



— LEGAL POLICY FOCUS —

# Title IX on a Collision Course with the First Amendment

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## EXECUTIVE SUMMARY

- Title IX prohibits schools from discriminating on the basis of sex. Schools that violate the law can have their federal funding revoked or be sued in federal court for monetary damages.
- The Supreme Court has made it clear that, while Title IX prohibits sex *discrimination* (including egregious sexual harassment), it does not prohibit all forms of sex-related speech.
- Nevertheless, school administrators for decades have used Title IX as an excuse to punish disfavored speech and expression.
- In June 2022, the Biden administration threw gas on the fire, releasing draft regulations that vastly expand the categories of speech that it expects schools to punish as discriminatory sexual harassment under Title IX.
- Under the proposed rules, schools that do not crack down on ‘misgendering’ or the refusal to use preferred pronouns can have their federal funding revoked or be sued in federal court.
- The new rules exacerbate the already problematic enforcement of Title IX by incentivizing repressive speech codes and campus cancel culture.

## MORE INFORMATION

### *What You Should Know*

Title IX prohibits sex discrimination, including some forms of sexual harassment. But it is not a federal civility code that prohibits all sex-related speech. In fact, new Biden administration rules notwithstanding, efforts by schools to prohibit offensive expression about sex or gender likely violate the First Amendment.

### *Why You Should Care*

- **In the name of Title IX, many schools prohibit ‘offensive’ speech and punish individuals for unpopular opinions related to sex or gender.** Much of the prohibited speech does not even come close to meeting the legal definition of discriminatory sexual harassment established by the U.S. Supreme Court.
- **Policies that sanction offensive speech have a chilling effect on freedom of expression and the marketplace of ideas.** At many schools, people feel increasingly afraid that they will be punished for things that they write or say. This puts the fundamental purpose of education—facilitating the free exchange of ideas—at risk.
- **Speech sanctions harm students.** Studies show that micromanaging speech can lead to distorted thinking and leave students ill-prepared for adult life.

### *Background*

In April 2022, school administrators in Kiel, Wisconsin threatened to open a **Title IX sexual harassment investigation** into three eighth-grade boys who used the pronoun ‘her’ to refer to a classmate who prefers to be called ‘them.’ The incident, which received national attention as an example of wokism run amok, should come as no surprise to anyone who has followed the slow, but steady, expansion of the definition of sexual harassment by education bureaucrats.

Although the Supreme Court created a narrow standard of federal liability for sexual harassment, activists and bureaucrats at the Department of Education for decades have instructed, without basis in law, that Title IX *requires* educational institutions to punish all offensive sex-based expression. On top of this, the Biden administration’s

attempt to redefine all references to ‘sex’ under federal law to include ‘gender identity’ made the incident in like the one Kiel, Wisconsin inevitable, placing Title IX on a collision course with the First Amendment.

### ***Origins of Federal Sexual Harassment Law***

Federal law prohibits sex discrimination in employment, education, lending, and various other areas of American life. The Supreme Court first recognized sexual harassment as a species of sex discrimination in ***Meritor Savings Bank v. Vinson***,<sup>1</sup> a case alleging employment discrimination. In *Meritor*, a unanimous Court ruled that an employee who is subjected to a “sexually hostile working environment” can sue her employer for damages under Title VII of the Civil Rights Act, which prohibits workplace sex discrimination.<sup>2</sup>

The Court was clear, however, that not every instance of inappropriate workplace conduct or sex-related speech constitutes discrimination. To the contrary, for sexual harassment to be actionable under Title VII, it must create an abusive working environment that alters the conditions of employment for members of one sex.<sup>3</sup> In other words, it must be discriminatory, not just lewd or unwanted. The Supreme Court has applied these same legal principles to claims of sexual harassment in education under Title IX.

### ***Sexual Harassment Under Title IX***

Title IX reads:

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.*<sup>4</sup>

Like Title VII, Title IX is an anti-discrimination statute that prohibits the unfair negative treatment of individuals on the basis of sex. In two cases decided during the

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<sup>1</sup> 477 U.S. 57 (1986).

<sup>2</sup> *Id.* at 63-69.

<sup>3</sup> *Id.* at 67. Courts have recognized two distinct types of unlawful sexual harassment. ‘**Quid Pro Quo**’ sexual harassment refers to the type of harassment where a person in a position of power conditions a favorable assignment or decision on the satisfaction of a sexual demand. ‘**Hostile environment**’ harassment, by contrast, refers to sex-based mistreatment (either verbal or physical) that alters the conditions of employment or the ability of the victim to equally access education.

<sup>4</sup> 20 U.S.C. § 1681(a).

late 1990s, *Gebser v. Lago Vista Independent School District*<sup>5</sup> and *Davis v. Monroe Cty Bd. of Education*,<sup>6</sup> the Supreme Court held that sexual harassment can, in some cases, be a form of unlawful sex discrimination under Title IX.

In the case of student-on-student harassment, the unwelcome behavior only implicates Title IX if it is so severe, pervasive, *and* objectively offensive that it denies the victim equal access to education.<sup>7</sup> Title IX imposes liability for harassment that has “a systemic effect on educational programs and activities,” not for teasing or random sexist remarks by peers.<sup>8</sup>

### ***Unwelcome Speech v. The First Amendment***

Due, in part, to concerns about freedom of expression, harassment jurisprudence draws a clear line between speech and unlawful conduct. Thus, while a public educational institution “may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable,”<sup>9</sup> it may punish abusive *conduct* without running afoul of the First Amendment. When a person targets<sup>10</sup> a member of the opposite sex for ridicule or verbal abuse that prevents that person from accessing education or employment, the speaker’s words may create a hostile environment that crosses over into the realm of discriminatory conduct.<sup>11</sup>

Public primary and secondary schools may prohibit and punish student speech that is lewd, vulgar, or profane without running afoul of the First Amendment, and they may prohibit and punish speech that disrupts school operations or interferes with the

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5 524 U.S. 274 (1998). In *Gebser*, the Court held that a school board may be liable for a *teacher’s* sexual harassment of a student if an official with authority to address the harassment acts with deliberate indifference to the known harassment. That deliberate indifference, the Court emphasized, must amount to “an official decision by the [school] not to remedy the violation.” 524 U.S. at 290.

6 526 U.S. 629 (1999). In *Davis*, the Court held that a school board can be held liable for *student-on-student* harassment only if the school is itself guilty of misconduct. In other words, a school can be held liable for peer harassment only where its own “deliberate indifference effectively ‘cause[d]’ the discrimination.” 526 U.S. at 642-43.

7 *Davis*, 526 U.S. at 652.

8 *Id.* at 633.

9 *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

10 See Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992).

11 As Justice Antonin Scalia explained in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), “words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation’s defense secrets).” Likewise, “sexually derogatory ‘fighting words,’ among other words, may produce a violation of [federal] prohibition[s] against sexual discrimination.” *Id.* at 389. See also *Meriwether*, 992 F.3d at 508 (noting that a teacher’s in-class speech about sex roles or racial issues are protected speech related to matters of public concern, while a basketball coach’s yelling racial epithets at his players does not) (internal citations and quotations omitted).

rights of others. But public primary and secondary schools may not regulate sex-based speech generally.<sup>12</sup> Claims that Title IX obligates them to do so are simply false.

The Supreme Court has yet to determine the limits of sexual harassment law in higher education, but First Amendment protections are arguably more robust at public colleges and universities than they are at primary and secondary schools. Indeed, outside the Title IX context, the Court has been clear that the

“**Title IX prohibits sex discrimination, not all forms of sex-related speech.**”

“vigilant protection of constitutional freedoms is nowhere more vital” than at public colleges and universities.<sup>13</sup> And lower federal courts that have confronted the issue routinely strike down public university harassment codes aimed at offensive speech.<sup>14</sup>

Private colleges and universities are, of course, not bound by the First Amendment, However, many such schools have policies that purport to advance free expression and, thus, have an implied duty to protect student and faculty speech.<sup>15</sup>

### ***Twisting Title IX to Censor Speech***

Title IX prohibits only sex *discrimination*, not all forms of sex-related speech. Nevertheless, educational bureaucrats across the country have for decades employed Title IX as a basis for punishing speech and expression deemed offensive by some members of the community.

<sup>12</sup> See, e.g., *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001) (Alito, J.) (school district’s policy restricting “unwelcome” and “offensive” speech on public school grounds violates the First Amendment’s Free Speech Clause).

<sup>13</sup> See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972) (“the college classroom, with its surrounding environs, is peculiarly the ‘marketplace of ideas’”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (at the collegiate level, academic freedom is a special concern of the First Amendment, which “does not tolerate laws that cast a pall of orthodoxy over the classroom”). See also *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir., 2021) (professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship).

<sup>14</sup> See, e.g., *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995)(policy prohibiting “any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational” environment); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (policy prohibiting “acts of intolerance” and any means of communication that might “provoke”); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (policy prohibiting sexually harassing speech).

<sup>15</sup> See José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale*, YALE L. & POL’Y REV. (Jan. 13, 2017).

Unfortunately, the misuse of Title IX to punish speech was not only tolerated, but encouraged, by the Office for Civil Rights (OCR) at the Department of Education during the administration of President Barack Obama. By 2011, OCR was broadly defining sexual harassment under Title IX to include everything from physical sexual violence (including rape, assault, battery, etc.) to verbally hostile educational environments.<sup>16</sup>

Subsequently, the Obama administration issued a **Federal Title IX Compliance Blueprint** (Departments of Justice and Education, 2013), followed by an **Investigation of University of New Mexico Findings Letter** (Department of Justice, 2016) that vastly expanded the definition of sexual harassment under Title IX to include any unwelcome expression, *“regardless of whether it causes*

*a hostile environment or is quid pro quo.”*

In other words, the Obama administration instructed educational institutions to open Title IX investigations whenever any member of the educational community feels subjectively offended by a sex-based comment or remark.<sup>17</sup>

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*Educational institutions play a unique role in fostering the free exchange of ideas.*

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Not surprisingly, it was around this time that colleges and universities became particularly aggressive in using Title IX to investigate and punish speech. To cite just a few of the many egregious examples,

- A female writing instructor at Yale filed a Title IX complaint against an undergraduate who submitted a paper that used the crime of rape to illustrate Socrates’ concept of the tripartite soul. The instructor was, apparently, offended by the argument that rape is an ‘irrational’ act in which the soul’s ‘appetitive’ and ‘spirited’ parts overwhelm ‘reason.’ As a penance for his academic thought crime, the student was forced to attend sensitivity training at the university’s mental-health center.<sup>18</sup>

<sup>16</sup> See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), noting that the Department applies the same principles to all harassment cases, including those involving speech.

<sup>17</sup> Jennifer C. Braceras, *Sexual Paranoia Comes to Campus*, National Review Online (April 6, 2017).

<sup>18</sup> Peter Berkowitz, *A Lawsuit Accuses Yale of Censoring Even Inoffensive Ideas*, WALL STREET JOURNAL (April 2, 2017).

- Northwestern University’s Title IX office opened a lengthy investigation into feminist film professor Laura Kipnis because two students complained about an article that Kipnis wrote criticizing the expansive definition of sexual harassment under Title IX.<sup>19</sup> When one of her fellow faculty members spoke out on her behalf, arguing that the investigation was a threat to academic freedom, he too was accused of violating Title IX.<sup>20</sup>
- At Michigan Technological University, administrators sanctioned a student newspaper for publishing a satirical article about people who “don’t take male sexual assault seriously.” The newspaper’s faculty adviser was forced to resign, and the paper was placed on probation for two years, such that “if the publication put out another problematic article, it could be removed as a student publication altogether.”<sup>21</sup>
- Louisiana State University education professor Teresa Buchanan was fired for violating the university’s sexual harassment policy because she occasionally used explicit language and profanity to better prepare students for their teaching careers after graduation.<sup>22</sup>

Did educational institutions step up their Orwellian enforcement of Title IX in order to shield themselves from punishment by the Obama administration? Or did they do so willingly for the purposes of squelching dissent? Either way, the result was the same: the infantilization of America’s youth and a chilling effect on academic inquiry and free expression.

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### ***Harm to Students***

In **The Coddling of the American Mind**, F.I.R.E. CEO Greg Lukianoff and social psychologist Jonathan Haidt outline the ways in which a repressive speech culture harms the very students it seeks to protect.

<sup>19</sup> Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC., (May 29, 2015),

<sup>20</sup> Robert Carle, *The Strange Career of Title IX*, National Association of Scholars (Nov. 4, 2016).

<sup>21</sup> Kaitlin DeWulf, *An Unintended Consequence of Title IX*, Student Press Law Center (Oct. 7, 2016).

<sup>22</sup> Alex Morey, *Teresa Buchanan Uncensored: How an Innovative Educator Created Top Teachers and Got Fired for It*, The Foundation for Individual Rights in Education (Jan. 22, 2016).

To begin with, the use of Title IX (and other federal anti-discrimination statutes) to protect student’s emotional ‘safety’ infantilizes them. Rather than teaching students critical thinking skills and tools to cope with distressing comments or viewpoints, universities are fostering **distorted thinking** and encouraging students to accept the authority of their emotions over facts. This acquiescence to emotion not only promotes a culture of victimhood but arguably exacerbates the already high incidence of anxiety and depression among today’s young people.

In addition to harming those who encounter offensive speech, the over-enforcement of anti-discrimination law hurts the speaker. On college campuses, repressive speech policies lead many students and professors with controversial viewpoints to self-censor, thus, undermining the very *raison d’etre* of the university—the free exchange of ideas.

A 2019 ACTA-IWF survey of over 2,100 college students found that 61% had stopped themselves from expressing an “opinion on sensitive political topics in class because of concerns [a] professor might disagree with them” at least occasionally, while 39% of students answered that they do so ‘often’ (13%) or ‘sometimes’ (26%).

Although the reasons for self-censorship are complex, a Heterodox Academy survey from 2017 indicates student concern that someone might file a complaint under a “campus harassment policy or code of conduct,” as well as concern that professors might “criticize [their] views as offensive” or give them a lower grade because of their views. The 2019 ACTA-IWF survey revealed similar student concerns, with 38% of students answering that they self-censor because of concerns related to . . . college[] speech policies” at least ‘occasionally.’ Among respondents who identify as strong Republicans, the figure rises to 54% (with 11% doing so “often” and 29% doing so occasionally).

Thus, over enforcement of Title IX, Lukianoff and Haidt point out, threatens both student mental health and the very spirit of bold inquiry critical to a truly liberal education.



### ***The 2020 Restoration***

In 2020, Secretary of Education Betsy DeVos issued **regulations** that attempted to re-establish the appropriate boundary between prohibitions on sexual harassment and free expression in educational settings. The regulations codified the basic principle articulated by the Supreme Court that a Title IX violation occurs *only* when the complained of conduct in is so severe, pervasive, *and* objectively offensive as to deny the victim access to education on the basis of sex.

### ***The 2022 Retreat***

Unfortunately, the Biden administration repealed the 2020 regulations, and on June 23, 2022 (the 50th anniversary of Title IX) proposed new regulations that, among other things, reimpose the over-broad definition of sexual harassment from the Obama era. The new regulations define sexual harassment as behavior that is severe *or* pervasive and that, “based on the totality of the circumstances and evaluated *subjectively and objectively*, denies or limits a person’s ability to participate” in his or her education.<sup>23</sup>

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This effectively encourages schools to investigate and punish speech about sex or sex roles any time an individual is severely offended by the speech. Indeed, schools are encouraged to investigate students or faculty for speech crimes, even where the speech in question is neither pervasive nor objectively offensive.

In addition, without congressional authorization or other constitutional authority, the Biden administration’s proposed regulations also unilaterally redefine ‘sex’ to mean ‘gender’ and ‘gender identity.’ Combined with the expansion of the definition of sexual harassment, the radical the redefinition of the word ‘sex’ vastly expands the category of speech that schools will now seek to punish, including the expression of legitimate political viewpoints on gender identity issues, as well as instances of ‘misgendering’

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<sup>23</sup> Federal Register Notice of Proposed Rulemaking, Title IX of the Education Amendments of 1972 (June 23, 2002).

(failing to use a person’s preferred pronoun) and ‘deadnaming’ (referring to someone by the name that he or she used prior to transitioning).<sup>24</sup>

Shockingly, the Biden administration released its new regulations in spite of the recent ruling by the United States Court of Appeals for the 6th Circuit in *Meriwether v. Hartop*, holding that a state university’s punishment of faculty for using biological pronouns may violate the First Amendment.<sup>25</sup>

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*The Orwellian enforcement of Title IX creates a chilling effect on academic inquiry and free expression.*  
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On top of all this, the Biden administration’s decision to repeal basic due process protections for students and faculty who are accused of sex discrimination promise to usher in a new era of Kafkaesque show trials and enforced political correctness.<sup>26</sup>

### ***Addressing Misperceptions***

#### **Misperception #1: Title IX prohibits sexist speech and sexual jokes.**

- Title IX prohibits discrimination, not offensive speech.
- A school can be found liable for discrimination under Title IX if it is deliberately indifferent to severe and pervasive verbal harassment that is systemic in nature and deliberately targeted at an individual on the basis of sex.
- Schools are not liable for random jokes or comments or unpopular viewpoints and should not use Title IX as an excuse to censor or punish speech.

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<sup>24</sup> Many schools already have such policies in place. Stanford University, for example, prohibits all forms of ‘gender’ discrimination, including ‘misgendering’ or ‘mispronouncing.’ At Point Park University in Pittsburgh, Pennsylvania, a 2021-22 “Misgendering, Pronoun Misuse, and Deadnaming Policy” requires students to address classmates using their preferred pronouns and promises punishment for non-compliance *regardless of the intent*. New regulations are expected to give such policies, and others like it, the force of law.

<sup>25</sup> 992 F.3d 492 (6th Cir., 2021) (professor allowed to proceed with First Amendment claim against Shawnee State where the university investigated and reprimanded him for refusing to use a student’s preferred pronouns). See also *Taking Offense v. California*, 281 Cal.Rptr.3d 298 (2021) (California law making misgendering nursing home residents a crime punishable by up to one year in prison and a \$1,000 fine violates the First Amendment).

<sup>26</sup> The due process implications of the proposed regulations, while significant, are beyond the scope of this Legal Policy Focus. *But see* Robby Soave, *5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus*, Reason.com (June 23, 2022).

**Misperception #2: Schools that punish ‘offensive’ and ‘uncomfortable’ speech are acting in the best interest of the students.**

- Censorship and punishment of speech harms students.
- Studies show that micromanaging speech can lead to **distorted thinking** and leave students ill-prepared for life after college.

**Misperception #3: Universities are responsible for regulating speech on campus.**

- Federal courts have routinely found university **harassment policies** to be inconsistent with the sexual harassment standard established in *Davis* and unconstitutional under the First and Fourteenth Amendments of the U.S. Constitution.

**Misperception #4: New regulations issued by the Biden administration simply protect gay and transgender students from unjust discrimination.**

- By redefining the word ‘sex’ to include ‘gender’ and ‘gender identity’, the Biden administration has vastly expanded the scope of Title IX without congressional or constitutional authority.
- Layered on top of over-broad prohibitions on offensive speech, the new regulations will lead many schools to punish students and faculty for speech about LGBTQ issues.

### ***Conclusion***

Current interpretations of Title IX are on a collision course with principles of free expression. The Department of Education should withdraw its proposed regulations and focus its efforts on enforcing Title IX’s prohibition against unequal treatment on the basis of sex.