

# Where Title IX Went Wrong

*The equal opportunity law that ran amok*

## The Transformation of Title IX: Regulating Gender Equality in Education

by R. Shep Melnick

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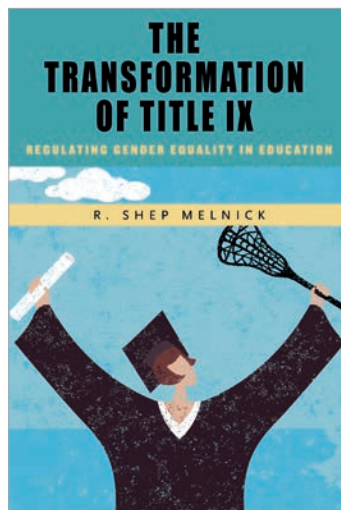
As reviewed by Christina Hoff Sommers

Title IX, the 1972 legislation banning sex discrimination in education programs that receive federal financial support, was a reasonable law in its original form. So what explains the scorched-earth campaign against men's sports carried out in its name? Why has it been used to deny students and professors due process and free speech in sexual harassment cases? When a Massachusetts district court judge reviewed Brandeis University's Title IX-inspired harassment proceedings, he declared them "closer to Salem 1692, than Boston 2015."

How did we get here?

In *The Transformation of Title IX*, Boston College political science professor R. Shep Melnick provides the answer: the transformation happened gradually and involved a strange symbiosis between government officials, federal judges, and activists. Melnick's straightforward analysis shows how a law intended to increase educational and athletic opportunities for girls and women came to diminish those opportunities for men and women alike.

Responsibility for administering Title IX falls to the U.S. Department of Education's Office for Civil Rights (OCR), which has the power to issue rules and regulations and to deny federal funding to schools that don't comply. But Congress has placed constraints on OCR rule making. New rules must be approved by the president after a "notice-and-comment" proceeding that allows colleges and universities, civil liberties organizations, policymakers, activist groups, students, and parents to question proposed rules



before they become binding policy.

But as Melnick shows, OCR officials found a way to sidestep this process by labeling a modification not as a formal rule change but as a "clarification" or "guidance." Such changes were then announced as *faits accomplis* through "Dear Colleague" letters. When someone protested, OCR administrators would insist they had merely clarified what was already in the law.

In a process Melnick calls "leapfrogging," federal judges would often treat OCR "clarifications" as settled law, deferring to them in their rulings and sometimes even expanding them. OCR could then refer to its clarifications as court-approved—and extend them a bit further. By this method, OCR officials have built an elaborate and aggressive regulatory empire—all the while denying that a single rule has been changed.

Colleges and universities had little choice but to comply with the guidelines and clarifications. After all, as Melnick shows, federal judges often treated the new directives as authoritative. Also, challenging OCR could subject a school to a costly and embarrassing Title IX investigation, with the threat of losing federal funding. Schools fell in line.

Why did OCR officials dodge the rules and impose radical new policies on the nation's schools? Largely because of pressure from gender advocacy groups—specifically the National Women's Law Center and the Women's Sports Foundation. When it came to regulating equity in college sports, these groups drove the agenda. They were gifted networkers and coalition builders, and they were highly motivated.

There were many common-sense ways schools could have applied Title IX to athletics. For example, why not consider the full array of athletic opportunities offered—from varsity, club, and intramural sports to dance, fitness, and outdoor exploration programs? Or find a way to gauge whether an institution's offerings satisfy both male and female students? But the women's groups insisted on "proportionality"—if a college's student body was 60 percent female, then 60 percent of the *varsity* athletes should be female. Anything less was proof of continuing discrimination. And other sports and fitness options did not count. For the activists, Title IX was not an equal opportunity law; it was a mandate to change conventional understandings of what it means to be a man or a woman. "This was a heady job for government regulators," writes Melnick.

In 1996, assistant secretary of OCR Norma Cantú sent out a "Letter of Clarification," which mentioned "proportionality" as a "safe harbor" that would protect schools from investigation. Schools got the message that anything less than statistical parity was risky. Previously, schools had been safe from investigation if they could show they were making good-faith efforts to accommodate student interests and abilities in sports. But Cantú's letter effectively imposed a quota system—even though the original law forbade quotas. Again the change was made without a notice-and-comment proceeding or the

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president’s signature. OCR labeled the decree a “clarification.” Judges deferred.

Melnick describes the chaos and expense that ensued. Colleges and universities generally have more female than male students, yet far fewer women than men aspire to participate in varsity athletics. To keep their football teams and avoid losing other male athletes, most schools have opted to devote a greater share of their athletic budgets to varsity sports. Untold millions now go to a relatively small group of elite male and female athletes inside the cloistered, commercialized world of college sports. Melnick wonders what the current regulation-driven system has to do with increasing *educational* opportunities for young women.

In April 2011, the head of OCR, Assistant Secretary of Education Russlynn Ali, sent out another Dear Colleague letter to colleges across the nation, outlining the steps colleges should take to curb an alleged epidemic of sexual mayhem on campus. Ali’s letter effectively mandated campus sex-crime tribunals. She advised schools to determine guilt by a very low standard—a “preponderance of evidence.” Mediation between accuser and accused was ruled out of order. The letter specified a new definition of sexual harassment: “unwelcome conduct of a sexual nature,” including even casual comments and jokes.

Ali’s goal, as Melnick explains, was to introduce a “new paradigm” into Title IX regulation. The old paradigm (that is, American law) attributes acts of sexual harassment to misbehaving *individuals*; the new paradigm (developed by radical legal theorists such as Catharine MacKinnon, professor at Michigan Law), blames *systemic* misogyny. To meet the new OCR standards, it was no longer enough for schools to identify and punish serious perpetrators—the entire culture of the institution had to change.

The letter stunned the education community. First of all, the U.S. Supreme Court had set standards for what constituted sexual harassment in educational settings in 1999, defining actionable harassment as behavior “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational

opportunities or benefits provided by the school.” Ali’s letter had effectively overruled the Supreme Court. Now colleges and universities had to police the everyday interactions of students—not just severe and persistent cases of harassment.

OCR also changed the focus of its investigations. Its practice had been to investigate a particular case and determine whether or not a school had failed to protect the complainant’s right to an equal education. After the Ali letter, a complaint to OCR could trigger a full-scale, multi-year investigation into the school’s “socio-cultural” environment. By the summer of 2017, OCR was conducting hundreds of such investigations. In many cases, that left complainants in limbo. Melnick quotes a survivor’s advocate who parodies the OCR response: “Thanks for the complaint, we’ll see you in four years while we do a compliance review.”

Ordinarily, a major policy change such as this would have been preceded by careful deliberation and vigorous debate. Instead, the radical transformation of college campuses was accomplished with little public notice and no open political participation. College administrators, fearing investigation, rushed to conform.

Schools have now developed elaborate “sex bureaucracies” to educate, monitor, train, investigate, and punish. Harvard has 50 full- and part-time Title IX coordinators. Yale has 30. On campuses throughout the country, students and faculty are now routinely denied due-process rights. Hundreds of students, mostly young men,

have been subject to kangaroo courts and expelled from school.

Melnick urges administrators, judges, and legislators to get back to preserving and protecting the fundamental principles of liberal constitutional democracy: due process, freedom of speech, academic freedom. And he pleads for restoring Title IX’s original purpose—not quirky social engineering but expanded *educational* opportunities. He ends on a hopeful note: “We might learn that real progress involves going back to basics.”

The current Department of Education, under Secretary Betsy DeVos, has rescinded the April 2011 Dear Colleague letter and promises a return to the required open process for rule changing. She has also issued interim guidelines restoring due process to the college campus. “The era of rule-by-letter is over,” said the secretary.

But it may be too late. So far, most schools, enmeshed in their Title IX bureaucracies, are sticking with the old rules and not adopting the interim guidelines. U.S. senators Bernie Sanders and Kirsten Gillibrand have denounced DeVos’s reform proposals as “a disgrace.” Congressional Democrats have introduced a bill to enact Ali’s Dear Colleague letter into law. A similar bill sailed through the California legislature last year.

Melnick’s hope might seem naive except for one unexpected development. When the California Title IX protection bill came to Governor Jerry Brown’s desk, he refused to sign it. Accused students, the governor said, are owed “the presumption of innocence until the facts speak otherwise.”

*The Transformation of Title IX* illustrates how, even in a rule-of-law nation like ours, bureaucrats and ideologues can subvert the law, wreak havoc on lives and civil liberties, and divert millions of dollars to harmful ends. In today’s contentious political climate, Melnick has provided a nonpartisan model for how to address complex issues with reason and restraint.

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