

## **Title IX Final Regulations - What will this mean for students?**

On Friday, April 19, 2024, the US Department of Education released its amended final rule governing Title IX of the Education Amendments of 1972 (the “Final Rule” or “Rule”). The Final Rule will take effect on August 1, 2024, and has sweeping implications for students of public schools and universities, as well as federally-funded private schools and universities.

Many are wondering what the Rule includes and how it will impact students in K-12 and higher education.

The Final Rule is over 1,500 pages long and covers a myriad of topics. In an effort to provide you with a valuable and timely overview of the Final Rule, we have chosen to focus on the issues of most concern to our supporters. But first, a quick overview of Title IX generally, and the rules that now apply.

### **Background**

Title IX of the Civil Rights Act was passed by Congress in 1972 and was amended several times in the subsequent years. It is generally recognized as the portion of the Civil Rights Act that prohibits discrimination on the basis of sex in educational programs and activities that receive Federal funding. While the original version of Title IX was aimed explicitly at prohibiting colleges and universities from discriminating against women in admissions and participation in educational programs, it was expanded to include protections for women's participation in extracurricular activities and athletics specifically. The statute itself states:

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....

It is important to note that the current regulations governing Title IX generally allow for sex-segregated spaces and activities as long as “substantially equal” opportunities are also offered to members of the excluded sex. This means that schools are allowed to offer different bathrooms and locker rooms for boys and girls, as well as sex-segregated activities and sports teams, as long as the members of the excluded sex have substantially equal opportunities otherwise (e.g., a school offers a boys baseball team and a girls softball team).

It is well-documented, both per the original intent of Title IX and the regulations that have governed it since its inception, that Title IX was enacted based on the understanding that sex is binary and that the core function of the law is to ensure that women have the same or substantially equal educational opportunities as men.

In finalizing the latest version of the Title IX regulations, the US Department of Education has upended Title IX as we have always known it. The Final Rule expands the scope of Title IX by prohibiting discrimination on the basis of “gender identity.” While the Rule does not define

“gender identity,” we feel it is reasonable to expect that the addition of this protected class will ultimately erode many safeguards that women have come to rely on in protecting their educational opportunities. FAIR will dig into this more deeply in a webinar we will host soon.

## **The New Rule**

In a statement released by the Department of Education on Friday, U.S. Secretary of Education Miguel Cardona said: “For more than 50 years, Title IX has promised an equal opportunity to learn and thrive in our nation's schools free from sex discrimination. These final regulations build on the legacy of Title IX by clarifying that all our nation's students can access schools that are safe, welcoming, and respect their rights.”

If you read the [public comment](#) we submitted when this Rule was first proposed, you know that we at FAIR have serious concerns about the implications of this Rule. Secretary Cardona's statement is true in some ways, and patently false in others. Here are a few of the alarming changes found in the Final Rule:

- The Final Rule is likely to result in compelled speech because schools will be required to discipline students if they fail to refer to others in accordance with chosen pronouns. The First Amendment forbids public schools from requiring students to recite ideological beliefs against their conscience. Alternative pronouns are not value-neutral terms such as name and age. They are premised on a specific set of ideological beliefs: that more than two genders exist, that one can be neither male nor female (or both), and that gender is a matter of personal choice rather than a biological reality. Requiring students to use others' preferred pronouns (and punishing them if they do not) necessarily compels them to affirm faith in a gender ideology they may not accept. The Final Rule will financially incentivize schools to punish students who do not ascribe to this particular set of ideological beliefs.
- The Final Rule is likely to result in sex-integration of all bathrooms and locker rooms because it prohibits discrimination on the basis of gender identity. After August 1st, if a school requires students to use facilities that align with their biological sex (which they are currently allowed to require under Federal law and regulations), a transgender student may file a discrimination complaint alleging that the school has violated Title IX by preventing him or her from using the bathroom that aligns with their gender identity.
- Arguably, the same rationale could be used in relation to sports teams. However, the DOE has said the Final Rule is not meant to govern athletics, and that they will publish a separate rule specifically on athletics at a later date (you can read FAIR's public comment on the proposed rule governing athletics [here](#)). The current Title IX regulations expressly allow schools to offer single-sex classes or extracurricular activities if there is good reason for doing so. The Final Rule will remove this allowance from the current regulations and will replace it with language that explicitly classifies “a policy or . . . practice that prevents a person from participating in an education program or activity consistent with the person's

gender identity” as unlawful discriminatory treatment on the basis of sex. It is possible that, even absent further rulemaking, schools may interpret this portion of the Final Rule to require that all students be allowed to participate in sports teams that align with their gender identity.

- The Final Rule removes important due process protections for students who are accused of engaging in sex-based discrimination. Under the current Title IX regulations, accused students have robust rights that provide for a fair and thorough investigation into complaints; however, the Final Rule removes various important safeguards, and is likely to result in incorrect and incomplete findings of fact, and biased final determinations.

As part of our legal and educational advocacy efforts, we will host a webinar (possibly a series of webinars) on this topic beginning next week. We will bring you experts on the issues and rights impacted by the Final Rule, and we are eager to answer all of your questions. Please check our social media channels and webpage for a registration link coming soon!