

AUSTIN KNUDSEN



STATE OF MONTANA

April 5, 2022

Ms. Catherine E. Lhamon
Assistant Secretary
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: U.S. Department of Education's Title IX Rulemaking

Dear Assistant Secretary Lhamon:

As the Attorneys General of our respective States, we are alarmed about the Department of Education's ("Department" or "ED") intent to propose new regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, in April 2022.¹ The Department, chiefly, has failed to provide sufficient justification for engaging in a new rulemaking. We therefore urge the Department to halt its effort and not disturb the current Title IX regulations. Relatedly, due to your key role in creating the Obama-era Title IX system and your public comments on the recently enacted Title IX Regulations from 2020, we call on you to recuse yourself from taking part in any rulemaking on Title IX. The Department should also not illegally re-write Title IX to include gender identity. Make the right choice for the rule of law as well as students, parents, teachers, and schools.

We are particularly perplexed as to why the Department believes the Title IX regulations require revision. In May 2020, after thoroughly considering over 124,000 public comments, the Department issued its historic Title IX Regulations, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) ("2020 Rule"), to better align the Title IX regulations with the text and purpose of 20 U.S.C. § 1681, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and schools with respect to sexual harassment allegations. For the first time in history, regulations regarding sexual harassment under Title IX were codified into law. And, unlike in previous administrations,

¹ See U.S. Department of Education, Statement by U.S. Department of Education Assistant Secretary for Civil Rights Catherine E. Lhamon on Title IX Update in Fall 2021 Unified Agenda and Regulatory Plan, Dec. 10, 2021, <https://www.ed.gov/news/press-releases/statement-us-department-education-assistant-secretary-office-civil-rights-catherine-lhamon-title-ix-update-fall-2021-unified-agenda-and-regulatory-plan>.

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the 2020 Rule holds public elementary and secondary schools accountable for sexual harassment, including sexual assault.²

The 2020 Rule, which became effective on August 14, 2020, sets forth clear legal obligations that require schools to promptly respond to allegations of sexual harassment, follow a fair grievance process to resolve those allegations, and provide remedies to victims. It guarantees victims and accused students strong, clear procedural rights in a predictable, transparent process designed to reach reliable outcomes.³ It offers important new protections and benefits for victims of sexual harassment and sexual assault.⁴ It provides essential provisions protecting free speech and academic freedom.⁵ The 2020 Rule also clarifies an institution's entitlement to a religious exemption under § 1681(a)(3).⁶ The Department should not eliminate or modify any of these vital provisions.

If the Department nevertheless decides to engage in rulemaking, you must recuse yourself from the process. The 2020 Rule was enacted in response to a constitutional and regulatory mess created by OCR from 2011 to 2016. As Assistant Secretary for Civil Rights from 2013 to 2017, you played a crucial role in creating this problem. OCR's infamous 2011 *Dear Colleague Letter: Sexual Violence* ("2011 DCL") and 2014 *Questions and Answers on Title IX and Sexual Violence* ("2014 Q&A")⁷ wreaked havoc on campuses across the country. OCR compelled schools to adopt the lowest standard of proof for proving sexual harassment and sexual assault claims—preponderance of the evidence—and pressured schools to find accused students responsible for sexual misconduct even where there was significant doubt about culpability.⁸

Your OCR pressured schools to employ a "single investigator" model that gives one person appointed by the school's Title IX coordinator authority both to investigate alleged

² Pursuant to the 2020 Rule, an elementary and secondary school must respond whenever any employee has notice of sexual harassment or allegations of sexual harassment. See 34 C.F.R. § 106.30(a).

³ See, e.g., U.S. Dep't of Educ. YouTube Channel, *OCR Webinar on Due Process Protections under the New Title IX Regulations* (July 21, 2020), <https://youtu.be/48UwobtiKDI>; U.S. Dep't of Educ. YouTube Channel, *OCR Title IX Webinar: Bias and Conflicts of Interest* (Jan 15, 2021), <https://www.youtube.com/watch?v=vHppcOdrzCg>.

⁴ See, e.g., U.S. Dep't of Educ. YouTube Channel, *OCR Webinar on New Title IX Protections Against Sexual Assault* (July 7, 2020), <https://www.youtube.com/watch?v=i-BCnhUsJ4s>.

⁵ See, e.g., U.S. Dep't of Educ. YouTube Channel, *The First Amendment and Title IX: An OCR Short Webinar* (July 29, 2020), <https://www.youtube.com/watch?v=XzSJ4uNspq8>.

⁶ 85 Fed. Reg. 59,916, 59,980–59,981 (Sept. 23, 2020).

⁷ U.S. Dep't. of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (April 4, 2011) (hereinafter "2011 DCL"), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁸ OCR found numerous institutions in violation of Title IX for failing to adopt the preponderance of the evidence standard in its investigations of sexual harassment, even though the notion that the preponderance of the evidence standard is the only standard that might be applied under Title IX was set forth in the 2011 Dear Colleague Letter—not in the Title IX statute, regulations, or other guidance. E.g., U.S. Dep't. of Education, Office for Civil Rights, *Letter of Findings to Harvard Law School 7*, Dec. 10, 2014, <https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> ("[I]n order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence."); see also Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. L. & PUB. POL'Y 533, 542 (2016) (The 2011 DCL "forced universities to change their former policies drastically, with regards to their specific procedures as well as the standard of proof, out of fear that the Department of Education will pursue their school for a violation of Title IX.").

misconduct and to determine guilt and innocence.⁹ Schools housed these investigators/adjudicators in their Title IX offices, which had strong incentives to ensure the school stayed compliant with the DCLs to avoid losing federal funding. Many Title IX offices assumed every role in the process, acting as prosecutor, judge, jury, and appeals board.¹⁰

OCR created an expansive definition of sexual harassment that included “verbal conduct” (i.e., speech) such as “making sexual comments, jokes or gestures,” “spreading sexual rumors,” and “creating e-mails or Web sites of a sexual nature.”¹¹ The environment became so precarious that Harvard Law School professor Jeannie Suk Gersen wrote in 2014 that law school faculty were increasingly reluctant to teach rape law for fear of offending or upsetting their students.¹² When the University of Montana sensibly incorporated the Supreme Court’s definition of sexual harassment (discriminatory conduct “that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities”)¹³ into its sexual harassment policy, OCR objected.¹⁴ It insisted in 2013 that the university establish policies to “encourage students to report sexual harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment.”¹⁵ The broad definition of sexual harassment was a so-called “national blueprint” for schools¹⁶ and led OCR to regulate conduct that was not covered under Title IX.¹⁷

⁹ See *Doe v. Univ. of Scis.*, 961 F.3d 203, 213 (3d Cir. 2020) (describing the pressure universities faced as a result of the Dear Colleague Letter). In the “single investigator” model, there is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. This makes the investigator all powerful. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose, because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator’s structural and personal biases as they baked them into the evidence-gathering.

¹⁰ A laundry list of due process violations—reminiscent of Star Chamber—stacked the deck against accused students. Schools failed to give students notice of the complaint against them, factual bases of charges, the evidence gathered, or the identities of witnesses. Schools failed to provide hearings or to allow the accused student’s lawyer to attend or speak at hearings. Schools barred the accused from putting questions to the accuser or witnesses, even through intermediaries. Schools denied parties the right to see the investigative report or get copies for their lawyers for preparing an appeal. Schools allowed appeals only on very narrow grounds such as new evidence or procedural error, providing no meaningful check on the initial decisionmaker.

¹¹ *Id.*

¹² THE NEW YORKER, Dec. 15, 2014, <http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law>.

¹³ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

¹⁴ U.S. Dep’t. of Education, Office for Civil Rights, Letter of Findings to University of Montana, May 8, 2013, <https://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>.

¹⁵ BROOKINGS INSTITUTION, Jan. 24, 2019, <https://www.brookings.edu/blog/brown-center-chalk-board/2019/01/24/the-department-of-educations-proposed-sexual-harassment-rules-looking-beyond-the-rhetoric/>.

¹⁶ FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, Departments of Education and Justice: National “Blueprint” for Unconstitutional Speech Codes, <https://www.thefire.org/cases/departments-of-education-and-justice-national-requirement-for-unconstitutional-speech-codes/>.

¹⁷ Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 902-03 (2016) (Asserting that the Obama OCR’s guidance required schools to regulate student conduct “that [was] not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination” and concluding that OCR’s guidance overstep[ped] OCR’s jurisdictional authority).

OCR didn't merely put its thumb on the scale of justice under your leadership, it became a biased institution. Investigations were not an inquiry into discrete complaints, but instead fishing expeditions into every aspect of schools' adjudication process and campus life.¹⁸ By 2016, "the average investigation had been open for 963 days, up from an average in 2010 of 289 days."¹⁹ Former and current OCR investigators told the media "the perceived message from Washington was that once an investigation into a school was opened, the investigators in the field offices were not meant to be objective fact finders. Their job was to find schools in violation of Title IX."²⁰ By 2014, OCR had stopped using the terms "complainant/alleged victim" and "alleged perpetrator" and replaced them with "victim/survivor" and "perpetrator." OCR then began keeping a public list of the schools at which it was investigating possible Title IX violations, putting schools under a cloud of suspicion. Under your leadership, the Title IX system quite literally resembled Kafka's *The Trial*.²¹ What followed were hundreds of successful lawsuits against schools for denying basic due process²² and widespread criticism from across the ideological spectrum. And one of the more tragic ironies is that the 2011 DCL resulted in a disproportionate number of expulsions and scholarship losses for Black male students.²³

Given your past statements and record, there's no possible way OCR or the Department can conduct the rulemaking process in accordance with the Administrative Procedure Act's requirements for reasoned decision-making.²⁴ When the 2020 Rule was released, you claimed that it was "taking us back to the bad old days, when it was permissible to rape and sexually harass students with impunity."²⁵ During your subsequent Senate Confirmation hearing, you confirmed that this was still your view.²⁶ With your mind already made up regarding the 2020 Rule—and your attachment to the defective regime it replaced—your involvement would taint the rulemaking process with bias. See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (a strong showing of bad faith may require the

¹⁸ THE ATLANTIC, Sept. 6, 2017, <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See, e.g., COMMENTARY MAGAZINE, June 2017, <https://www.commentarymagazine.com/articles/kc-johnson/kafka-u/>.

²² These lawsuits, more often than not resulted in victories for accused students across the country in state and federal court, including key wins at the appellate level. See, e.g., *Doe v. Oberlin Coll.*, 963 F.3d 580, 581 (6th Cir. 2020); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 205 (3d Cir. 2020); *Doe v. Purdue Univ.*, 928 F.3d 652, 656 (7th Cir. 2019); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 60 (1st Cir. 2019); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1070 (2018); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (2018).

²³ REALCLEAR EDUCATION, Jan. 21, 2019, https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html.

²⁴ We also note that then-Former Vice President Biden called supporters of the Title IX Reform "cultural netherthals" and compared them to neo-Nazis. THE COLLEGE FIX, Sept. 14, 2017, <https://www.thecollegefix.com/joe-biden-compares-supporters-due-process-nazis-marched-charlottesville/>.

²⁵ Catherine Lhamon (@CatherineLhamon), Twitter (May 5, 2020, 6:48pm) <https://twitter.com/CatherineLhamon/status/1257834691366772737?s=20&t=brCKjSXrdnvf7CUhfM-WNA>.

²⁶ See KC Johnson YouTube Channel, *Excerpt of Catherine Lhamon Confirmation Hearing* (July 13, 2021), <https://youtu.be/vqip7Dj8iwI>.

administrative officials who participated in a decision to give testimony explaining their action); *United States v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994) (decisionmaker cannot possess “an unacceptable probability of actual bias”).²⁷ Further, any future rationale for changing the 2020 Rule that’s offered by the Department would be invalid because your statements prove the Department’s outcome is pre-ordained. See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (uncontested that decision resting on “pretextual basis” “warrant[s] a remand to the agency”).

Finally, we strongly urge the Department not to extend Title IX by regulatory fiat to cover discrimination on the basis of gender identity.²⁸ This would plainly exceed the Department’s rulemaking authority under Title IX. Title IX prohibits discrimination “on the basis of sex” in any education program or activity receiving Federal financial assistance. Statutory and regulatory text and structure,²⁹ contemporaneous Supreme Court authorities,³⁰ and the U.S. Department of Education’s historic practice³¹ demonstrate that the ordinary public meaning of the term “sex” at the time of Title IX’s enactment could only have been biological distinctions between male and female. A person’s biological sex is relevant for Title IX considerations involving athletics, and distinctions based on sex are permissible (and may be required) because the sexes are—simply—not similarly situated. See 20 U.S.C. §§ 1681(a), 1686; 34 C.F.R. §§ 106.32(b), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61; *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (noting Title IX expressly authorizes separation based on sex in certain circumstances). This is because biological females and biological males possess profound physiological differences that are relevant in certain circumstances. See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (“Physical differences between men and women, however, are enduring.”).

One of Title IX’s crucial purposes, for example, is protecting athletic opportunity for women and girls. Adding gender identity to the definition of “sex” in Title IX would have a detrimental effect on the great strides made over the last 50 years to create equal athletic opportunity. Several of our states have enacted legislation to protect athletic opportunities for women by prohibiting biological males from competing in female athletics. See, e.g., H.B. 112, 2021 Leg. (Mt. 2021); H.B. 25, 87th Sess. (Tx. 2021); H.B. 3293, 2021 Leg., H.B. 500,

²⁷ A reviewing court may delve outside the administrative record under a strong showing of bad faith or improper behavior. See, e.g., *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep’t of Energy*, 485 F.3d 1091, 1096 (10th Cir. 2007); *Voyageurs Nat’l Park Ass’n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004); *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 907 (5th Cir. 1983); *Pub. Power Council v. Johnson*, 674 F.2d 791, 795 (9th Cir. 1982).

²⁸ Laura Meckler, *New Title IX rules set to assert rights of transgender students*, WASH. POST. (Mar. 30, 2022), <https://www.washingtonpost.com/education/2022/03/30/transgender-discrimination-title-ix-rule-students/>.

²⁹ See 20 U.S.C. §§ 1681(a); 34 C.F.R. §§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43, 106.52, 106.59, 106.61.

³⁰ See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (“[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”); see also *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020) (assuming that the ordinary public meaning of the term “sex” in Title VII means biological distinctions between male and female); *id.* at 1784–91 (Appendix A) (Alito, J. dissenting) (collecting definitions of “sex”); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (“discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”).

³¹ See U.S. Dep’t of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock v. Clayton Cty.*, at 2–3 (Jan. 8, 2021) (discussing Department’s longstanding interpretation of “sex” in Title IX as meaning biological sex), available at <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

65th Leg., 2d Sess. (Id. 2020). Those laws would undoubtedly conflict with the Department's intended rulemaking. We are prepared to take legal action to uphold Title IX's plain meaning and safeguard the integrity of women's sports.

In addition to the foregoing, we are also concerned that an interpretation of Title IX that goes beyond sex to include gender identity has and will be used by schools to improperly intrude into parental decision-making regarding the education and upbringing of their children. For example, as has been well documented in the controversy over Florida's Parental Rights in Education law³², certain organizations and advocates have taken the position that laws which require parental notification about healthcare services offered at school or impose limitations on curricula for young children on gender identity issues violates Title IX. Specifically, advocates allege that the Florida law violates "Title IX by discriminating against them on the basis of sex, which includes sexual orientation and gender identity."³³ An interpretation of Title IX that supports such radical positions runs contrary to the role of the Department of Education,³⁴ the text of Title IX, and parents' constitutional right to decide what is in the best interests of their children.

The courts, as well as commentators across the political spectrum, agreed the Title IX system was broken under your watch. The 2020 Rule fixed those problems and created a better, more reliable system for victims and accused students. The Department has provided no rationale for why the 2020 Rule has proven unworkable or in need of adjustment. The COVID-19 pandemic has also provided a variety of challenges for education at all levels. Modifying or eliminating the 2020 Rule now will only add to the uncertainty and regulatory burden on schools, parents, teachers, and students across America.

We strongly urge the Department to cancel its plans to engage in rulemaking on Title IX. If the Department elects to continue with the process, we firmly believe you should have no role in it.

Respectfully,



AUSTIN KNUDSEN
ATTORNEY GENERAL OF MONTANA

³² Florida House Bill 1557.

³³ *Equality Florida, et al. v. Florida, et al.*, Cause No. 4:22-cv-00134-AW-MJF, pending in the United States District Court for the Northern District of Florida, filed on March 31, 2022, Count VI, ¶ 247.

³⁴ See 20 USC § 3401(3) & (4) (Pub. L. 96-88, title I, § 101(3) & (4), Oct. 17, 1979, 93 Stat. 669) (As President Carter noted when signing the Department of Education Organization Act: "[P]arents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role").

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