proposals will combine to ensure that Title IX Coordinators serve as untethered "campus commissars" who are tasked with policing all potentially offensive content and imposing prior restraints on speech and conduct that might be perceived as offensive whether or not it ever leads to a complaint (to prevent any recurrence).

The current regulations require recipients to designate a Title IX Coordinator whose duties consist of taking in reports of sex discrimination prohibited by Title IX, offering supportive measures to complainants who alleged that they have been subject to sexual harassment, launching the Title IX grievance process in the case of complainants who file a formal complaint, and implementing any remedies the decisionmaker in the grievance process determines to be necessary. The current regulations thus set out specific responsibilities of the Title IX Coordinator that are directly related

to specific reports or complaints of Title IX sex discrimination in a recipient's programs or activities.

In place of this reasonable framework, the Department now seeks to detach Title IX Coordinators' responsibilities from specific reports or complaints of discrimination and direct them to take on any possibly qualifying discrimination that could be occurring or might occur in the future within the recipient's programs or activities. The Title IX Coordinator would at all times be required to "monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX" and "[t]ake steps reasonably calculated to address such barriers," whether or not anyone alleges that any such barriers exist. Upon being notified of conduct that could constitute sex discrimination or of a determination that sex discrimination occurred, the proposed rule would task the Title IX Coordinator with "[t]ak[ing] other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity . . . ."

These new massive grants of responsibility and commensurate authority for Title IX Coordinators would detach their roles from specific complaints of sex discrimination and transform them into roving, campus-wide civility investigators on the hunt for any potential hindrances to reporting and ensuring that discrimination does not "recur" in a recipient's program or activity. One harmful outcome of these added responsibilities is that they would saddle Title IX Coordinators with roles for which they are not prepared and for which they do not have time, thus forcing them to spend less time addressing actual complaints of sex discrimination.[642] An additional concern is that schools, school districts, colleges, and universities will suffer massive increases in Title IX compliance and staffing costs that many, in the wake of the COVID-19 pandemic, simply cannot afford. This is particularly true for state university systems, many of whose campuses constitute *de facto* cities—populated with tens of thousands of students, faculty, and staff. Still another danger is that, in combination with the proposed regulations prohibiting constitutionally protected speech and eliminating actual knowledge and deliberate indifference limitations on recipients' liability, they would incentivize Title IX Coordinators to police behavior that does not rise to the

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[642] *See, e.g.,* Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAVIORAL. SCI. 4 (2018) (explaining that most Title IX Coordinators have less than three years' experience and that about two-thirds of them are also employed in other positions); Sarah Brown, Life Inside the Title IX Pressure Cooker, Chronicle of Higher Education (Sept. 5, 2019) ("Nationwide, the administrators who are in charge of dealing with campus sexual assault and harassment are turning over fast. Many colleges have had three, four, or even five different Title IX coordinators in the recent era of heightened enforcement, which began eight years ago. Two-thirds of Title IX coordinators say they've been in their jobs for less than three years, according to a 2018 survey by the Association of Title IX Administrators, or ATIXA, the field's national membership group. One-fifth have held their positions for less than a year.").

level of conduct that is prohibited under Title IX but that *might* become such conduct. Requiring Title IX Coordinators to engage in such anticipatory policing, which would be necessary if they are to prevent the future "recurrence" of prohibited discrimination, is unlawful because it would sweep outside ED's regulatory authority under Title IX and because, in the case of speech, it would require the imposition of a prior restraint on constitutionally protected expression, which would be impermissible under the First Amendment to the U.S. Constitution.[643] The Department must consider these problems in the proposed rule, or it is acting in an arbitrary and capricious manner.

Title IX Coordinators are generally not equipped to handle the additional demand of policing behavior on campus to stop discrimination from "recurring," and for those who are, the contemplated new responsibilities of Title IX Coordinators would limit constitutionally protected speech and stifle academic freedom. Therefore, the Department should withdraw its proposed rule and limit the obligations of Title IX Coordinators to their duties under the current regulations.

4. Procedural Defect

As discussed above, the proposed rule would go beyond the bounds of the Title IX statutory text and structure to require recipients to enforce Title IX's prohibitions against sex discrimination outside of their programs or activities if such conduct creates a "hostile environment" within the recipient's program or activity. It would also require recipients to enforce Title IX in any circumstance "under the school's disciplinary authority," including when the recipient's code of conduct covers conduct in an off-campus setting. Under the proposed rule, recipients would be required to enforce Title IX's prohibition of sex discrimination in that same setting. This proposed rule is unlawful because it is not authorized by the Title IX statute.

It is also arbitrary and capricious, and thus a violation of the APA, because the Department fails to consider its cost to recipients, its negative impacts on academic freedom, and the difficulty of administering this requirement. The Department's failure to consider these factors and the simple fact that a recipient's ability to subject some off-campus conduct to its control does not mean that it can control all conduct reveals that the proposed rule is arbitrary and capricious.

E. Degrading Complainant Autonomy by Expanding Compulsory Reporting and Launching the Grievance Process Without the Consent of Complainant

1. ED's Proposed Changes

Current Rule: "*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary

[643] *See Near v. Minn.*, 283 U.S. 697, 712–714 (1931).

and secondary school. . . . The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. 'Notice' as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a). . . .

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. . . . As used in this paragraph, the phrase 'document filed by a complainant' means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part . . . ." 34 C.F.R. § 106.30.

"*Response to a formal complaint.* (1) In response to a formal complaint, a recipient must follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a). . . ." 34 C.F.R. § 106.44(b).

Proposed Rule: "*Complaint* means an oral or written request to the recipient to initiate the recipient's grievance procedures as described in § 106.45, and if applicable § 106.46." Proposed 34 C.F.R. § 106.2.

"*Notification requirements.* (1) An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

(2) All other recipients must, at a minimum, require:

(i) Any employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX;

(ii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX . . . . Proposed 34 C.F.R. § 106.44(c).

"*Title IX Coordinator requirements.* A recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX: . . . (5) In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures under § 106.45, and if applicable § 106.46, if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity . . . ." Proposed 34 C.F.R. § 106.44(f).

"*Complaint.* The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient initiate its grievance procedures:

(i) A complainant;

(ii) A person who has a right to make a complaint on behalf of a complainant under § 106.6(g) [recognizing "[e]xercise of rights by parents, guardians, or other authorized legal representatives"];

(iii) The Title IX Coordinator;

(iv) With respect to complaints of sex discrimination other than sex-based harassment, any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred." Proposed 34 C.F.R. § 106.45(a)(2).

In 2020, ED issued Title IX regulations that constitute a carefully balanced approach for recipients to respond to reports of sexual harassment while respecting the autonomy of complainants and giving such complainants the information that they need to decide whether they wish to launch the grievance process. Now, ED proposes dramatically to expand the circumstances in which complainants are stripped of the decision whether to move forward with a complaint, either through the conscious decision of the Title IX Coordinator or anyone else participating in the education program or activity or through a misunderstanding by the complainant arising from the proposed rule's informalization of the complaint process. These proposed changes do not benefit complainants or respondents to a Title IX grievance process and provide cover for overzealous school, college, and university employees unilaterally to undertake to investigate and punish what they perceive to be insensitive speech or conduct without considering the wishes of the individual subjected to that conduct not to pursue the matter.

2. The Department's proposed mandatory reporting regime would diminish victim autonomy and deter victims from seeking support after harmful conduct

For sexual harassment in violation of Title IX, the current regulations properly take into account the age and maturity of complainants and respondents by providing different standards for recipients' responsibilities for elementary and secondary schools from the applicable standards for postsecondary institutions. Elementary and secondary schools have the obligation to respond to sexual harassment or allegations of sexual harassment in a manner that is not deliberately indifferent when any of their employees become aware of the harassment or allegations. In the postsecondary context, recipients must respond to allegations of sexual harassment when the allegations are reported to the Title IX Coordinator. The current regulations recognize that minor students are more likely to believe that notifying their teacher or another employee at their school will result in action by the school in response to sexual harassment and that such young students should not be expected to seek out a specific, designated individual at their school to report such alleged misconduct. College and university students, on the other hand, are generally adults capable of identifying and following procedures for the reporting of sexual harassment, while understanding that they can confide in other employees at the institution without triggering its response obligations.

In the first place, as explained above, the Department inappropriately proposes to end the "deliberate indifference" requirement and would make recipients responsible for ending any discrimination in their programs or activities, whether or not they are aware of such discrimination. The proposed regulations would also impose reporting requirements on a broad array of school employees that, in the aggregate, would harm victim autonomy and deter victims from seeking support from employees at their school.

The Department would impose an obligation on all employees of elementary and secondary schools, other than confidential employees like school counselors, to report "information about conduct that may constitute sex discrimination under Title IX" to their Title IX Coordinator. DFI believes that, to the extent that this provision relates to the alleged sexual harassment of students, such an obligation is proper. However, it extends far beyond this type of conduct to interfere in student autonomy for potentially minor alleged infractions, with the effect of contributing to the Department's apparent desire to install a "Federal Civility Code" in all schools.

DFI recognizes that school employees generally have an existing obligation under State law to report sexual assault and other kinds of abuse that would violate Title IX's prohibition of sex discrimination. Clearly, in line with these pre-existing requirements, all school employees outside of confidential employees should be required to report to their Title IX Coordinator sexual harassment and allegations of sexual harassment of a student, and we urge the Department to retain this requirement in the final rule.

As for allegations regarding the sexual harassment of or other sex discrimination against an adult school employee, the Department fails to sufficiently explain why the agency thinks that these adults lack the autonomy to report such alleged misconduct to their Title IX Coordinator. Surely,

adult employees of a school should be considered in a different category than are minor students, yet the rule requires mandatory reporting in both contexts. Adult elementary and secondary school employees should retain the autonomy to determine whether it is in their best interest to report harassment or discrimination against them to the school's Title IX Coordinator, and there should be no mandatory reporting requirement for conduct that may rise to the level of discrimination in these cases. At the very least, the Department must explain why it is making this unpersuasive distinction. Failure to do so would constitute arbitrary and capricious conduct by the agency.

Despite the propriety of mandatory reporting of the sexual harassment of students in the elementary and secondary school context, the Department's proposed policy improperly goes much further to encompass *all* instances of anything that *may* constitute "sex discrimination," including student-on-student activity. By including all sex discrimination by students against other students, the proposed rule arbitrarily and capriciously fails to account for the likely relative immaturity of the parties involved in the allegations. For instance, if a group of second-grade boys exclude a girl from their kickball team, and the girl tells a teacher, the teacher would be required to report the sex discrimination to the school's Title IX Coordinator. The Title IX Coordinator, in turn, would then be required to offer the complainant supportive measures, give the girl resources to decide whether to file a complaint, and, even if she chose not to, consider whether to file a complaint against the boys. In this way, the Department's proposed reporting requirement would rigidify the process to the detriment of teachers who would prefer to use the conduct as an opportunity for a "teaching moment." Surely, any teacher or nearby adult would be far better-placed to handle the hypothetical kickball incident described above by teaching the boys the benefits of inclusion; however, these rules would instead invoke the inflexible, bureaucratic machinery of Title IX to deal with such a scenario.

Aside from the rigidity the Department's proposed approach would impose on reports of peer-on-peer discrimination, the Department arbitrarily and capriciously fails to consider the different calculation it must make when allegations do not relate to sexual harassment but rather to less severe conduct. The primary reason for State laws requiring certain employees to report violence and sexual abuse is the severity and heinousness of the crime involved. The calculus is different in the case of less severe misconduct. In its effort to stamp out *all* instances of sex discrimination in educational institutions across the country, the Department fails to engage in this calculus and subjects all discriminatory misconduct to the same standard as the most severe misconduct, *i.e.*, sexual assault. It fails to consider the student who has been subjected to minor misconduct, such as hearing an isolated comment from another student deprecating the sex of the student. In such a scenario, they should be permitted to disclose this information to a teacher without triggering reporting obligations.

Consider a student who believes a teacher has engaged in sex discrimination while grading and seeks advice from another teacher on this subject. If the second teacher suspects that her allegations *may* be true, the student would have perhaps unwittingly triggered the teacher's reporting

obligations and launched a process she never wished to begin: the sharing of her discussion with the school's Title IX Coordinator. This kind of system does not represent fairness or deference to victims; it represents the Department's overzealous attempt to enlist all employees of elementary and secondary schools in its mission to destroy all perceived sex discrimination. Moreover, the proposed rule would inundate Title IX Coordinators with complaints about possible misconduct, leaving them with less time to address the most serious allegations. It would also make students less likely to talk to their teachers or other employees about less-severe discrimination because they may not wish to subject themselves to embarrassment or criticism by launching the bureaucratic Title IX machinery over relatively minor incidents. The Department must consider these problems with its proposed rule, or it is acting in an arbitrary and capricious manner.

Going even further in its overzealous attempt to stamp out all perceived incidents of discrimination, the preamble to the Department's proposed rule states that the Department "does not expect that a recipient will follow the online activity of its students that is not part of the recipient's education program or activity; however, when an employee has information about sex-based harassment among its students that took place on social media or other online platforms and created a hostile environment in the recipient's education program or activity, the recipient would have an obligation to address that conduct."[644]

Of course, this requirement to report off-campus online activity only worsens the harmful impacts of the proposed rule, including by inundating the recipient's Title IX Coordinator with discrimination complaints to the detriment of their responsibility to address serious misconduct like sexual harassment. This requirement sweeps broadly into constitutionally protected speech and conduct that is not at issue in Title IX—off-campus activity that is beyond a school's control. The mandatory reporting rule thus would chill students and employees from engaging in online debate, perhaps about controversial or provocative topics, even when they are in their homes and not otherwise subject to school rules. In applying the reporting requirement in this way, the Department acts in an arbitrary and capricious manner, goes well beyond the enforcement of Title IX, and violates the free speech and academic freedom protections of the First Amendment. Rather than extend "hostile environment" analysis to this absurd and unconstitutional extent, the Department should retain its current regulations, which prohibit sexual harassing conduct *within* the recipient's program or activity that is so "severe, pervasive, and objectively offensive" that it deprives a student or employee of equal access to that program or activity.

Much worse would be the situation in postsecondary institutions, where the proposed mandatory reporting requirements would deter adults, who have the agency and maturity to understand how to report allegations of discrimination to the institution-designated office or staff member, from discussing their experiences with faculty members, coaches, and others lest their conversations be immediately transmitted to a Title IX Coordinator. The proposed rule would require any recipient

[644] NPRM at 41,440.

other than an elementary or secondary school to force "[a]ny employee who is not a confidential employee and who has authority to institute corrective measures on behalf of the recipient" and "[a]ny employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity" to report to the Title IX Coordinator any conduct that *may* constitute Title IX-prohibited sex discrimination.

The Department proposes to include in its definition of employees with "responsibility for administrative leadership, teaching, or advising" a massive array of employees that includes deans; assistant or associate deans; directors of programs or activities; coaches; public safety supervisors; full-time, part-time, and adjunct faculty members; graduate students who have full responsibility for teaching and grading students in a course; academic advisors; and employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient.[645] This list of mandatory reporters, which is not exhaustive, appears to include nearly every employee with whom a student would regularly interact on a college or university campus, and it does not end here. The proposed rule states that whether an individual is an employee "who has authority to institute corrective measures on behalf of the recipient" is "a fact-specific determination that rests on the recipient's own policies regarding whether an employee has the authority to take action to address sex discrimination on behalf of the recipient." This rule arbitrarily and capriciously puts the onus on a complainant to study the college or university's handbook on mandatory reporting prior to approaching an employee to discuss their alleged harassment; otherwise, complainants might only find out after the fact whether that employee must report their conversation to the Title IX Coordinator.

The proposed rule, unlike the current regulations, would actually discourage adult victims of sexual harassment from discussing their experiences with trusted advisors, such as a professor, dean, or coach, because they would fear that such an advisor would be required to share their story with a stranger.[646] This chilling effect upon reporting can only serve to stymy recipients' efforts

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[645] *Id.* at 41,439.

[646] Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 92 (2017) ("Apart from the fact that wide-net reporting policies remove survivors' ability to access their preferred confidants, wide-net reporting policies also leave survivors without the ability to control their situation in certain instances. If a survivor inadvertently discloses to an employee who has a reporting obligation or if someone else discloses the survivor's situation to an employee with such an obligation, then the survivor cannot, herself, stop the process from moving forward" (footnote omitted).); *id.* at 87 ("Because of the negative effects of disclosing in a system that removes a survivor's autonomy (and can harm a survivor psychologically and physically), wide-net reporting policies inhibit reporting by victims themselves, even if they may increase reporting by employees. Fewer disclosures by survivors create two problematic effects. First, the institution's ability to connect survivors with support and services decreases. Second, the institution's ability to hold perpetrators accountable also decreases. If perpetrators are not held accountable, then the campus culture inadequately deters sexual violence and, in fact, makes

to encourage reporting of and to respond to allegations of sexual harassment.[647] In proposing this rule, the Department arbitrarily and capriciously fails to recognize and respect the rights of victims of sexual harassment, including sexual assault, to control who knows about their intensely personal experience and whether the alleged perpetrator of the harassment is held accountable, thus potentially contributing to the aggravation of the psychological or physical harms to which they may have been subjected.[648] The proposed rule would in fact adopt a blatantly paternalistic system, where victims of sexual harassment, including survivors of sexual assault, cannot be trusted to

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victimization possible" (footnote omitted).); *id.* at 93–94 ("In addition, removing the survivor's choice about reporting removes the survivor's ability to control her situation in the aftermath of her victimization. Yet control matters greatly to a survivor's recovery, often reducing symptoms of post-traumatic stress disorder (PTSD). Research has shown that it is present control, rather than past control (understanding why the assault occurred) or future control (controlling whether one will be assaulted again in the future), that furthers recovery most" (footnote omitted).).

[647] *Id.* at 101 ("A policy that decreases the number of disclosures to the university also means the university is less able to provide survivors with the support and information that may increase their willingness to report. This is a terrible effect because universities typically cannot hold perpetrators accountable for their sexual misconduct unless their victims disclose it and cooperate with the investigation. Currently, only about 10% of students talk to any campus employee about their victimization.").

[648] *Id.* at 87 ("For students who disclose their victimization, these policies infringe their autonomy (that is, self-determination) and aggravate the psychological and/or physical harm caused by the violence itself. Undoubtedly, these categories of injury overlap; interfering with a survivor's autonomy can contribute to psychological and/or physical harm, and psychological or physical harm can impede a person's exercise of autonomy" (footnote omitted).); 2020 Rule at 30042–30043 ("What research does demonstrate is that respecting an alleged victim's autonomy, giving alleged victims control over how official systems respond to an alleged victim, and offering clear options to alleged victims are critical aspects of helping an alleged victim recover from sexual harassment. Unsupportive institutional responses increase the effects of trauma on complainants, and institutional betrayal may occur when an institution's mandatory reporting policies require a complainant's intended private conversation about sexual assault to result in a report to the Title IX Coordinator" (footnotes omitted).); Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. OF CRIM. LAW 67, 71–72 (2015) ("Research reveals that for some victims who interact with the criminal justice system, participation is beneficial. It can allow them to experience improvement in depression and quality of life, provide a sense of safety and protection, and validate the harm done by the offender. For other victims, interaction with the criminal justice system leads to a harm beyond that of the original crime, a harm that is often referred to as 'secondary victimization' and which is recognized to have significant negative impacts on victims. . . . A significant part of what accounts for the difference in experience is whether victims have the ability to meaningfully choose whether, when, how, and to what extent to meaningfully participate in the system and exercise their rights. In short, the difference in experience is explained by the existence—or lack of—agency.") (internal citations omitted)).

make the correct decision on their own or others' behalf about whether to report their experience.[649]

A recipient's designation of a limited number of campus-based mandatory reporters, such as high-level administrators and campus security personnel, may be beneficial when a complainant can readily discern that disclosing misconduct to them will result in a report of sexual harassment to the Title IX Coordinator,[650] and the Department, at the very least, must explain why this more limited approach would not better respect victims' autonomy and rights than the one it proposes. However, Title IX, which simply prohibits sex discrimination in recipients' education programs and activities, charts no discernible pathway on the issue of who should be a mandatory reporter of sex discrimination at postsecondary institutions. Such a designation should therefore be left to State law and to recipients.

3. The Department's Proposed Rule Would Cause Confusion at the Expense of the Complainant by No Longer Requiring a Signed Complaint to Launch the Grievance Process

The current Title IX regulations require a formal complaint signed by either the complainant or the Title IX Coordinator to launch the grievance process to resolve allegations of sexual harassment. This requirement results in predictability for both the complainant and the respondent regarding what is required to launch the process. As the Department explained as it issued these regulations two years ago, "[A] complainant's decision to initiate a grievance process should be clear, to avoid situations where a recipient involves a complainant in a grievance process when that was neither what the complainant wanted nor what the Title IX Coordinator believed was necessary."[651] Such a clear standard prevents confusion and uncertainty about who initiated the grievance process: "absent a written document signed by the complainant alleging sexual harassment against a respondent and requesting an investigation, the Department believes that complainants and recipients may face confusion about whether an investigation is initiated because the complainant desires it, because the Title IX Coordinator believes it necessary, both, or

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[649] Weiner, *supra*, at 91 ("When a school takes away choice from an adult survivor, the school signals the acceptability of paternalism; women are not competent to make decisions about their own lives, but need someone else to do it for them. It also signals the acceptability of selfishness; administrators can elevate the institution's interests above the survivor's interests, not unlike the way that the perpetrator elevates his interests over the survivor's. As if these messages weren't bad enough, the university's response also signals a lack of equal regard for women as a class because most survivors of sexual violence on campus are women, and university employees are often not required to report against the wishes of other crime victims.").

[650] *See, e.g.*, *id.* at 141 (arguing that high-level administrators, but not faculty, should be "designated reporters" of sexual assault because students will identify them as having the authority to address the conduct).

[651] 2020 Rule at 30,130.

neither."[652] The formal, written complaint "advises both parties of essential details of allegations under investigation, and of important rights available to both parties under the grievance process."[653]

The Department now arbitrarily and capriciously seeks to dispose of this predictable process designed to benefit complainants and recipients by standardizing how a grievance process is launched by proposing to allow written *or* oral complaints to launch a grievance process to evaluate allegations of sex discrimination. This provision aligns with the Department's pattern in its proposed rule to prioritize the unbridled ability of recipients to hunt down and destroy all perceived sex discrimination in its programs or activities at the expense of the rights of the parties to a sexual harassment grievance process to predictability and an understanding of the nature of the allegations.

The requirement of a formal, written complaint is largely aimed to benefit the complainant, since he or she will know that filing such a complaint—which is a formal rather than burdensome undertaking—will launch what may be a lifechanging process that she or he has the authority to initiate. There is little to no chance under the current regulations that such a process could be initiated by mistake or through the mischaracterization of a complainant's intent by an overzealous Title IX Coordinator. The proposed rule would unnecessarily introduce these real risks, and the Department must consider such risks in its rulemaking or else engage in arbitrary and capricious rulemaking.

The Title IX Coordinator should be able to serve as a trusted resource with whom a complainant can initially discuss allegations and supportive measures prior to determining whether to proceed with a grievance process.[654] The proposed rule would dramatically alter this dynamic by requiring complainants to cabin their speech with the Title IX Coordinator or any other employee of the recipient so it is not perceived as a complaint rather than the seeking of advice or information. In

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[652] *Id.*
[653] *Id.*
[654] In fact, the proposed rule would provide for complaints to be made to the recipient rather than only the Title IX Coordinator, further muddying the waters regarding whether a complainant's discussion with any employee at a school, college, or university will unwittingly result in the launch of a formal grievance proceeding that is beyond the complainant's control. NPRM at 41,409 ("The proposed regulations would also differ from the current regulations in that they would not require a complaint to be made to the Title IX Coordinator, or to any specific employee of the recipient; a complaint need only be made to the recipient."). This proposed provision is bad policy that will harm complainant autonomy for all of the reasons discussed in this section. It should be withdrawn in favor of the current regulations' requirement that complainants must file a formal complaint with the Title IX Coordinator to launch a Title IX sexual harassment grievance proceeding.

the end, the proposal would harm, not help, a complainant, and the lack of a written record of a complaint could result in confusion later in the process regarding who launched the proceedings.

The lack of a written complaint would also harm the respondent, who will be forced to rely on the characterization of the offense by a Title IX Coordinator who received allegations in an oral format. The written allegations contained in the complaint serve as a basis for the respondent to fully understand what conduct he or she is accused of. An oral complaint will be far less reliable in transmitting the relevant information to the Title IX Coordinator and will result in far more mistakes or miscommunications as to the alleged behavior that forms the basis of the complaint.

This proposed change would harm both parties and should be withdrawn in favor of the current regulations' requirement of a written complaint to launch the Title IX grievance process.

4. The Department's Proposal to Require the Title IX Coordinator to Consider Unilaterally Launching the Title IX Grievance Process Strikes Another Blow to Complainants' Autonomy

The current regulations contemplate that, in certain circumstances, the Title IX Coordinator might sign a formal complaint and initiate a grievance process to evaluate allegations of sexual harassment without the consent of the complainant. This authority is necessary to account for situations such as, in the most serious scenario, allegations pointing to a serial perpetrator of sexual violence. In prioritizing the autonomy of complainants, the current regulations contain no requirements forcing Title IX Coordinators to sign formal complaints in certain situations or requiring that they consider doing so.

The proposed rule would require Title IX Coordinators to determine whether they should launch a grievance proceeding "if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient's education program or activity." This proposed provision would sweep much too broadly to require Title IX Coordinators to sign complaints without the consent of the complainant when alleged conduct *may* amount to discrimination. This is a very low bar for the filing of a complaint that may result in the destruction of an individual's livelihood or academic opportunities. In fact, it constitutes no standard at all for launching grievance proceedings, not only permitting but requiring Title IX Coordinators to sign complaints when there is the slightest chance that the respondent engaged in discrimination. This replaces recipient discretion with a vast mandate to launch grievance proceedings against behavior that may be but is likely not discriminatory behavior under Title IX. The Department has no statutory authority to require that the Title IX Coordinator sign a complaint in these instances.

Furthermore, the Department includes no requirement for the Title IX Coordinator to take into account the complainant's opposition to the filing of a complaint in his or her decision to sign the complaint. As explained in the section above on mandatory reporting provisions, victims of sexual

harassment, including sexual assault, benefit greatly from control over the process of holding the perpetrator of such harassment accountable. Stripping them of such control is not a decision to be taken lightly, but in its quest to rid schools of all conduct that *may* constitute sex discrimination in education, the Department proposes no requirement that Title IX Coordinators consider that factor in deciding whether to sign a complaint.

The Department should withdraw its requirement for the Title IX Coordinator to determine whether to sign a complaint in favor of the current regulatory requirement granting discretion to recipients in this area.

5. The Department's Proposal to Allow Third Party Complaints Further Degrades Control by Complainants over the Grievance Process

In 2020, the Department considered but rejected arguments for a provision allowing third parties to file formal complaints launching sexual harassment proceedings. At that time, it reasoned that "we believe that respecting a complainant's autonomy to the greatest degree possible means that an investigation against a complainant's wishes or without a complainant's willingness to participate, should happen only when the Title IX Coordinator has determined that the investigation is necessary under the particular circumstances."[655]

The Department properly proposes to continue the exclusion of third-party complaints in the context of what it calls "sex-based harassment" allegations. DFI supports the exclusion of third-party complaints in this context. However, the Department does propose to allow such third-party complaints, by any student, employee, or anyone else "participating or attempting to participate in the recipient's education program or activity," to launch a Title IX grievance process in the context of any other allegations of sex discrimination. DFI opposes such free-for-all standing to file complaints that would inundate Title IX Coordinators with complaints, forcing their attention away from allegations of sexual harassment, and that would take control of the process out of the hands of complainants and place it in the hands of individuals who are inherently less knowledgeable than the complainant about the conduct at issue.

As described above, victims of sexual harassment, including sexual assault, benefit from control over the process of holding the perpetrator of the misconduct accountable, and there is no reason to believe that victims of other types of sex discrimination do not benefit in a similar manner from such control. DFI recognizes that, in limited circumstances, it is necessary for Title IX Coordinators to conclude, based on the training they receive and a consideration of the autonomy of complainant, that they should launch a grievance process without the consent of the complainant. The Department arbitrarily and capriciously proposes to open up this decision to anyone—even individuals who have no affiliation with the recipient whatsoever. These individuals

[655] 2020 Rule at 30,131 (footnote omitted).

are not required to have any training on when to launch a grievance proceeding on someone else's behalf. They will also inevitably have less knowledge about the discrimination than the person who was subjected to it, thus forcing recipients to investigate alleged misconduct based on incomplete and potentially faulty facts. The Department's failure to consider these facts is arbitrary and capricious.

For instance, if a spectator at a university co-ed competition who does not attend or work at the institution believes, based on the fleeting experience of attending the event, that men on one university's team are being denied equal opportunities to participate, the proposed rule would empower the spectator to file a complaint with the university alleging sex discrimination under Title IX, regardless of whether the male members of the team believe they are being denied such equal opportunities. Under the proposed rule, upon receipt of the complaint, the Title IX Coordinator *must* launch a costly process involving an investigation of the team's practices (quite likely resulting in negative publicity and potential embarrassment of the coach and the male and female members of the team). Control over whether to launch such a process should remain in the hands of the individuals who were allegedly subject to the discrimination, or, in limited circumstances, a trained Title IX Coordinator who has knowledge about the recipient's educational programs and activities that is superior to that of someone who may be attempting to participate in the recipient's program. The Department must consider this scenario and explain why such a spectator should be granted the right to submit a complaint, or it is acting in an arbitrary and capricious manner.

This proposal also cuts against the principle of a person or entity having standing to allege harm – a principle that is fundamental to our nation's justice system, which recognizes that the individuals who are best placed to pursue a court-ordered remedy are those who have a "personal stake" in the outcome of the dispute.[656] By proposing to remove this common-sense limitation from the rule and throw open the Title IX grievance process to permit standing to allege harm by anyone who believes discrimination may have occurred, whether or not he or she actually suffered any injury as a result of such alleged discrimination, the Department threatens to overburden the recipient's Title IX process, massively increase compliance costs and liability risk, and disregard complainant autonomy with results that will harm the parties who have the greatest interest in the proceedings outcome—the complainant and the respondent.

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[656] *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498–499 (1975) ("As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action . . . ." (citations and internal quotation marks omitted)).

The Department's failure to consider these factors is arbitrary and capricious. It should withdraw its proposal to allow third parties to file complaints and retain its current rule limiting the filing of formal complaints to the complainant and the Title IX Coordinator.

F. ED's Proposed Rule Would Impose Unfair Burdens on the Respondent Prior to the Outcome of the Grievance Process.

1. ED's Proposed Changes

Current Rule: "*Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. . . ." 34 C.F.R. § 106.30.

"*General response to sexual harassment*. . . . A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. . . . The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment." 34 C.F.R. § 106.44(a).

"*Emergency removal*. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. . . ." 34 C.F.R. § 106.44(c).

"*Investigation of a formal complaint*. When investigating a formal complaint and throughout the grievance process, a recipient must— . . . . (iii) Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence . . . ." 34 C.F.R. § 106.45(b)(4).

"(a) *Retaliation prohibited*. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part . . . .

(b) *Specific circumstances*. (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section." 34 C.F.R. § 106.71.

Proposed Rule: "*Peer retaliation* means retaliation by a student against another student.

Retaliation means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or this part . . . .

Supportive measures means non-disciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to: (i) restore or preserve that party's access to the recipient's education program or activity, including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment; or (ii) provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k)." Proposed 34 C.F.R. § 106.2.

"Supportive measures that burden a respondent may be imposed only during the pendency of a recipient's grievance procedures under § 106.45, and if applicable § 106.46, and must be terminated at the conclusion of those grievance procedures. These measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity. A recipient may not impose such measures for punitive or disciplinary reasons." Proposed 34 C.F.R. § 106.44(g)(2).

"*Emergency removal*. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. . . ." Proposed 34 C.F.R. § 106.44(h).

"*Basic requirements for grievance procedures*. A recipient's grievance procedures must: . . . . (5) Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to

obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered; or otherwise defend their interests . . . .” Proposed 34 C.F.R. § 106.45(b)(5).

“*Complaint investigation*. When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution’s grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution: . . . . (6) Must provide each party and the party’s advisor, if any, with equitable access to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible . . . in the following manner: . . . . (iii) A postsecondary institution must take reasonable steps to prevent and address the parties’ and their advisors’ unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures . . . .” Proposed 34 C.F.R. § 106.46(e).

“A recipient must prohibit retaliation in its education program or activity. . . . Prohibited retaliation includes but is not limited to:

(a) Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or

(b) Peer retaliation.” Proposed 34 C.F.R. § 106.71.

2. The Department’s Proposed Rule Would Treat Respondents Less Favorably than Complainants Prior to Any Determination of Responsibility

Following a report of sexual harassment and throughout any grievance proceeding, the current Title IX regulations permit supportive measures that burden a party, so long as such measures are non-disciplinary and non-punitive and do not unreasonably burden the other party. These regulations recognize that, prior to a determination of responsibility by a neutral, trained decisionmaker, the parties must be treated equitably while giving discretion to recipients regarding what supportive measures are appropriate on a case-by-case basis. Under the current regulations, the Department does not consider measures restricting parties’ rights under the First, Fifth, or Fourteenth Amendments to fulfill the recipient’s responsibility to respond to allegations of sexual harassment under Title IX.

The proposed rule, on the other hand, arbitrarily and capriciously ignores the current requirement that recipients treat parties equitably and consider a respondent not responsible for the alleged misconduct prior to a responsibility determination. It would tilt the grievance process against the respondent in multiple ways following an accusation, including by allowing supportive measures

that burden respondents but not supportive measures that burden complainants. By only allowing recipients to place potentially onerous restrictions on one party but not the other, the Department would essentially require recipients to prejudge the outcome of the process and provisionally accept as true the allegations of the complainant, who could be a third party, no matter how credible the allegations are. The Department would also remove from the current regulations the language stating that the Department will not consider restrictions on parties' constitutional rights to fulfill recipient's obligations to address sex discrimination under Title IX. These proposed changes would encourage recipients to subject respondents to inequitable supportive measures that violate their rights to free speech and due process prior to any determination of responsibility, limited only by the vague prohibition "without unreasonably burdening a party."

The proposal is arbitrary and capricious in violation of the APA because it is inconsistent with the current regulations' requirement of equitable treatment and a presumption of non-responsibility, goes beyond the Department's authority to regulate recipients under Title IX, and violates the First, Fifth, and Fourteenth Amendments to the U.S. Constitution. The Department should withdraw this proposed change and retain the current regulations' discretion to offer and impose supportive measures that do not unreasonably burden any party. The Department should continue not to consider measures that violate parties' constitutional rights as a basis for recipients to fulfill their responsibilities to address sex discrimination under Title IX.

3. The Department's Proposed Rule Would Vastly Broaden the Circumstances in Which Recipients May Provide for the "Emergency Removal" of a Respondent

The current Title IX regulations appropriately carve out discretion for recipients in emergency situations to remove a respondent accused of sexual harassment from their programs or activities following an individualized safety and risk analysis indicating that the respondent poses an immediate threat to the physical health or safety of any individual. The regulations recognize that, in situations potentially involving sexual harassment—which the Department defines to include sexual assault and other crimes—threats to the physical health or safety of a student or any other person can justify removing the respondent from the educational program or activity.

In the current rulemaking, the Department would properly continue to permit the emergency removal of respondents when the recipient determines, based on an individualized safety and risk analysis, there is an immediate threat to the physical safety of any individual. However, the Department proposes to expand this provision in two ways that would grant recipients potentially open-ended discretion to burden respondents with emergency removal when the situation does not require it. First, it would remove the requirement that the threat be to the *physical* health or safety of an individual, including threats to the mental health or safety of individuals. Common sense indicates that such "threats" are naturally less serious and immediate than physical threats and that permitting recipients to impose such a drastic measure on respondents who have not yet been found responsible for any misconduct and are to be presumed not responsible is unreasonably

burdensome in such cases. Just two years ago, the Department considered and rejected comments suggesting that it remove the word "physical" from the description of the nature of a threat justifying emergency removal,[657] and there is nothing that has changed since that time that warrants such a reweighing of the Department's analysis. The Department's unreasoned about-face is arbitrary and capricious.

Second, and more absurdly, the Department proposes to expand the scope of conduct that could be the basis of an emergency removal from sexual harassment, defined to include sexual assault, to *any* sex discrimination prohibited under Title IX. It is difficult, if not impossible, to fathom any situations in which mere sex discrimination that does not fall within the scope of the current regulation's definition of sexual harassment could lay the basis for the emergency removal of a teacher. Yet, because the Department arbitrarily and capriciously proposes to expand the scope of a recipient's discretion to subject a respondent to an emergency removal in such cases, it must have some discriminatory conduct in mind outside of sexual harassment that would give rise to "an immediate and serious threat to the health or safety" of individuals and justify removal. For instance, would a professor's alleged discrimination against a student in grading based on the student's sex warrant that professor's emergency removal? Would a male or female gym teacher's alleged discrimination against girls in his or her class by not allowing them to participate in certain sports justify the emergency removal of that teacher? If such alleged conduct, even if it occurred, would not meet ED's standard for an emergency removal, DFI calls on the Department to identify conduct outside of sexual harassment that *could* justify such removal under its proposed rule. If it cannot, and if it cannot answer with reasoned explanations the foregoing questions, then the proposed change is completely unnecessary and is arbitrary and capricious.

These two proposed changes—removal of the requirement that a threat be to the *physical* health or safety of an individual and the expansion of the underlying conduct justifying the removal to include any form of sex discrimination—would combine inappropriately to burden respondents who have not been found to be responsible for any misconduct.[658] To take one of the examples

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[657] *See, e.g.*, 2020 Rule at 30,225 ("The final regulations revise this provision to state that the risk posed by the respondent must be to the 'physical' health or safety, of 'any student or other individual,' arising from the allegations of sexual harassment. These revisions help ensure that this provision applies to genuine emergencies involving the physical health or safety of one or more individuals (including the respondent, complainant, or any other individual) and not only multiple students or employees. We agree with commenters who asserted that adding the word 'physical' before 'health or safety' will help ensure that the emergency removal provision is not used inappropriately to prematurely punish respondents by relying on a person's mental or emotional 'health or safety' to justify an emergency removal, as the emotional and mental well-being of complainants may be addressed by recipients via supportive measures as defined in § 106.30.").

[658] The proposed addition of the word "serious" to describe the threat does not cure the proposal's deficiencies. "Serious" is undefined, and the Department does nothing to help clarify

from the paragraph above, the student claiming that his or her professor gave him or her a bad grade due to his sex might be able to have that professor barred from campus by indicating that merely seeing the professor would cause him mental anguish. The unnecessary imposition of such a drastic measure could easily lead to publicity of the allegations and negatively affect the respondent's livelihood and reputation, well before any determination of misconduct is made. This is why the current regulations properly limit recipients' discretion to remove a respondent on an emergency basis to a narrow, sensible set of circumstances. The Department should withdraw its proposed change and retain the current rule's narrowly drawn provision for the emergency removal of a respondent.

4. The Department's Proposed Rule Would Broadly Restrict Both Parties from Exercising Their Constitutional Right to Free Speech

The current regulations properly prohibit recipients from restricting the right of the parties to discuss the allegations under investigation and to gather evidence to help them present their cases. In doing so, the Department explained that it was important not only to permit minors and young adults who are alleged victims of sexual misconduct or who are accused of having committed such misconduct to seek advice and support from family members and other trusted advisors,[659] but also to openly criticize the allegations against them or the recipient's handling of the grievance process to help their case or effect change in the future handling of Title IX allegations.[660] To

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what kind of "serious" conduct that is not sexual harassment and is not a physical threat could form the basis for an emergency removal.

[659] *See* 2020 Rule at 30,295 ("[T]he Department believes that a recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (*i.e.*, speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization. Many commenters have observed that the grievance process is stressful, difficult to navigate, and distressing for both parties, many of whom in the postsecondary institution context are young adults 'on their own' for the first time, and many of whom in the elementary and secondary school context are minors. The Department does not believe recipients should render parties feeling isolated or alone through the grievance process by restricting parties' ability to seek advice and support outside the recipient's provision of supportive measures.").

[660] *See id.* ("Nor should a party face prior restraint on the party's ability to discuss the allegations under investigation where the party intends to, for example, criticize the recipient's handling of the investigation or approach to Title IX generally. The Department notes that student activism, and employee publication of articles and essays, has spurred many recipients to change or improve Title IX procedures, and often such activism and publications have included discussion by parties to a Title IX grievance process of perceived flaws in the recipient's Title IX policies and procedures.").

restrict such speech would, in the Department's view as of 2020, permit recipients to impose inappropriate prior restraints on the parties' speech for the pendency of proceedings.[661]

Importantly, the Department in 2020 did not prevent recipients from imposing some confidentiality requirements on complainants or respondents. As such restrictions only relate to discussion of "the allegations under investigation," they permit recipients to restrict, for instance, the disclosure of evidence at issue in the proceedings and discussion of allegations prior to the filing of a complaint.[662] The current provision thus permits recipients to retain much of their discretion to impose confidentiality requirements except in the circumstance where the speech is of greatest importance: where parties need to gather evidence, seek support from trusted confidantes and advisors, and exercise their right to criticize what they perceive as a flawed process.

The current regulations also address the dangers of retaliation and threats of retaliation to the reliability of the grievance process while protecting free speech in the context of sexual harassment allegations. The regulations prohibit anyone from intimidating, threatening, coercing, or discriminating against any individual for the purpose of preventing them from exercising their Title IX rights, while exempting the exercise of an individual's First Amendment rights from the rule's definition of prohibited retaliation. These provisions appropriately prohibit interference with the exercise of statutory rights by parties to a Title IX sexual harassment proceeding while recognizing that merely discussing the allegations under investigation or criticizing the recipient's process does not amount to prohibited conduct.

The Department's proposed rule would arbitrarily and capriciously turn the current regulations' speech protections upside-down by *requiring* recipients to "protect the privacy of parties and witnesses" by restricting discussion of Title IX grievance proceedings. The Department exempts from this confidentiality requirement the gathering of evidence, including by speaking to witnesses; consultation with limited categories of people such as family members; preparing for

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[661] *See id.*

[662] *See id.* at 30,295–30,296 ("The Department further notes that § 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss 'the allegations under investigation.' This provision does not, therefore, apply to discussion of information that does not consist of 'the allegations under investigation' (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii))."); *id.* at 30296 ("This provision, by its terms, applies only to discussion of 'the allegations under investigation,' which means that where a complainant reports sexual harassment but no formal complaint is filed, § 106.45(b)(5)(iii) does not apply, leaving recipients discretion to impose non-disclosure or confidentiality requirements on complainants and respondents. Thus, reporting should not be chilled by this provision because it does not apply to a report of sexual harassment but only where a formal complaint is filed.").

any live hearing that is offered; or "otherwise defending [one's] interests." DFI supports the exclusion of all of these categories of speech from the Department's proposed confidentiality requirements. However, the better approach for parties facing potentially life-altering grievance proceedings who wish to seek support and engage the public about perceived flaws in the recipient's process is that of the current regulations, which uphold freedom of speech by allowing parties to discuss the allegations once they are under investigation.

Moreover, by requiring recipients to prohibit speech and then exempting certain speech from that requirement, the Department says nothing about recipients' requirement to allow such speech generally. It would appear that, under the proposed rule, recipients *may* prohibit parties from speaking to witnesses to gather evidence, consult with their family members, prepare for a live hearing, or defend their interests, as long as they are not specifically acting under the proposed mandate of "protect[ing]the privacy of parties and witnesses." The Department should categorically prohibit recipients' interference with speech in these categories, no matter whether the recipient is taking steps to enforce the Department's confidentiality requirements or pursuing some other aim.

By restricting parties' right to discuss the proceedings with anyone outside a family member, confidential resource, or advisor, the proposed rule would inappropriately restrict the options of parties facing the extreme stresses of a grievance process to overly narrow categories of people. Parties to these proceedings are much better-placed than the Department to decide where they can seek support and share their feelings and opinions during such a serious and consequential process, such as from friends and teachers.[663] Moreover, outside of preparing to present one's case and consulting with narrow categories of confidantes, the Department would only allow parties to discuss the allegations if they are defending their interests, which is an inappropriate, vague restriction on constitutional speech that would effectively restrain parties from expressing themselves about the proceedings in the public square. For instance, it is impossible to know whether OCR would consider the publication by one of the parties of an op-ed criticizing the perceived flaws in a recipient's grievance proceedings as "defending [one's] interests," since it

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[663] Since "confidential resource" is not defined in the rule, it is unclear whether a friend or a teacher would meet its definition, or if it is referring to an individual that resembles a "confidential employee," such as a counselor, attorney, or spiritual advisor. In the absence of such a definition, recipients will likely sweep broadly to restrict free discussion of allegations among the former category and only permit it among the latter. A similar problem is presented by the fact that "advisor" could refer to the party's advisor in the grievance process or more broadly to any type of advisor. Again, recipients are likely to take the approach of banning discussion with a broader set of people to avoid running afoul of the Department's proposed confidentiality requirements. The Department should define these terms broadly, but the better approach would be to prohibit any restrictions by recipients on parties' discussion of the allegations under investigation, as the regulations currently do.

may have no influence on the conduct of the proceedings whatsoever but be motivated by correcting problematic procedures for future parties in the recipient's grievance process.[664] By proposing to restrict parties' discussion to such narrow categories of people and limiting public discussion to "defending [one's] interests," the Department would impose a prior restraint of speech on respondents and complainants alike in violation of the First Amendment to the U.S. Constitution.

In the context of sexual harassment allegations involving a student in postsecondary institutions, the proposed rule's incursion on constitutionally protected speech goes even further. The Department would require such recipients to prevent parties from disclosing "information . . . obtained solely through the sex-based harassment grievance procedures," with none of the exceptions outlined in the part of the proposed rule that applies to other types of discrimination complaints under Title IX. Such "information" would likely include *any* details about the allegations, making the provision operate as a gag order on either party preventing them from seeking support from their family members or others, effectively prepare their case by interviewing potential witnesses, or criticizing the proceedings in the public square. This unnecessarily broad prohibition would serve as a blatantly unconstitutional prior restraint. DFI calls on the Department to withdraw this provision and retain its current regulations permitting parties to discuss the allegations under investigation.

In the context of retaliation, the Department would properly continue to prohibit "intimidation, threats, coercion, or discrimination" for the purpose of interfering with one's Title IX rights. Given the existing definition of retaliation, which the Department proposes largely to retain, DFI believes that it is unnecessary to specifically define and prohibit "peer retaliation," and that the inclusion of this category may cause confusion and make recipients more likely to sweep into prohibiting constitutionally protected speech of students as retaliation. Because such "peer retaliation" is already covered by the existing regulations, the addition of such a category of prohibited conduct is arbitrary and capricious.

Far more troubling is the Department's proposal to eliminate the provision in the current regulations specifying that the exercise of one's First Amendment right to free speech is not prohibited retaliation. The department's conclusory argument that the inclusion of such a provision is unnecessary because First Amendment rights are protected elsewhere in the regulations ignores the need for the inclusion of this specific provision and is arbitrary and capricious. The rule exempting constitutionally protected speech from the reach of the retaliation prohibition is

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[664] A related question is whether a student or faculty member would have to be challenged by someone else to "defend their interests" in the public square, or if they would be permitted to set out their case proactively. The Department's vague terminology regarding when it would permit parties to exercise their right to free speech does nothing to elucidate this question and others, and it is therefore arbitrary and capricious.

specifically intended to outline the contours of the definition of prohibited retaliation under § 106.71. If the Department, through its move to delete this provision protecting free speech, intends no change in the scope of recipients' prohibition of retaliation, the Department is doing something wholly unnecessary, which would be arbitrary and capricious. In the far more likely scenario that the Department intends this change to have an effect on the scope of recipients' prohibition of retaliation by barring constitutionally protected speech in the name of the Title IX regulations, the Department is unlawfully making its continued provision of federal funding to recipients contingent upon their prohibition of the exercise of First Amendment rights.

Under the Department's proposed rule, recipients would undoubtedly be more likely than under the current regulations to prohibit speech by complainants, respondents, and others regarding Title IX grievance proceedings due to the perception of such speech as "retaliation" prohibited under the Department's enforcement authority. For instance, under the proposed rule, a professor's publication of an article in a campus newspaper criticizing the procedures involved in his university's Title IX investigation of allegations of sex discrimination in grading could be prohibited by the university as "intimidation" of other students who contemplate coming forward and supporting the discrimination claims. This result would not only be arbitrary and capricious because it conflicts with the Department's proposed protection of party statement "defending [one's] interests" in proposed § 106.45(b)(5); it would unconstitutionally sweep into the prohibition of constitutionally protected speech, and would therefore be an invalid use of the Department's rulemaking authority.

The Department should withdraw its proposed changes requiring recipients to prohibit the constitutionally protected speech of parties to a Title IX grievance proceeding and retain its current regulations preventing recipients from interfering with these rights.

G. DFI Supports Reasonable Modifications for Pregnant Students and Employees and Parents Contained in the Proposed Rule.

Unlike other, ill-advised portions of the Department's rule—especially in the case of its dramatic and baseless interpretation of Title IX's text to include gender identity—DFI believes that the Department's proposed requirement of "reasonable modifications" for pregnant women and parents in education programs and activities is refreshingly warranted and properly furthers Title IX's prohibition of sex discrimination.

Specifically, the proposed rule would require recipients to provide students who are pregnant or who have related conditions "with voluntary reasonable modifications to the recipient's policies, practices, or procedures."[665] It would also require recipients to offer a voluntary leave of absence and to "[e]nsure the availability of a lactation space, which must be a space other than a bathroom,

[665] Proposed 34 C.F.R. § 106.40(b)(3)(ii).

that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed."[666]

This portion of the NPRM is grounded in the difficulty pregnant women and new parents, particularly mothers, experience in maintaining equal access to education programs and activities in light of their needs and the needs of their child or children. Women should not be discouraged from participating on an equal footing in recipients' activities because of the constraints they experience due to their pregnancy or their children's needs. The proposed rule's list of potential reasonable modifications[667] is reasonable, and its requirement that recipients provide clean, private lactation spaces is valuable in ensuring that new mothers maintain equal access to education under Title IX.

Title IX's attempt to provide equal educational opportunities for women and men directly supports this proposed portion of the rule. Women should never be forced to choose between having a baby (and providing nutrition for that baby) and having equal access to recipient education programs and activities.

DFI calls on the Department to take two specific actions to improve the proposed rule as it stands. First, the Department must ensure that the proposed rule complies with the federal law requiring neutrality of the enforcement of Title IX with respect to abortion.[668] Because the proposed rule defines "pregnancy or related conditions" to include "termination of pregnancy,"[669] the Department must ensure that recipients understand they will not be subject to OCR investigation or deprivation of federal funding if they do not provide a "reasonable modification" under the proposed rule in the form of paying for all or a portion of abortion services or referring students or employees to an abortion provider. The Department should include a provision in the rule making clear that, in compliance with existing law, the provision of such services to students and employees or reasonable modifications arising therefrom are neither prohibited nor required.

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[666] Proposed 34 C.F.R. §§ 106.40(b)(3)(iii)–(iv).
[667] Such modifications "[m]ay include but are not limited to breaks during class to attend to related health needs, expressing breast milk, or breastfeeding; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; extension of time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other appropriate changes to policies, practices, or procedures." Proposed 34 C.F.R. § 106.40(b)(4)(iii).
[668] 20 U.S.C. § 1688 ("Nothing in this chapter 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. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.").
[669] Proposed 34 C.F.R. § 106.2.

Second, the Department needs to perform a full accounting of the costs of its proposed rule with respect to reasonable modifications, which appear to DFI to be relatively significant. The Department proposes to require thousands of educational institutions to provide lactation spaces and other structural facility modifications in support of this provision, benefitting students and recipient employees. It will result in significant construction costs to many recipients,[670] yet the Department has failed to provide a projection of the associated costs. The Department must follow federal law in calculating the expected cost of these requirements and not indulge in fantasies that new physical spaces and supplies will occur without imposing significant costs on recipients. Such an accounting is a necessary and legally required part of the rulemaking process, and the Department cannot avoid correcting this legal deficiency in the proposed rule.

IV. Responses to the NPRM's Directed Questions

The Department includes several directed questions in its NPRM.[671] DFI lists these questions below and includes its responses in bold.

1. Interaction with Family Educational Rights and Privacy Act (FERPA) (proposed § 106.6(e))
Some aspects of the proposed regulations address areas in which recipients may also have obligations under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99, including, for example, provisions regarding the exercise of rights by parents, guardians, or other authorized legal representatives at proposed § 106.6(g); disclosure of supportive measures at proposed § 106.44(g)(5); consolidation of complaints at proposed § 106.45(e); description of the relevant evidence at proposed § 106.45(f)(4); access to an investigative report or relevant and not otherwise impermissible evidence at proposed § 106.46(e)(6); and notification of the determination of a sex discrimination complaint at proposed §§ 106.45(h)(2) and 106.46(h)(1). The Department is seeking comments on the intersection between the proposed Title IX regulations and FERPA, any challenges that recipients may face as a result of the intersection between the two laws, and any steps the Department might take to address those challenges in the Title IX regulations.

DFI Response: DFI refers the agency to its discussion of the conflicts between the proposed rule and FERPA in the section on gender identity set forth above in this public submission at page 94.

2. Recipient's obligation to provide an educational environment free from sex discrimination (proposed §§ 106.44-106.46)

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[670] NPRM at 41,558–41,560.
[671] NPRM at 41,544.

The proposed regulations at §§ 106.44, 106.45, and 106.46 clarify the obligation of a recipient to respond promptly and effectively to information and complaints about sex discrimination in its education program or activity in a way that ensures full implementation of Title IX. The Department invites comments on whether there are additional requirements that should be included in, or removed from, the current and proposed regulations to assist recipients in meeting their obligation under Title IX to provide an educational environment free from discrimination based on sex. The Department also seeks comment on whether and how any of the proposed grievance procedures (or any proposed additions from commenters) should apply differently to various subgroups of complainants or respondents, such as students or employees, or students at varying educational levels.

DFI Response: As explained on pages 116–207 of this comment, the Department should generally withdraw its proposed regulations at §§ 106.44, 106.45, and 106.46 as bad policy and, in parts, either unlawful or unconstitutional. DFI supports a limited requirement, as provided in proposed § 106.44(c)(1), for employees of elementary and secondary schools to notify their Title IX Coordinator of sexual harassment or allegations of sexual harassment committed against a student; however, the proposed rule sweeps too broadly in requiring all employees to report any conduct that may constitute sex discrimination.

3. Single investigator (proposed § 106.45(b)(2))
The Department is aware that, prior to August 2020, some recipients used a single investigator or team of investigators to investigate complaints of sex-based harassment and make determinations whether sex-based harassment occurred. The Department invites comments on recipients' experiences using that model to comply with Title IX and the steps taken, if any, to ensure adequate, reliable, and impartial investigation and resolution of complaints, including equitable treatment of the parties and reliable grievance procedures that are free from bias. The Department also invites comments on these issues from persons who were parties or served as an advisor to a party to a complaint that was investigated and resolved by a recipient using a single investigator model.

DFI Response: As explained in considerable detail on pages 126–130 of this comment, DFI opposes the Department's proposal to permit the return of the single-investigator model as a deprivation of the fundamental due process rights of parties to Title IX grievance proceedings. The Department should follow its reasoning from just two years ago and prohibit recipients from designating a decisionmaker in such a proceeding who also serves as the Title IX Coordinator or the investigator.

4. Standard of proof (proposed § 106.45(h)(1))
a. To the extent commenters take the position that the clear and convincing standard would be appropriate when used in all other comparable proceedings, the Department invites comments on steps that recipients implementing that standard have taken to ensure equitable treatment between the parties.

DFI Response: As explained in considerable detail on pages 156–162 of this comment, whether or not the clear and convincing standard would be appropriate when used in all other "comparable proceedings," the Department should not require that it be used in all such proceedings for it to be used in the most serious proceedings—those that could result in expulsion, termination, lifelong trauma, and reputational injury. This is especially true when the Department proposes to strip parties to Title IX grievance proceedings of many of the procedural protections at the heart of the 2020 Rule.

The use of a higher standard of evidence in these serious, life-altering proceedings does not make them less equitable—since, at least under the current regulations, each party continues to have equal access to procedural protections. Use of the standard is based on the reasonable decision that such a consequential determination, especially when there is no requirement for a live hearing or cross-examination and the decisionmaker may also be the Title IX Coordinator or investigator, should not hinge on a "more likely than not" standard. The Department should withdraw this proposal, retain the procedural protections of the current regulations, and permit recipients' discretion regarding whether to choose the preponderance of the evidence or clear and convincing standard of proof in Title IX sexual harassment proceedings.

b. The Department invites comments on whether it is appropriate to allow a recipient to use a different standard of proof in employee-on-employee sex discrimination complaints, than it uses in sex discrimination complaints involving a student.

DFI Response: As explained in considerable detail on pages 162–164 of this comment, it is wholly inappropriate to allow a recipient to use a different standard of proof in employee-on-employee sex discrimination complaints than it uses in sex discrimination complaints involving a student. This proposal flaunts the fundamental principle of the rule of law by making the standard of proof to which an individual is entitled contingent on their identity rather than on their alleged conduct. The Department should withdraw the proposed change and retain its current regulations requiring the application of the same standard of proof to all formal complaints of sexual harassment.

c. The Department invites comments on whether it would be appropriate to mandate the use of only one standard of proof for sex discrimination complaints.

DFI Response: As explained in considerable detail on pages 156–164 of this comment, we believe that it would not be appropriate for the Department to mandate the use of only one standard of proof for all sex discrimination complaints, but it is appropriate to mandate the use of only one standard of proof for complaints against individuals in different roles (*e.g.*, a student versus a teacher) accused of the same misconduct.

DFI believes that the potentially life-altering impacts of a Title IX sexual harassment grievance proceeding make it reasonable for recipients to choose the clear and convincing evidence standard in these cases while using a preponderance of the evidence standard in other sex discrimination cases. In fact, DFI believes that the use of the clear and convincing evidence standard may be required by the U.S. Constitution in Title IX sexual harassment proceedings where recipients, exercising the discretion the Department proposes to grant them, dispose of the numerous procedural protections required under the current regulations. Whether or not recipients choose to evaluate less serious allegations of sex discrimination using the clear and convincing evidence standard is, in the end, irrelevant to their decision to apply this standard to evaluate the most serious allegations under Title IX.

As DFI explains in our answer to question 4(b), the Department should continue to require recipients to apply one standard of proof for sex discrimination to allegations of the same misconduct under Title IX regardless of the identity or role of the respondent in the recipient's program. To do otherwise would be to ignore principles of fundamental fairness and would likely violate the U.S. Constitution's right to due process.

CONCLUSION

It is extraordinary that the Department presumes that it possesses the regulatory power to expand Title IX's protections to include gender identity, sexual orientation, sex stereotypes, and sex characteristics and to gut the statute's abortion neutrality provision. Title IX simply did not include delegations of this unprecedented authority to the Department, nor has subsequent legislation achieved the policy ends the Department now seeks to unilaterally and unlawfully impose on the American people.

The Department's proposed rulemaking directly violates Title IX's express statutory purpose and is an impermissibly arbitrary and capricious exercise of power by the Department on major questions of economic and political significance properly determined by Congress, not the President or federal agencies. The NPRM is an illogical, unjustified reinterpretation of congressional intent, despite the Department's own longstanding interpretations of Title IX's protections. It would severely and unconscionably erode the rights of accused students, teachers, and employees in sex discrimination proceedings and concentrate investigative and decision-making power in the hands of a single campus investigator while lowering the required standard of proof (for accused students, not faculty) and eliminating the right to a live hearing, to confront witnesses, and to fully examine the evidence.

In summary, the proposed regulatory scheme is contrary to Title IX's express statutory purpose, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. It would impose unacceptable costs on the States and America's educational institutions.

For the reasons discussed above, the Department should immediately withdraw the NPRM in its entirety.

Sincerely,

/s/ *Robert S. Eitel*
Robert S. Eitel
President
Defense of Freedom Institute for Policy Studies

/s/ *Paul R. Moore*
Paul R. Moore
Senior Counsel
Defense of Freedom Institute for Policy Studies

/s/ *Paul F. Zimmerman*
Paul F. Zimmerman
Policy Counsel
Defense of Freedom Institute for Policy Studies