September 12, 2022

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202
[submitted electronically via rulemaking portal]

RE: Notice of proposed rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Docket ID ED-2021-OCR-0166

Dear Secretary Cardona,

This year, 2022, marks the 50th anniversary of Title IX of the Education Amendments of 1972, legislation that has protected female students attending schools that receive federal funding from discrimination based on sex. The text of the act specifies that "no person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subject to discrimination in education and athletic programs on the basis of sex." Its legacy has been to open educational opportunities to women, most famously in collegiate athletics.

The United States Department of Education ("Department" or "ED") has published in the Federal Registry a Notice of Proposed Rulemaking ("NPRM" or "proposal") under Title IX of the Education Amendments of 1972 that would require schools to radically change the way they understand and respond to sex-based discrimination. In expanding the scope of sex-based discrimination to include gender identity and sexual orientation, the proposed regulation fundamentally transforms Title IX—from statutory language designed to equalize educational opportunity for women to a far-reaching edict crafted to advance a radical sexual identity agenda. Such an idea would have been inconceivable to Title IX's architects. Moreover, the proposal violates the United States Constitution, and a 2022 Supreme Court ruling, and disregards core values of our Republic, including, but not limited to, due process and the presumption of innocence, religious liberty, freedom of speech, and parental rights in education. The proposed rule will also undermine the primary purpose of Title IX by discouraging female participation in specific educational activities.

Further, the Department has failed to establish why a new NPRM is necessary. ED undertook an exhaustive process to promulgate a Title IX regulation in 2019-2020. The current rule strikes a careful balance between a student's right to access equal educational opportunities as guaranteed by Title IX and the due process rights of those accused of sexual harassment. It was the first formal rulemaking since 1975, when the Department of Health, Education and Welfare first promulgated regulations pursuant to the legislation. The policies and processes that institutions of higher education (IHE) were required to establish only went into effect in the summer of 2020, at a time when schools were heavily reliant on

remote learning modalities due to the COVID-19 pandemic. ED acknowledges that "this absence of data means the Department could not construct a baseline from which to estimate the likely effects of the proposed regulations."[1] Indeed, there simply has not been sufficient time to assess the success and deficiencies of the existing framework. Revising the regulation again is not only unnecessary but is bound to sow confusion within, and impose unnecessary costs upon, schools around the country. Equally troubling, the new rule will also have profoundly negative consequences that are easy to anticipate: experiments with several provisions of the proposed regulation have already failed. They are outlined immediately below and elaborated in this comment, along with suggestions for amendments that the American First Policy Institute (AFPI) respectfully proposes.

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AFPI's Interest

Authors

1. The new definition (§106.2) and scope (§106.10) of sex-based harassment is overbroad and will create serious implementation problems, specifically:

- Consistent enforcement of Title IX harassment policies will be difficult, if not impossible, in the K-12 classroom;
- The proposed regulation will likely require schools to support the social transition of gender non-conforming students;
- The proposed regulation will severely undermine parental authority;
- Children can be investigated for sexual harassment if they "misgender" classroom peers and will be bullied into speech that violates their religious beliefs;
- The proposed regulation will preempt state and local laws, including state and local initiatives enacted to protect young students from age-inappropriate sexual content; and
- Proposed §106.31 will require schools to open intimate facilities designed for biological females to include biological males, negatively affecting female students in violation of Title IX's general purpose.

2. Congress allows for sex-separation in educational activities under Title IX, which it clearly understood in terms of biological sex differences.

- Schools cannot wait for a separate rulemaking regarding athletics given that the proposed regulation obscures what sex-separation means; and
- Congress intended sex to be understood according to its ordinary public meaning.

3. The proposed rule relies on a misreading of *Bostock v. Clayton County*.

4. The proposed rule will significantly weaken the due process rights of students accused of sexual assault.

[1] Federal Register 34 CFR 106 (2022, July 12). Notice of proposed rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (87: 132), 41549. Retrieved September 7, 2022, from https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf

5. The proposed rule will require the establishment of processes and policies that chill student and faculty speech.

6. The proposed rule purports to answer a "major question" of the kind addressed by *West Virginia v. EPA.*

7. The proposed rule includes new definitions that will require colleges and universities to provide health care services and insurance that could raise religious liberty issues.

8. The proposed rule should not be finalized if changes to the Free Inquiry and Religious Liberty rule are being contemplated.

AFPI's Interest

The America First Policy Institute (AFPI) is a 501(c)(3) non-profit, non-partisan research institute. AFPI exists to conduct research and develop policies that put the American people first. Our guiding principles are liberty, free enterprise, American military superiority, foreign-policy engagement in the American interest, freedom of conscience, and the primacy of American workers, families, and communities in all we do. In AFPI's view, it is the mandate of policymakers to advance and serve these policy interests above all others. To this end, AFPI affirms and celebrates the American experiment—not as an aesthetic act but as a moral statement. AFPI aims to promulgate American values in our educational institutions, laws, and culture. AFPI does this by disseminating the truth about the American Founding, our shared history, and the principles that underlie our constitutional republic.

One of AFPI's core priorities is ensuring that America is a nation of values that can build and prosper. That's AFPI's public policy interest in the Title IX NPRM, which is instrumental to a virtuous, free America. These comments explain why the NPRM should not be adopted, are bad policy and contrary to law.

Authors

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The new definition (§106.2) and scope (§106.10) of sex-based harassment is overbroad and will create serious implementation problems.

Consistent enforcement of Title IX harassment policies will be difficult, if not impossible, in the K-12 classroom.

The proposed regulation requires schools to adopt a broader, more subjective, definition of sex-based hostile environment harassment than the current regulation's definition, which adopts the Supreme Court's standard. The proposal defines sex-based harassment as

> Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (proposed §106.2).

The proposal also extends the "scope" of the definition to include discrimination based on sexual orientation, gender identity, and sex characteristics (proposed §106.10). Recipients of federal aid are required to "take prompt and effective action to end any sex discrimination that has occurred in its programs or activity, prevent its recurrence, and remedy its effects" (proposed §106.44). And they must provide a long list of supportive measures while the conduct at issue is being investigated (proposed §106.44).

The breadth of the definition of harassment and the scope of a school's reciprocal responsibilities make it difficult to anticipate what types of policies K-12 schools will be required to adopt by later agency guidance and Office of Civil Rights (OCR) investigation settlements. But we get a clue from the analysis of "hostile environment," where the Department makes clear that a student who skips class to avoid a harasser or has difficulty concentrating in class is experiencing "unequal educational access."[2] An environment that causes a student to experience "mental or emotional distress" would also deny a student equal educational access under the rule.[3] One concrete example of sex-based harassment provided in the proposed regulation—a student repeatedly referred to as "girly" by peers—suggests a wide range of uncivil speech will be reportable, including virtually anything related to gender identity or sex characteristics that causes a young person to have difficulty concentrating in class.[4] Given that young people are already prone to stress and anxiety, especially on issues related to sexual development and identity, the range of utterances this covers will vary immensely according to the subjective judgments of students and teachers. This creates an absolute minefield for the unwary.

Schools should, and do, address uncivil speech when it rises to the level of inappropriate teasing or outright bullying. Educators on the scene are best suited to make judgments about how to intervene in these circumstances. This rule would make virtually all speech related to sexual identity reportable as harassment to Title IX officers and ED's Office of Civil Rights if a student (or bystander) subjectively takes offense. The result will be vastly different standards and penalties at schools around the country as well as the selective use of Title IX investigations to punish students when other forms of constructive intervention would be more appropriate and beneficial. Federal regulations should not be used to force schools to create rigid disciplinary structures that will effectively supersede the classroom judgment of teaching professionals. To do so accustoms students to viewing all uncomfortable interpersonal interaction in adversarial terms—a recipe for a coarser public dialogue in the future. The Department should maintain the present definition and scope of sexual harassment in its final rule, which

[2] 34 CFR 106, 41414.
[3] 34 CFR 106, 41417.
[4] Ibid.

appropriately sets a higher bar for what constitutes harassment, so that schools are not required to subject children to investigations where other pedagogical approaches are more appropriate to their development.

The proposed regulation will likely require schools to support the social transition of gender non-conforming students.

The new scope of harassment (proposed §106.10) will almost surely be interpreted by many as requiring schools to take positive steps to ensure that students are addressed by names and pronouns corresponding to self-professed gender identity, even when it does not align with biological sex or legal identity documentation. The Biden Administration's June 2021 "Interpretation" of Title IX confirms that OCR will expend resources investigating allegations of individuals "being harassed… or subjected to sex stereotyping… because of their… gender identity."[5] The Obama Administration 2016 "Dear Colleague letter" (rescinded during the Trump Administration) explicitly required recipient schools to "treat students consistent with their gender identity even if their education records or identification documents indicate a different sex."[6] So it is unsurprising that schools around the country are already adopting policies that require teachers and students to use students' preferred pronouns and otherwise affirm students' social transition.[7]

And yet, the NPRM does not address the affirmation of gender identity, or social transition of non-binary young people, in K-12 schools—even though the consequences of such policies to minor students' health and well-being are far-reaching and still under vigorous dispute.[8] Since it has not addressed this major question, the Department should clarify that the rule does not require schools to adopt policies requiring staff to affirm or support students undergoing social gender transition. It should also clarify that OCR will *not* investigate schools when students or other persons complain that students or staff have failed to affirm a student's gender identities or in cases where students or other persons report "misgendering" or "deadnaming" (the use of a student's previous name) as sex-based harassment.

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[5] Federal Register 34 CFR 1 (2021, July 12). *Interpretation: Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County* (86: 117), 32639. Retrieved September 7, 2022, from https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

[6] Department of Education, Office of Civil Rights (2016, May 13). "Dear Colleague" letter, p.3. Retrieved September 7, 2022, from https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

[7] For example, Montgomery County Public Schools includes the following section in its gender identity guidelines: "Whenever schools are not legally required to use a student's legal name or sex assigned at birth on school records and other documents, the school should use the name and gender identified by the student on documents such as classroom rosters, identification badges, announcements, certificates, newspapers, newsletters, and yearbooks. To avoid harmful misgendering or misnaming, schools should be especially mindful that all information shared with substitute teachers should be in alignment with the student's identified name and gender." Montgomery County Public Schools (2021, September). *2021-22 Guidelines for Student Gender Identity in Montgomery County Public Schools*, p.3. Retrieved September 7, 2022, from https://www.montgomeryschoolsmd.org/uploadedFiles/students/rights/0504.21_GenderIdentityGuidelinesForStudents_Web.pdf

[8] For example, one recent study found that most commonly, "transgender youth who socially transitioned at early ages continued to identify that way" but notes that "very few data about retransitions exist in the scientific literature." Olson, K., et al (2022, August). *Gender Identity 5 Years After Social Transition*. Pediatrics (150: 2). Retrieved September 7, 2022, from https://publications.aap.org/pediatrics/article/150/2/e2021056082/186992/Gender-Identity-5-Years-After-Social-Transition?autologincheck=redirected%3fnfToken%3d00000000-0000-0000-0000-000000000000

These sections of the regulation could also be interpreted as requiring schools to extend gender-affirming counseling services (and, in cases where schools offer them, psychological services) to children wrestling with their gender or sexual identity. It is inconceivable that Congress intended Title IX to have this effect when it passed the law 50 years ago. Given that there is no discussion of gender-affirming counseling in the proposed regulation, the final rule should also specify that schools will *not* be required to take on this role.

If the rule does, indeed, contemplate a regime in which schools will be required to support and advance the social transition of young people, ED must provide a detailed analysis of the specific benefits and harms that are likely to be done if K-12 school personnel, most of whom are not medical professionals, are required by federal regulations to affirm minor students' gender identity. The public should then be afforded new opportunity to comment on ED's discussion given the high level of public interest and vigorous deliberation on the subject. The potential costs of federally mandated affirmation students undergoing gender transition is especially high given that it is an important step toward medical transition, treatment that involves irreversible hormone therapy and invasive surgeries.

The proposed regulation will severely undermine parental authority.

The proposed regulation threatens to severely undermine parental authority. When parents have good reason to believe their children will be harmed if school officials encourage gender transition, and school officials agree not to adopt a student's preferred pronouns, it appears teachers and staff could be accused of sex-based harassment. This concern has already led some school districts to adopt policies that require school personnel to support students' gender transition even when "the family is nonsupportive [sic]."[9] School district policy in Montgomery County, Maryland, even forbids forthright communication with parents if it would interfere with providing affirmative care. As the policy explains, "the fact that students choose to disclose their status to staff members… does not authorize school staff members to disclose a student's status to others, including parents/guardians."[10]

Title IX officers may conclude that this regulation, as proposed, empowers them to direct schools to adopt similar policies, effectively prioritizing affirmation of students' gender transition above parental notification and deference to parental judgment. This goes well beyond the purpose of Title IX. Furthermore, parental rights and authority in the context of K-12 education are not specifically addressed in the NPRM. It would, therefore, violate the Treasury and General Government Appropriations Act of 1999 for the regulation to weaken parental authority. That law clearly requires agencies conduct a family policymaking assessment "before implementing policies and regulations that may affect family well-being," including an agency assessment "with respect to whether… the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children."[11]

As no such discussion informs this NPRM, the final rule should make clear that nothing contained in it should be construed as weakening parental rights in any way. This means that, at a minimum, the proposal should be amended to clarify that it does not require schools to affirm students' trans identities—without parental knowledge and consent and certainly not against parents' directives—and that recipient schools will not be encouraged or required to adopt policies that discourage parental notification. The rule should also clarify that deciding not to affirm a young person's gender identity is

[9] Montgomery County Public Schools, 2021-22, p.3.
[10] Ibid.
[11] Pub. Law 105-277, Section 654(c)(2). Retrieved September 7, 2022, from https://www.govinfo.gov/content/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf

not discrimination or harassment, and that the proposed regulation does not require Title IX offices to investigate such complaints.

Because the definition of sex-based harassment proposed in the regulation is overbroad, and because the extension of its scope to include "gender identity" and "sex characteristics" will in all likelihood be interpreted as requiring schools to take positive steps to affirm the social transition of minor students (including without parental consent or notification), the only workable and prudential solution is to maintain the current definition of sexual harassment, which is based on the Supreme Court's definition in *Davis v. Monroe County. Board. of Education*, and to strike altogether the expansion of scope in proposed §106.10.

Children may be investigated for sexual harassment if they "misgender" classroom peers and will be bullied into speech that violates their religious beliefs.

The new, overly broad, definition of sex-based harassment (proposed §106.2 and §106.10) raises the possibility that trans-identifying students will be able to report a student's or teacher's failure to use their preferred pronouns or name to a recipient school's Title IX coordinator or national OCR. Given the stated threshold for denying a student equal educational opportunity extends to behavior that causes a student to have difficulty concentrating in class, the scope of potentially problematic speech is vast. As a result, very young people will be reported to Title IX coordinators for "misgendering" or "deadnaming" other students and investigated by their schools for sexual harassment (or sex-based harassment). This is to say nothing of the informer culture that such a regime facilitates among impressionable American children.

The proposed regulation also empowers Title IX coordinators to initiate a complaint against a teacher or student even "in the absence of a complaint" (proposed §106.44). This will empower administrators with strong ideological agendas to use the punitive Title IX framework to enforce ideological conformity on issues of gender identity. In fact, this is already happening. Adult school district officials in Wisconsin filed a Title IX sexual harassment complaint against three *eighth-graders* who chose not to refer to a classmate using the plural pronouns "they" and "them."[12] The school district issued a "Notice of a Formal Complaint of Sexual Harassment" advising the student of an "investigation" under the district's Title IX grievance process.[13] In Kansas, a school teacher was suspended for refusing to use a student's preferred pronoun, even though she asked for an exception to the policy requiring it because it violates her religious beliefs.[14] A school district in Northern Virginia will start the Fall 2022 term with a new rule in the student handbook: students in the fourth grade and above will be suspended for "malicious misgendering" and

[12] Roth, C. (2022, May 24). *Will to Kiel Schools: Drop title IX complaint, investigation of eighth graders for using "incorrect pronouns"*. Wisconsin Institute for Law and Liberty. Retrieved September 7, 2022, from https://will-law.org/will-urges-kiel-schools-to-drop-title-ix-complaint-investigation-of-eighth-graders-for-using-incorrect-pronouns/?fbclid=IwAR1ApAlL0BXMGsNERs6dtmZUlhSTwLBW_IHdpFda_ATkqyZ88JRnGfB-xKI

[13] Kiel Area School District (2022, April). "Notice of a Formal Complain of Sexual Harassment. Retrieved September 7, 2022, from https://will-law.org/wp-content/uploads/2022/05/Complaint-Notification-Letter-Redacted38.pdf

[14] Mayberry, C. (2022, March 10). *Teacher suspended for not using student's preferred pronouns sues school*. Newsweek. Retrieved September 7, 2022, from https://www.newsweek.com/teacher-suspended-not-using-students-preferred-pronouns-sues-school-1686518

"malicious deadnaming."[15] Under the proposed regulations, it is likely that schools around the country will be pressured to adopt similar policies.

These policies are constitutionally suspect because they subject students to onerous and reputation damaging investigations that objectively reasonable students will want to avoid. But because such a broad range of speech could conceivably trigger a Title IX complaint, it is difficult to know what not to say. Because the process itself is punitive, students will have good reason to exercise prior restraint. Such an environment would, therefore, chill protected speech, which is manifestly not conductive to wide ranging inquiry –and free inquiry is essential to learning. The Department does not discuss whether Title IX investigations into offensive speech related to gender identity could be problematic in a K-12 context under existing constitutional standards, including *Tinker v. Des Moines*, which makes clear that K-12 students do not check their free speech rights at the schoolhouse door.[16]

At a minimum, the final rule should be revised to clarify that schools are not required to establish policies that compel students and teachers to speak in ways that violate their deeply held faith commitments, which are protected under the free exercise clause of the First Amendment. It should also be revised to make clear that "misgendering" or "deadnaming," for whatever reason, does not constitute sex-based harassment. If it is the intention of the Department that the new definition and scope of sex-based harassment extends this far—to compelling student and staff speech—the Department ought to have addressed in detail the obvious and foreseeable infringements on students' and teachers' free speech and religious liberty rights the proposed regulation will encourage. This would have been necessary to provide an opportunity for the public to comment on the specifics of this important dimension of the proposal.

<u>The proposed regulation will preempt state and local laws, including state and local initiatives enacted to protect young students from age-inappropriate sexual content.</u>

Section 106.6(b) of the proposed federal regulation purports to preempt state and local laws; as the Department explains in its discussion, "all of the Title IX regulations would preempt State or local law."[17] Education Department statements suggest this could include state and local initiatives designed to protect students from age-inappropriate sexual content. For example, when Florida legislators were debating the state's Parental Rights in Education Bill, a measure that prohibits formal instruction regarding sexual orientation and gender identity in the K-3 public classroom, Secretary of Education Miguel Cardona issued a press release criticizing it. The basis of his criticism was Title IX: "schools receiving federal funding must follow federal civil rights law, including Title IX's protections against discrimination based on sexual orientation and gender identity."[18] When Florida passed the law in late March, 2022, Secretary Cardona issued a second press release encouraging "any student who believes they are experiencing

[15] Christenson, J. (2022, June 17). *Tiger moms maul Virginia school board over 'misgendering' rules*. Washington Free Beacon. Retrieved September 7, 2022, from https://freebeacon.com/campus/tiger-moms-maul-virginia-school-board-over-misgendering-rules/

[16] *Tinker v. Des Moines*, 25-26. https://www.law.cornell.edu/supremecourt/text/393/503.

[17] 34 CFR 106, 41404.

[18] Department of Education (2022, March 8). *Statement from U.S. Secretary of Education Miguel Cardona on the Florida State Legislature's Parental Rights in Education Bill*. Retrieved September 9, 2022, from https://www.ed.gov/news/press-releases/statement-us-secretary-education-miguel-cardona-florida-state-legislatures-parental-rights-education-bill

discrimination, including harassment… [to] file a complaint with our Office for Civil Rights."[19] This suggests that the Department might imagine using the proposed regulation to launch OCR investigations into school districts and schools that make curriculum and resource decisions that restrict or remove sexually explicit materials regarding (or prohibit teaching very young students about) sexual orientation and gender identity.

This is not only ahistorical but does violence to our constitutional design of divisible powers. As the Framers well understood, educating young people is a paramount parental responsibility.[20] When the function is delegated to others—for example, public schools—basic principles of federalism require that it be closely supervised by families at the state and local level. The Supreme Court has explained that

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . [We have] observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence.[21]

The NAACP has echoed this sentiment in another case before the Supreme Court, namely, local control encourages "responsiveness of local school boards to those whom they serve . . . community confidence in and support for the public school system . . . and 'experimentation, innovation, and a healthy competition for educational excellence.'"[22]

Legitimate federal intervention into the affairs of local schools has been limited to moral emergencies, such as dismantling the tyranny of Jim Crow in the South and enforcing court-order desegregation "with all deliberate speed." As Chief Justice Rehnquist explained, "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."[23] It is scarcely the same thing to treat fellow American as second-class citizens and subject them to the worst kind of injustices because of immutable characteristics like skin color as it is to enjoin the teaching of deeply complicated questions of sexuality to second graders. If "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges," then it is likewise true that Title IX bureaucrats are equally ill suited to this responsibility.[24]

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[19] Department of Education (2022, March 28*). Statement by Secretary of Education Miguel Cardona on Newly Signed Florida State Legislation*. Retrieved September 9, 2022, from https://www.ed.gov/news/press-releases/statement-secretary-education-miguel-cardona-newly-signed-florida-state-legislation

[20] James Wilson makes this argument in a discussion of natural rights: "It is the duty of parents to maintain their children decently, and according to their circumstances; to protect them according to the dictates of prudence; and to educate them according to the suggestions of a judicious and zealous regard for their usefulness, their respectability, and their happiness… Part of his authority he may delegate to the person intrusted with his child's education: that person acts then in the place, and he ought to act with the disposition, of a parent." James Wilson, "Of the Natural Rights of Individuals," 1790–1791, FOUNDING.COM: A Project of the Claremont Institute, https://founding.com/founders-library/american-political-figures/james-wilson/of-the-natural-rights-ofindividuals/

[21] *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (internal citations omitted).

[22] Brief of the NAACP Legal Def. & Educ. Fund, Inc. as *Amicus Curiae* in Supporting Respondents, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007) (Nos. 05-908, 05-915), 2006 WL 2927075, at *17 (citations omitted).

[23] *Bd. of Educ., v. Dowell*, 498 U.S. 237, 247 (1991).

[24] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

Thus, when it comes to school curriculum, "First Amendment principles would allow a school board to refuse to make a book available to students because it contains offensive language, or because it is psychologically or intellectually inappropriate for the age group, or even, perhaps, because the ideas it advances are 'manifestly inimical to the public welfare.'"[25] Accordingly, ED must clarify in its final rule that curriculum and resource decisions related to sexual orientation and gender identity do not fall within the scope of the Title IX regulation or OCR's anti-discrimination enforcement mandate.

Proposed §106.31 will require schools to open intimate facilities designed for biological females to include biological males, negatively affecting female students in violation of Title IX.

Section 106.31 of the proposed regulation specifies that "Adopting a policy or engaging in a practice that prevents a person from participation in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." Among other things, the new rule will require recipient schools to open intimate facilities like bathrooms and locker rooms to students based on self-professed gender identity. Based on Obama Administration guidance issued in 2016, it seems likely that private facilities for gender non-conforming students will not satisfy OCR interpretations of this proposed regulation.[26]

That would create unacceptable safety risks for young women in the places they are most likely to feel most vulnerable. When biological males are permitted to use women's changing rooms, some young women will naturally choose not to take advantage of educational opportunities and facilities because they do not feel safe undressing around students with male genitalia. ED ought to have included a review of relevant literature on the subject, commissioning original survey research of young women at various stages of physical and psychological development, if necessary, in order to understand whether girls and young women are comfortable sharing intimate facilities with biological males. This would have allowed a discussion of the negative consequences of such a directive to inform the proposed rule. It would also have prompted important public discussion on an issue that is hotly debated today. At a minimum, the final rule should include such a discussion.

This provision also contradicts the original purpose of Title IX, which was designed to open additional educational opportunities to women on equal opportunity grounds. The Department simply dismisses this claim without addressing the specific situations in which it is already happening.[27] For example, biological male athletes who compete in female athletics receive scholarship support that counts toward an institution's outlay in female athletics. When biological male athletes advance to higher levels of women's competition, they deny the opportunity to compete at that level to a biological female athlete—including the chance to impress college scouts.[28] When biological male athletes competing in women's

[25] *Board of Education, Island Trees Union Free School District No. 26 et al. v. Steven A. Pico et al.,* 457 U.S. 853 (1982) (Blackmun, J., concurring), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/supremecourt/text/457/853, 65.
[26] Department of Education, Office of Civil Rights (2016, May 13). "Dear Colleague" letter, p.3. Retrieved September 7, 2022, from https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
[27] 34 CFR 106, 41535.
[28] For example, at the 2019 Connecticut Indoor Track & Field State Championships, biological male athletes finished in first and second place in the 55-meter dash. As a result, no female competitor advanced to the New England Regional Championships in the sport, depriving female athletes of recognition and opportunity to compete

divisions break school or league records, they erase the achievements of biological female athletes.[29] When biological male athletes use the women's locker room, they alter the environment in ways that negatively affect female athletes.[30] When biological males compete as women in contact sports, they significantly increase the risk of injury to biological women, which could lead female athletes reasonably concerned about their health and safety to refrain from participating.[31] Again, the notion that the architects of Title IX would have countenanced any one of these individual circumstances, much less them all, strains credulity to the breaking point. To its credit, the International Swimming Federation (FINA) announced a new policy that restricts eligibility for the women's category to biological females and those who transitioned early enough to have avoided the benefits associated with male puberty. They also articulated the stakes clearly and directly: "[w]ithout eligibility standards based on biological sex or sex-linked traits, we are very unlikely to see biological females in finals, on podiums, or in championship positions.[32]

Given that the original purpose of Title IX was to open opportunities to women, the Department must do likewise and specifically address the thresholds at which the loss of scholarship and competitive opportunities, the erasure of league records, and the dangers of competing against biological males, would constitute harmful discrimination against biological female athletes.

2. Congress allows for sex-separation in educational activities under Title IX, which it clearly understood in terms of biological sex differences.

Schools cannot wait for a separate rulemaking regarding athletics given that the proposed regulation obscures what sex-separation means.

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in front of college scouts. This is only one of several recent examples documented by the Alliance Defending Freedom. Alliance Defending Freedom (n.d.). *Track Athletes Taking a Stand to Defend Women's Sports: The Selina Soule, Chelsea Mitchell, and Alanna Smith Stories.* Retrieved September 7, 2022, from https://adflegal.org/selina-soule-track-athlete-story

[29] For example, Lia Thomas won the 1,650-yeard freestyle at the Zippy Invitational in Akron, Ohio, finishing 38 seconds ahead of the second-place swimmer. That level of dominance is unheard of in elite athletics and reflects the consideration competitive advantages biological male athletes derive from an androgenized body. When biological male athletes smash school, tournament, and league records, they erase dedicated women—whose achievements reflect dedication and hard work, not biological advantage—from record books. Dutton, J. (2021, Dec. 8). *Who Is Lia Thomas? Trans Swimmer Breaking College Records Sparks Debate*. Newsweek. Retrieved September 7, 2022, from https://www.newsweek.com/trans-swimmer-breaking-college-records-sparks-debate-1657354.

[30] For example, teammates have complained that Lia Thomas does not always cover her male genitalia in the women's locker room. Female athletes expressed their discomfort. According to one account, "we were basically told that we could not ostracize Lia by not having her in the locker room and that there's nothing we can do about it, that we basically have to roll over and accept it, or we cannot use our own locker room." Reilly, P. (2022, Jan. 27). *Teammates say they are uncomfortable changing in locker room with trans UPenn swimmer Lia Thomas.* New York Post. Retrieved September 7, 2022, from https://nypost.com/2022/01/27/teammates-are-uneasy-changing-in-locker-room-with-trans-upenn-swimmer-lia-thomas/

[31] Hellen, N. (2019, Sept. 28). *Too strong trans players in women's rugby are driving referees away.* The Times. Retrieved September 7, 2022, from https://www.thetimes.co.uk/article/injury-fears-over-rugbys-trans-women-drive-referees-off-pitch-877hjsfz0

[32] International Swimming Federation (FINA, 2022). *Policy on Eligibility for the Men's and Women's Competition Categories*, p. 1, 8. Retrieved August 2, 2022, from https://resources.fina.org/fina/document/2022/06/19/525de003-51f4-47d3-8d5a-716dac5f77c7/FINA-INCLUSION-POLICY-AND-APPENDICES-FINAL-.pdf.

The Department expressly acknowledges that "its regulations must not contradict the express provisions of the statute."[33] It further acknowledges that Congress did not intend Title IX to prohibit IHEs from "maintaining separate living facilities for the different sexes."[34] This also applies to athletics. As the Department acknowledges, "exclusion from a particular male or female athletics team may cause some students more than de minimis harm," given the new definition and scope of sex-based harassment, "and yet that possibility is allowed under current §106.41(b)."[35] The Department proposes no changes to §106.41(b). But the proposed rule declines to define "male" and "female" in biological terms, or otherwise. This raises an enormous problem in the context of athletics. The Department promises a new rulemaking at some later point, yet to be determined, where it will explain "what criteria, *if any*, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team" (emphasis added).[36]

This is an unacceptable hedge. The Department seems to be pointing to the promised later rulemaking to suggest that it will abide by the law's purpose with respect to the most salient permitted instance of sex separation in education. In the meantime, the lack of a definition of "sex" where sex separation is permitted makes the regulation utterly unworkable. It is impossible to tell from the NPRM whether a single-sex team, activity, or space is one that limits participation to biological male or female students. Or is it one that limits participation to either male- or female-identifying students? It cannot be both without construing an essential term in the statute as meaning two contradictory things.

In the new regime created by this regulation—in which sex-based discrimination is defined to include the denial of educational opportunity on the basis of gender identity—neglecting to define key terms including "sex," "male," and "female" makes it impossible to foresee how claims of sex discrimination involving trans-students and trans-athletes will be adjudicated. What complaints will OCR see fit to investigate? ED must define sex in the final rule and make explicit that sex-separation based on biological definitions of male and female is permitted in collegiate athletics (and everywhere Congress allows sex-separation). The decision to issue a rule that will create such obvious confusion and uncertainty, raising the risk of accidental noncompliance by recipient schools, while planning to address this confusion in a second, later rulemaking appears to be arbitrary and capricious given that ED provides no justification for addressing these intimately related questions through separate processes at different times.

<u>Congress intended "sex" and "female" to be understood according to their ordinary public meaning.</u>

ED argues that it is free *not* to adopt a definition of "sex" based in biology because there is no indication that the statute purported "to restrict the scope of sex discrimination to biological considerations."

> Contrary to assertions made in 2020 and January 2021, the Department does not have a "long-standing construction" of the term "sex" in Title IX to mean "biological sex." The text of the statute and current regulations do not resolve this issue; neither the statute nor the regulations define "sex," purport to restrict the scope of sex discrimination to biological considerations, or even use the term "biological." The Department does not construe the term "sex" to necessarily be limited to a single component of an individual's anatomy or physiology.[37]

[33] 34 CFR 106, 41534.
[34] 34 CFR 106, 41536.
[35] 34 CFR 106, 41536.
[36] 34 CFR 106, 41538.
[37] 34 CFR 106, 41537.

The idea that Congress in 1972, or the Department in the decades since, did not intend for "sex" to be interpreted in biological terms does not withstand even superficial scrutiny. The specific types of sex-separation the statute permits—in athletics, living facilities, and father-son and mother-daughter activities—only make sense in biological terms. Schools established male and female residence halls as women attended college in higher numbers in large part due to concern about sexual intimacy among unmarried men and women, a concern related to the risk of pregnancy outside of marriage—a concept that cannot be understood without thinking about *biological* sex differences. Sex-separation in athletics is justified by fairness considerations given the immense competitive advantages biological male athletes derive from an androgenized body: greater muscle mass, higher bone density, larger wingspan, greater heart and lung capacity.[38] These differences are, by definition, biological. It is hard to understand the relationship between a father and son, or a mother and daughter, without thinking of processes (sexual intercourse, pregnancy, and childbirth) rooted in biology. Similarly, the types of sex-separated educational activities the Department has allowed since the 1975 regulation—for example, choruses and human sexuality courses—have justifications related to biological sex differences: male and female students have different reproductive systems to learn about and physiological developmental differences account for typical distinctions in male and female vocal range. In the statute, original regulation, and 1975 Congressional hearing regarding that regulation, sex categories are always treated as binary—men/women, male/female, boy/girl, mother/father—which corresponds to biological sex categories but not gender categories, of which there are more than two.[39] The Department does not point to an instance of sex-separation Congress expressly permits that is not binary and related to biological sex difference or reproductive function, and yet it claims Congress did not mean to construe "sex" in biological terms.

If the statute does not explicitly use the term "biological" to define "sex," it is presumably because the study of gender identity was only beginning when the language of Title IX was being debated in Congress. Only a handful of obscure academics writing at the time posited definitions of "sex," "male," and "female" that did not rely on biology. The relationship of the term "sex" to biology in 1972 is about as necessary, obvious, and direct as the relationship between the concept "square" and geometry. As such, ED cannot simply assert that Congress intended for sex to be construed in a way that was highly unusual at the time and, in fact, undermines the ordinary purpose of the statute. That is akin to discovering an elephant in a mousehole, a novel reading of a word in the statute that allows the executive branch to pursue objectives vastly exceeding its delegated authority. If ED cannot credibly establish that Congress intended a construction not rooted in biology with reference to statutory language or the congressional record, the final rule should adopt definitions of "sex," "male," and "female" rooted in biology and aligned to their ordinary public meaning at the time of enactment

[38] One study of elite male and female athletics performance found that "Just in the single year 2017, Olympic, World, and U.S. Champion Tori Bowie's 100 meters lifetime best of 10.78 was beaten 15,000 times by men and boys." Similar performance disparities were recorded in other sports; in some track and field events, hundreds of boys under the age of 18 outperformed the best adult female result posted in the study year. Coleman, D., and Shreve, W. (n.d.). *Comparing Athletic Performances: The Best Elite Women to Boys and Men.* Duke Law: Center for Sports Law and Policy. Retrieved September 8, 2022 from https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf

[39] United States Congress, House Committee on Education and Labor (1975). *Hearing Before the Subcommittee on Equal Opportunities of the Committee on Education and Labor*, H. Con. Res. 330. Retrieved August 7, 2022, from https://books.google.com/books?id=RyggAAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

3. The proposed rule relies on a misreading of *Bostock v. Clayton County*.

At key junctures, the Department relies on its reading of *Bostock v. Clayton County* to justify its decision to interpret "sex" in the statute as permitting changes in the "scope" of sex-based hostile environment harassment, stating flatly that "the Supreme Court's reasoning in *Bostock* applies to Title IX."[40] Because the Court found that "it is 'impossible to discriminate against a person' on the basis of sexual orientation or gender identity without 'discriminating against that individual based on sex'" in an employment discrimination context, ED believes it can extend the scope of sex-based harassment protections in the proposed regulation to cover the same features of identity.[41]

This is a mistake for two important reasons. First, Title IX has a very different purpose: to prevent discrimination on the basis of sex in the provision of educational opportunities. Sex differences rooted in biology matter in an educational context in ways they do not in an employment discrimination context. This is why Title IX explicitly permits the provision of sex separate activities, facilities, and even institutions and activities. Forcing women to compete against men would deprive them of athletic opportunities, scholarships, and recognition; sex-separation in choir and human sexuality courses helps educators to achieve important learning objectives. Indeed, it would turn the very purpose of Title IX on its head.

Second, the *Bostock* court went out of its way to explain that its reasoning does *not* extend to several of the specific issues raised by Title IX, including the permissibility of "sex-segregated bathrooms, locker rooms, and dress codes."

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."[42]

Indeed, one federal court recently explained that "Title IX's ordinary public meaning remains intact until changed by Congress," and the "ordinary public meaning of 'sex' turned on reproductive function when Congress enacted Title IX."[43]

As such, it is a mistake for the Department to rely upon *Bostock* to justify expanding the scope of sex-based hostile environment harassment in an educational context. The Supreme Court could hardly have warned against it in clearer language. The final rule should, therefore, justify extending the scope of sex-based harassment to include gender identity by referring to clear statutory language. If no such language can be found, ED should strike proposed §106.10 in its entirety.

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[40] 34 CFR 106, 41531.
[41] 34 CFR 106, 41532.
[42] *Bostock v. Clayton County*, 31. https://www.law.cornell.edu/supct/pdf/17-1618.pdf
[43] *Neese v. Becerra*, 21-CV-163-Z, 2022 U.S. Dist. LEXIS 75847, at *33 (N.D. Tex. Apr. 26, 2022) (internal citations omitted).

4. The proposed rule (§106.45) **will significantly weaken the due process rights of students accused of sexual assault.**

The proposed rule will roll back many of the due process guarantees established by the existing regulation in the context of sexual misconduct investigations. For example, the Biden Administration's proposed rule permits schools to reinstitute single-investigator models and requires most colleges and universities to adopt the weaker and error-prone "preponderance-of-the-evidence" standard (proposed §106.45(h)(1)).[44] (Schools may only use a higher "clear and convincing" standard if they adopt the same standard for all other investigations into alleged student and faculty misconduct).[45] The proposal would also end the requirements that schools hold live hearings[46] and provide opportunity for an advisor to the respondent to cross-examine the other side, along with the mandate that schools share all evidence collected during the investigation with both parties (the new rule only guarantees "description of the relevant evidence" and "equitable access to the relevant… evidence" (proposed §106.45(f)(4)).[47] In its discussion of supportive measures provided to the complainant during the investigation, the proposal permits "measures that burden a respondent, such as requiring changes in a respondent's class, work, housing, extracurricular or any other activity"—without the safety and risk analysis required under the existing regulation (proposed §106.44(g)(2)).

The failure of these policies has already been established. As universities adapted their policies to adhere to Obama Administration-era guidelines, Title IX litigation exploded. Hundreds of students seeking to have their records expunged, along with monetary damages in some cases, sued universities for their handling of complaints, often alleging egregious violations of due process.[48] Many of them have prevailed in court.[49] And judges have scolded university administrators for astonishing failures to protect students' due process rights.[50] In a case involving Brandeis University, one judge characterized the university's procedures—which administrators said they established "in conformity to the various [Obama-era] guidance letters and policy statements"—as "closer to Salem 1792 than Boston, 2015."[51]

Federal appeals courts have already ruled that some of these practices extend inadequate due process protections to students. As Samantha Harris and KC Johnson summarize in an important study, a series of Sixth Circuit decisions have upheld "an accused student's right to cross-examine witnesses, to present expert testimony, to have access to potentially exculpatory evidence, and to be adjudicated before a live hearing." Indeed, even the late Justice Ruth Bader Ginsburg acknowledged problems with the Obama Administration's framework, venturing in an *Atlantic* interview that the right of the accused to a "fair

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[44] 34 CFR 106, 41483.
[45] 34 CFR 106, 41486.
[46] 34 CFR 106, 41503.
[47] 34 CFR 106, 41500.
[48] *Title IX lawsuits database*. Title IX for All. (2022, August 28). Retrieved September 7, 2022, from https://titleixforall.com/title-ix-legal-database/
[49] Shapiro, T. R. (2017, April 28). *Expelled for sex assault, young men are filing more lawsuits to clear their names*. The Washington Post. Retrieved September 7, 2022, from https://www.washingtonpost.com/local/education/expelled-for-sex-assault-young-men-are-filing-more-lawsuits-to-clear-their-names/2017/04/27/c2cfb1d2-0d89-11e7-9b0d-d27c98455440_story.html
[50] Harris, S and Johnson, KC (2019). *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*. Journal of Legislation and Public Policy (22: 49), 72.
[51] *John Doe vs. Brandeis University* (2015). U.S. District Court, District of Massachusetts, Motion hearing, October 5, 2015. Retrieved August 2, 2022, from https://kcjohnson.files.wordpress.com/2020/05/brandeis-hearing-transcript.pdf

hearing" is a "basic tenet[] of our system" and that "criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard" is valid.[52]

The existing rule requires all universities to adopt practices that will survive judicial scrutiny. The proposed new rule, in contrast, would lead to a situation in which schools in some parts of the country are required to extend stronger due process protections to students than the proposed federal regulations require, leaving others to revert to Obama Administration-era practices. At a minimum, ED should rethink the minimum due process protections it requires schools to extend to respondents so that they are in alignment with the strongest requirements to this point articulated by federal appeals courts. If not, the result will be a situation in which a student's due process rights vary widely depending on which federal appeals court has jurisdiction—a recipe for confusion and further legal challenges. It will also expose universities to additional and unnecessary litigation risk where administrators revert to aspects of the flawed Obama Administration-era paradigm, costs that are not addressed in the NPRM. At a minimum, they must be discussed in the final rule.

Most importantly, proposed §106.45(h)(1) should be amended to require recipient institutions use the clear and convincing evidentiary standard of proof. Any standard less rigorous than this will not satisfy the constitutional concerns that the Obama Administration-era Title IX sexual misconduct investigations crystalized. In *Wisconsin v. Constantineau*, the Supreme Court held that, "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential."[53] Notice and a hearing are central tenants of due process. A hearing is meaningless without a credible standard of proof, which is a legal construct central to our adversarial justice system. In *Addington v. Texas*, Chief Justice Warren Burger explained that "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[54] *Addington* teaches that the specific standard of proof employed in a controversy, adjudication, or litigation contemplates a societal judgment about how best to allocate the risk of error, a sort of due process cost-benefit analysis. Standards of proof are, thus, chiefly concerned with probabilities, the minimization of factual errors, and the aspiration that the truth will be discovered or, at the very least, reasonably approximated. As a result, the greater the interest at stake, the higher the standard of proof.

Unlike the anemic preponderance of the evidence standard, the clear and convincing evidentiary standard requires "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'"[55] In the Title IX context, given the virtually irreversible reputational damage that a student accused of, and found liable for, sexual misconduct sustains, principles of due process require elevated quanta of proof. Any evidentiary rule short of clear and convincing will only reinstate the sham due process regime that the Trump Administration drove a stake through when it rescinded the Obama Administration guidance in this realm.

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[52] Rosen, J. (2019, March 6). *Ruth Bader Ginsburg opens up about MeToo, voting rights, and millennials*. The Atlantic. Retrieved September 7, 2022, from https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millenials/553409/

[53] *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

[54] *Addington v. Texas*, 441 U.S. 418, 423 (1979).

[55] *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1983)).

5. The proposed rule will require the establishment of processes and policies that unconstitutionally chill student and faculty speech.

The Obama Administration-era guidelines made it possible for students to set off onerous and reputation-damaging investigations by making complaints targeting students and faculty with whose views they disagreed. One of the most telling examples occurred at Northwestern University, where two students filed a complaint when a feminist professor published an essay in the *Chronicle of Higher Education* criticizing "sexual paranoia" and the expanding reach of Title IX investigations in general.[56] The long investigation into Professor Kipnis that ensued ensnarled a second professor who had the temerity to point out that the investigation was itself a violation of academic freedom.[57] When she published a follow-up essay describing her Title IX experience, she was reported again. At Howard University, student complaints to the Title IX officer over a test question involving "A Brazilian wax and an upset client" resulted in an investigation that dragged on for more than a year; it ultimately found the professor responsible for sexual harassment.[58] And at Harvard University, 50 students used the Title IX process to file complaints against Supreme Court Justice Brett Kavanaugh, who periodically taught a course at the law school, over allegations that surfaced during his confirmation hearings.[59]

The list of such investigations is a long one. But it only captures the controversies that have been publicized. Untold numbers of students and faculty have suffered quietly through frivolous inquisitions made possible by the weaponization of Title IX, a campus trend that has mirrored the emergence of cancel culture on social media. What is more, as Title IX offices grew in size, they began to create work for themselves by actively soliciting complaints from students (in some cases, to punish faculty members for publishing controversial research).[60] Students, for their part, know that they can punish faculty who dare to express heterodox, generally conservative, viewpoints by setting off a social media swarm and/or complaining to administrators.[61] Faculty have adapted to the new environment by changing what and how they teach. For example, law professors report that they avoid teaching rape law in criminal law classes because "it's not worth the risk of complaints of discomfort by students," a development that ultimately harms students by impoverishing the campus intellectual environment—and could have significant public

[56] Kipnis, L. (2015, February 27). *Sexual Paranoia Strikes Academe*. The Chronicle of Higher Education. Retrieved August 1, 2022, from https://www.chronicle.com/article/sexual-paranoia-strikes-academe/
[57] Kipnis, L (2015, March 29). *My Title IX Inquisition*. The Chronicle of Higher Education. Retrieved August 1, 2022, from https://www.chronicle.com/article/my-title-ix-inquisition/
[58] FIRE Newsdesk (2017, July 6). *Ouch! Brazilian wax test question nets Howard University professor a 504-day Title IX investigation, sanctions*. Retrieved August 1, 2022, from https://www.thefire.org/a-sticky-situation-at-howard-university-brazilian-wax-test-question-nets-professor-a-504-day-title-ix-investigation-sanctions/
[59] Wermund, B. (2018, October 3). *Harvard students file complaints saying Kavanaugh violates sexual harassment policies*. *Politico*. Retrieved August 1, 2022, from https://www.politico.com/story/2018/10/03/harvard-law-students-kavanaugh-title-ix-827773
[60] Yenor, S. (2022, June 6). *Inside the Title IX Tribunal – Scott Yenor*. Law & Liberty. Retrieved September 7, 2022, from https://lawliberty.org/inside-the-title-ix-tribunal/
[61] American Council of Trustees and Alumni (ACTA) (2021, August). *Building a Culture of Free Expression in the Online Classroom*, p. 5-10. Retrieved September 7, 2022, from https://www.goacta.org/wp-content/uploads/2022/03/Building-a-Culture-of-Free-Expression-in-the-Online-Classroom_Revised.pdf

safety implications in the long term.[62] Others, including gifted teachers and researchers,[63] have left the academy altogether citing "administrator[s' abdication of] the university's truth-seeking mission."[64]

Unsurprisingly, the development of Obama Administration-era Title IX policies and their enforcement coincided with the well-documented rise in student self-censorship that has made it difficult to discuss an array of important public policy issues in college classrooms and cafeterias. The largest study of its kind, a 2021 Foundation of Individual Rights and Expression (FIRE) survey of 37,000 students on over 150 U.S. campuses, found that 83% of students could recall an occasion in which they felt they could not express an opinion "because of how students, a professor, or the administration would respond."[65] This is probably why 51% said that it is difficult to have an "open and honest conversation" about "racial inequality" on their campus. (Forty-four percent said the same about abortion and 40% said it is difficult to have open and honest conversations about transgender issues).[66] Conservative students self-censor at higher rates than their liberal peers, according to several studies.[67]

The proposed rule will make this bad situation worse. In addition to broadening the definition of harassment to include "unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on the totality of the circumstances and evaluated *subjectively and objectively*, denies or limits a person's ability to participate in *or* benefit from [a school's] education program *or* activity," [emphasis added] the proposed regulations extend Title IX protections to discrimination based on "sexual orientation," "gender identity," and "sex characteristics" (Proposed §106.2 and §106.10). To parse that another way, unwelcome speech about gender identity subjectively judged to limit a student's ability to participate in, or benefit from, an educational activity could violate the Biden Administration's proposed rule.

It is not hard to imagine what will happen when Title IX administrators begin receiving complaints about improper pronoun use and the expression of "offensive" viewpoints regarding biological sex differences. Students will claim that offensive speech has harmed them in a way that limits their ability to "benefit from" an education program or activity; the Title IX investigatory apparatus will spring into high gear; some of those who are accused will be punished, and others subjected to burdensome and humiliating investigations, but all will learn there are consequences for venturing disfavored viewpoints that touch on sexual orientation or gender identity. To borrow from the eloquent response of then-Judge Clarence Thomas who, during his 1991 confirmation hearing to the Supreme Court, castigated the Senate Judiciary Committee for its bad faith, last minute investigation into specious allegations against him of workplace harassment: "This is not an opportunity to talk about difficult matters privately or in a closed environment. This is a circus. It's a national disgrace." A philosophical conservative on matters of race

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[62] Gersen, J. (2014, December 15). *The Trouble with Teaching Rape Law*. The New Yorker. Retrieved August 1, 2022, from https://www.newyorker.com/news/news-desk/trouble-teaching-rape-law

[63] Peterson, J. (2022, January 19). *Why I am no longer a tenured professor at the University of Toronto*. The National Post. Retrieved August 2, 2022, from https://nationalpost.com/opinion/jordan-peterson-why-i-am-no-longer-a-tenured-professor-at-the-university-of-toronto

[64] Miller, M. (2021, September 8). *Portland professor resigns, saying university turned into 'social justice factory.'* The Washington Examiner. Retrieved August 2, 2022, from https://www.washingtonexaminer.com/news/portland-professor-resiogns-university-turned-into-social-justice-factory

[65] Foundation for Individual Rights and Expression (FIRE) and College Pulse (2021). *2021 College Free Speech Rankings Data*, Question 21. Retrieved August 2, 2022, from https://public.tableau.com/app/profile/college.pulse/viz/2021CollegeFreeSpeechRankingsData/2021CollegeFreeSpeechRankingsData

[66] Ibid., Question 25.

[67] Ibid., Question 21. See also Stiksma, M. (2021). *Understanding the Campus Expression Climate: Fall 2020, p5.* Heterodox Academy. Retrieved September 7, 2022, from https://heterodoxacademy.org/wp-content/uploads/2021/03/Campus-Expression-Survey-Report-2020.pdf

and racial justice, Justice Thomas then, as students now who deviate from ideological orthodoxy on trans issues, faced "a high-tech lynching for uppity blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that unless you kowtow to an old order, this is what will happen to you."[68]

Moreover, on campuses today, an even closer analogue may be bias incident response teams and overly broad discriminatory harassment policies, which allow students to report offensive speech to administrators. Several federal appeals courts have ruled that such policies appear to have an unconstitutional chilling effect, even in cases where protected speech is not specifically prohibited and where the response teams lack the power to mete out formal punishment.[69] In a case involving the University of Central Florida, the Eleventh Circuit remanded the case to the district court, noting that "the discriminatory-harassment policy likely violates the First Amendment on the grounds that it is an overbroad and content- and viewpoint-based regulation of constitutionally protected expression."[70] As such, it is not sufficient for ED to acknowledge that "the First Amendment may prohibit a recipient from restricting the rights of students to express opinions about one sex that may be considered derogatory"—as though this type of inquisition is allowable as long as those accused of Title IX violations for protected speech are not, in the end, formally punished.[71] It must also specifically address the likelihood that its proposed rule will lead to the establishment of overbroad policies and disciplinary processes that cause objectively reasonable students (and faculty) to exercise prior restraint to avoid becoming subject to an onerous and reputation-damaging Title IX investigation.[72] Policies that have a chilling effect on speech at public universities are also unconstitutional.

If the new regulations are adopted, the policies that schools devise to comply with them will inevitably contain a constitutional time bomb, namely, an inherent conflict with the First Amendment's guarantee of religious liberty. Indeed, the Sixth Circuit Court of Appeals has already ruled in *Meriwether v. Hartop, et al.*, that state universities cannot punish a faculty member for refusing to use feminine pronouns to address a biologically male student.[73] ED must, therefore, address the foreseeable collision of the Title IX

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[68] Thomas, C (1991, Oct. 11). *Statement Before the Senate Judiciary Committee.* American Rhetoric https://www.americanrhetoric.com/speeches/clarencethomashightechlynching.htm

[69] See, for example, *Speech First, Inc. v* Fenves, which prompted the University of Texas—Austin to abandon its bias response team and make changes to several policies that were constitutionally suspect. https://reason.com/wp-content/uploads/2020/10/SpeechFirstvFenves.pdf.

[70] *Speech First v. Alexander Cartwright* (2021). United States Court of Appeals for the Eleventh Circuit, No. 21-12583, https://speechfirst.org/wp-content/uploads/2021/02/UCF-Op-2.pdf

[71] 34 CFR 106, 41415.

[72] In *Speech First v. Cartwright*, the Eleventh Circuit finds fault with the University of Central Florida's overbroad "discriminatory harassment policy" and "bias related incidents policy" on grounds that will likely apply to Title IX policies established to comply with the proposed rule: "No reasonable college student wants to run the risk of being accused of "offensive," "hostile," "negative," or "harmful" conduct—let alone "hate or bias." Nor would the average college student want to run the risk that the University will "track[]" her, "monitor[]" her, or mount a "comprehensive response[]" against her. And as with the discriminatory-harassment policy, the breadth and vagueness of the bias-related-incidents policy exacerbates the chill that the average student would feel." *Speech First v. Cartwright*, No. 21-12583, 27. Retrieved September 7, 2022, from https://speechfirst.org/wp-content/uploads/2021/02/UCF-Op-2.pdf

[73] *Meriwether v. Hartop, et al.* (2021). United States Court of Appeals for the Sixth Circuit, No. 20-3289. Retrieved September 7, 2022 from https://www.opn.ca6.uscourts.gov/opinions.pdf/21a0071p-06.pdf See also Pidluzny, J. (2021, April 1). *Appeals Court Reminds Shawnee State that the First Amendment Protects Faculty Speech*. ACTA: The Forum. Retrieved August 2, 2022, from https://www.goacta.org/2021/04/appeals-court-reminds-shawnee-state-that-the-first-amendment-protects-faculty-speech/

investigative apparatuses required by the proposed rule with student and faculty free exercise of religious rights, a discussion that is conspicuously absent from the NPRM.

Efforts to forbid unwelcome speech will always do more harm than good at institutions with a truth-seeking mission because what constitutes offensive speech is an inherently subjective judgment with immense variation between individuals. The current regulation adopted the Supreme Court's definition of sexual harassment, as articulated in *Davis v. Monroe County Bd. of Ed.* According to that standard, a school can be held liable for "student-on student" harassment when the university has "actual knowledge" of misconduct that is "so severe, persistent, and objectively offensive that if effectively bars the victim's access to educational opportunity" and school officials respond with "deliberate indifference."[74] This is the appropriate definition of sexual harassment for a Title IX regulation because it is compatible with strong protections for students' constitutional rights. At a minimum, the final rule should retain it and the constitutional safeguards inherent in its formulation.

6. The proposed rule purports to answer a "major question" of the kind addressed by *West Virginia v. EPA*.

The Department is blazing forward with these cultural shifting proposed rules even in the face of *West Virginia v. EPA*, which limits the power of agencies to adopt regulatory programs that "Congress has conspicuously declined… to enact itself".[75] Nor does Congress "typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[76] In his concurrence, Justice Neil Gorsuch offers guidance about "when an agency action involves a major question for which clear congressional authority is required": "First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great 'political significance,' …. [s]econd… when it seeks to regulate 'a significant portion of the American economy,'… [and t]hird,… when an agency seeks to 'intrud[e] into an area "that is the particular domain of state law.'"[77]

The proposed Title IX regulations clearly fall into two of the three categories. Redefining sexual harassment in ways that confuse biological sex and gender identity, especially in the context of minor students where serious medical and psychological issues are raised, is of immense social, political, and cultural significance. Likewise, a government action that would significantly reduce the role of parents and increase power of educational institutions should come (if it must) via representative lawmaking. So, too, changes in how universities investigate putative offensive speech that raise serious due process and free speech concerns—changes that will fundamentally transform the culture of truth-seeking institutions—should not be dictated by administrative edict. The proposed regulations, if implemented, will set up additional areas of litigation, with more needless taxpayer costs attached. Given how clearly the principle articulated in *West Virginia v. EPA* applies to the proposed Title IX regulation, the Department should withdraw the rule and, instead, make its case to the people's representatives in Congress.

Notably, Justice Gorsuch stated that "[w]hen an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States." Section 106.6(b) of the proposed regulations makes clear that the obligation to comply with the proposed regulations is not "alleviated by any State or local law or other requirement."

[74] *Davis v. Monroe County Bd. Of Ed.*
[75] *Virginia v. EPA*, No. 20-1530, 20. https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf
[76] Ibid., 18.
[77] Ibid., 9.

Therefore, these regulations will create legal uncertainty about the enforceability of state laws protecting parental rights and female athletics where they conflict with the new federal Title IX regulations. *West Virginia v. EPA* is, thus, on point here, too. With this proposed rule, the executive branch, through an undelegated exercise of administrative authority, is attempting to preempt state law in education, an area in which federal authority is limited and state authority expansive.

7. The proposed rule includes new definitions that will require colleges and universities to provide health care services and insurance that could raise religious liberty issues.

In addition to expanding the definition of sexual harassment to include "gender identity," the proposed Title IX regulation redefines "pregnancy or related conditions" to include "medical conditions related to… termination of pregnancy" and "recovery from… termination of pregnancy" (§106.2). As a result, students will be able to allege "sex discrimination" under Title IX if schools that provide medical services (or insurance) do not cover treatment related to gender transition and termination of pregnancy. This will be unduly burdensome for many schools to navigate, particularly in states that have strong protections for unborn life. The changes could pose special difficulties for university employees working in healthcare roles who have religious objections to providing some forms of medical care related to abortion or gender transition. The final rule should acknowledge these concerns and clearly exempt university personnel from being required to deliver health services that violate their religious commitments. The rule should also make clear that it is not discrimination under Title IX if an employee declines to provide medical care or services when it conflicts with his or her deeply held religious beliefs.

8. The proposed rule should not be finalized if changes to the Free Inquiry and Religious Liberty rule are being contemplated.

While the NPRM does not propose revisions to an important section of the regulation exempting institutions that are controlled by a religious organization (§106.12), a separate rulemaking to revise the Trump Administration's "Free Inquiry and Religious Liberty" rule has been announced and is underway.[78] That process could result in a regulation that rescinds or revises the religious liberty protections in §106.12 of the current Title IX regulation.[79] Such a change would dramatically increase the relevance of this rulemaking to religious IHEs—after the comment period has ended. To change the population of schools profoundly affected by this rulemaking after the final rule has been issued would deny them opportunity to comment on the proposed Title IX rule with a reasonable understanding of how they will be affected. To continue down this path suggests cynical political expediency, at best, or bad faith and hostility toward faith, at worse. In either event, the proposed rule should be held in abeyance unless and until the Department makes a determination regarding its view of the Free Inquiry and Religious Liberty rule.

[78] Cooper, M. (2021, Aug. 19). *Update on the Free Inquiry Rule*. U.S. Department of Education. Retrieved September 7, 2022, from https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/

[79] Office of Information and Regulatory Affairs (2022). *Meetings Search Results: Religious Liberty and Free Inquiry Rule.* Retrieved September 7, 2022, from https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=202204&rin=1840-AD72&viewRule=true