

## The Strange Career of Title IX

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In June 2016, the American Association of University Professors (AAUP) published a devastating thirty-one-page critique of the way in which the Obama administration's interpretations of Title IX are chilling free speech, eviscerating faculty governance, and trampling due process rights on American college campuses.<sup>1</sup>

The AAUP recounts how, under the leadership of Russlynn Ali and Catherine Lhamon, Title IX has devolved from its laudable purpose of establishing equal opportunity for women on college campuses to a highly ideological instrument for remaking higher education. Department of Education (ED) mandates now extend to all aspects of campus life. They have turned colleges and universities into corporations that are governed by campus officials who act defensively in order to avoid lawsuits and federal investigations. The AAUP highlights egregious cases in which risk-averse, compliance-driven, rights-indifferent administrators, under pressure from federal bureaucrats, have expelled students for frivolous infractions and fired, threatened, and censored professors. The AAUP report calls for an end to the ED's expansive and opaque interpretations of Title IX.

### Leveling the Playing Field

President Richard Nixon signed Title IX into law in 1972. At the time, women faced serious discriminatory practices at American universities. At

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<sup>1</sup>American Association of University Professors, *The History, Uses, and Abuses of Title IX* (Washington, DC: American Association of University Professors, 2016), <https://www.aaup.org/report/history-uses-and-abuses-title-ix>.

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the University of Virginia, women were excluded from enrolling in the College of Arts and Sciences. At Georgetown, married women were barred from attending the school's nursing program. Female college athletes were rare, and women's sports programs were underfunded. In 1971 a Connecticut judge wrote, "Athletic competition builds character in our boys. We do not need that kind of character in our girls."<sup>2</sup> Title IX was designed to remedy such abuses.<sup>3</sup>

Title IX consists of these thirty-seven words: "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."<sup>4</sup> Throughout the 1980s, Title IX functioned as a classically liberal equal opportunity law. This changed abruptly in 1993, when President Bill Clinton appointed Norma Cantu as his Title IX enforcer. Cantu promised to end the "reactive approach to civil rights enforcement" of the Reagan and Bush era.<sup>5</sup> Under Reagan and Bush, the ED's Office for Civil Rights (OCR) investigated the civil rights complaints that came into the office. Cantu emphasized "agency-initiated investigations."<sup>6</sup> In her first nineteen months in office, Cantu's OCR investigated 240 schools at which no civil rights complaints had been filed. In addition, Cantu directed her ten regional offices to double the number of complaints they investigated. Cantu's activism emboldened trial lawyers to scour the country looking for complainants who were willing to sue for monetary damages.

In the 1990s, colleges across America were besieged by Title IX lawsuits. In California, the National Organization of Women sued the entire California State University (CSU) system, charging that the state was failing to provide equal opportunity to female students because women were 55 percent of CSU students but only 30 percent of student-athletes. The plaintiffs charged that statistics—not any hostile act on the part of schools—proved they were victims of illegal discrimination. In the CSU

<sup>2</sup>"Title IX: A Sea Change in Gender Equity in Education," in *Title IX: 25 Years of Progress* (Washington, DC: U.S. Department of Education, 1997), archived at <https://www2.ed.gov/pubs/TitleIX/part3.html>.

<sup>3</sup>Despite these good intentions, Title IX has always had dubious legal authority. The U.S. Constitution does not grant the federal government authority over educational policy.

<sup>4</sup>U.S. Department of Education, Office for Civil Rights, "Title IX and Sex Discrimination," April 2014, rev. April 2015, [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>5</sup>U.S. Department of Education, Office for Civil Rights, *Annual Report to Congress: Fiscal Year 1995* (Washington, DC: U.S. Department of Education, Office for Civil Rights, 1996), 4, <http://files.eric.ed.gov/fulltext/ED422669.pdf>.

<sup>6</sup>Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex and Title IX* (San Francisco: Encounter Books, 2002), 25.

settlement, women had to form the majority of athletes on each campus—even though student surveys consistently showed that men were twice as likely as women to be interested in participating in sports.

In 1993, Brown University lost an anti-discrimination case even though Brown offered many more opportunities for women to play sports than men and made strenuous efforts to increase its number of female athletes. Because men joined intramural sports by a five-to-one margin and club sports by an eight-to-one margin, Brown automatically stood in violation of Title IX. If a school could not produce enough female bodies on the field, it was out of compliance with the law. Brown's legal complaint made the point that women are overwhelmingly overrepresented in its dance, music, and drama programs, yet the federal government wasn't imposing a gender-equity quota regime on these programs.

In 1996, Cantu's office sent a "Dear Colleague" letter to every college and university in the country admonishing schools that quotas were the best way to comply with Title IX. College administrators quickly adapted strategies to comply with the zero-sum game of gender equality. Schools began eliminating men's teams and creating women's teams not because of student demand but because they feared federal investigators. Because men's football and basketball are moneymakers for schools, these teams were generally spared cuts. But Title IX quotas have devastated smaller, less profitable sports such as men's gymnastics, wrestling, baseball, swimming, and diving.

In *Tilting the Playing Field: Schools, Sports, Sex and Title IX*, Jessica Gavora describes the legacy of the Cantu era for men's college sports. The schools of the CSU system achieved "proportionality" by eliminating men's baseball, volleyball, soccer, cross-country, wrestling, and swimming programs. UCLA, citing Title IX pressure, dropped its men's swimming and diving teams, which had produced twenty-two Olympic medalists, including sixteen golds. Brigham Young cut its top-ten-ranked men's gymnastics team and its top-twenty-five-ranked wrestling team. The University of Miami eliminated its men's swimming program—which had sent swimmers, including the gold medalist Greg Louganis, to every Olympic Game since 1972. Colgate cut its 107-year-old men's baseball program. Using data from a 1997 NCAA Gender Equity report, University of Chicago wrestling coach Leo Kocher found that more than twenty thousand male athletes disappeared from the ranks of the NCAA between

1992 and 1997.<sup>7</sup> During the same period, fewer than six thousand female athletes were added.

And there is considerable debate about how genuine these increases in women's participation are. Under pressure from Title IX bureaucrats to inflate numbers of women athletes, athletic directors began offering scholarships to women to participate in crew, a sport that requires no previous experience and has squad sizes that reach as high as two hundred. In 1995, there were seventy-four intercollegiate rowing teams. By 1999, there were 122. The *Wall Street Journal* reported that coaches were literally walking through campuses recruiting women in stairwells and campus lunchrooms.<sup>8</sup> Ohio State published an ad in a student newspaper: "Tall athletic women wanted. No experience necessary."<sup>9</sup> Arizona State University, in the desert city of Tempe, flooded a two-mile dry gully to create a place for its new crew team to practice.<sup>10</sup>

Over the years, schools have become more and more creative in playing the numbers game. In 2011, *New York Times* reporter Katie Thomas found that nearly half of the fencers on the Cornell women's fencing team were men, but Cornell University counts them as women.<sup>11</sup> Texas A&M and Duke count as women men who practice with the women's basketball team. Quinnipiac University in Connecticut requires women cross-country runners to join the indoor and outdoor track teams so they can be counted three times. At the University of South Florida, more than half of the seventy-one women on the cross-country roster never ran a race. Thomas reported that some of the women on the roster did not even know they were on the team.<sup>12</sup>

Christina Hoff Sommers reports that men's teams at historically black colleges and universities have been especially hard hit by pressures for Title IX compliance.<sup>13</sup> In 2007, at Howard University in Washington, D.C., women made up 67 percent of the student body, but filled only 43 percent of Howard's athletic spots. The Women's Sports Foundation, a Title IX advocacy group, gave Howard a failing grade because of this 24 percent proportionality gap. Howard had already cut men's baseball and wrestling, but the school was placed under enormous

<sup>7</sup>John Stossel, *Myths, Lies, and Downright Stupidity: Get Out the Shovel—Why Everything You Know Is Wrong* (New York: Hyperion, 2006), chap. 1.

<sup>8</sup>Barbara Carton, "You Don't Need Oars in the Water to Go Out for Crew," *Wall Street Journal*, May 14, 1999.

<sup>9</sup>Gavora, *Tilting the Playing Field*, 67.

<sup>10</sup>Ibid.

<sup>11</sup>Katie Thomas, "College Teams, Relying on Deception, Undermine Gender Equality," *New York Times*, April 25, 2011, <http://www.nytimes.com/2011/04/26/sports/26titleix.html>.

<sup>12</sup>Ibid.

<sup>13</sup>Christina Hoff Sommers, "Title IX: How a Good Law Went Terribly Wrong," *Time*, June 23, 2014, <http://time.com/2912420/titleix-anniversary/>.

pressure to cut half of its remaining male athletes. One of the attractions of Howard has been excellent men's sports teams. Slashing these teams has led to a dramatic imbalance between male and female admissions.<sup>14</sup> This leaves the school in a quandary. It needs male students to balance its enrollment, yet how does it attract male students when it is eliminating sports, which is a major draw?

## Sexual Policing

The expansion of Title IX into the area of sexual policing followed a familiar trajectory during the Obama administration. In 2011, President Obama's Title IX enforcer, Russlynn Ali, sent a Dear Colleague letter to every campus administrator in the country that excoriated them for maintaining hostile environments for women.<sup>15</sup> The letter ordered colleges and universities to investigate and adjudicate student reports of sexual assault, even if the complainant decides not to have a medical exam or report the incident to the police. This has led to a proliferation of low-quality, shadow judiciaries on college campuses composed of judicially obtuse educators who have no training in forensics, no authority to subpoena witnesses, and no power to incarcerate dangerous offenders. In these tribunals, the accused do not have the right to confront and cross-examine their accusers, and they do not have the right to remain silent, even though whatever they say may be used against them in subsequent criminal proceedings.<sup>16</sup>

Further OCR directives advised schools to eliminate presumption of innocence and to subject accused students to double or even triple jeopardy by allowing complainants to appeal not-guilty findings. The OCR warns colleges not "to accord due process rights to the alleged perpetrator" that would "delay the Title IX protections."<sup>17</sup> Perhaps most significantly, the OCR has recommended that colleges use a "preponderance of evidence" standard (50.01 percent probability of guilt) to adjudicate cases of sexual misconduct. This means that half of the students found guilty under this new regime may, in fact, be innocent. Colleges and universities that do not take the steps recommended by the OCR will lose federal funding and be referred to the U.S. Department of Justice (DOJ) for litigation.

<sup>14</sup>"Study Shows Historically Black Colleges and Universities Struggle to Meet Title IX's Proportionality Test," *The College Sports Council*, news release, February 27, 2008, [http://collegesportscouncil.org/newsroom/display\\_releases.cfm?ID=22](http://collegesportscouncil.org/newsroom/display_releases.cfm?ID=22).

<sup>15</sup>Russlynn Ali, Office of the Assistant Secretary, "Dear Colleague Letter," U.S. Department of Education, Office for Civil Rights, April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>16</sup>See my "Assault by the DOE," *Academic Questions* 28, no. 1 (Spring 2015): 11–21.

<sup>17</sup>Ali, "Dear Colleague."

On May 9, 2013, the DOJ sent a “findings” letter to the president of the University of Montana that would serve as a blueprint for all colleges and universities in the country.<sup>18</sup> This letter defines “sexual harassment” so broadly that it turns virtually every word and every gesture into a possible Title IX violation. Whereas the Supreme Court defines sexual harassment as targeted, discriminatory conduct that is “severe, pervasive, and objectively offensive,”<sup>19</sup> the ED now defines harassment as any “unwelcome conduct of a sexual nature” and writes that such actions or speech don’t have to be “offensive” according to reasonable standards and objective evidence.<sup>20</sup> In an April 22, 2016, letter to the president of the University of New Mexico, the DOJ wrote that a college or university “carries the responsibility to investigate” all speech of a sexual nature that somebody subjectively finds unwelcome.<sup>21</sup> This expansive interpretation of harassment has the potential to turn every college student into a sexual offender and to shut down free speech on campus.

The ordeal that Laura Kipnis, a Northwestern University film professor and feminist, suffered at the hands of Title IX investigators dramatized for many faculty members how stifling this new regime can be. In February 2015, Kipnis wrote a *Chronicle of Higher Education* article criticizing the OCR’s expansive new definition of sexual harassment. The OCR, she wrote, is infantilizing women by encouraging them to “regard themselves as such exquisitely sensitive creatures that an errant classroom remark could impede their education.”<sup>22</sup> Instead of preventing a hostile environment, such rules instead have created an atmosphere of “sexual paranoia.” Kipnis wrote that students’ expanding sense of vulnerability was impeding their education as well as harming their chances of succeeding in the workplace, where a certain amount of resilience will be required of them.

For expressing these opinions, Kipnis was hit with a Title IX investigation. Two Northwestern students charged that Kipnis’s article created a hostile environment for women on campus. One student said that she had a “visceral

<sup>18</sup>Anurima Bhargava, Chief, U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section, and Gary Jackson, Regional Director, U.S. Department of Justice, Office for Civil Rights, Seattle Office, to Royce Engstrom, President, University of Montana, and Lucy France, Esq., University Counsel, University of Montana, May 9, 2013, <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>.

<sup>19</sup>*Davis v. Monroe County Bd. of Ed.* 526 U.S. 629 (1999), 631, <https://supreme.justia.com/cases/federal/us/526/629/case.html>.

<sup>20</sup>Bhargava and Jackson, letter.

<sup>21</sup>Shaheena Simons, Chief, Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice, and Damon Martinez, United States Attorney, District of New Mexico, U.S. Department of Justice, to Robert G. Frank, President, University of New Mexico, April 22, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>22</sup>Laura Kipnis, “Sexual Paranoia Strikes Academia,” *Chronicle of Higher Education*, February 27, 2015, <http://www.chronicle.com/article/sexual-paranoia-strikes/190351>.

reaction” to Kipnis’s essay; another student called it “terrifying.”<sup>23</sup> Northwestern subjected Kipnis to hours of grilling about her essay and the ideas underlying it. Kipnis was not permitted to have a lawyer present during her hearings, but she was allowed to have a colleague present. Kipnis chose Stephen Eisenman, the head of the Northwestern faculty senate. When Eisenman told the faculty senate that he believed Kipnis’s investigation was a threat to academic freedom, Eisenman was brought up on charges of violating Title IX as well.

Kipnis’s ordeal is not an isolated incident. At the University of Colorado Boulder, Patti Adler, a sociology professor, was charged with violating Title IX for enacting a role-playing exercise in her popular “Deviance in U.S. Society” course.<sup>24</sup> The role-play was directly relevant to the course material involving the global sex trade, and it had been a feature of the class for twenty years. No one had ever raised any objections to it. But in fall 2013, a student brought charges against Adler for making her feel uncomfortable during the role-play. The administration deemed Adler a risk to the university and offered her a buyout. Adler was afraid that if she didn’t accept this offer, she would lose her retirement benefits and her medical insurance. Adler said that had the administration simply asked her to end the role-play, she would have “dropped it like a hot potato.”<sup>25</sup>

“It is astounding how aggressive...assertions of vulnerability have gotten in the past few years,” Kipnis wrote. “Most academics I know—feminists, progressives, minorities, gays—live in fear of some classroom incident spiraling into professional disaster.”<sup>26</sup>

On March 29, 2016, the *New York Times* ran an article describing the financial costs of this regime.<sup>27</sup> Colleges are spending millions of dollars in order to hire layers of bureaucrats, law firms, and consultants in order to comply with federal Title IX mandates. “There’s so much more litigation on all sides of the issue,” Brent Sokolow, executive director of the Association of Title IX Administrators, said. “This has very much created a cottage industry.”<sup>28</sup> A university can expect to spend \$500,000 a year on Title IX compliance, and settlements from lawsuits

<sup>23</sup>Laura Kipnis, “My Title IX Inquisition,” Chronicle Review, *Chronicle of Higher Education*, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>.

<sup>24</sup>AAUP, *History, Uses, and Abuses*.

<sup>25</sup>Michelle Goldberg, “This Professor Was Fired for Saying ‘[F—] No’ in Class,” *Nation*, July 2, 2015, <https://www.thenation.com/article/this-professor-was-fired-for-saying-fuck-no-in-class/>.

<sup>26</sup>Kipnis, “My Title IX Inquisition.”

<sup>27</sup>Anemona Hartocollis, “Colleges Spending Millions to Deal with Sexual Misconduct Complaints,” *New York Times*, March 29, 2016, [http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html?\\_r=1](http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html?_r=1).

<sup>28</sup>Ibid.



can run into the millions. To satisfy OCR demands, colleges and universities have been expelling students for unsubstantiated charges of harassment only to have courts later order them to pay settlements to these students.<sup>29</sup> There are two hundred schools currently under OCR investigation for Title IX violations. Yale has thirty faculty and staff members who work part-time or full-time in Title IX efforts. Harvard has fifty. At the University of California, Berkeley, Title IX spending has risen at least \$2 million since 2013.<sup>30</sup>

## Bathroom Battles

On March 23, 2016, North Carolina governor Pat McCrory signed into law the Public Facilities Privacy & Security Act, or House Bill 2 (HB2). HB2 rescinds laws in North Carolina that protect gay, transgender, and intersex people from discrimination. The law also legislates that in all public buildings and schools, people may only use restrooms that correspond to their sex on their birth certificates.

The response to the law was swift and fierce. Bruce Springsteen, Boston, Pearl Jam, and Ringo Starr cancelled their concerts in North Carolina. The NBA moved the 2017 All-Star Game out of the state, and the NCAA and the Atlantic Conference moved championship games in multiple sports out of the state. PayPal stopped a planned expansion that would have created four hundred jobs, and Deutsche Bank halted plans to add 250 jobs to the state. Several cities and states banned official travel to North Carolina. The Center for American Progress estimates that the law will cost the state \$600 million in lost private sector economic activity through 2018, and the federal government could withhold billions of dollars in federal funding for the state.<sup>31</sup> Roy Cooper, North Carolina's attorney general and Democratic gubernatorial candidate, said that HB2 is unconstitutional and that he will not defend it in court.<sup>32</sup>

<sup>29</sup>KC Johnson, "Here Come the Lawsuits over Sex Hearings: Accused Males Take on Columbia and Drew," *Minding the Campus*, May 21, 2014, [http://www.mindingthecampus.org/2014/05/here\\_come\\_the\\_lawsuits\\_over\\_se/](http://www.mindingthecampus.org/2014/05/here_come_the_lawsuits_over_se/).

<sup>30</sup>Hartocollis, "Colleges Spending Millions."

<sup>31</sup>Shabab Ahmed Mirza, Sarah McBride, and Laura E. Durso, "North Carolina's Discriminatory H.B.2 Threatens More Than Half Billion Dollars in Economic Activity," Center for American Progress, April 13, 2016, <https://www.americanprogress.org/issues/lgbt/news/2016/04/13/135391/north-carolinas-discriminatory-h-b-2-threatens-more-than-half-billion-dollars-in-economic-activity/>.

<sup>32</sup>"North Carolina Attorney General Roy Cooper Won't Defend Transgender Law in Court," *Fox News*, March 29, 2016, <http://myfox8.com/2016/03/29/attorney-general-roy-cooper-speaks-out-on-hb2/>.



HB2 is unpopular in North Carolina, and several North Carolina Republican state senators have withdrawn their initial support for the law.<sup>33</sup> Polls show that Pat McCrory is now trailing Roy Cooper in the gubernatorial race.<sup>34</sup>

In response to the chaos caused by HB2, the federal government unleashed some chaos of its own. On May 13, 2016, the ED and the DOJ sent a Dear Colleague letter to every public school in the country, directing schools to allow students to choose bathrooms and locker rooms based on their chosen gender identity rather than on their biological sex. Title IX, the letter argues, requires that a school must accept without question “an individual’s internal sense of gender.”<sup>35</sup> The ED claimed that this letter merely provided guidance to school districts, but the letter also warned that schools that don’t comply with its interpretation of Title IX could lose federal funding and suffer legal sanctions.

Although its goal of protecting the safety and dignity of transgender students is laudable, the ED’s method of imposing a single standard on the whole country by fiat stands on shaky legal ground. In a *New York Times* editorial Yale law professor Peter Schuck writes that the ED does not have the authority to amend Title IX in this fashion.<sup>36</sup> Sweeping changes in policy are the responsibility of Congress and the courts, not of government bureaucrats. Furthermore, the Administrative Procedure Act requires that the government publish a proposed policy, explain its rationale, and solicit public comments before it enacts a new rule. By ignoring the notice and comment process in this case, the ED has “aborted a much-needed public debate over whether identity-based bathroom use can and should be regulated as a legal right, or merely left as an option.”<sup>37</sup>

Dexter Lehtinen, who teaches constitutional law at the University of Miami and has a transgender son, worries that the ED’s unilateral action will backfire: “It is important that in this slow but necessary recognition of equality that we do it on a sound legal basis, because law and process carry great weight with the

<sup>33</sup>“N.C. Republican Calls on Lawmakers to Repeal Bathroom Law,” *National Public Radio*, September 16, 2016, <http://www.npr.org/2016/09/16/494283680/n-c-republican-calls-on-lawmakers-to-repeal-bathroom-law>.

<sup>34</sup>Public Policy Polling, “HB 2 Deeply Unpopular in North Carolina; Voters Think It’s Hurting State,” news release, April 25, 2016, <http://www.publicpolicypolling.com/main/2016/04/hb-2-deeply-unpopular-in-north-carolina-voters-think-its-hurting-state.html>.

<sup>35</sup>U.S. Department of Justice, Civil Rights Division, and U.S. Department of Education, Office for Civil Rights, “Dear Colleague Letter on Transgender Students,” May 13, 2016, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

<sup>36</sup>Peter H. Schuck, “A Bathroom of One’s Own?” op-ed, *New York Times*, May 18, 2016, [http://www.nytimes.com/2016/05/18/opinion/a-bathroom-of-ones-own.html?\\_r=0](http://www.nytimes.com/2016/05/18/opinion/a-bathroom-of-ones-own.html?_r=0).

<sup>37</sup>Ibid.

American people.”<sup>38</sup> The editorial board of the *Wall Street Journal* predicts that the Dear Colleague letter on transgender students “will launch years of litigation and release political furies in school districts across America.”<sup>39</sup>

## Ending the Madness

The OCR’s efforts to remake American education through an increasingly arcane interpretation of Title IX is just one example of hundreds of such abuses perpetrated by the ED.

On February 28, 2015, the Senate Health, Education, and Labor Committee released a lengthy report, *Recalibrating Regulation of Colleges and Universities*, which finds that the federal government has entangled colleges in a continually expanding “jungle of red tape.”<sup>40</sup> Higher education is subject to a massive amount of federal statutory, regulatory requirements “totaling thousands of pages.”<sup>41</sup> Every year, institutions are also subject to thousands of pages of sub-regulatory “guidance” issued by the ED in the form of Dear Colleague letters that are sent to every college and university in the country. In 2012 alone, the ED released 270 Dear Colleague letters and other announcements. This means that the ED issues more than one new directive or clarification every working day of the year. These letters impose an avalanche of rules and regulations upon schools, without congressional authorization and without input from stakeholders affected by these regulations.

The cost of complying with these mandates is immense. The American Action Forum reports that the number of individuals in higher education with the title of “compliance officer” has grown by nearly 33 percent in the past decade.<sup>42</sup> The forum also determined that institutions spend 26.1 million hours annually completing ED mandated forms. This figure does not include the cost of regulatory burdens that go beyond completing forms, such as the cost of

<sup>38</sup>Lizette Alvarez, “A Republican Congresswoman Has Personal Stake in Transgender Debate,” *New York Times*, May 15, 2016, <http://www.nytimes.com/2016/05/16/us/florida-congresswoman-has-personal-stake-in-transgender-debate.html>.

<sup>39</sup>Editorial, “Obama’s Transgender ‘Guidance,’” *Wall Street Journal*, May 17, 2016, <http://www.wsj.com/articles/obamas-transgender-guidance-1463438713>.

<sup>40</sup>*Recalibrating Regulation of Colleges and Universities: Report of the Task Force on Federal Regulation of Higher Education* (Washington, DC: American Council on Education, 2015), 1, [http://www.help.senate.gov/imo/media/Regulations\\_Task\\_Force\\_Report\\_2015\\_FINAL.pdf](http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf).

<sup>41</sup>*Ibid.*, 10.

<sup>42</sup>Sam Batkins, Chad Miller, and Ben Gitis, “Rising Tide of Education Rules Increase Costs,” American Action Forum, April 30, 2014, <https://www.americanactionforum.org/research/rising-tide-of-education-rules-increase-costs/>.

litigation and the time required to develop and implement mandated compliance policies. Such mandates require colleges and universities to become experts in obscure disciplines or hire outside consultants with such expertise. Since the ED was formed in 1979, education costs have soared and there has been a shocking decline in academic standards. If tuition rates had risen as fast after 1979 as in the previous four decades, they would be about half the level they are today.

On May 22, 1979, the editorial board of the *New York Times* ran an editorial opposing the new department: “It has always been American policy...to deliberately avoid centralizing education in a way that requires direction and financing by a national ministry.... We believe that diversity of direction has served American education well and that it will continue to do better without a central bureaucracy.”<sup>43</sup>

Richard L. Lyman, president of Stanford University from 1970 to 1980, testified before Congress against forming the new department, pointing out that “the two-hundred-year-old absence of a Department of Education is not the result of simple failure during all that time. On the contrary, it derives from the conviction that we do not want the kind of educational system that such arrangements produce.”<sup>44</sup> The ED’s budget has continually increased from the time of its inception. In 1979, the ED cost \$14.5 billion. It will spend \$79 billion in 2016, or \$630 for every U.S. household. And the effect of all this spending is shocking declines in student achievement and soaring tuition rates.<sup>45</sup>

The authors of the Constitution believed that the powers of the federal government should be few and enumerated. They would be appalled at how the ED is micromanaging aspects of campus life that were never intended to come under federal control. The ED does more than just waste money. It creates reams of rules and regulations that divert colleges and universities away from their educational mission. Its website lists hundreds of programs that have no relation to education. At the ED, the only consequences for inefficiency and mismanagement are ever-increasing levels of funding.<sup>46</sup> The only solution to this problem is to abolish the Department of Education and put education policy back into the hands of faculty and administrators, for they know best how to govern the institutions they serve.

<sup>43</sup>Editorial, “Centralizing Education Is No Reform,” *New York Times*, May 22, 1979, [http://www.nytimes.com/1979/05/22/archives/centralizing-education-is-no-reform.html?\\_t=0](http://www.nytimes.com/1979/05/22/archives/centralizing-education-is-no-reform.html?_t=0).

<sup>44</sup>*CATO Handbook for Congress: Policy Recommendations for the 108th Congress* (Washington, DC: CATO Institute, 2002), 295, <http://holtz.org/Library/MarketLiberal/CatoHandbookForCongress2002.pdf>.

<sup>45</sup>See Richard Arum and Josipa Roksa, *Academically Adrift: Limited Learning on College Campuses* (Chicago: University of Chicago Press, 2010).

<sup>46</sup>Hans Bader, “Senators Reward Office for Civil Rights Power Grabs with Budget Increase,” *cnsnews.com*, April 4, 2016, <http://www.cnsnews.com/commentary/hans-bader/senators-reward-office-civil-rights-power-grabs-budget-increase>.