

**E.O. 12866 Meeting  
Nondiscrimination on the Basis of Sex in  
Education Programs or Activities Receiving  
Federal Financial Assistance  
Rulemaking RIN: 1870-AA16**

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Thank you for the opportunity to provide comments on OIRA’s review of the final rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (RIN 1870-AA16).

**A. The Need for Federal Regulatory Action**

- There is no need for this regulatory action. In fact, the part of the regulation that would add sexual orientation and gender identity as prohibited nondiscrimination categories will have significant economic and non-economic impacts, particularly for female students on college campuses across the county.
  - Title IX was “enacted in response to evidence of pervasive discrimination against women with respect to educational opportunities.”<sup>1</sup> This extended to school sports, in which women and girls lacked equal access to sports teams, athletic facilities, scholarships, and other opportunities compared to their male counterparts.
  - Title IX sought to remedy these inequities by mandating that schools could not discriminate, exclude from participation, or deny benefits to any student “on the basis of sex.” 20 U.S.C. § 1681. In this context, Title IX uses “sex” as a binary concept, encapsulating only males and females. This is apparent from the statute’s goal of remedying past discrimination against persons of the female sex, and the text of the statute.<sup>2</sup>
  - While Title IX has done much to level the playing field, women and girls still lack equitable opportunities to participate in sports compared to boys and men. Schools on average spend more on

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<sup>1</sup> *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); see also *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 523 n.13 (1982).

<sup>2</sup> For example, Title IX provides an exemption for schools to change “from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*.” 20 U.S.C. § 1681(a)(2) (emphases added). It also exempts “father-son or mother-daughter activities ... but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*.” 20 U.S.C. § 1681(a)(8) (emphases added).

- men's programs than women's programs, particularly at the college championship level.<sup>3</sup> Girls still lag behind boys in participation at the high school and collegiate level.<sup>4</sup> As one report put it, “[g]irls enter sports later, participate in fewer numbers, and exit earlier than boys.”<sup>5</sup>
- Adding gender identity in particular as a nondiscrimination category under Title IX will cause significant negative impacts to the equitable opportunities of women, because it will require schools to allow biological men to claim scholarships, spaces in academic programs, athletic positions, and sports championships that would otherwise be reserved for women as part of Title IX's requirement to create and maintain a level playing field for women.
  - Consequently, the agency should estimate the economic impacts of adding gender identity as a nondiscrimination category under Title IX. These 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.
- 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.
    - 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.” 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. See 34 C.F.R. § 106.12; 45 FR 30955, 30958 (May 9, 1980).
    - Recent regulations relieved the regulatory and paperwork burdens of those rules by acknowledging that religious schools are

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<sup>3</sup> NCAA External Gender Equity Review Phase II 7–8 (2021), <https://ncaagenderequityreview.com/>.

<sup>4</sup> Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women, Women's Sports Foundation (2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>; see also NCAA Demographics Database, <https://www.ncaa.org/about/resources/research/ncaa-demographics-database>.

<sup>5</sup> *Id.*

statutorily exempt and do not need to pursue a paperwork confirmation of their exemption. *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).

- 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 confirmation process re-created if the agency repeals the recent rules would therefore impose unnecessary regulatory costs and paperwork burdens on religious schools.
- The 2020 rule also 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>6</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 as mentioned, 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.
- 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.

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<sup>6</sup> U.S. Department of Education letter to Kevin J. Worthen, available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/brigham-young-university-response-01032022.pdf>.

## B. Identifying and Measuring Benefits and Costs

### *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>7</sup>
  - And in Connecticut two transgender athletes recently “won 15 state championships that were once held by nine different girls.”<sup>8</sup> One female competitor described it as “discouraging and demoralizing.”<sup>9</sup>
  - These anecdotes highlight the distributive impact on women and girls that the agency 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.

### *Costs 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.

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<sup>7</sup> 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>8</sup> Vitrix ludorum, 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>9</sup> 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>.

- Costs of lost athletic sponsorships.
- Costs of increased incidence of injuries to female athletes by virtue of competing against larger, faster, and stronger male bodies in contact sports.<sup>10</sup> This includes the costs of medical care, and the lost opportunities to compete, win championships, and obtain the other financial benefits described above.

### *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:
  - 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>11</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.
- The agency should also consider the unnecessary costs imposed if the religious exemption rules are changed.
  - 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.

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<sup>10</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)

<sup>11</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).

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

### *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 student's 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.

### *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 a college scholarship. These costs include the downstream effects of fewer women obtaining higher salaries and other measures of economic success correlated with a college education.

## C. Specialized Analytical Requirements

### *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>12</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.

### *Comment period*

- Because of the wide-ranging impacts of this rule on so many individuals, students and businesses, and because of the lack of negative impact of leaving the current rule in place while this rule is considered, the agency should provide at least 60 days for a public comment period so groups have a sufficient opportunity to read the rule and obtain and submit helpful information about its potential impact.

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<sup>12</sup> For example, women fill a majority of the following positions: veterinarians, physician assistants, speech language pathologists, dietitians and nutritionists, human resource management, psychologists, occupational therapists,