



PROPOSED ACTION
MEMORANDUM

Protecting the Rights of LGBTQ+ Students
Under Title IX of the Education Amendments of
1972

Department of Education
November 2020

I. Summary

The Trump administration has weakened protections for transgender individuals under Title IX of the Education Amendments of 1972 (Title IX) by rescinding previous policy statements, changing its enforcement policy, filing Statements of Interest in litigation, and threatening fund termination for schools that support transgender students.¹ This is part of the administration's broader attack on the rights of transgender individuals.

In addition, the U.S Department of Education (Department or ED) has, during a number of administrations, stated that Title IX prohibition does not extend to discrimination on the basis of sexual orientation, unless the discrimination was also based on sex stereotypes.²

These actions have resulted in significant harm to lesbian, gay, bisexual, transgender, and gender-nonconforming students by denying them protections under Title IX. To address this harm, and in response to the Supreme Court's recent decision in *Bostock v. Clayton County*, Nos. 17-1618, 17-1623, 18-107, 140 S.Ct. 1731 (2020), the incoming administration must:

- (1) Coordinate across federal agencies to ensure that federal laws prohibiting sex discrimination are interpreted and enforced consistently.
- (2) Withdraw the Trump administration's February 2017 policy guidance on Title IX's protections of transgender students, and consider issuing interim guidance that makes clear that the Department's Office for Civil Rights (OCR) interprets Title IX's prohibition on sex discrimination to include discrimination based on sexual orientation and transgender status, consistent with *Bostock*.
- (3) Assess cases pending with OCR, or that were dismissed or closed after OCR issued the February 2017 guidance that involve allegations of discrimination against a transgender student or a gender-nonconforming student, or allege discrimination based on gender identity or transgender status, in light of the Supreme Court's decision in *Bostock*.
- (4) Assess cases pending with OCR, or that were dismissed or closed after the Supreme Court's decision in *Bostock* that involve allegations of discrimination based on sexual orientation.
- (5) Issue a Notice of Proposed Rulemaking (NPRM) to clarify that Title IX covers discrimination based on sex stereotypes, sexual orientation, gender identity, transgender status, and sex characteristics. The final rule should be issued as soon as possible, but no later than within one year of the NPRM.
- (6) Issue sub-regulatory guidance that explains how the new regulations intersect with other federal education laws, such as Family Educational Rights and Privacy (FERPA),³ the Individuals with Disabilities Education Act (IDEA),⁴ and Section 504 of the Rehabilitation Act of 1973.⁵

¹ Title IX prohibits sex discrimination against any *person* in an education program or activity receiving federal financial assistance, and is not limited to students. 20 U.S.C. § 1681, *et seq.* Thus, any clarification of how the U.S. Department of Education interprets the term "sex" will also apply to individuals who are employed, recruited, considered, or selected for employment in an education program or activity which receives federal financial assistance. 34 C.F.R. Part 106, Subpart E (Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited).

² See, e.g., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties at 3 (Jan. 2001), *available at*: <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. OCR has included the 2001 Guidance on the list of rescinded policy guidance that it has published on its website. OCR, *Rescinded Policy Guidance* (last modified Sept. 11, 2020), *available at*: <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/respolicy.html>. See also Office for Civil Rights, Dear Colleague Letter: Harassment and Bullying at 8 (Oct. 26, 2010), *available at*: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

³ 20 U.S.C. § 1232g.

⁴ 20 U.S.C. § 1400, *et seq.*

⁵ 29 U.S.C. § 701, *et seq.*

- (7) Revise and reissue the Office of Elementary and Secondary Education’s document providing examples of policies that support elementary and secondary transgender students,⁶ and consider expanding to include postsecondary students.
- (8) Revise OCR’s webpage on resources for LGBTQ students to make clear that discrimination based on sexual orientation and transgender status is prohibited under Title IX.⁷

II. Background and Current State

In May 2016, OCR, jointly with the Civil Rights Division of the U.S. Department of Justice (DOJ), issued a Dear Colleague Letter addressing the rights of transgender students under Title IX (2016 DCL).⁸ The 2016 DCL stated that “[t]he Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations.” The 2016 DCL then explained, “[t]his means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity.” OCR and the Civil Rights Division made clear that their interpretation was consistent with courts’ and other agencies’ interpretations of federal laws prohibiting sex discrimination. The 2016 DCL was consistent with the Departments’ enforcement practices dating back to 2013.⁹

The 2016 DCL addressed the specific application of Title IX with respect to:

- A safe and nondiscriminatory environment
- Identification documents, names, and pronouns
- Sex-segregated activities and facilities, including restrooms and locker rooms, athletics, single-sex classes, single-sex schools, social fraternities and sororities, housing and overnight accommodations, and other sex-specific activities and rules
- Privacy and education records

On February 22, 2017, the Department, jointly with DOJ, issued a Dear Colleague Letter¹⁰ (2017 DCL) rescinding its previous statements of policy and guidance contained in two documents: (1) a letter¹¹ from the Acting Deputy Assistant Secretary of Policy to a member of the public (Jan. 7, 2015), and (2) the 2016 DCL.¹² In the 2017 DCL, the Department explained that the decision to withdraw and rescind the documents was “to further and more completely consider the legal issues involved.” 2017 DCL at 1.

On June 6, 2017, the Acting Assistant Secretary for Civil Rights issued instructions to OCR’s Regional Directors on how to process complaints involving transgender students.¹³ The instructions emphasized the need to treat each case individually, and stated that for each case, OCR should “evaluate each allegation

⁶ See Office of Elementary and Secondary Students, U.S. Department of Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (archived) (last visited Oct. 1, 2020), available at: <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

⁷ See Office for Civil Rights, U.S. Department of Education, *Resources for LGBTQ Students* (last visited Oct. 1, 2020), available at: <https://www2.ed.gov/about/offices/list/ocr/lgbt.html>.

⁸ See Office for Civil Rights, U.S. Department of Education, and Civil Rights Division, U.S. Department of Justice, Dear Colleague Letter, (May 13, 2016) (“2016 DCL”), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁹ See 2016 DCL at 7 n.9, 7 n.11, 7 n.15, 8 n.23, and 8 n.24.

¹⁰ See Office for Civil Rights, U.S. Department of Education, and Civil Rights Division, U.S. Department of Justice, Dear Colleague Letter, (February 22, 2017) (“2017 DCL”), available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹¹ Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Department of Education, to Emily T. Prince, Esq. (Jan. 7, 2015), available at: http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf.

¹² In May 2016, the Department also issued a document listing examples of policies from school districts that support transgender students. Office of Elementary and Secondary Education, U.S. Department of Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 13, 2016), available at: <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>. This document is currently marked as “Archived Information,” but has not been rescinded or withdrawn by the Department.

¹³ Office for Civil Rights, U.S. Department of Education, OCR Instructions to the Field re Complaints Involving Transgender Students, (Jun. 6. 2017), available at: <http://blogs.edweek.org/edweek/rulesforengagement/OCR-Instructions-to-the-Field-Re-Transgender.pdf>.

separately, searching for a permissible jurisdictional basis for OCR to retain and pursue the complaint.” In 2018, the Department confirmed that “it will not investigate civil rights complaints from transgender students regarding bathroom access, though it will continue to scrutinize other forms of discrimination.”¹⁴

In March 2020, DOJ filed a Statement of Interest in *Soule v. Connecticut Association of Schools, Inc.*, No. 3:20-cv-00201 (RNC) (D. Conn. March 24, 2020).¹⁵ The plaintiff in *Soule* alleged that the Connecticut Interscholastic Athletics Conference’s policy, which allows transgender students to participate in athletics based on their gender identity, violated Title IX.¹⁶ In its Statement of Interest, the DOJ argued that the term “sex” in Title IX must be interpreted as referring to a student’s sex assigned at birth, rather than their gender identity, and thus Title IX did not require a policy that allowed transgender students to participate consistent with their gender identity.¹⁷

On May 15, 2020, OCR issued a Letter of Impending Enforcement Action to the Connecticut Interscholastic Athletics Conference (CIAC)¹⁸ and six Connecticut school districts, stating that the association’s policy of permitting the participation of transgender female athletes to compete in girls’ events violated 34 C.F.R. § 106.41(a), which provides that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”¹⁹ In its letter, OCR explained that “the CIAC, by permitting the participation of biologically male students . . . denied female student-athletes benefits and opportunities” and “treated students differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes.” OCR determined that the school districts had also violated the regulation by participating in events sponsored by the CIAC, which were conducted consistent with the CIAC’s policy on participation of transgender students. Because OCR had requested that the CIAC and the school districts enter into resolution agreements to remedy the violations, and they did not, OCR issued letters of impasse, and subsequently, this letter of impending enforcement. According to OCR’s Case Processing Manual, following a letter of impending enforcement, “OCR will either: (1) initiate administrative proceedings to suspend, terminate, or refuse to grant or continue financial assistance from . . . the Department to the recipient; or (2) refer the case to DOJ for judicial proceedings.”²⁰

On June 15, 2020, the U.S. Supreme Court held that terminating an employee based on transgender status violates Title VII’s prohibition on discrimination based on sex.²¹ *Bostock*, 140 S.Ct. at 1737. Because the

¹⁴ Moriah Balingit, *Education Department No Longer Investigating Transgender Bathroom Complaints*, Wash. Post (Feb. 12, 2018), available at: <https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/>.

¹⁵ Statement of Interest for the United States, *Soule v. Connecticut Association of Schools, Inc.*, No. 3:20-cv-00201 (RNC) (D. Conn. March 24, 2020), available at: <https://www.justice.gov/opa/press-release/file/1262901/download>.

¹⁶ The Alliance Defending Freedom is representing the *Soule* plaintiffs. The case documents are available on their website at <https://www.adflegal.org/detailspages/case-details/soule-v-connecticut-association-of-schools>.

¹⁷ The position taken in the *Soule* Statement of Interest is contrary to the position taken by the United States in previous litigation. For example, in 2015, the United States filed an amicus brief in the U.S. Court of Appeals for the Fourth Circuit. In its amicus brief, the federal government stated that “[t]reating a student differently from other students because his birth-assigned sex diverges from his gender identity constitutes differential treatment ‘on the basis of sex’ under Title IX.” Brief for the United States as *Amicus Curiae* Supporting Plaintiff-Appellant and Urging Reversal at 9, *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056 (4th Cir. Oct. 28, 2015), available at: https://www.aclu.org/sites/default/files/field_document/dojamicusbrief.pdf. The U.S. Supreme Court granted certiorari to hear this case in October 2016. On February 22, 2017, the United States notified the Court that the 2016 DCL had been withdrawn. On March 6, 2017, the Court vacated the case and remanded it to the Fourth Circuit for further consideration in light of the 2017 DCL.

¹⁸ As noted in note 55, *infra*, OCR’s jurisdiction to enforce Title IX with respect to state athletic associations is a fact-specific determination that is based on the association’s relationship with its member schools.

¹⁹ Office for Civil Rights, U.S. Department of Education, Letter of Impending Enforcement Action to Connecticut Interscholastic Athletics Conference, et al., (May 15, 2020), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a1.pdf>.

²⁰ Office for Civil Rights, U.S. Department of Education, Case Processing Manual (effective Aug. 26, 2020) (“CPM”), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

²¹ The United States participated in oral arguments and advocated for a narrow interpretation of Title VII’s prohibition against sex discrimination that does not include discrimination based on gender identity or transgender status. Oral Arguments, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (Oct. 8, 2019), available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-107_c18e.pdf.

interpretation of Title VII's prohibition on sex discrimination often informs the interpretation of Title IX,²² the Supreme Court's opinion has a significant impact on the Department's interpretation of Title IX with respect to transgender students.²³ However, the majority opinion explicitly stated that although it concluded that terminating an employee based on transgender status violates Title VII, other related issues, including with respect to "sex-segregated bathrooms, locker rooms, and dress codes" were not before the Court, and "we do not prejudge any such question today." *Id.* at 1753. Justices Alito and Thomas, in dissent, pointed out that the Court's opinion has implications for issues under Title IX, including with respect to sex-segregated facilities and athletics. *Id.* at **1777–80 (Alito, J., and Thomas, J., dissenting). The dissent added, "[t]he entire Federal Judiciary will be mired for years in disputes about the reach of the Court's reasoning." *Id.* at 1783.

Following the Supreme Court's decision, on June 19, 2020, DOJ filed a Statement of Interest in *Hecox v. Little*, defending Idaho's Fairness in Women's Sports Act under the Equal Protection Clause.²⁴ The Fairness in Women's Sports Act required athletic teams to be designated as male, female, or coeducational, based on biological sex, and stated that athletic teams designated for females "shall not be open to students of the male sex."²⁵ In its Statement of Interest, the United States argued that Idaho's law was consistent with Ninth Circuit precedent that allowed states to provide biological women with equal opportunities to participate in school athletics, and that "the Constitution does not require Idaho to provide the *special treatment* Plaintiffs request, under which biological males are allowed to compete with biological females if and only if the biological males are transgender."²⁶ The United States distinguished the Supreme Court's opinion in *Bostock* on two bases: (1) the opinion did not address constitutional implications, and (2) "nothing in the Fairness Act discriminates on the basis of transgender status."²⁷

On August 31, 2020, OCR issued a revised Letter of Impending Enforcement Action to the CIAC and six school districts to address the effects of *Bostock*.²⁸ It concluded that *Bostock*'s "reasoning would only confirm that Title IX does not permit a biologically male student to compete against females on a sex-segregated team or in a sex-segregated league."²⁹ OCR distinguished Title IX from Title VII, arguing that "one of Title IX's crucial purposes is protecting women's and girls' athletic opportunities."³⁰ It explained that

the Department continues to interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams "for members of *each* sex" (emphasis added), to mean operation of teams for biological males, and for biological females, and does not interpret Title IX to authorize separate teams based on each person's transgender status, or for members of each gender identity. When a recipient provides "separate teams for members of each sex" under 34 C.F.R. § 106.41(b), the recipient must separate those teams on the basis of biological sex, and not on the basis of homosexual or transgender status.³¹

The letter also departed from OCR's typical practice by stating that it "constitutes a formal statement of OCR's interpretation of Title IX and its implementing regulations and should be relied upon, cited, and construed as such. Congress explicitly delegated to the OCR the task of prescribing standards for athletic

²² See, e.g., *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (applying Supreme Court's interpretation of sex discrimination under Title VII to Title IX).

²³ Several federal appellate courts have addressed the issue of how Title IX applies to transgender students. See, e.g., *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018); *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded by Gloucester Cty. Sch. Bd. v. G.G.*, 137 S.Ct. 1239 (2017); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020).

²⁴ Statement of Interest for the United States, *Hecox v. Little*, No. 1:20-cv-00184-DCN (D. Idaho June 19, 2020), *available at*: <https://www.justice.gov/opa/press-release/file/1287311/download>.

²⁵ *Id.* at 3.

²⁶ *Id.* (emphasis in original).

²⁷ *Id.* at 14.

²⁸ Office for Civil Rights, U.S. Department of Education, Letter of Impending Enforcement Action to Connecticut Interscholastic Athletics Conference, *et al.*, (Aug. 31, 2020), *available at*: <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>.

²⁹ *Id.* at 34.

³⁰ *Id.*

³¹ *Id.* at 36.

programs under Title IX. As a result, the degree of deference to the Department is particularly high in Title IX cases.”³²

On September 17, 2020, OCR issued a notice of referral to the CIAC, stating that “ten days from the date of this letter, [OCR] will request that [DOJ] seek appropriate judicial relief.”³³ Simultaneously, OCR also informed three Connecticut school districts that their federal funding through the Magnet School Assistance Program (MSAP), totaling approximately eighteen million dollars, was at risk if they did not withdraw from interscholastic athletics.³⁴ Ultimately, it seems that a compromise was reached, under which the districts agreed to “not use MSAP funds toward interscholastic sports and would comply with the outcome of any court case concerning the application of Title IX to interscholastic athletic participation by transgender high school students.”³⁵

In contrast, OCR has indicated that it will investigate claims of discrimination based on sexual orientation. In another letter that was issued on August 31, 2020, OCR issued a letter in an individual case, signed by the Acting Assistant Secretary that concluded it would investigate a claim that a student wasn’t selected for a school position because she was gay.³⁶ OCR explained though “*Bostock* does not control the Department’s interpretation of Title IX,” “the *Bostock* opinion guides OCR’s understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex.”³⁷ It stated the OCR “possesses jurisdiction over your complaint that the Student was discriminated against on the basis of her biological sex, by reason of her sexual orientation.”³⁸

III. Justification

The Department’s change in policy has resulted in significant harm to LGBTQ+ students, a population that is already particularly vulnerable to discrimination and harassment.³⁹ OCR complaint records and other publicly available information from the Department show that “allegations of harassment appeared more frequently in complaints based on LGBTQ identity than in the general population—72.5 percent versus 19.9 percent.”⁴⁰ The rescission of the Obama administration’s policy documents and the Department’s change in its enforcement practices communicated to transgender students, and the public more generally, that OCR enforcement would be limited to allegations of harassment and bullying, and would not reach other claims of discrimination based on transgender status or gender identity. A study of OCR complaint data from March 31, 2010, to May 21, 2018, showed that complaints related to sexual orientation or gender identity that were

³² *Id.* at 49.

³³ Office for Civil Rights, U.S. Department of Education, Notice of Referral to Connecticut Interscholastic Athletics Conference (Sept. 17, 2020), available at: <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a3.pdf>.

³⁴ Kimberly Drelich, *Compromise reached over magnet school funding for Groton, Norwich and LEARN*, The Day (updated Sept. 25, 2020), available at: <https://www.theday.com/local-news/20200924/compromise-reached-over-magnet-school-funding-for-groton-norwich-and-learn>; Brian Zahn, *New Haven to avoid \$3 million penalty for supporting transgender athletes*, New Haven Register (Sept. 23, 2020), available at: <https://www.nhregister.com/news/article/New-Haven-to-avoid-3-million-penalty-for-15590934.php>. See also Luke Broadwater and Erica L. Green, *DeVos Vows to Withhold Desegregation Aid to Schools over Transgender Athletes*, N.Y. Times (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/transgender-students-betsy-devos.html>.

³⁵ Drelich, *Compromise reached over magnet school funding*.

³⁶ Office for Civil Rights, U.S. Department of Education, Letter of Notification (Aug. 31, 2020), available at: <https://www2.ed.gov/about/offices/list/ocr/letters/20200831-letter-of-notification.pdf>.

³⁷ *Id.* at 2.

³⁸ *Id.*

³⁹ Shabab Ahmed Mirza and Frank J. Bewkes, *Secretary DeVos Is Failing to Protect the Civil Rights of LGBT Students*, Center for American Progress (July 29, 2019), available at:

<https://www.americanprogress.org/issues/lgbtq-rights/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/> (quoting Joseph G. Kosciw, et al., *The 2017 National School Climate Survey: Executive Summary*, GLSEN (2018), <https://www.glsen.org/sites/default/files/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>).

⁴⁰ *Id.*

resolved under the Trump administration “were more than nine times less likely to result in corrective action than they were under the Obama administration,” and “[f]ewer complaints proceeded to a formal investigation being opened by OCR.”⁴¹

The United States, in its recent Statements of Interest in the *Soule* case and in the *Hecox* case, and its recent threat to withhold federal funding related to the CIAC case, left little doubt that the Department does not protect the rights of transgender students, even in the wake of the Supreme Court’s decision in *Bostock*. The federal government stated clearly in its Statement of Interest in the *Soule* case that “the prohibition on ‘sex’ discrimination does not extend to discrimination on the basis of transgender status or gender identity,” and that the Department interprets the term “sex” to be limited to “biological sex” or “the physiological distinctions between males and females, and more particularly, their reproductive functions.”⁴² The United States’ position in *Bostock* also reflected the administration’s position that discrimination based on transgender status is not encompassed by a prohibition on discrimination based on sex. After *Bostock*, in its Statement of Interest in *Hecox* and its actions in the CIAC case, the federal government made clear its position that under Title IX, student athletes must be treated based on their biological sex rather than their gender identity.

While the same hostility is not reflected in its recent actions regarding sexual orientation, the Department has not taken any affirmative steps to inform the public that it is now investigating complaints alleging discrimination based on sexual orientation discrimination, nor is there any indication of how OCR will resolve these cases in practice.

IV. Proposed Actions

Immediately take steps to reverse the Trump administration’s actions and strengthen legal protections for transgender and gender-nonconforming students, including:

Coordinate with other federal agencies. The Department should immediately begin coordinating with the White House and other federal agencies to ensure that federal laws prohibiting sex discrimination are interpreted and enforced consistently.

Immediately withdraw the 2017 DCL and consider issuing interim guidance. By publicly withdrawing the 2017 DCL through the publication of a new DCL, the Department will visibly and vocally renounce the policy of the Trump administration. The new DCL can be short so that it can be issued immediately, and simply state that the Department is withdrawing the 2017 DCL while it engages in rulemaking. (Indeed, it took the Trump administration only a month after taking office to withdraw the 2016 DCL.) As noted above, in the alternative, the Department could issue interim guidance that not only withdraws the 2017 DCL, but also either (1) updates the 2016 DCL to include a reference to *Bostock* before an NPRM and Final Rule are published, or (2) simply notifies schools that OCR interprets “sex” under Title IX and its implementing regulations to include sexual orientation, gender identity, and transgender status; and that Title IX and its implementing regulations require schools to treat students consistent with their gender identity for purposes of Title IX and not to discriminate on the basis of sexual orientation or gender identity.

Immediately assess pending and dismissed OCR cases. The landing team should instruct OCR career leadership to immediately review all pending OCR cases that involve discrimination against an LGBTQ+ student, or allege discrimination based on gender identity or transgender status in light of *Bostock*. The landing

⁴¹ *Id.*

⁴² *Soule* Statement of Interest at 4–5.

team should work with OCR enforcement offices to ensure that such cases are not dismissed as a result of the Trump administration's narrow and erroneous interpretation of Title IX and clarify case processing practices for OCR enforcement offices. In addition, the landing team should work with OCR career leadership to identify all cases that were closed or narrowed on the grounds that discrimination on the basis of sex did not encompass discrimination on the basis of sexual orientation and gender identity. Once identified, the OCR must contact all the complainants, and provide them with a reasonable opportunity to request that OCR reopen investigations into the issues and claims that were closed, or for which OCR refused to exercise jurisdiction, as it has in analogous situations.⁴³ A small committee of enforcement attorneys and attorneys from the Program Legal Group were selected to review cases after the Acting Assistant Secretary's instructions on case processing were issued in June 2017, based on their expertise in this area. To the extent possible, those attorneys should be invited to review these appeals as well.

Commence rulemaking to amend Title IX regulations. The Department should, as soon as possible, publish an NPRM in the *Federal Register* that proposes to amend ED's Title IX implementing regulations, to clarify that a student's sex is determined by their gender identity,⁴⁴ based on the Supreme Court's opinion in *Bostock*, federal appellate case law on Title IX and transgender students,⁴⁵ Supreme Court precedent that mandates a broad construction of Title IX,⁴⁶ and Supreme Court precedent that has interpreted the term "sex" in federal civil rights laws to extend beyond one's biological status as male or female.⁴⁷ The NPRM should provide a sixty-day comment period for interested members of the public to comment on the proposed rule,⁴⁸ and the final rule should be published as soon as possible, but no later than within a year of the NPRM.

Issuing a NPRM is preferable to rescinding the 2017 DCL and reinstating previous or issuing new sub-regulatory guidance, because: (1) the notice-and-comment rulemaking process gives the public the opportunity to express their views on this important issue, (2) regulations impose legal obligations on recipients, whereas sub-regulatory guidance does not, and (3) regulations are afforded a higher level of judicial deference than sub-regulatory deference, and may only be rescinded through notice-and-comment rulemaking procedures. Although a new rule that has gone through notice-and-comment rulemaking can still be rescinded by subsequent administrations, any amendments or rescissions must go through the same notice-and-comment rulemaking procedures as the original rule. In contrast, the process for rescinding sub-

⁴³ For example, OCR contacted complainants in more than 800 cases and, at the complainants' requests, "reopened over 500 complaints that previously had been closed or had too narrow a focus" based on the Supreme Court's overturned decision in *Grove City v. Bell* (1984). U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement* 11 (June 1995), available at:

https://play.google.com/books/reader?id=pst1aKDA_M0C&hl=en&pg=GBS.PA11; see also *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1989, Part 6: Hearings before Subcomm. of the House Comm. on Appropriations, 100th Cong., 2d Sess. 1378* (March 1, 1988) (OCR's Assistant Secretary noting "[o]ver 800 cases will be screened and the complainants contacted"), available at: <https://play.google.com/books/reader?id=LRxV5eKkMgAC&hl=en&pg=GBS.PA1378>. More recently, OCR promised to use variety of procedural mechanisms to reopen more than 700 complaints that had been dismissed based WHAT AND WHY?

on a repealed provision of OCR's Case Processing Manual, making sure that complainants were notified about the reopening and resolution of those complaints. See *The Nat'l Fed'n of the Blind v. U.S. Dep't of Educ.*, 407 F.Supp.3d 524, 537 (D. Md. 2019); Settlement Agreement ¶ 2 (Feb. 4, 2020), available at: <https://www.nfb.org/sites/www.nfb.org/files/files-pdf/countersigned-settlement-agreement-ace-for-website.pdf>.

⁴⁴ Twenty other federal agencies have promulgated regulations under Title IX. DOJ issued the "Common Rule" in 2000, which provides common enforcement standards for all of the participating agencies. See Federal Coordination and Compliance Section, U.S. Department of Justice, Title IX Final Common Rule for 21 Federal agencies: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,857 (Aug. 30, 2000), available at: <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/t9final.pdf>. Ideally, all participating agencies would join to publish the NPRM to ensure that the change across all regulations implementing Title IX are uniform, but recognizing the logistical difficulties involved in coordinating so many agencies, ED should act first and DOJ should coordinate other agencies to follow suit. It should be noted that ED "is the lead agency for enforcement of Title IX through its guidance, interpretations, technical assistance, investigative expertise, and resources committed." 65 Fed. Reg. at 52,859.

⁴⁵ See note 24, *supra*.

⁴⁶ *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" (Citation omitted.)).

⁴⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion) (sex discrimination under Title VII includes differential treatment based on failure to conform to sex stereotypes).

⁴⁸ In general, federal agencies may specify a comment period of 30–60 days. In light of the significance of this issue, 60 days is recommended. See, e.g., Office for Civil Rights, U.S. Department of Education, *Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61462 (Nov. 29, 2018) (sixty-day comment period for OCR's proposed changes to the Department's Title IX regulations).

regulatory guidance documents, such as a Dear Colleague Letter, does not require going through notice-and-comment rulemaking and can be done with the publication of a single document. The 2016 DCL was easily rescinded by the Trump administration without having to solicit public comment or going through a significant clearance process.

Title IX and its implementing regulations prohibit discrimination on the basis of “sex,” a term that is not currently defined in the statute or in the regulations.⁴⁹ The proposed rule should clarify that the Department interprets the term “sex” to include sex stereotypes, sexual orientation, gender identity, transgender status, and sex characteristics, and seek comment on the following proposals, which follow from this interpretation:

- (1) **General rule.** Unless expressly authorized by Title IX or its implementing regulations, a school may not segregate or otherwise distinguish students on the basis of their sex, including sex stereotypes, sexual orientation, gender identity, transgender status, or sex characteristics, in any school activities or the application of any school rule. Likewise, a school may not discipline students or exclude them from participating in activities based on sexual orientation, gender identity, transgender status, or sex characteristics, or sex stereotypes, such as for appearing or behaving in a manner that is consistent with their gender identity, or that does not conform to stereotypical notions of masculinity or femininity.
- (2) **Sex-segregated activities and facilities.**
 - a. Schools must treat a student’s gender identity as their sex in all instances in which Title IX permits students to be separated by sex, such as with respect to restrooms and locker rooms,⁵⁰ single-sex classes,⁵¹ and housing and overnight accommodations.⁵²
 - b. Under Title IX, schools may operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill, or when the activity involved is a contact sport.⁵³ The Department should make clear in the proposed rule that it is seeking input on this issue from individuals and organizations at every educational level, including athletics associations, athletic directors, student-athletes, parents, and advocates through a directed question. The proposed rule should require, consistent with the policies of many state athletics associations,⁵⁴ that elementary and secondary schools must permit transgender students to participate in athletics consistent with their gender identity. The proposed rule should also require that in the postsecondary setting, transgender students must be allowed

⁴⁹ In *Bostock*, the parties conceded, and the Court accepted, that the term “sex” refers “only to biological distinctions between male and female.” 140 S.Ct. at 1739.

⁵⁰ 34 C.F.R. § 106.33.

⁵¹ *Id.* § 106.34(b).

⁵² *Id.* § 106.32.

⁵³ *Id.* § 106.41(b).

⁵⁴ See, e.g., Arizona Interscholastic Association, 2019–2020 AIA Policies and Procedures § 41.7, available at: https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_a63549f0db1f4fa2a24dd90b51a08e3.pdf; California Interscholastic Federation, *Guidelines for Gender Identity Participation*, available at:

https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_75388a5135094dd999ac5a57bead97b7.pdf;

Connecticut Interscholastic Athletic Conference, *CLAC Reference Guide for Transgender Policy*, available at:

https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_a86a597d90a84de690bb2349e0b3cdba.pdf;

District of Columbia State Athletic Association, *DCSAA Member Handbook* at 43–45 (May 5, 2020), available at:

https://cdn1.sportngin.com/attachments/document/be73-1688853/DCSAA_handbook_2020.5.27.pdf#_ga=2.112376269.837715261.1602598520-1441027149.1602598520;

Florida High School Athletic Association, *Administrative Policies of the Florida High School Athletic Association 2019–20 Edition* § 16.8, available at: https://www.fhsaa.org/sites/default/files/attachments/2010/09/16/node-235/1920_handbook_policies_website_116.pdf;

Oregon School Athletic Association, 2020–2021 *OSAA Handbook* § 75–77, available at: <http://www.osaa.org/docs/handbooks/osaahandbook.pdf>;

Rhode Island Interscholastic League, *Rules and Regulations* Art. 3, § 3B, available at: <https://www.ril.org/page/3033>;

Washington Interscholastic Athletic Association, *WIAA 2019–20 Handbook* § 18.15.0, available at: <http://www.wiaa.com/conDocs/Con1782/2019-20%20HANDBOOK%20-%209-23-19.pdf>;

Wyoming High School Athletic Association, 2019–2020 *Handbook* § 6.8.0, available at: <http://www.whsaa.org/handbook/Handbook.pdf>.

OCR’s jurisdiction to enforce Title IX with respect to state athletic associations is a fact-specific determination that is based on the association’s relationship with its member schools. See, e.g., *Horner v. Ky. High Sch. Ath. Ass’n*, 43 F.3d 265 (6th Cir. 1994) (KHSAA was subject to Title IX because it was a recipient of federal financial assistance); *Cmty. for Equity v. Mich. High Sch. Ath. Ass’n*, 459 F.3d 676 (6th Cir. 2006) (MHSAA conceded that it was subject to Title IX).

to participate on sex-segregated teams consistent with their gender identity, and in conformance with any rules regarding banned substances, such as testosterone.⁵⁵

- (3) **Exceptions to Title IX.** Title IX does not apply to the admissions policies of certain educational institutions, including nonvocational elementary and secondary schools and private undergraduate colleges,⁵⁶ or to the membership practices of social fraternities and sororities.⁵⁷ Thus, these schools and organizations are permitted under Title IX to set their own sex-based admissions and membership policies, and Title IX does not prohibit them from admitting transgender students in accordance with their gender identity (*e.g.*, admitting a transgender woman to a undergraduate women's college or admitting a transgender man to a fraternity). However, Title IX prohibits these schools or organizations from engaging in discrimination based on sex once the students or members are admitted.

The Department's sub-regulatory guidance should address topics including:

- (1) **Transitioning, gender-fluid, and agender students.** School employees should be trained to talk confidentially with a student who is transitioning, is gender-fluid, or does not identify with any gender, regarding the student's privacy and safety needs, and the safest way for the student to access sex-segregated activities and facilities.⁵⁸
- (2) **FERPA and privacy rights.** The 2016 DCL discussed the intersection of Title IX and FERPA, and a school's obligation to protect a student's privacy, and amend or correct education records. The guidance should also address the parameters for disclosing a student's gender identity to a parent.
- (3) **IDEA and the Rehabilitation Act of 1973.** Although a student's sexual orientation, transgender status, or nonconformance with sex stereotypes are not considered disabilities, the effects of identifying as LGBTQ+ may require schools to provide supports under IDEA and the Rehabilitation Act of 1973.

⁵⁵ The NCAA published its policy on participation of transgender student-athletes in 2011. NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* (2011), available at: https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. NCAA Bylaw 31.2.3 identifies testosterone as a banned substance and provides for a medical exception for demonstrated need for use of a banned medication. The federal courts have not resolved whether Title IX applies to the NCAA. See *Smith v. Nat'l Coll. Ath. Ass'n*, 266 F.3d 152 (3d Cir. 2001) (holding that the NCAA was not subject to Title IX because of its authority over its federally-funded member schools, but remanding to determine if the NCAA indirectly received federal financial assistance that would subject it to Title IX).

⁵⁶ 34 C.F.R. § 106.15(d).

⁵⁷ *Id.* § 106.14(a).

⁵⁸ See, *e.g.*, Office of Job Corps, U.S. Department of Labor, Directive: Ensuring Equal Access to Transgender Applicants and Students to the Job Corps Program (Job Corps Program Instruction Notice No. 14-31 (May 1, 2015), available at: https://supportservices.jobcorps.gov/Program%20Instruction%20Notices/pi_14_31.pdf).

