



September 11, 2022

**Miguel A. Cardona**  
**Secretary of Education**  
**U.S. Department of Education**  
**VIA REGULATIONS.GOV**

**RE: Nondiscrimination on the Basis of Sex in Education Programs or  
Activities Receiving Federal Financial Assistance**  
**Docket ID ED-2021-OCR-01666**

***The Rule is Legally Unsound and Procedurally Infirm***

Dear Secretary Cardona,

Fifty years ago, Congress acted to protect equal opportunity for women by passing Title IX. Now, by radically rewriting federal law, the Biden administration is threatening the advancements that women have long fought to achieve in education and athletics. Along with denying women a fair and level playing field in sports, this new rule seeks to impose widespread harms, including threatening the health of adults and children, denying free speech on campus, trampling parental rights, violating religious liberty, and endangering unborn human life.

Alliance Defending Freedom (ADF) submits these comments on the Notice of Proposed Rulemaking (NPRM) on Title IX of the Education Amendments of 1972, Docket ID ED-2021-OCR-01666. ADF is an alliance-building legal organization that advocates for the right of all people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters involving Title IX, the First Amendment, athletic fairness, student privacy, and other legal principles addressed by the Notice of Proposed Rulemaking.

ADF strongly opposes any effort to redefine sex in federal regulations inconsistent with the text of Title IX itself, or otherwise impair the First Amendment, due process, or parental rights. This proposed rule seeks to redefine sex discrimination and sexual harassment under Title IX to address new matters beyond the scope of the statute. ADF thus encourages the Department of Education to withdraw and abandon the NPRM.

These comments focus on the rule's overarching legal and procedural infirmities.

## **I. Redefining “sex discrimination” will harm students, faculty, and schools.**

The Department’s notice proposes to add new sections that impact the definition of sex discrimination:

- the Department proposes in section 106.10 to define sex discrimination to include discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity;<sup>1</sup>
- the Department proposes in section 106.31(a)(2) to clarify that even where Title IX permits sex separation, a recipient cannot carry out that different treatment in a way that discriminates on the basis of sex by subjecting a person to more than de minimis harm. A policy or practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than de minimis harm.<sup>2</sup>

Not only does this redefinition of sex deviate from past agency statements<sup>3</sup> (as the Department admits) and lack any basis in federal law or Supreme Court opinion, but this collective redefinition of sex in Title IX will hurt students, faculty, and schools alike. For the reasons detailed below, Alliance Defending Freedom opposes the addition of sections 106.10 and 106.31(a)(2) to the Title IX regulations.

The Department thus should consider the alternative of using the biological definition of sex, which does not address gender identity or sexual orientation on any theory. It must explain why that definition cannot be retained. And it must consider the many harms that will follow from this redefinition.

## **II. Redefining “sex discrimination” is not authorized by Title IX’s text or Supreme Court precedent.**

The NPRM states that the “Department now believes that its prior position (i.e., that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity) is at odds with Title IX’s text and purpose and the reasoning of the *Bostock* Court and other courts to

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<sup>1</sup> NPRM at 519.

<sup>2</sup> NPRM at 529.

<sup>3</sup> NPRM at 7-8.

have considered the issue in recent years—both before and after *Bostock*.<sup>4</sup> This is simply wrong.

**A. Title IX deals with sex, not gender identity or sexual orientation.**

To interpret a statute, “we begin with the text.”<sup>5</sup> “After all, only the words on the page constitute the law.”<sup>6</sup> And neither judges nor bureaucrats can “add to, remodel, update, or detract from old statutory terms” according to their “own imaginations,”<sup>7</sup> or to ensure statutes “better reflect the current values of society.”<sup>8</sup> Title IX says no person “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.”<sup>9</sup>

Title IX doesn’t say anything about sexual orientation or gender identity. It prohibits discrimination only “on the basis of sex.” But sexual orientation, gender identity, and “transgender status are distinct concepts from sex.”<sup>10</sup> Since the word “sex” can’t fully encompass all of these terms at once, the question is which term Title IX uses when it prohibits discrimination “on the basis of sex.”<sup>11</sup> Because “sex” is not defined in the statute, it should be interpreted according to “the ordinary public meaning of [the] term[] at the time of its enactment.”<sup>12</sup> In 1972, the ordinary meaning of “sex” was “one of the two divisions of organic esp. human beings respectively designated male or female.”<sup>13</sup>

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<sup>4</sup> NPRM at 521.

<sup>5</sup> *United States v. Lauderdale Cnty.*, 914 F.3d 960, 961 (5th Cir. 2019).

<sup>6</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1756 (Alito, J., dissenting).

<sup>9</sup> 20 U.S.C. § 1681(a) (emphasis added).

<sup>10</sup> *Bostock*, 140 S. Ct. at 1746–47; see also *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1053 (7th Cir. 2017).

<sup>11</sup> 20 U.S.C. § 1681(a).

<sup>12</sup> *Bostock*, 140 S. Ct. at 1738.

<sup>13</sup> Webster’s Third New International Dictionary 2081 (1968); see also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“sex” meant “an immutable characteristic determined solely by the accident of birth.”); The American Heritage Dictionary of the English Language 1187 (1st ed. 1969) (defining sex as “[t]he property or quality by which organisms are classified according to their reproductive functions”); see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (opining that sex

Though we start with the words themselves, the text should be “interpreted in its statutory and historical context and with appreciation for its importance to the [statute] as a whole.”<sup>14</sup> “After all, context matters. As the late Justice Thurgood Marshall once put it, ‘A sign that says “men only” looks very different on a bathroom door than a courthouse door.’”<sup>15</sup>

Throughout Title IX, “sex” is used as a binary concept, encapsulating only male and female. For example, Title IX allows schools in some cases to change “from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*.”<sup>16</sup> Not only do these provisions speak of “the” other sex or “both sexes,” rather than “another” sex or “all sexes,” they also use terms like “father-son” and “mother-daughter” which are rooted in biology. At the time, mother was defined as “a female parent”;<sup>17</sup> “father” as “a male parent”;<sup>18</sup> “son” as a “male offspring”;<sup>19</sup> and “daughter” as “a human female.”<sup>20</sup> This makes no sense if “sex” includes the non-binary concept of gender identity. (In stark contrast to the statute’s biological binary, the Department attempts to erase references to “both sexes” in the regulations and replace them with “all applicants.”<sup>21</sup>)

If sex included concepts like a person’s gender identity, many Title IX exemptions would not make sense. Title IX’s regulations would not make sense either. They correctly allow for separate locker rooms and showers, so long as facilities “for students of one sex” are comparable to “facilities provided for students of the other sex.”<sup>22</sup> In sports, the regulation allows schools to “sponsor separate

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did not encompass “a person who has a sexual identity disorder, *i.e.*, a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male”). And until it is changed by Congress, “Title IX’s ordinary public meaning remains intact.” *Neese v. Becerra*, 2:21-CV-163-Z, 2022 WL 1265925, at \*12 (N.D. Tex. Apr. 26, 2022) (interpreting Title IX to protect biological sex, not gender identity).

<sup>14</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 471 (2001).

<sup>15</sup> *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1321 (11th Cir.) (Pryor, J. dissenting) (citation omitted), reh’g en banc granted, 9 F.4th 1369 (11th Cir. 2021).

<sup>16</sup> 20 U.S.C. § 1681(a)(2) (emphases added).

<sup>17</sup> Webster’s Third New International Dictionary 1474 (1968).

<sup>18</sup> *Id.* at 828.

<sup>19</sup> *Id.* at 2172.

<sup>20</sup> *Id.* at 577.

<sup>21</sup> See NPRM at 469, 509.

<sup>22</sup> 34 C.F.R. § 106.33.

teams for members of each sex.”<sup>23</sup> And schools must “provide equal athletic opportunity for members of both sexes” to “effectively accommodate the interests and abilities of members of both sexes.”<sup>24</sup>

The list goes on. Title IX or its regulations exempt institutions “traditionally” limited to “only students of one sex”;<sup>25</sup> “youth service organizations” traditionally “limited to persons of one sex”;<sup>26</sup> “living facilities for the different sexes”;<sup>27</sup> “separation of students by sex within physical education classes” for sports chiefly involving bodily contact;<sup>28</sup> and human sexuality classes and choirs separated by “sex”.<sup>29</sup> Title IX and its regulations only make sense against a binary, biological backdrop. For these reasons, courts, jurists, and even this Department have repeatedly rejected the effort to redefine sex to mean gender identity, both before and after *Bostock v. Clayton County*.<sup>30</sup>

In contrast, the Department’s proposed regulations would have a discriminatory, and even nonsensical, effect. If sex includes sexual orientation, these exemptions affirmatively bless heterosexual-only choirs,<sup>31</sup> or living facilities for gays only.<sup>32</sup> And if sex means gender identity, schools could not use a biology-based classification to separate physical education classes involving sports like

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<sup>23</sup> *Id.* § 106.41(b).

<sup>24</sup> *Id.* § 106.41(c) (emphases added).

<sup>25</sup> 20 U.S.C. § 1681(a)(5).

<sup>26</sup> *Id.* § 1681(a)(6)(B)

<sup>27</sup> 20 U.S.C. § 1686.

<sup>28</sup> 34 C.F.R. § 106.34(a)(1).

<sup>29</sup> *Id.* § 106.34(a)(3)&(4).

<sup>30</sup> See, e.g., *Tennessee v. U.S. Dep’t of Educ.*, No. 3:21-cv-308, 2022 WL 2791450, at \*21 (E.D. Tenn. July 15, 2022) (noting a plausible conflict between the U.S. Department of Education’s redefinition of sex discrimination to include gender identity and Title IX itself and its implementing regulations); see also *Adams v. Sch. Bd. of St. Johns Cnty., Fla.*, 3 F.4th 1299, 1336-38 (11th Cir. 2021) (Pryor, J. dissenting); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 731 (4th Cir. 2016) (Niemeyer, J. concurring in part and dissenting in part); U.S. Dep’t of Educ., Office for Civil Rights, Memorandum from Principal Deputy General Counsel Reed D. Rubinstein to Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights re *Bostock v. Clayton Cnty.* (Jan. 8, 2021) (rescinded 2021) <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

<sup>31</sup> See 34 C.F.R. § 106.34(a)(4).

<sup>32</sup> See 20 U.S.C. § 1686.

boxing and rugby.<sup>33</sup> These exemptions only make sense if they are rooted in biology, not identity or orientation.

There is no basis in the text of Title IX, or its implementing regulations, for reinterpreting sex to include gender identity.

**B. *Bostock* does not require reinterpreting “sex” under Title IX.**

*Bostock v. Clayton County* does not compel a different conclusion. *Bostock* held that discrimination based on sexual orientation or gender identity in the employment context violates Title VII.<sup>34</sup> In short, the Court observed that an employer who discriminates against an employee based on their sexual orientation or gender identity bases their decision, in part, on sex, and sex “is not relevant to the selection, evaluation, or compensation of employees.”<sup>35</sup>

*Bostock* does not support the Department’s reinterpretation of “sex” for at least three reasons. First, *Bostock* does not change the “ordinary, contemporary, common meaning” of sex under Title IX.<sup>36</sup> Just the opposite: *Bostock* recognized that “sex,” “gender identity,” and “sexual orientation” are “distinct concepts.”<sup>37</sup> *Bostock* merely said that gender-identity discrimination considered sex.<sup>38</sup> But did not consider the inverse question: whether considering biological sex always constitutes gender-identity discrimination.

Second, *Bostock* was a narrow holding, and the Court disclaimed any application outside the Title VII employment context.

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws

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<sup>33</sup> See 34 C.F.R. § 106.34(a)(1).

<sup>34</sup> 140 S. Ct. at 1741.

<sup>35</sup> *Id.*

<sup>36</sup> *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted).

<sup>37</sup> 140 S. Ct. at 1739.

<sup>38</sup> 140 S. Ct. at 1747–48.

are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.<sup>39</sup>

For this reason, other courts have concluded that “the rule in *Bostock* extends no further than Title VII.”<sup>40</sup>

Third, *Bostock*’s analysis does not work under Title IX. “Title VII differs from Title IX in important respects.”<sup>41</sup> Though sex is irrelevant to hiring or firing decisions, “athletics differs from . . . employment in analytically material ways.”<sup>42</sup> So “it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.”<sup>43</sup> “Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics.”<sup>44</sup>

Sports prove the point. Remember, *Bostock* simply held that Title VII forbids employers from taking sex into consideration (even in part) when they fire an employee. Applying the same reasoning here would mean Title IX forbids schools from taking sex into consideration (even in part) when they field a soccer team. But “athletics programs necessarily allocate opportunities separately for male and female students.”<sup>45</sup> And because males would largely displace females in sports if they were forced to compete against one another, the Department’s interpretation would be the death knell of women’s sports.

But no one thinks that Title IX forbids all sex-separated sports in every situation<sup>46</sup>—including the Department.<sup>47</sup> And even if the Department attempts to

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<sup>39</sup> 140 S. Ct. at 1753.

<sup>40</sup> See, e.g., *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021).

<sup>41</sup> *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4.

<sup>42</sup> *Cohen v. Brown Univ.*, 101 F.3d 155, 177 (1st Cir. 1996).

<sup>43</sup> *Meriwether*, 992 F.3d at 510 n.4; *Neal*, 198 F.3d at 772 n.8 (Title VII “precedents are not relevant in the context of collegiate athletics. Unlike most employment settings, athletic teams are gender segregated”); *Cohen*, 101 F.3d at 177 (“It is imperative to recognize that athletics presents a distinctly different situation from . . . employment and requires a different analysis in order to determine the existence *vel non* of discrimination.”).

<sup>44</sup> *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994).

<sup>45</sup> *Cohen*, 101 F.3d at 17.

<sup>46</sup> See *Kelley*, 35 F.3d at 271 (rejecting male’s challenge to sex-separated sports under Title IX).

<sup>47</sup> NPRM at 538 (“The Department also recognizes that exclusion from a particular male or female athletics team may cause some students more than de minimis harm, and yet that possibility is

preserve sex separation in sports except to the extent an athlete wants to play on an opposite-sex team that matches his or her gender identity, it would still destroy women’s sports by making it impossible to police males’ participation. That’s because “the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex).”<sup>48</sup> And major governing sports bodies that allow males to participate in women’s sports only do so for males who have taken puberty blockers or suppressed their testosterone. World Rugby, for example, only allows males to participate if they have never experienced male puberty. And organizations like the NCAA acknowledge that males’ participation in women’s sports based solely on gender identity is untenable. But even these regulations would violate the Department’s interpretation of Title IX because they would still exclude some males (who identify as female) from participating in the women’s category. According to the Department’s proposed rule, every male (who identifies as female) gets to participate in women’s sports—regardless of medical interventions or athletic ability—because to do otherwise would inflict more than de minimis harm.

Ironically, the Department’s proposed de minimis standard violates its own interpretation of *Bostock*. The Department—without foundation in law, logic, or statute—invented a new de minimis standard. The Department’s proposed rule would make subjecting a person to more than de minimis harm on the basis of sex a violation of Title IX. Subjecting a person to *less* than de minimis harm is permissible—and it appears that only the Department can define that threshold. But *Bostock* did not use such a standard. According to the Department’s own interpretation, *Bostock* is all or nothing. Either the policy or rule considers sex, or it does not. *Bostock* does not consider or measure harm. This means that the Department’s own proposed rule, by its interpretation of *Bostock*, is flawed.

Finally, sex-separated “bathrooms, locker rooms, [and] anything else of the kind”—even overnight facilities at battered-women’s shelters—would be abruptly illegal. Mechanically and uncritically importing *Bostock*’s narrow holding into Title

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allowed under current § 106.41(b). The Department’s authority to permit such different treatment in the context of athletics is described in the discussion of § 106.41”).

<sup>48</sup> *Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring); *see also id.* at 701 (Wilkins, J., concurring) (same holding).



IX would work precisely a sea change in this country's education laws, a change to Title IX that *Bostock* itself refused to endorse.<sup>49</sup>

**C. Reinterpreting “sex” is a matter for Congress and exceeds the Department’s authority.**

Our federal government is one “of limited powers.”<sup>50</sup> “The powers not delegated to the United States” are reserved to the individual States and the people.<sup>51</sup> And though the Supremacy Clause gives the federal government “a decided advantage” to “impose its will on the States,” States still “retain substantial sovereign authority” owing to our system’s “constitutionally mandated balance of power.”<sup>52</sup> This decentralized structure “preserves to the people numerous advantages,” and helps to protect “our fundamental liberties.”<sup>53</sup>

That is why “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides this balance.”<sup>54</sup> A “clear and manifest” statement is necessary for a statute to preempt “the historic police powers of the States,”<sup>55</sup> to abrogate state sovereign immunity, or to permit an agency to regulate a matter in “areas of traditional state responsibility.”<sup>56</sup> Courts thus “insist on a clear” statement “before interpreting” any “expansive language in a way that intrudes on the police power of the States.”<sup>57</sup>

Courts may also insist that “Congress speak with a clear voice” when it imposes conditions on the receipt of federal funds.<sup>58</sup> “‘Legislation enacted pursuant to the spending power is much in the nature of a contract,’ and therefore, to be

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<sup>49</sup> 140 S. Ct. at 1753.

<sup>50</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

<sup>51</sup> U.S. Const. amend. X.

<sup>52</sup> *Gregory*, 501 U.S. at 457–460 (citation omitted).

<sup>53</sup> *Id.* at 458.

<sup>54</sup> *Id.* at 460 (citation omitted).

<sup>55</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>56</sup> *Bond v. United States*, 572 U.S. 844, 858 (2014).

<sup>57</sup> *Id.*, 572 U.S. at 860; *Rice*, 331 U.S. at 230 (requiring “clear and manifest purpose” to override the “historic police powers of the States”).

<sup>58</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

bound by ‘federally imposed conditions,’ recipients of federal funds must accept them ‘voluntarily and knowingly.’”<sup>59</sup>

So the federal government may not “surpris[e] participating States with post acceptance or ‘retroactive’ conditions,”<sup>60</sup> or impose “a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication.”<sup>61</sup> And private recipients of federal funds must have “notice” of their responsibilities too.<sup>62</sup> Congress must “enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”<sup>63</sup> The federal Constitution limits the States’ and the public’s obligations to those requirements “unambiguously” set forth on the face of the statute,<sup>64</sup> both to make a statute apply to the States and to show that the statute applies in the particular manner claimed.<sup>65</sup>

All of these federalism concerns call for the “clear statement” rule here.<sup>66</sup> The Department’s reinterpretation of Title IX obviously affects education, which is the state’s “high responsibility.”<sup>67</sup> In fact, public education is “the very apex of the function of a State.”<sup>68</sup> And “Title IX was enacted as an exercise of Congress’ powers under the Spending Clause.”<sup>69</sup>

For these reasons Congress’ “intention” to cover sexual-orientation and gender-identity discrimination under Title IX must be “unmistakably clear in the language of the statute.”<sup>70</sup> It is not. Congress did not unmistakably address sexual

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<sup>59</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*, 451 U.S. at 17).

<sup>60</sup> *Pennhurst*, 451 U.S. at 24.

<sup>61</sup> *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 190 n.11 (1982).

<sup>62</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998) (citation omitted).

<sup>63</sup> *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (citation omitted) (striking down eviction ‘moratorium’).

<sup>64</sup> *Pennhurst*, 451 U.S. at 17.

<sup>65</sup> *Gregory*, 501 U.S. at 460–70.

<sup>66</sup> *Bond*, 572 U.S. at 2089.

<sup>67</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

<sup>68</sup> *Id.*

<sup>69</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005). So was § 1557 of the ACA. 42 U.S.C. § 18116(a); see *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012).

<sup>70</sup> *Gregory*, 501 U.S. at 460 (citations omitted).

orientation and gender identity in the 1972 Title IX, let alone unmistakably force colleges to abandon their codes of conduct on matters of sex, sexuality, and the human person. In fact, in a 1976 letter to the President of Harding College, OCR Acting Director Martin H. Gerry specifically denied that Title IX applied to sexual orientation: “We should, perhaps, note in this connection that Title IX does not address the question of homosexuality—it prohibits discrimination based on sex, not actions based upon sexual preference.”<sup>71</sup>

The Department’s reinterpretation goes against the plain text and purpose of Title IX. And in doing so, it doesn’t just infringe core state responsibilities or upend settled expectations; the Department seeks to redefine notions of privacy, fairness, and biological differences that have “been commonplace and universally accepted . . . across societies and throughout history.”<sup>72</sup> Congress did not address sexual orientation or gender identity when it codified Title IX in 1972. For fifty years, everyone has accepted that schools may recognize biological differences between males and females. And the Department’s reinterpretation would have momentous consequences throughout society. That’s an unfair “surprise[e]” to States and their citizens if there ever was one.<sup>73</sup>

The proposed rule thus unlawfully seeks to impose obligations that Congress did not clearly impose when it enacted Title IX—reason enough for it to be unconstitutional.<sup>74</sup>

*Bostock* does not help the Department here. In fact, Title IX’s “contractual framework distinguishes [it] from Title VII, which is framed in terms not of a condition but of an outright prohibition.”<sup>75</sup> So while “Title VII applies to all employers without regard to federal funding and aims broadly to ‘eradicate discrimination throughout the economy,’” “Title IX focuses more on ‘protecting’ individuals from discriminatory practices carried out by recipients of federal

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<sup>71</sup> Letter from Martin H. Gerry, Acting Dir., Office for Civil Rights, Dep’t of Health, Educ., & Welfare, to Clifton L. Ganus, Jr., President, Harding Coll. 4-5 (Oct. 14, 1976), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/harding-university-response-10141976.pdf>.

<sup>72</sup> *Grimm*, 972 F.3d at 634 (Niemeyer, J., dissenting).

<sup>73</sup> *Pennhurst*, 451 U.S. at 25.

<sup>74</sup> U.S. Const. amend. X.

<sup>75</sup> *Gebser*, 524 U.S. at 286.

funds.”<sup>76</sup> “Title IX’s contractual nature” is one more reason to distinguish this case from *Bostock*, and why Title IX demands a narrow reading.<sup>77</sup>

Moreover, modern agency interpretations cannot change the ordinary meaning of a statutory text. Agency interpretations only come into play when the underlying statute is “genuinely ambiguous.”<sup>78</sup> And Title IX is not ambiguous. When Congress enacted Title IX, “sex” referred to the physiological distinctions between males and females.”<sup>79</sup>

This means that by redefining sex discrimination to include sexual orientation and gender identity—concepts that cannot coexist with biological sex—the Department has exceeded its agency authority in going beyond the clear, unambiguous terms of Title IX. The Department’s interpretation also “radically readjusts the balance of state and national authority.”<sup>80</sup> The Department’s proposed regulations must therefore be rejected.

### **III. The attempt to redefine sex is arbitrary and capricious.**

The proposed rule claims that “[c]ontrary to the assertions made in 2020 and January 2021, the Department does not have a ‘long-standing construction’ of the term ‘sex’ in Title IX to mean ‘biological sex.’”<sup>81</sup>

If this claim is incorrect, then the Department’s mischaracterization of its own prior position and consequent failure to appreciate the degree to which it is effectuating change in that position is arbitrary and capricious.

This claim is incorrect. The Department’s own regulations showed a biological binary. The Department never announced any notices of a contrary definition until 2016, when its attempt to do so was swiftly struck down.<sup>82</sup> When the

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<sup>76</sup> *Id.* at 286–87.

<sup>77</sup> *Id.* at 287.

<sup>78</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

<sup>79</sup> *Grimm*, 822 F.3d at 736 (Niemeyer, J., concurring and dissenting in part) (collecting sources).

<sup>80</sup> *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539–540) (1947).

<sup>81</sup> 87 Fed. Reg. at 41537.

<sup>82</sup> Educational providers sued when the government sent a “Dear Colleague” letter to impose a similar standard on federally funded educational facilities. *Texas v. United States*, 201 F. Supp. 3d 810, 819–23 (N.D. Tex. 2016). There, as here, the Department announced new guidelines under which colleges must “alter their policies concerning students’ access to single sex toilet, locker room,

Department tried to do so last year, through informal guidance, the guidance was again enjoined. The Department never had this definition in the past.<sup>83</sup>

And, indeed, the past notices themselves are evidence that a past definition was in place. The proposed rule even says that the “Department now believes that its prior position (i.e., that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity) is at odds with Title IX’s text and purpose and the reasoning of the *Bostock* Court and other courts to have considered the issue in recent years—both before and after *Bostock*.”<sup>84</sup>

The Department is trying to rewrite the past to pretend that its new far-reaching interpretation of Title IX was in the statute all along. But this defies common sense. The Department would be on better ground simply to admit that it seeks to add new protected classes to the statute.

#### **IV. IV. The Department should delay the rule until after the next Supreme Court term and then re-open the comment period.**

The Department should delay the start of any comment period until the Supreme Court decides *303 Creative* in the October 2022 term.<sup>85</sup>

A Colorado law threatens web designer Lorie Smith and her studio, 303 Creative, to design and publish websites promoting messages that violate her religious beliefs. The law at issue also prevents Lorie from even explaining on her

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and shower facilities, forcing them to redefine who may enter apart from traditional biological considerations.” *Id.* A similar coalition sued in 2021 when the Department tried to do so again with informal guidance, and it was again enjoined. *Tennessee v. U.S. Dep’t of Educ.*, 2022 WL 2791450, at \*5–12.

<sup>83</sup> On February 23, 2021, citing the Executive Order, President Biden’s Departments of Education and Justice explicitly withdrew the previous administration’s position that Title IX does not allow schools to let biological men compete in women’s sports. Dep’t of Educ. Office for Civil Rights, Letter to City of Hartford, et al. (Feb. 23, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a5.pdf>; see Dep’t of Educ., Letter to City of Hartford, et al. (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>, at the top of which the Biden Administration posted a red-lettered disclaimer stating, “This document expresses policy that is inconsistent in many respects with Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”

<sup>84</sup> NPRM at 521.

<sup>85</sup> *303 Creative LLC v. Elenis*, No. 21-476 (U.S.).

own company's website what websites she can create consistent with her religious beliefs.

The U.S. Court of Appeals for the 10th Circuit ruled that Colorado can force Lorie to express messages and celebrate events that violate her faith because of the importance of the alleged government interest in prohibiting discrimination on the basis of sexual orientation and gender identity.

No one should be banished from the marketplace simply for living and speaking consistently with his or her religious beliefs. That's why ADF appealed this decision to the U.S. Supreme Court on Lorie's behalf.

The Supreme Court agreed to hear Lorie's case and will address the question of "whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." ADF looks forward to representing Lorie before the high court.

This could be a landmark case for the freedom of speech, religious liberty, and artistic freedom. Because that same nondiscrimination standard is the one the Department plans to insert into the proposed rule, the Department and the public need to be aware of how the Supreme Court views the significance of that interest generally, and how it balances those interests in light of important constitutional concerns such as free speech and free exercise of religion.

Given the direct applicability of this case to the proposed rule's speech restrictions, the Department should hold its consideration of the proposed rule, which affects provider speech, until after the Supreme Court decides *303 Creative*.

If the Department publishes the final rule or (as seems likely) closes the comment period before the Supreme Court rules in *303 Creative*, it should revise its proposed rule and open a supplemental comment period after the Supreme Court issues its decision.

**V. The proposed rule suffers from multiple procedural errors.**

**A. The proposed rule fails to give adequate definitions of key terms.**

The proposed rule fails, but should, define the terms used in proposed § 106.10. The Department proposes to enact a new regulation stating, "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.” But the rule does not define “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.” This rule does not even define what is a man, or what is a woman. Even though it uses the terms male and female throughout its proposed rule, it never addresses what these terms mean.

The proper definition is, of course, by biological sex. No theory of interpretation, such as a sex-stereotyping theory, should incorporate concepts of gender identity or sexual orientation.

The final rule must address these vagueness issues and define, in a non-circular way, what is a man and what is a woman. If the rule fails to do so, the Department is ignoring key issues and is failing to act with reasoned decision making. It is also susceptible to challenge under the due process clause for vagueness because the regulated community would lack clear notice of its obligations.

The final rule should define these terms with precision and moreover do so expressly in the text of a new regulation. In particular, key terms like “gender identity” and “transgender status” must be defined in ways that show how they comport with Title IX, and in ways that are not vague or malleable. It should explain frankly whether and how they address persons who identify as a detransitioner or as gender non-conforming.

The final rule must also address the inherent contradiction of reinterpreting “sex” (an immutable reality) to include “gender identity” and “transgender status” (subjective self-identifiers based on a person’s rejection of his or her own biological sex).

Nor does the final rule define “termination of pregnancy.” It is impossible to know what an abortion mandate may require.

Any final definition section must provide a rationale for any proposal that redefines “sex” in terms inherently contradictory to the statutory intent of Title IX as a whole and to Title IX’s specific provisions regarding sex-specific clubs, activities, facilities, and athletics, as well as to the statutory abortion neutrality provision. If the government does not provide definitions, it should explain why it will not do so, and explain why its current proposed text will not create problems of vagueness, lack of notice, and contradictions. It should also reopen the comment period to allow comment on the correct definitions to be proposed.

**B. The agency must ascertain important economic impacts.**

The agency should (but fails to) estimate the economic impacts of adding gender identity as a nondiscrimination category under Title IX. These impacts include estimating the number of women covered by Title IX and impacted by such a change, and the macroeconomic impacts on women's opportunities generally by reversing the progress made since Title IX was enacted. All of the costs identified in this comment, in particular, must be taken into consideration, and quantified or estimated to the maximum extent possible for a sufficient analysis of impact, costs, benefits, and transfers. The agency cannot avoid this cost calculation by claiming, implausibly, that the rule will not change anything—the rule obviously seeks to impose massive changes in practice in this area, even if the Department believes its position to have legal authority and even if the Department believes that all of these changes should have been carried into effect many years ago.

In addition to the numerous costs of the proposed rule the Department must consider, it must also consider alternatives, including not regulating, or maintaining the status quo, and provide that analysis, with analysis of each cost in each alternative.

- The agency should consider multiple alternative approaches, and it should specify why each alternative approach cannot be maintained.
- The agency should identify why each alternative is feasible or not, and it should give specific reasons for its conclusions.
- The agency should perform cost-benefit analyses for each alternative, so that HHS can select the most cost-effective option.
- If any one of the following alternative regulatory approaches better follows the law, better promotes good education or good medicine, or better protects conscience and religious freedom, it should be chosen.<sup>86</sup>

The agency should consider the alternative of leaving the current rule in place, in whole or in part, or of rescinding the current rule without replacement.

- The current rule ensures that the Department does not exceed its authority.
- The current rule helps eliminate religious discrimination and intolerance in healthcare. In a pluralistic society, we should respect many religious perspectives.

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<sup>86</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).



- The current rule reduces burdens on schools and healthcare providers and improves parental rights, freedom of choice, personal dignity, and personal freedom.
- Even if part of the rule is rescinded, the Department should consider retaining individual portions of the past rule.
- For example, the Department should consider retaining the rule’s protections for good medicine, single-sex facilities, conscience, and religious freedom, especially the Title IX religious exemption.
- Likewise, the Department should consider retaining the scope of the current Section 1557 rule on the size of the regulated community, rather than reaching out to sweep in new regulated entities, such as insurers.
- The agency should consider providing for disclosure of the limited scope of services, rather than performance mandates, and the Department should consider flexible approaches to enforcement, providing for warnings rather than penalties for non-compliance.
- The agency should consider allowing regional variations to reflect the differences in state and local laws, including by respecting state and local laws that regulate or prohibit practices that the Department would otherwise seek to mandate, including state laws prohibiting gender interventions on minors and laws prohibiting abortion. Federal law should be harmonized to allow regional variation and flexibility, respecting the primary role of state and local governments to set healthcare policy.

The agency thus should consider each individual portion of the rule, in each possible combination, to ensure that it has considered all possible regulatory alternatives to full repeal. And its cost-benefit analysis should be altered accordingly, on a granular level, in order to accurately consider each alternative.

This analysis should include the following specific considerations of costs and benefits.

### **1. *Benefits***

The Department must quantify and show the proposed rule’s benefits with evidence and data. But instead the proposal calls into question the benefits side of the equation, by opining—without evidence—that the current regulations “may have created a risk that Title IX’s prohibition on sex discrimination would be

underenforced.”<sup>87</sup> Nowhere does the Department show such underenforcement. And a rule is arbitrary and capricious if it seeks to address a problem that is not a problem at all. The Department thus should withdraw the rule, provide this evidence, reopen the comment period, and allow an orderly process of decision making on this point.

Toward the same end, the proposal admits that its redefinition of sex discrimination “could result in increased costs to recipients, especially those recipients that limited the application of their Title IX policies to those forms of conduct” hitherto covered as sex discrimination—yet it asserts without any analysis that “the non-monetary benefits of providing clarity and recognizing the broad scope of Title IX’s protections outweighs the costs associated with the implementation of” the revised definition.<sup>88</sup> Because this off-hand analysis fails to 1) articulate the extent to which discrimination (as the Department views it) is happening now, 2) assess the costs of the expansion of the definition, and 3) compare #1 to #2, the analysis is arbitrary and capricious. The Department should engage instead in an evidence-based cost-benefit analysis.

## **2. *Distributive Impact***

The agency should consider how a rule that allows transgender athletes to compete in women’s sports will impact women and girls who already face inequitable opportunities. For example, a transgender swimmer at the University of Pennsylvania recently set a women’s record at the Ivy League Championship swim meet, superseding the previous record set by a female competitor.<sup>89</sup> And in Connecticut two transgender athletes recently “won 15 state championships that were once held by nine different girls.”<sup>90</sup> One female competitor described it as “discouraging and demoralizing.”<sup>91</sup> These anecdotes highlight the distributive

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<sup>87</sup> 87 Fed. Reg. at 41561.

<sup>88</sup> *Id.* at 41562.

<sup>89</sup> David Chavkin, *Lia Thomas Sets Record at Ivy League Swimming and Diving Championships*, Sports Illustrated, Feb. 18, 2022, <https://www.si.com/college/2022/02/19/lia-thomas-ivy-league-championships-record>.

<sup>90</sup> *The battle over trans athletes in American schools heats up*, The Economist, Sep. 5, 2020, <https://www.economist.com/united-states/2020/09/05/the-battle-over-trans-athletes-in-american-schools-heats-up>.

<sup>91</sup> Chelsea Mitchell, *Chelsea Mitchell on the unfairness of trans women at the Olympics*, The Economist, July 27, 2021, <https://www.economist.com/by-invitation/2021/07/27/chelsea-mitchell-on-the-unfairness-of-trans-women-at-the-olympics>.

impact on women and girls that the Department should consider, including in the form of:

- Displacement of women winning championships and setting records.
- Displacement of women competing at championship events.
- Displacement of women on team rosters.
- Deterrence on female participation on athletic teams.

### **3. *Cost to Female Athletes***

The agency should consider how the rule imposes economic and non-economic costs on female athletes by, for example, shifting lost opportunities from males (who might not be talented enough to secure a spot on the men's team) to females (where the same males could displace women on the women's team).

The agency should calculate these costs, including but not limited to:

- Costs of lost college scholarships.
- Costs of lost college admissions due to displacement on team rosters, or due to a student's inability to attend because of lost scholarships.
- Costs of lost professional athletic opportunities.
- Costs of lost athletic sponsorships.
- Costs of lost leadership opportunities.
- Costs of increased incidence of injuries to female athletes by virtue of competing against larger, faster, and stronger male bodies in contact sports.<sup>92</sup> This includes the costs of medical care, and the lost opportunities to compete, win championships, and obtain the other financial benefits described above.

### **4. *Costs to Educational Institutions***

The agency should consider how the rule adding gender identity to Title IX's nondiscrimination provisions would impose compliance costs on educational institutions or governing sports leagues, including but not limited to:

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<sup>92</sup> See, e.g., World Rugby Transgender Women Guidelines, <https://www.world.rugby/the-game/player-welfare/guidelines/transgender/women> (detailing risks to female players' welfare if forced to compete against males).

- Costs of constructing restrooms, showers, and other facilities to protect the privacy of male and female athletes in the presence of transgender athletes of the opposite sex.
- Costs of researching and developing policies to support competitive equity and safety of female players. For example, there may be little or no guidelines or peer-reviewed studies on how the inclusion of transgender athletes in particular women's sports like wrestling or hockey affects fairness and safety.
- Costs of implementing a regime of hormone testing to ensure males who compete in women's sports have testosterone levels at or below respective guidelines,<sup>93</sup> or to ensure that females who are transgender and receiving hormone treatment do not have an unfair advantage if they continue to compete on the women's team.
- Likely administrative and legal costs for school districts, regional athletic organizations, and inter-collegiate athletic organizations in managing rules changes, record-keeping, and participation criteria, and responding to potential legal challenges from displaced female athletes.
- Likely costs, apart from athletics, of a "gender identity" criteria that results in greater need for retrofitting school and institutional facilities to accommodate student needs for privacy (single stall "all-gender" restrooms and locker rooms instead of multi-user facilities; measures to ensure privacy in dormitories and overnight accommodations; signage changes; and other additional privacy measures, e.g., doors, curtains, and other measures).
- Potential increased costs in monitoring for and preventing any sexual assaults in all-gender restroom and locker room facilities, occasioned by male students gaining unchallenged access to female facilities or in response to female requests to ensure safe access to shared facilities.

The proposed rule, 87 Fed. Reg. at 41552, also underestimates the costs to schools (in employee time) and students (in lost productivity) for attending lengthier trainings which would be caused by the proposed rule if finalized. The proposal claims that, because schools have an interest in keeping these trainings as short as possible, they will find a way to add no time to the trainings. But if in fact the schools have such an interest, then they have already made them as short as

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<sup>93</sup> See, e.g., USA Swimming Athlete Inclusion, Competitive Equity and Eligibility Policy, [https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules\\_policies/usa-swimming-policy-19.pdf](https://www.usaswimming.org/docs/default-source/governance/governance-lsc-website/rules_policies/usa-swimming-policy-19.pdf) (requiring proof of testosterone levels below guidelines for 36 months).

possible, so lack any spare time in the current trainings to devote to the proposed rule's new requirements. Because so many schools, employees, and students are involved, this is a potentially large additional cost. Further, the proposed rule does not calculate the costs to students of lost productivity at all.

Of further critical importance is the Department's failure to consider the likely litigation costs from its new proposal. The Department admits that "there may be some costs associated with potential litigation," but it declines to predict how large or small those costs will be.<sup>94</sup> Given the manifold risks of constitutional and statutory violations outlined in this comment, the failure to identify and quantify these risks and costs is arbitrary and capricious. The final rule should correct this error by providing this important data and by engaging in a cost-benefit analysis. Indeed, commenters are predicting "a wave of litigation."<sup>95</sup>

The agency should also consider the unnecessary costs imposed if the religious exemption rules are changed.<sup>96</sup>

- Religious educational institutions would incur costs and information collection burdens associated with the preparation (by institutions) and processing (by the Department of Education's Office for Civil Rights) of a wave of new exemption confirmation requests by institutions that have been assured (both by the statutory text and the May 2020 regulation) that they need not undergo the optional administrative process until such time (if ever) they face a charge of discrimination under Title IX.
- The rule would cause unnecessary costs for institutions for whom the Department might incorrectly deem ineligible for the Title IX religious exemption on the ground that they are controlled by their boards of trustees as opposed to some separate external entity.
- The rule could incur costs on students at religious educational institutions who may effectively lose their federal financial assistance in the event schools deemed ineligible for the Title IX religious exemption elect to forego

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<sup>94</sup> 87 Fed. Reg. at 41561.

<sup>95</sup> Colleen Murphy, 'A Wave of Litigation' Likely as Proposed Title IX Changes Roll Back Due Process Rights at Universities, *Observers Say*, N.Y.L.J., July 13, 2022, <https://www.law.com/nationallawjournal/2022/07/13/proposed-title-ix-changes-would-roll-back-due-process-rights-at-universities-causing-wave-of-litigation/>.

<sup>96</sup> 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12.

participation in federal student aid programs in order to avoid unlawful and unconstitutional applications of Title IX to them.

### **5. *Costs to Students***

The rule under review could pose significant costs to students in the combined effect of adding gender identity nondiscrimination provisions and the removal of due process protections afforded by the previous administration.

- Students have a First Amendment right to freedom of speech when attending a public educational institution, or when being regulated by a federal statute such as Title IX. This includes the freedom to speak one's views on a public campus regarding issues of sexuality and gender identity, and to use pronouns that the speaker deems appropriate. It also includes the freedom not to be punished by Title IX and its regulations for engaging in speech on those issues.
- A rule adding gender identity nondiscrimination provisions to Title IX and simultaneously removing due process protections could lead to students being accused of discrimination or harassment under Title IX because of the students' exercise of free speech on campus concerning issues of sexuality or use of pronouns to which others object.
- These accusations, combined with the lack of due process protections for students, could lead to excessive burdens and costs on students for exercising their freedom of speech.
- Costs to students may also include costs from false convictions (made more likely by some of the NPRM's changes, such as impeding access to evidence that the schools deem irrelevant) and costs to students and employees who can no longer attend or work at schools receiving federal funding because they would be compelled to violate their beliefs about gender.
- Costs to students and to their parents and families from the proposed rule's interference with the parent-child relationship, as described above.

The Department has utterly failed to quantify these costs to students.<sup>97</sup> The proposed rule examines only costs to *institutions*; it does not examine costs to students. But, as shown throughout this comment, evidence shows significant costs to students. So this is a major oversight, and failure to rectify it would render the

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<sup>97</sup> 87 Fed. Reg. at 41547 *et seq.* (cost-benefit analysis).

final rule arbitrary and capricious. Any attempt to quantify these costs should also be subject to a separate comment period, so that it can properly be subject to scrutiny.

## **6. *Other Costs to Society***

The agency should consider how the adverse effects on women and girls described above impact society and our economy. The agency should calculate these costs, including but not limited to the impact of fewer women obtaining college degrees because they were displaced on a team roster or lost college scholarships. These costs include the downstream effects of fewer women obtaining higher salaries and other measures of economic success correlated with a college education. The cost analysis should also consider the added financial, health, administrative, legal, and other costs likely to be incurred by society and individuals as a result of the Department's undoing of sex-based protections and opportunities that have been in place for decades and successfully ensured female equality and advancement.

It must also quantify the costs of States and schools losing federal funding—including an estimate of which States and schools will lose funding—and by how much and with what downstream effects, rather than comply with the rule. This impact should be measured in evidence, reflecting the many States and many schools that have already sued and indicated an unwillingness to comply.

## **7. *Costs to the Unborn and Pregnant Mothers***

The Department should also quantify the irreparable loss of life to the unborn who are killed via abortion as a result of the pressure to abort and the coercion to abort, which will be caused by this rule. It must also quantify the impact and unfairness to other students (grades, participation, etc.) because of any reasonable modification (such as delayed or longer test taking) due to leave for abortions. More importantly, it must quantify the irreparable loss of First Amendment rights to free speech or free exercise of religion rights for any school employee (such as a counselor) forced to promote or refer for abortion; for any student or employee silenced from speaking out against abortion; for any other chilling of pro-life free speech; and for the negative impacts on the parent-child relationship.

As to method, the Department must quantify the loss of life, productivity, and intangible value of the lives lost to abortion. It must apply a statistical value for each life cut short in the womb. As a matter of equality and human dignity, it should not assign a lesser value to some people than to others. This means that it should value children in the womb as people. Under the principle of inter-generational neutrality, future generations should not be treated as of lesser

concern. Applying a discount rate to their welfare poses serious ethical concerns. It should also consider the harms of abortion to pregnant women, including their long-term mental health.

### **8. *Small Businesses and Non-profits***

The agency needs to assess the impact on small businesses, which includes nonprofit entities, under the Regulatory Flexibility Act (“RFA”).

- If fewer women have the opportunity to go to college due to a lack of an athletic scholarship, that will impact businesses who are looking to hire new employees, particularly in female dominated fields that require a college degree.<sup>98</sup>
- Religious educational institutions are small entities for purposes of the RFA, and any changes to the Title IX rule that affects a substantial number of them needs to account for and certify the impacts on those institutions.

The proposed rule fails to implement these requirements. For instance, at p. 41565, the discussion of impacts on small entities just states that discrimination can occur at small entities, and therefore no modifications can be made for them. But the RFA requires that agencies do more than assess whether the harm against which the regulation protects can be found at small entities; rather, the Department has the obligation to determine whether the smallness and presumably slender resources of small entities warrant the application of different rules than to large, well-funded entities.

### **9. *Healthcare and Housing***

The rule must consider its impact on Section 1557 in healthcare and on housing under the Fair Housing Act. When issuing a far-reaching rule like this one, the Department must consider the impact of those regulations on other laws and in other contexts. For example, Section 1557 of the Patient Protection and Affordable Care Act incorporates Title IX’s prohibition against sex discrimination. Section 1557 guarantees that no individual can “be excluded from participation in, be denied the benefits of, or be subjected to discrimination under,” any federally run or federally funded health program “on the ground prohibited under . . . Title IX.”<sup>99</sup> Thus, how

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<sup>98</sup> For example, women fill a majority of the following positions: veterinarians, physician assistants, speech language pathologists, dietitians and nutritionists, human resource management, psychologists, and occupational therapists.

<sup>99</sup> 42 U.S.C. § 18116(a) (citing Title IX, 20 U.S.C. § 1681 *et seq.*).



the Department defines the ground of sex discrimination under Title IX in its regulations could have direct impact for Section 1557 and the healthcare context. That is why the Department must also evaluate the impact of the rule on Section 1557 and the healthcare context. Likewise, the Department of Housing and Urban Development has interpreted the Fair Housing Act's prohibition on sex discrimination in practice and in enforcement purportedly in a way that harmonizes with Title IX on campus. If Title IX is changed, this housing enforcement will change, too, and so the Department must address this issue and quantify its costs.

The Department also should consider this rule in an omnibus rulemaking with the related Section 1557 rule, and in joint inter-agency rule led by the Department of Justice under Executive Order 12,250, so that a holistic sense of statutory interplay and related costs and benefits may be established.

As to the specific assessment of healthcare costs, the proposed rule will create poor health outcomes—costs which must be quantified. The Department must quantify the harms of gender procedures and the costs of the resulting necessary lifelong care. The Department must quantify the immediate and long-term risks relative to benefit of these new forms of medical intervention, including significant intervention-associated morbidity, especially evidence that raises concerns that the main goal of suicide prevention is not achieved. The Department should consider in its assessment of the health benefits and costs of encouraging and mandating gender interventions studies showing the lifelong costs of such interventions in the form of ongoing treatment and negative side effects. This quantification should include data on the precise encouraged or mandated services, procedures, treatments, drugs, surgeries, and more to be covered by insurance or provided by healthcare professionals, including whether this includes services for detransitioners, and including their number, direct cost, cost of follow-up treatments and complications, and their attendant increase in premium costs. This data should also quantify the number of people covered by age, including minor children, including estimated annual increases. The Department should identify the present number and qualifications of doctors willing to perform such services, especially on minor children. The Department must quantify the number and costs of malpractice and other suits by those who regret gender interventions against practitioners who performed them.

As to healthcare, if it requires certain procedures or actions in healthcare settings as to gender identity, the proposed rule will also transfer costs to healthcare providers and patients more generally—costs that the Department must also quantify.

- It must quantify the cost to the health care profession of requiring healthcare providers nationwide to violate the Hippocratic Oath, which requires they “do no harm” and refrain from providing gender interventions and participating in abortion.
- Any improvement in access to services by government attempts to coerce participation in objectionable practices will be greatly outweighed by transferred costs to others. Any new mandates are bad medicine and will drive many good providers out of healthcare unless the rule exempts scientific, moral, conscientious, and religious objections. Any benefits in increasing access to for some, by coercing the provision of objectionable services, will be massively offset by curtailing access to the healthcare marketplace for patients and providers overall and in specific fields like obstetrics. By driving religious healthcare providers in particular out of medicine in many settings, the government will increase existing health disparities in rural and underserved communities, which will in turn raise prices.
- Any benefits in regulatory clarity will be offset by uncertainty about the government’s shifting view of what constitutes discrimination and about its disregard for conscience and religious freedom protections.
- The agency should consider the costs from freezing the development of medical research, including the problems attendant upon mandating a standard of care and preventing the free flow of medical information.
- The agency should identify the costs of the lack of public trust in healthcare overall from its efforts to set a standard of care contrary to the best interests of patients and contrary to state laws.
- Because the current law protects conscience, religious freedom, diversity, free speech, and pro-life nondiscrimination, the Department should calculate the cost of losing those benefits. The agency should assess how rescinding this rule would lead to further discrimination, intolerance, and marginalization of religious people in healthcare, particularly those who are members of minority religions or those who lack a cause of action to vindicate a statutory conscience right.
- The agency must quantify the free speech harms of making doctors use preferred pronouns contrary to biology, of refraining from free medical discussions, and of inaccurately charting patient sex.
- The agency should consider the burdens and costs resulting from loss of diversity in healthcare from non-enforcement of statutory protections and from rescission of the rule, and it should assess the number of religious

people and organizations out of practice or likely to be expelled from healthcare that currently should have protection under this regulation.

- The agency must state how many people will choose not to enter the health care profession or certain practices like obstetrics as a result of the proposed rule and lack of conscience protections.
- The agency must calculate the stresses to be placed on the nation's infrastructure of healthcare as a whole, and the detrimental public health consequences resulting from the inability of conscientious providers to participate in healthcare practice on equal terms.
- The agency should quantify the number and demographics of healthcare providers and institutions that will be driven out of the practices they built, and estimate their economic value, including loss of livelihood, unpaid small business loans, defaulted mortgages or leases, and unpaid student loan debt.
- The agency should quantify the number and demographics of patients who have lost or lose the ability to find any provider or the provider of their choice, and who thus are less likely to seek or receive timely care. The loss of a provider because of government coercion increases travel costs, reduces regular care, risks higher morbidities, and creates a lack of trust for patients, who will not easily trust new providers who do not share their values, another factor to quantify.
- The agency must calculate the costs of constructing hospital wards, exam rooms, locker rooms, restrooms, showers, and other facilities to protect the privacy of male and female patients and providers in the presence of the opposite sex, such as single-stall rooms or new privacy screens, and the potential increased costs in monitoring for and preventing any sexual assaults in all-gender restroom and other facilities, occasioned by males gaining unchallenged access to female facilities or in foreseeable response to foreseeable female requests to ensure safe access to shared facilities.
- The agency must calculate the costs to health and welfare of women deprived of female-only health programs, such as breastfeeding support groups or postpartum mental health groups or mother-baby groups, or breast cancer groups, given the foreseeable reluctance of women to participate in programs that cannot guarantee female privacy.
- The agency must calculate costs for employees who lose their jobs or cannot practice medicine, including not only their economic losses, but greater payments in unemployment benefits, and decreased productivity among companies that lose employees. These combined factors will contribute to an increase in the national debt. The agency must calculate the rule's costs in

exacerbating existing labor shortages, and the negative effects on the economy overall should also be calculated.

- The rule will contribute to a shortage in labor because many employees will quit or accept termination rather than participate in objectionable practices. Economic and health costs also result to consumers from exacerbating labor shortages. Shortages in nursing have led to increased travel and medical costs for patients, for example.
- The agency must calculate the rule's costs for time spent reading and understanding how to comply with the rule and for costs spent availing themselves of rights that HHS will not defend, respect, or enforce, including through litigation, measured in terms of time, expenses, and uncertainties.
- The agency must estimate the effects of all of the above to federal, state, and local healthcare programs like Medicaid.

#### ***10. Proper Assessment of Evidence and Costs***

The agency should consider, with citations, a fair view of science and medicine on gender interventions and abortion from all perspectives.<sup>100</sup>

This evidence-based decision making should include considering scholarship pointing out the deficiencies in studies on gender dysphoria.

There is a lack of high-quality scientific data for common gender identity interventions, such as the general lack of randomized prospective trial design, a small sample size, recruitment bias, short study duration, high subject dropout rates, and reliance on opinion. There are serious deficits in understanding the cause of this condition or in understanding the reasons for the marked increase in people presenting for care.<sup>101</sup>

The agency should ensure the objectivity of any scientific and medical information by avoiding reliance on standards promoted by advocacy groups and industry groups with a financial incentive in promoting gender interventions and

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<sup>100</sup> Both in 2016 and in 2021, in its Section 1557 rules, HHS failed to adequately consider one side of the issue—the side for which, in medical practice, sex is a biological reality; patients are harmed by imposing the provision of controversial and dangerous medical procedures; and patients are harmed by preventing doctors from providing full and timely disclosure of all relevant health information about gender identity procedures and interventions. Instead, HHS only considered evidence from the other side of the issue, mostly from advocacy groups. 81 Fed. Reg. at 31,429 n.263.

<sup>101</sup> See, e.g., Paul W. Hruz, *Deficiencies in Scientific Evidence for Medical Management of Gender Dysphoria*, 87 *Linacre Quarterly* 34, 34-42 (2019), <https://doi.org/10.1177/0024363919873762>.

abortions. This means avoiding uncritical acceptance of biased sources of information such as the American College of Obstetricians and Gynecologists (ACOG), Planned Parenthood, the Guttmacher Institute, and related groups.

The agency should not use unreliable or inapposite studies. That includes avoiding uncritical reliance on self-selected online surveys, polls with cash prizes, studies with tiny samples, and studies missing more than half of their subjects.<sup>102</sup> The agency also should not generalize from studies involving adult patients and clinics with strong gatekeeping procedures to studies involving minor patients and clinics without strong gatekeeping procedures.<sup>103</sup> The agency should not repeat the mistakes that HHS made in the recent document “Gender-Affirming Care and Young People.”<sup>104</sup> HHS’s claims conflict with the conclusions of more and more of other nations’ public health authorities, misreads data, and ignores contrary evidence.<sup>105</sup>

The agency should take care to quantify the number of detransitioners, which could number in the tens of thousands (and growing), as a detrans subreddit has over 26,000 members, with 4,000 new members since December 2021.<sup>106</sup>

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<sup>102</sup> Nathanael Blake, *The Studies Cited To Support Gender-Bending Kids Are Largely Junk Science*, *The Federalist*, Mar. 10, 2020, <https://thefederalist.com/2022/03/10/the-studies-cited-to-support-gender-bending-kids-are-largely-junk-science/>; Nathanael Blake, *What We Don’t Know: Does Gender Transition Improve the Lives of People with Gender Dysphoria?* *Public Discourse*, Apr. 13, 2019, <https://www.thepublicdiscourse.com/2019/04/51524/>.

<sup>103</sup> *Id.*

<sup>104</sup> HHS, *Gender-Affirming Care and Young People*, <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.

<sup>105</sup> See, e.g., Society for Evidence-Based Gender Medicine, *Fact-Checking the HHS* (April 7, 2022), <https://segm.org/fact-checking-gender-affirming-care-and-young-people-HHS> (explaining that “a number of the claims made in the document range from overreaching to highly misleading,” such as “[m]isstatements of the effects of social transition on well-being”; “[u]nsupported claim of the reversibility of puberty blockers”; “[i]naccurate statement regarding the age eligibility for surgeries”; “[e]rroneous claims about the effects of gender transition on adolescent mental health”; “[o]mission of any discussion of risks”; “[c]onflation of distinctly different concepts”; “[m]isleading information on the incidence of suicide and suicidality,” and the HHS document relied on an “[i]nadequate literature review”; “[b]iased recommendations that do not acknowledge the low quality of evidence”; “[f]ailure to consult a range of stakeholders with diverse views”; and “[l]ack of identification or acknowledgement of alternatives.”).

<sup>106</sup> Ginny Gentles, *Detransitioners and Parents vs. Gender Ideology*, *Independent Women’s Forum* (March 30, 2022), <https://www.iwf.org/2022/03/30/detransitioners-and-parents-vs-gender-ideology>.

The analyses of the effect of conscience protections should also occur in light of HHS OCR's record-high receipt of complaints between 2017–2020 identifying violations of conscience laws in comparison to the much smaller number of complaints filed before OCR announced in 2017 that it was “open for business” in enforcing these laws.

**C. The proposed rule fails to account for increased compliance costs.**

The proposed rule fails to consider important factors, explore sufficient data, and make necessary estimates.

First, recipient institutions previously had responsibility where there was “actual knowledge of sexual harassment.” The proposed rules provide, “A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity.”<sup>107</sup> Combined with the new obligations of administrators to report and take action for anything that “may constitute sex discrimination” under proposed § 106.44(b) & (f), dramatically expanding (1) potential liabilities of the recipients, (2) costs of compliance, and (3) likely restrictions on speech in order to avoid those liabilities.

Second, the Department says that it “assumes that the proposed regulations would ultimately have a de minimis effect on the time burden for employees associated with training, but requests comment on this assumption.”<sup>108</sup> Expanding from “sex” to “sexual orientation and gender identity” is an enormous expansion and raises myriad sensitive, difficult issues surrounding names, pronouns, recordkeeping, access to facilities, and more. This will exact far more than de minimis training costs. The Department should generate a well-supported estimate of those costs.

Third, the Department “anticipates that the proposed regulations may increase the number of incidents for which supportive measures are provided per year,” but never addresses any costs associated with litigation.<sup>109</sup> As recent cases indicate, incidents of supportive measures (including no-contact orders giving rise to costly litigation) are on the rise *even without* the dramatic expansion the proposed

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<sup>107</sup> NPRM at 672.

<sup>108</sup> NPRM at 598.

<sup>109</sup> NPRM at 602.

rules will authorize.<sup>110</sup> The Department should estimate (1) the likely increase in the number of supportive measures offered, (2) the cost of offering measures themselves, and (3) the likely litigation costs in view of the extent to which the proposed rules authorize use of supportive measures that restrict constitutionally protected speech.

Finally, the Department notes in passing that “[a]s this is an evolving area of the law, the Department anticipates there may be some costs associated with potential litigation.”<sup>111</sup> The Department has failed to account for potential litigation from female athletes who have experienced lost opportunities or injury from males; students and even teachers whose First Amendment speech and expression is censored; school districts who are being forced to violate state law or risk their federal funding; and parents whose children are being pushed towards dangerous and unscientific ideologies behind their backs.

**D. The proposed rule would improperly impose additional paperwork costs, should it amend the religious exemption procedures.**

There is also no need for regulatory action to the extent the administration plans to restrict or repeal regulations issued by the previous administration that protect the religious exemption that Title IX affords to religious colleges and universities. Pursuing such actions would impose significant costs, including unnecessary information collection requirements under the Paperwork Reduction Act. These costs should be considered expressly, and they are reason alone to ensure that the rule does not change the procedural requirements for invoking the religious exemption.

Title IX includes a robust religious exemption, which declares that “this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”<sup>112</sup>

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<sup>110</sup> See, e.g., *Perlot v. Green*, No. 3:22-cv-00183-DCN, 2022 WL 2355532, at \*3–4 (D. Idaho June 30, 2022). See also *DeJong v. Pembroke*, No. 22-1124 (S.D. Ill. May 31, 2022).

<sup>111</sup> NPRM at 628.

<sup>112</sup> 20 U.S.C. § 1681(a)(3).

Decades ago, the Department created by regulation a process under which a religious educational institution may seek confirmation of its possession of the exemption with respect to particular applications of Title IX.<sup>113</sup>

Recent regulations relieved the regulatory and paperwork burdens of those rules by acknowledging that religious schools are statutorily exempt and do not need to pursue a paperwork confirmation of their exemption.<sup>114</sup>

The Education Department's Office for Civil Rights, to our knowledge, has never declined to confirm an institution's possession of the exemption on the ground that it is controlled by its board of trustees as opposed to some separate external entity. Nor has it declined to acknowledge the applicability of the exemption when an institution invokes it for the first time in response to a charge (as opposed to having gone through the optional administrative confirmation process at an earlier time).

The proposed rule does not purport to affect these recent rule changes. Nor should it do so. The confirmation process re-created if the Department repeals the recent rules would therefore impose unnecessary regulatory costs and paperwork burdens on religious schools. And the 2020 rule avoided unnecessary costs by deferring to colleges and universities concerning their religious control under the Title IX exemption rather than requiring them to establish that control through a flawed interpretation of the statute.

Religious educational institutions are by definition controlled by a religious organization. The Department of Education recently acknowledged the existence of religious control at Brigham Young University in response to a complaint.<sup>115</sup> This is consistent with the approach taken by the 2020 regulation acknowledging that religious schools satisfy the control element of the Title IX exemption by virtue of having religious boards. And we are not aware of the Department ever rejecting a religious school's request for confirmation of exemption, much less because of how their governing board is structured.

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<sup>113</sup> See 34 C.F.R. § 106.12; 45 FR 30955, 30958 (May 9, 1980).

<sup>114</sup> See 85 FR 30026, 30573 ("An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption.")(May 19, 2020); 85 FR 59916, 59980-59981 (setting forth exemption eligibility criteria)(Sep. 23, 2020).

<sup>115</sup> U.S. Department of Education letter to Kevin J. Worthen, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/brigham-young-university-response-01032022.pdf>.



Repealing the 2020 regulation's deferential approach on the issue of control of religious schools therefore avoids the unnecessary costs and paperwork burdens that schools would incur due to trying to prove religious control in circumstances where the question of such control has apparently never been dispositive in considering a religious school's exempt status. The final rule thus should leave that issue untouched.

In light of these many legal and procedural failings, the Department should withdraw and abandon the proposed rule. It is for Congress, not unelected bureaucrats, to address the major questions presented in this rulemaking.

Thank you for your consideration of these important concerns.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Julie Marie Blake". The signature is written in a cursive, flowing style.

Julie Marie Blake  
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Regulatory Litigation  
Alliance Defending Freedom