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Reverting to the "New Paradigm" on Title IX: What the Biden Administration's 'Gender Identity' Regulations Mean for U.S. Universities

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TOPLINE POINTS

- The Biden Administration has proposed two revisions to Title IX regulations. The 2022 proposal would forbid universities from discriminating based on gender identity, requiring universities to open intimate facilities like bathrooms and locker rooms to students based on self-professed gender identity. The 2023 proposal is focused on athletics and will pressure administrators to allow biologically male athletes to compete in women's sports in K–12 and college athletics.
- Under the new rules, universities will revert to many features of the Obama-era "Dear Colleague Letter" paradigm for investigating allegations of sexual misconduct, a framework that failed to meet rudimentary standards of due process. It will also require schools to respond when students allege that speech regarding gender identity and sexual orientation has created an environment that negatively impacts learning, deepening the campus free speech crisis.
- As regulatory ping-pong continues and federal courts adjudicate the constitutional issues that have been raised, states should adopt laws improving free speech and due process protections for students and faculty at public campuses as well as protections for female athletes at all levels.

Introduction

The Department of Education (DoEd) has proposed two revisions to its Title IX regulations, which require K–12 and postsecondary schools that receive federal funding to take steps to prevent, investigate, and punish certain forms of sex discrimination and sexual harassment. President Joe Biden mandated the actions in a March 2021 executive order directing the review of DoEd regulations and policies to ensure consistency with a definition of sexual harassment that encompasses "discrimination on the basis of sexual orientation [and] gender identity" (White House, 2021). The proposed revisions came less than two years after colleges and universities were required to implement revamped policies and procedures to comply with the Trump Administration's Title IX reforms.

The 2020 rule, finalized after an exhaustive 18-month negotiated rulemaking process under the leadership of Secretary of Education Betsy DeVos, struck a careful balance between a student's right to access equal educational opportunities, as guaranteed by Title IX of the Education Amendments of 1972, and the due process rights of those accused of sexual harassment (including sexual assault; Department of Education, 2020). Revising the regulations again is not only unnecessary and bound to sow confusion on campuses around the country, but many of the proposed revisions have, in the main, already been discredited by federal judges who are, by definition, due process experts. This is a solution in search of a problem.

This research paper focuses on what the proposed regulations will mean for higher education in three major areas. First, the 2022 Biden Administration proposal will roll back important procedural guarantees for those accused of sexual misconduct. Second, its broader definition of sexual harassment will exacerbate the well-documented campus free speech crisis by requiring universities to investigate political speech firmly protected by the First Amendment when students file Title IX complaints. Third, the regulations will force universities to open intimate spaces to students based on self-professed gender identity. The second proposed rule, released in early 2023, deals specifically with athletics and will require universities to consider students' gender identities instead of biological sex when they operate single sex teams in most circumstances.

Nearly 240,000 public comments rolled in when the first proposal was published in the Federal Register, flagging hundreds of major problems with the first new regulation. An additional 134,000 comments were submitted in relation to the second, athletics-focused Notice of Proposed Rulemaking (NPRM). Hopefully, the final version incorporates many of those suggestions to ensure that the end result makes a few major changes to the DeVos-era Title IX rule. Given the influence of gender ideology advocates and the Biden Administration's dedication to their cause, however, major improvements seem highly improbable. This means that regulatory ping-pong on Title IX is likely to continue until Congress or the Supreme Court acts to clarify the meaning of the statute. In the meantime, states are strengthening free speech and due process protections at public universities, as well as protections for female sports. Lawmakers should consider replicating those reforms to protect students and faculty studying at state colleges and universities while the debate over the meaning of Title IX continues at the national level.

Background

The 37 words that makeup Title IX of the Education Amendments of 1972 specifically prohibit "discrimination," not "harassment," in straightforward language: "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" (20 U.S.C. 38 §1621(a) (1972)). Although

Title IX is best known for requiring universities to invest in female athletics so they can provide equal educational opportunities to female athletes, the Supreme Court held that some forms of harassment constitute discrimination under Title IX in two cases it decided in the late-1990s. A school can be held liable for "student-on-student" harassment, the court explained in *Davis v. Monroe County Bd. Of Ed.*, when the university has "actual knowledge" of misconduct that is "so severe, persistent, and objectively offensive that it effectively bars the victim's access to educational opportunity" and school officials respond with "deliberate indifference" (1999).

Building on earlier efforts of the Clinton Administration, President Barack Obama's DoEd made it a priority to force schools to do more to investigate and prevent sexual harassment by agency guidance, most famously a 2011 "Dear Colleague" letter (DCL) and wide-ranging Q&A document three years later (Department of Education, 2011; Department of Education, 2014). The DCL threatened to withhold federal funds if universities did not adopt a broader definition of sexual harassment, and it required schools to use a lower "preponderance-of-the-evidence" ("more likely than not") standard when adjudicating harassment complaints. It also encouraged a 60-day timeframe for most investigations, warning that the Office of Civil Rights (OCR) will evaluate whether "a school's grievance procedures specify the time frames for all major stages of the procedures" (Department of Education, 2011, 12). The White House and subsequent OCR guidelines went so far as to strongly discourage allowing cross-examination and to endorse a "single investigator" model under which one school official investigates the allegations and either recommends or determines the outcome and penalty—a tremendous authority to lodge in a single person who, in many cases, has no formal legal training (White House, 2014, pg. 3, 14). In effect, the Obama Administration was encouraging universities to adopt a "judge, jury, executioner" model the Western world had long abandoned in civil and criminal contexts, recognizing its inherent inconsistency with fundamental tenets of due process that are essential to protecting individual liberties.

Universities reacted to the Obama-era guidelines by establishing processes that were often rushed and sometimes failed to provide basic process protections to students accused of sexual misconduct, even in cases where serious penalties, including expulsion, were being contemplated. (Expulsion from a U.S. college or university for sexual misconduct is a life-altering event for many students who find it next to impossible to transfer colleges or gain admission to another institution.) As universities adapted their policies to adhere to Obama-era guidelines, Title IX litigation exploded. Hundreds of students seeking to have their records expunged, along with monetary damages in some cases, sued universities for their handling of complaints, often alleging egregious violations of due process (Title IX for All, n.d.). Many of them have prevailed in court (Shapiro, 2017). And judges have scolded university administrators for astonishing failures to protect students' due process rights (Harris and Johnson, 2019, pg. 67). In a case involving Brandeis University, one judge characterized the university's procedures—which administrators said they established "in conformity to the various [Obama-era] guidance letters and policy statements"—as "closer to Salem 1792 than Boston, 2015" (John Doe v. Brandeis University, 2015, p. 9).

SECTION ONE

Additional revisions to Title IX are unnecessary. The DeVos-era rules strengthened due process protections for those accused of harassment while protecting victims.

In 2017, Secretary DeVos rescinded the DCL and 2014 guidance and undertook a formal rulemaking process to strike a better balance between the interests and rights of all students (Kreighbaum, 2017). The Trump Administration's final regulation, based on years of careful research and wide-ranging consultation, was published in May of 2020, after a process that generated more than 100,000 public comments and almost 2,000 pages of commentary.

The final rule strengthened due process protections for the accused in several important ways. It prohibited the single investigator model, required colleges to begin from a presumption of innocence, allowed universities to adopt a higher "clear and convincing" standard of proof, required live hearings, and mandated that an adviser for each party have the opportunity to ask the other party questions (Department of Education, 2020, p. 1970). The DeVos rule also prioritized careful review of all available evidence (not time to resolution), mandating that schools provide both parties with a written explanation of the allegations at the beginning of the investigation and that all evidence collected be shared with both parties.

In addition to improving due process protections for the accused, the DeVos-era regulations advance many of the goals the Biden and Obama Administrations have championed. For example, the 2020 rules prevent colleges from ignoring or sweeping allegations under the rug. Colleges were forced to establish and publicize clear reporting systems. When students report harassment, administrators are required to respond promptly and "offer supportive measures to every complainant... regardless of whether a grievance process is ever initiated" (p. 1032). All complaints must be investigated under the DeVos rule, which reminds schools that they must ensure complainants have continued access to educational programs and opportunities during any investigation. Where this requires removing a respondent from his or her educational program before the institution has concluded its investigation, schools are free to do so, provided they conduct an "individualized safety and risk analysis" and provide an opportunity for the respondent to challenge the action (p. 2017).

The DeVos rules were designed to protect all students, no matter how they identify and make clear "that every person, regardless of demographic or personal characteristics or identity, is entitled to the same protections against sexual harassment... and that every individual should be treated with equal dignity and respect" (p. 24). The rules are sensitive to the difficult situation of bona fide victims, for whom hearings can be a burden. To ensure victims are not discouraged from making a complaint by the prospect of interrogation designed to shame or embarrass, the Trump Administration rule specifies that questions or evidence about "the complainant's sexual predisposition or prior sexual behavior" are generally not relevant and, thus, cannot be asked (p. 1592).

The new framework required schools to implement conforming policies and processes by August 2020. Only seven months later—without any basis or evidence to conclude that the DeVos-era rules had proved unworkable for Title IX purposes—the Biden Administration announced its intention to revert to the Obama Administration's "new paradigm" in Executive Order 14021 (White House, 2021).

SECTION TWO

The Biden Administration's proposed Title IX regulations will erode students' due process rights.

The Biden Administration's 2022 NPRM would roll back many of the due process guarantees established by the Trump Administration, which were themselves time-honored principles of procedural fairness meant to facilitate the truth-seeking function. For example, the proposed rule permits schools to reinstitute single-investigator models and requires most colleges and universities to adopt the weaker "preponderance-of-the-evidence" standard. (Schools may only use a higher standard if they adopt the same standard for all other investigations into alleged student and faculty misconduct). The new rules would also end the requirements that schools hold live hearings and provide the opportunity for an advisor to the accused to cross-examine the other side, along with the mandate that schools share all evidence collected during the investigation with both parties (the new rule only guarantees "description of the relevant evidence"; Department of Education, 2022a, p. 688, 691, 693).

Federal appeals courts have already ruled that some of these practices extend inadequate protections to students. As Samantha Harris and KC Johnson summarize in an important study, a series of Sixth Circuit decisions have upheld "an accused student's right to cross-examine witnesses, to present expert testimony, to have access to potentially exculpatory evidence, and to be adjudicated before a live hearing" (Harris and Johnson, 2019, p. 72). Justice Amy Coney Barrett wrote an influential Seventh Circuit opinion shortly before her nomination to the U.S. Supreme Court in which she held that a school could violate Title IX if Title IX investigators show sex bias in their investigation—for example, by assuming female accusers are more credible than male respondents—where the outcome is a suspension (or other penalty) that denies a student an educational opportunity (*John Doe v. Purdue University, 2019*). Justice Ruth Bader Ginsburg, too, acknowledged problems with the Obama Administration's framework, venturing in an Atlantic interview that the right of the accused to a "fair hearing" is a "basic tenet[] of our system" and that "criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard" is valid (Rosen, 2018).

The Trump Administration rules required all universities to adopt practices that would survive this kind of judicial scrutiny. The Biden Administration proposal, in contrast, would lead to a situation in which schools in some parts of the country are required to extend stronger due process protections to students than the proposed federal regulations require, leaving others to revert to Obama-era practices—an outcome that will generate confusing inequities as well as new legal challenges.

It is no wonder civil rights experts immediately condemned the Biden Administration's proposed changes. Robert Shibley, then the executive director of the Foundation for Individual Rights and Expression, called the DeVos regulations "one of the biggest victories for student rights in memory," noting that he predicted "our work is not over" when they first went into effect (FIRE, 2022). John Cohn, FIRE's legislative and policy director, warned that the Biden proposal is "a recipe for constitutional violations that courts are unlikely to ignore" (Ibid.). KC Johnson, a leading expert on Title IX, told Inside Higher Education that he foresees "a return to the 2012-16 system but in a dramatically different legal environment. Rather than having a standard system where all students will have the same core procedural rights... as now exists with the DeVos regs, there will be wild disparities between public & private schools and also depending on what judicial circuit the school happens to be in" (Moody, 2022).

R. Shep Melnick, author of a book-length treatment entitled The Transformation of Title IX, explained why the "oscillation of Title IX policy" is likely to continue. In short: Democrat and Republican administrations are in fundamental disagreement about Title IX's "purpose" (or put another way, the objectives that can be achieved through it). As Melnick put it after the Biden proposal was released,

> *The Trump Administration's 2020 regulations followed [a] relatively narrow understanding, with a focus on spotting and punishing the 'bad apples' who engage in serious misconduct. The 2022 proposal, in contrast, endorses what the Obama administration called a "new paradigm" on sexual harassment, one far removed from the Supreme Court's interpretation of Title IX... [According to the Obama and Biden administrations,] the problem is... a 'rape culture'... The Biden Administration's focus is changing that culture... [which] entails a much broader set of actions... (*Melnick, 2022*).*

SECTION THREE

The Biden Administration's broader definition of sexual harassment will exacerbate the campus free speech crisis.

Those diverging goals also help to explain why the Trump and Biden administrations propose such different definitions of sexual harassment. The Trump Administration's rule required universities to investigate sexual assault, dating violence, stalking, and quid pro quo harassment (for example, a request for a sexual favor in exchange for a benefit from a teacher or supervisor). With respect to other forms of "unwelcome conduct," however, much of which is verbal in nature, the 2020 rule adopted the Supreme Court's standard, requiring that the misconduct be "'so serious, pervasive, and objectively offensive' that it effectively denies a person equal access" to educational programs to constitute a violation of Title IX (p. 40).

The Obama Administration believed schools' general ambivalence to sexual harassment contributed to the emergence of a "rape culture" on campus. It, therefore sought to "change [the] culture on college campuses... to cure the epidemic of sexual violence on our college campuses across the country[,]" but it did so in ways that undermined efforts to promote a healthy culture of mutual respect and open inquiry (Lombardi, 2010). The Biden Administration sees the problem the same way, which is why it is also working on conditioning Title IV aid eligibility on the adoption of a much broader definition of sexual harassment. In this view, it is not enough to require universities to investigate instances of sexual harassment and assault with vigor, respecting the right of all students during investigations. Changing the culture means using the institution to embark on a social engineering exercise to transform behavioral norms. That is why Obama Administration settlements extended the definition of harassment to forms of offensive speech including, "unwelcome sexual advances" and "requests for sexual favors" as well as "sexual comments, jokes or gestures" and "spreading sexual rumors" (Department of Justice, 2013; Melnick, 2020). Lewd speech is a problem, and civility should always be encouraged. But using the power of the federal government to push the campus culture in a specific direction was always bound to do more harm than good.

Settlements with universities investigated by the Obama Administration's OCR typically included requirements that training about sexual harassment and Title IX be incorporated into university-wide freshman orientations, student focus groups, new materials for distribution on campus, and orientations for students living in dormitories (Office of Civil Rights, 2010 and Office of Civil Rights, 2011). OCR also required those schools to

define sexual harassment, which led administrators across the country to establish broad definitions encouraging students to report "sexual jokes," "dirty jokes," "sexual teasing," "discuss[ions of] sexual activity," "sexually degrading... sounds," "sexually explicit drawings," and even "sexually explicit stories" (Appalachian State University Office of Title IX Compliance, n.d., and Savannah State University Title IX Office of Compliance, n.d.). In some cases, the university's definition page includes a direct weblink to the Title IX complaint form.

What professor would dare teach a 19th century French novel in such an environment? Or the "misogynoir" works of William Shakespeare (Brown, 2021)? The point: efforts to forbid unwelcome speech will always do more harm than good at institutions with a truth-seeking mission because what constitutes offensive speech is inherently a subjective judgment with immense variation between individuals. Real learning requires a lively marketplace of conflicting ideas and viewpoints—some of which will inevitably cause discomfort, even offense. Requiring university Title IX apparatuses to investigate speech of a sexual nature when students allege offense, even in cases where the speech is constitutionally protected, inevitably chills campus discussion and debate.

This is not a speculative claim. The Obama-era guidelines made it possible for students to set off onerous and reputation-damaging investigations by making complaints targeting students and faculty whose views they disagreed with. One of the most telling examples occurred at Northwestern University, where two students filed a complaint when a feminist professor published an essay in the Chronicle of Higher Education criticizing "sexual paranoia" and the expanding reach of Title IX investigations in general (Kipnis, 2015a). The long investigation that ensued ensnarled a second professor who had the temerity to point out the investigation was itself a violation of academic freedom (Kipnis, 2015b). When Professor Kipnis published a follow-up essay describing her Title IX experience, she was reported again. At Howard University, student complaints to the Title IX officer over a test question involving "A Brazilian wax and an upset client" resulted in an investigation that dragged on for more than a year; it ultimately found the professor responsible for sexual harassment (FIRE, 2017). And at Harvard University, 50 students used the Title IX process to file complaints against Supreme Court Justice Brett Kavanaugh, who periodically taught a course at the law school, over allegations that surfaced during his confirmation hearings (Wermund, 2018).

The list of such investigations is a long one. But it only captures the sagas that have been publicized. Untold numbers of students and faculty have suffered quietly through frivolous inquisitions made possible by the weaponization of Title IX, a campus trend that has mirrored the emergence of cancel culture on social media. What is more, as Title IX offices grew in size—Harvard had more than 50 coordinators by 2016— (Melnick, 2018, p. 18) they began to create work for themselves by actively soliciting complaints from students (in some cases, to punish faculty members for publishing controversial research; Yenor, 2022). Students, for their part, know that they can punish faculty who dare to express heterodox, generally conservative viewpoints by setting off a social media swarm and/or complaining to administrators (ACTA, 2021, p. 5–10). Faculty have adapted to the new environment by changing what and how they teach. For example, law professors report that they avoid teaching rape law in criminal law classes because "it's not worth the risk of complaints of discomfort by students," a development that ultimately harms students by impoverishing the campus intellectual environment (Gersen, 2014). Others, including gifted teachers and researchers, have left the academy altogether citing "administrator[s' abdication of] the university's truth-seeking mission." (Miller, 2021, and Peterson, 2022).

Unsurprisingly, the development of Obama-era Title IX policies and their enforcement coincided with the well-documented rise in student self-censorship that has made it difficult to discuss an array of important public policy issues in college classrooms and cafeterias. The largest study of its kind, a 2021 FIRE survey of 37,000 students on over 150 U.S. campuses, found that 83% of students could think of an occasion in which they felt they could not express an opinion "because of how students, a professor, or the administration would respond" (FIRE-College Pulse, 2021, Question 21). This is probably why 51% said that it is difficult to have an "open and honest conversation" about "racial inequality" on their campus. (Forty-four percent said the same about abortion, and 40% said it is difficult to have open and honest conversations about transgender issues; FIRE-College Pulse, 2021, Question 25.) Conservative students self-censor at higher rates than their liberal peers, according to several studies (FIRE-College Pulse, 2021, Question 21, and Stiksma, 2020, p. 7).

The Biden Administration's proposal will likely make this situation much worse. In addition to broadening the definition of harassment to include "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 [a school's] education program or activity," [emphasis added] the proposed regulations extend Title IX protections to discrimination based on "sexual orientation," "gender identity," and "sex characteristics" (Department of Education, 2022a, p. 657–58). To parse that another way, unwelcome speech about gender identity subjectively judged to limit a student's ability to participate in or benefit from an educational activity could violate the Biden Administration's proposed rule.

It is not hard to imagine what will happen when Title IX administrators begin receiving complaints about improper pronoun use and the expression of "offensive" viewpoints regarding biological sex differences. Students will claim that offensive speech has harmed them in a way that limits their ability to "benefit from" an education program or activity; the Title IX investigatory apparatus will spring into high gear; some of those who are accused will be punished, and others subjected to burdensome and humiliating investigations, but all will learn there are consequences for venturing into disfavored viewpoints that touch on sexual orientation or gender identity.

As Jennifer Braceras and Heather Madden summarize in their recent analysis, "The Biden Administration's radical redefinition of the word 'sex' vastly expands the category of speech that schools may now try to punish" (Braceras & Madden, 2022, p. 8). Activist students, administrators, and faculty will deploy the new weapon to raise the cost of venturing disfavored viewpoints—in class, on social media, and even in academic journals. The consequence will be yet more self-censorship and the further impoverishment of the campus intellectual climate. If the new regulations are adopted, the policies schools devise to comply with them are likely to raise serious religious liberty issues on free exercise grounds, a virtual inevitability given that the Sixth Circuit has already ruled that state universities cannot punish a faculty member for refusing to use feminine pronouns to address a biologically male student (Pidluzny, 2021; *Meriwether v. Shawnee State University, 2021*).

SECTION FOUR

The proposed regulations will require colleges and universities to open female athletics to natal male athletes—in clear violation of Title IX.

Existing Title IX regulations specifically permit schools to "operate or sponsor separate teams for members of each sex" as long as a university's overall program provides equal athletic opportunities to both sexes. Many observers expected the Biden Administration would require U.S. colleges and universities that receive federal aid to allow students to participate in sex-specific school-sponsored athletics according to their gender identity in the 2022 NPRM—effectively, to redefine sex to include students' self-proclaimed gender identity. Instead, Secretary Miguel Cardona announced that a separate rulemaking on the issue would follow the 2022 NPRM, noting that "standards for students participating in male and female athletic teams are evolving in real time" (Quilantan, 2022).

Secretary Cardona was referring to a flurry of activity at the state level, where at least 20 states have now passed some form of legislation to limit participation in female athletics to biological females (not all apply to collegiate athletics; Lewis, 2023; Reilly & Carlisle, 2022). States passing new laws in response to the increasing participation of natal males in female sports were responding to concerns about athlete safety and fairness, given the considerable size and strength advantages male athletes derive from male puberty and/or an androgenized body. Female athletes have been seriously injured by natal male athletes in a range of sports, from volleyball to rugby to mixed martial arts (Rychcik, 2022; Downey, 2022). Regarding fairness in competition, one study of elite male and female athletics performance found that "in the single year [2017] Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys" (Coleman & Shreve, n.d., p. 1). Similar performance disparities were recorded in other sports; in some track and field events, hundreds of boys under 18 outperformed the best adult female result posted in the study year (Ibid., p. 2). A study published by the Journal of Sports Science & Medicine found "a mean difference of 10.0% ± 2.94 between men and women" in Olympic events studied and observes that the athletics performance gap has not changed significantly since 1982 (Thibault et al., 2010).

Change coming from within the athletics world also complicated the landscape as governing federations began adopting their own eligibility standards to limit the participation of natal male athletes in female sports. In January 2022, the National Collegiate Athletics Association (NCAA) voted for a sport-by-sport approach to transgender student athlete eligibility criteria, with rules set by the sport's national governing body (NCAA, 2022). The International Swimming Federation (FINA) , which oversees international competition, recently announced a new policy that restricts eligibility for the women's category to biological females and those who transitioned early enough to have avoided the benefits associated with male puberty. As FINA explains in its statement, "[w]ithout eligibility standards based on biological sex or sex-linked traits, we are very unlikely to see biological females in finals, on podiums, or in championship positions" (FINA, 2022, p. 1, 8). Most recently, Union Cycliste Internationale (UCI), world cycling's governing body, announced it was reopening "consultation" regarding its own eligibility criteria after Austin Killips became the first natal male athlete to win the Tour of the Gila in New Mexico (Ingle, 2023).

As a result of these and other developments, a hard and fast determination by the Department of Education that "sex" means subjective gender identity in athletics would have put universities in outright conflict with NCAA standards in some sports. It would also have deprived them of

the flexibility necessary to accommodate future developments in others. This is probably why the DoEd chose to delay the athletics rulemaking. However, they did so with the awareness that the language of the first rulemaking would nonetheless create significant pressure to comply with trans-activist demands on the field, in the pool, and in intimate facilities. That is because the new rule establishes a potent test to identify discrimination: "[a]dopting 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" (Department of Education, 2022a, p. 530). As a result, schools will be required to open single-sex locker rooms and bathrooms to students based on gender identity—as the Obama-era and initial Biden Administration guidance documents did.

The 2023 rulemaking proposes to allow college administrators modestly more wiggle room when it comes to sex separated athletics by allowing schools to establish criteria limiting participation (based on biology or reproductive function) when the policy is "substantially related to the achievement of an important educational objective" (Department of Education, 2023, p. 22872). The Department provides little in the way of specific guidance on what will constitute a "substantial" relationship to an "important educational objective," however. It speculates "that a recipient might assert fairness in competition or prevention of sports-related injury as an important educational objective in its athletics programs, particularly in competitive athletic programs" (Ibid., p. 22872). This means that DoEd will look more favorably on biology-conscious criteria at higher levels of competition (where natal males' physiological advantages translate into performance advantages) and in sports where disparities in size or level of athletic performance poses significant injury risk. The burden, however, will be on schools to establish that relationship with little concrete guidance from DoEd regarding the sports or levels of competition where it will agree that biology-conscious eligibility criteria are reasonable.

The fact that DoEd offers only vague guidance on what constitutes an "important educational objective" could well be a strategic move. The result will be to give OCR wide investigatory latitude. DoEd will also be able to issue guidance letters refining its understanding—in ways that push forward the transgender agenda—without the public scrutiny (and opportunity for comment) that attends a formal rulemaking.

In practice, the Biden Administration's Title IX regulation will allow students who are not allowed to compete according to their gender identity to file complaints with the school's Title IX office, claiming that no similar athletic opportunity is available to them. If the school refuses to allow natal males to participate in women's sports to protect biological women, activists can file complaints with OCR, an action sure to bring negative publicity to the college. The Biden Administration has already made clear that it views biology-conscious eligibility standards as discriminatory. In a "statement of interest" filed in a case challenging West Virginia's law excluding biological male athletes from female athletics, the government's argument was unnuanced: "A state law that limits or denies a particular class of people's ability to participate in public, federally funded educational programs... solely because their gender identity does not match their sex assigned at birth violates both Title IX and the Equal Protection Clause" (*Jackson v. West Virginia State Bd. of Ed., 2021, p. 5*) .

The effect of the proposed rule will therefore be to encourage colleges to open athletic activities to students based on trans-identity, wherever federation rules and NCAA policy allow it. (Schools are already doing this, including the University of Pennsylvania, where Lia Thomas became the

first openly transgender athlete to win a Division-I NCAA national competition; Glasspielgel, 2022). It is reasonable to expect many college administrators will desire to follow the University of Pennsylvania's lead for ideological reasons, given the well-established fact that they lean to the political Left at ratios exceeding students and faculty (Abrams, 2018).

Why the professed ambiguity—and modest flexibility—around athletics in the rulemaking process, then? The regulation's ostensibly more accommodating approach to athletics appears to help the Biden Administration navigate difficult political waters. According to a February 2022 Scott Rasmussen national survey of registered voters, 67% of voters believe biological males have an unfair advantage competing against biological females in women's sports (America First Parents, 2022). The proposed rules give campus administrators and student activists all they need to advance the inclusion of trans-athletes in female sports as far as developing NCAA rules allow—all without putting wildly unpopular language in the plain text of a proposed regulation. The result will be the same, in the end: more biological males competing against biological females, in contravention of basic norms of fairness given the substantial athletic performance advantages male puberty conveys. The policy goal will just be achieved in fits and starts off the national stage: pushed forward by the actions of activists on the ground, sympathetic administrations, judicial decisions, and subsequent administrative actions. How ironic that Title IX, which dramatically increased the collegiate athletic opportunities open to women, is now being used to allow biological males to break those athletes' school and league records.

As students demand additional policy changes to accommodate their gender identity, schools will be forced to adapt to a quickly changing environment. The questions left open could fill volumes. What if schools maintain biology-conscious eligibility criteria for single sex teams to protect female athletes—including victims of sexual assault—who are uncomfortable competing against or sharing intimate facilities with natal male athletes (who often have functional sexual organs)? Will DoEd judge a school's concern about creating a safe and inclusive environment for natal female athletes to be an important educational objective? What if natal male athletes with questionable motivations begin to claim false female identities in higher numbers to gain access to female spaces—whether to be around women in a vulnerable state or to make a political point about biological sex differences? That is what has occurred in state and federal prisons, where the number of male-to-female transitioners has exploded (Reinl, 2022). How will schools judge whether natal males claiming to be women are expressing a genuine gender identity?

And what if schools shift their athletics programs to prioritize sports in which competition is less physically intense or that require minimal athlete-to-athlete contact? A school that offers more sports where natal males can participate as women without threatening the safety of natal female athletes will have a stronger argument that it is providing equality of athletic opportunity, across the totality of its athletics program, to students who identify as transgender. Just as colleges opened new female sports and closed some men's sports where there was insufficient interest to launch a women's program (for example, in wrestling) to comply with Title IX's requirement that they offer equal opportunity to female athletes, colleges and universities will have strong incentives to close female sports where trans-athletes might dominate competition (Dosh, 2017). This points to a future in which colleges have more female bowling and badminton teams but fewer soccer, hockey, and rugby teams. Of course, to offer vastly different athletics programs to male and female athletes is itself a violation of Title IX.

This much is certain: the Biden Administration's proposed regulations will inevitably deny women the equal educational opportunities Congress intended the legislation to advance. Female students will appropriately turn to Title IX offices for help when they are denied opportunities to compete in school-sponsored athletics because they judge it unsafe to compete against trans athletes who benefit from the size and strength advantages of an androgenized body. Natal males will deprive deserving female athletes of scholarships, recognition, and opportunities to compete at the highest levels and in event finals. There will also be cases of female students, some victims of sexual violence, declining to use recreation facilities because trans students with male genitalia are an intimidating presence in a women's locker room. Federal appeals courts are likely to follow the lead of the Seventh Circuit in taking up such cases, which will put the Biden Administration's proposed Title IX regulation on a collision course with Title IX.

If finalized in its current form, the new regulation will also create conflicts with state laws. Of course, the proposed rules purport to preempt state legislation that conflicts with them, including statutes prohibiting schools and colleges from opening women's athletics (and bathrooms) to biological males. However, that will require federal courts to agree that this is a civil rights issue. DoEd has argued that the Supreme Court's holding in *Bostock v. Clayton County*, which extends protections based on an employee's sex to their gender identity under Title VII of the Civil Rights Act, also applies to Title IX. This is a dubious reading of the case, given that the Court was careful to note that its holding applies in an employment discrimination context only.

> *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 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. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex"* (*Bostock v. Clayton County, 2020, pg. 31*).

Supreme Court Justices Clarence Thomas and Samuel Alito tacitly acknowledged as much in a recent dissent—opposing the Court's decision not to take up one such case on an emergency basis—when they observed that West Virginia's "application concerns an important issue that this Court is likely to be required to address in the near future, namely, whether either Title IX of the Education Amendments of 1972 or the Fourteenth Amendment's Equal Protection Clause prohibits a State from restricting participation in women's or girls' sports based on genes or physiological or anatomical characteristics" (*West Virginia v. Jackson, 2023, pg. 1*). When they do ultimately take up the question, the courts are likely to reassert a basic principle of American federalism. Health, safety, and education are quintessentially local powers for good reason: Policies and practices in these realms should align with the sensibilities of local populations.

State officials are very likely to make these (and other) arguments in lawsuits asking federal courts to enjoin or strike down the final rules. Meanwhile, colleges establish inconsistent policies under the vague athletics rule; as a result, some schools will allow natal males to participate while others will likely not—in the same sport and league. National athletics federations are likely to disseminate a spate

of inconsistent eligibility rules. This will create compliance nightmares for athletics departments and confusion among student athletes. In the end, the range of disputes set off by the proposed rule will keep the issue in news headlines—pouring accelerant on a burning and divisive social policy issue.

Conclusion

Title IX regulations should not change every time a presidential administration does. This only creates uncertainty around students' due process rights and deepens the politicization of our college and university campuses. Nor should such an important law be distorted to advance a radical ideological agenda. Using Title IX to open female athletics to female-identifying biological males is entirely antithetical to the legislation's original purpose. Nor was it ever intended to create enforcement mechanisms that would be widely used to chill student and faculty speech.

Hopefully, the public comments that poured in from concerned groups and citizens during the comment period—almost 400,000 in total—made the administration aware of the proposed regulation's many, many problems. It now has an opportunity to make adjustments that will prevent serious miscarriages of justice on college campuses in the coming years, some of which it may not have anticipated.

Because Title IX has become such an important lever for activists in the areas of gender identity and sexual orientation, however, the administration will face considerable pressure to keep many of the ill-advised provisions of the proposal in the final regulation. This means that the ping-pong over Title IX is unlikely to end until Congress or the Supreme Court acts. Congress can specify that the Supreme Court's definition of sexual harassment governs Title IX enforcement activities and that the Secretary of Education shall not condition federal aid eligibility on broader understandings manufactured by bureaucrats. Although the original meaning is clear in the statute, lawmakers could also add language that further clarifies that the term "sex" in Title IX means biological sex, not gender identity. This would go a long way toward preventing the worst failures of due process, and it would limit the scope for inquisitions into student and faculty speech.

In the meantime, state lawmakers can—and should—act to strengthen due process and free speech protections for students studying at public universities. Several states have already done so, and the America First Policy Institute has published an inventory of model policies that include over a dozen proven approaches for state legislators to consider (America First Policy Institute, 2022, p. 1–6).

Until Congress acts, however, federal courts are likely to continue ruling that university disciplinary procedures established under the Obama-Biden paradigm fail to extend required due process protections to those accused of sexual harassment. As states adopt divergent statutes and disagreements among circuit courts reviewing cases on appeal emerge, the chance that the Supreme Court will have to step in only increases. Similarly, it is not hard to imagine a case reaching the Supreme Court that requires the justices to determine whether "sex" can be construed by DoEd to include "gender identity" in the context of access to educational opportunities under Title IX. If the new regulations go into effect, state attorneys general are likely to ask federal courts for an immediate injunction. As we have seen, they will have ample grounds to do so. All of this means that Title IX will remain a front in the country's culture war—with real-world consequences for students, faculty, and athletes—until the meaning of its 37 words is settled.

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