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Submitted Electronically to
Regulations.gov
Hon. Miguel Cardona
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance
Docket ID No. ED-2021-OCR-0166
87 FR 41390 (July 12, 2022)

Dear Secretary Cardona:

Southeastern Legal Foundation (SLF) appreciates the opportunity to submit these comments on the Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" to the Department of Education. SLF is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Since 1976, SLF has been going to court for the American people when the government overreaches and violates their constitutional rights.

Today, we find ourselves on multiple battlegrounds fighting to save the American Republic. One of the most important battlegrounds is America's schools. Antidiscrimination laws like Title IX ensure equal opportunity for all students regardless of sex, race, or other protected classifications. These laws represent years of hard-fought battles to ensure that every American is treated equally, as enshrined in our Constitution and Declaration of Independence. And just as equal treatment furthers the ideals of our nation's founding, so does open discourse. A college campus is the "marketplace of ideas" where students are exposed "to that robust exchange of ideas which discovers truth."[1] Freedom of speech and academic inquiry are "vital" on college campuses, because only through thoughtful debate and discourse can real education occur.[2] Likewise, K-12 students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[3] Even though K-12 schools stand *in loco parentis* at times, they cannot replace

[1] *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967).

[2] *Healy v. James*, 408 U.S. 169, 180 (1972).

[3] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

parents. Parents play a valuable role—and the primary one—in the upbringing of their own children.

Yet the Biden Administration's proposed changes to Title IX, set forth in this arbitrary and capricious rule, would chip away at parents' rights, making the government their children's ultimate caregiver. The changes would do away with students' freedom of expression while reversing years of progress toward true equality. They would, in an unprecedented manner, impose a nationwide orthodoxy on all parents, students, and teachers in any school receiving federal funds. This is all on top of the arbitrary and capricious nature of the proposed rule.

The Department is redefining Title IX in a vague and overbroad manner, setting schools back by decades and forcing students to guess at what could offend their peers.

For decades now, the legal standard for harassment under Title IX has been settled. Harassment exists where conduct is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[4] The Department of Education promulgated this in 2020, defining sexual harassment as "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[5]

This standard is a high one, and rightfully so. First, it captures the main purpose of Title IX: ensuring equal access to education regardless of sex. Second, it ensures that protected speech—including so-called "hate speech" and offensive speech—are not swept into the definition for harassment. Third, it requires schools to be objective in how they assess claims of harassment to determine whether discrimination on the basis of sex has occurred.

But under this administration's arbitrary and capricious rule, the standard for harassment will change drastically. The proposed rule seeks to ban "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[.]"[6] From the start, this new rule shifts the standard from an objective to a subjective one by removing the reasonable person standard from the equation and allowing schools to examine the harassment from both an objective *and* subjective perspective. Then, it lowers the threshold for establishing harassment by only requiring schools to consider whether conduct is severe *or* pervasive, a departure from the *Davis* standard that requires *both* elements to be met. Finally, the proposed rule does not merely ban harassment that denies access to educational opportunities, but it even bans harassment that merely "*limits* the ability to *participate*" in an educational program. Each of these provisions filters harassment through the complainant's perspective, reeling back a purely objective approach under the current rule that affords due process to the accused. By requiring schools to assess complaints primarily from the

[4] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

[5] 34 CFR 106.30(a)(2).

[6] 87 FR 41410.

complainant's point of view and to consider whether perceived harassment merely limits the complainant's participation in an educational program, the Biden Administration will significantly lower the standard for harassment and open the floodgates to findings of discrimination.

Given its subjective nature, the proposed standard for harassment is unconstitutionally vague and overbroad. A policy violates the Constitution when it is so broad that it infringes on constitutionally protected speech. Similarly, a law or policy is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning[.]"[7] Vague and overbroad policies are especially dangerous when students must hazard guesses as to what conduct or speech is punishable; students cannot be expected to comply with a vague school policy when they have no way of knowing exactly what is required or prohibited. But under the Biden Administration's proposed changes to the standard for harassment under Title IX, students will now be expected to guess whether a classmate would consider certain speech severe, or pervasive, or subjectively offensive.

Worse, the proposed rule seeks to expand sex-based harassment to include "harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[8] Harassment based on sex stereotypes is in itself vague and has never been specifically included in the scope of Title IX.[9] More egregiously, sex characteristics, sexual orientation, and gender identity do not appear once in the current rule as included within the scope of Title IX. Despite this, the proposed rule fails to adequately define what any of these new terms mean. Instead, it merely relies on past OCR guidance and Dear Colleague letters—most of which were rescinded or found unlawful—to conclude that sexual orientation, sex characteristics, and gender identity should be included within the scope of Title IX.[10] Because the Department fails to explain what exactly constitutes harassment based on sex stereotypes, sex characteristics, sexual orientation, or gender identity, this provision is unconstitutionally vague and overbroad. Without clear guidelines and definitions, the proposed rule allows individuals to decide for themselves whether speech triggers one of these protected categories and whether that speech is offensive.

What offends one person might not offend another. For this reason, offensive speech has long been protected by the Constitution.[11] But given the subjectivity of the proposed rule, offensive speech—or speech that individuals *perceive* to be offensive—will no longer be protected. That could include expressing one's belief that there are only two genders, stating that marriage should

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[7] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

[8] 87 FR 41410.

[9] The Department misleadingly suggests that the current rule specifically includes sex stereotypes within the scope of Title IX. *See* 87 FR 41528. But the current rule only says that officials cannot employ sex stereotypes during the grievance process (such as assuming that women are typically the victims of sexual assault). 34 CFR 106.45(b)(1)(iii).

[10] *See id*. at 41528-29.

[11] *See, e.g., Texas* v. *Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) ("Giving offense is a viewpoint.").

be between one man and one woman, misgendering another student, or even expressing concerns about sharing facilities with students of a different biological sex.

With this change, harassment will no longer be a legal term that schools can readily identify and investigate. Rather, it will become a malleable standard, allowing each school to define for itself what counts as harassment. And in turn, given the subjective nature of this new rule, each school will be required to let individual students define harassment for themselves. Whether a student engages in harassment will ultimately depend on what his classmate perceives to be offensive.

Through the proposed rule, the Biden Administration chills expression.

As we've seen these past few years, cancel culture is a pandemic itself. One need only say something that could be perceived in a remotely offensive way, and she is shouted down, unfollowed on social media, threatened, and even fired from work or expelled from school. Unfortunately, nowhere is cancel culture more visible than on school grounds. Studies show that censorship on college campuses is at an all-time high.[12] The Biden Administration's proposed changes to Title IX will only exacerbate this problem.

A chilling effect exists when a speaker objectively fears that speaking will result in discipline and as a result censors her speech altogether. The Supreme Court repeatedly writes that the danger of chilling speech "is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[13] Any action taken by government authorities that has a chilling effect on speech is unconstitutional.[14] And even when a government official lacks the authority to impose discipline, the mere appearance of authority is enough to objectively chill and censor speech.[15] This is especially true when schools rely on reporting systems, through which students can report their peers for any perceived violation of school policies.[16]

The proposed changes to Title IX include opportunities for college and K-12 students to report one another for harassment. For example, the proposed rule requires schools "to monitor barriers in the recipient's education program or activity to reporting information about conduct that may constitute sex discrimination under Title IX," and then "take steps reasonably calculated to address barriers that have been identified."[17] In other words, schools must now set up reporting systems to ensure that students can report each other for perceived harassment and discrimination.

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[12] College Pulse, et al., *2021 College Free Speech Rankings: What's the Climate for Free Speech on America's College Campuses?*, https://reports.collegepulse.com/college-freespeech-rankings-2021; Knight Foundation, *College Students Support the First Amendment, but Some Favor Diversity and Inclusion Over Protecting the Extremes of Free Speech* (May 13, 2019), https://knightfoundation.org/press/releases/college-students-support-first-amendment-some-favor-diversity-and-inclusion-new-knight-report/.

[13] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995).

[14] *Id.*

[15] *Speech First, Inc. v. Fenves*, 979 F.3d 319, 333 (5th Cir. 2020).

[16] *Id.*

[17] 87 FR 41435.

Moreover, the proposed rule *requires* staff, including teachers and coaches, to report any "information about conduct that *may* constitute sex discrimination under Title IX."[18] Whereas the current rule only obligates schools to remedy discrimination when they have actual knowledge of harm, the new rule demands that teachers and coaches report anything that could be considered discriminatory. Based on the Department's proposed definition of harassment, that means reporting anything that could be considered offensive. If students approach a coach with concerns about competing against members of another sex, the coach would have a duty to notify the school, subjecting the students to an investigation and discipline. Likewise, a teacher who overhears a joke between friends after class would be required to report it to the Title IX coordinator, even if neither friend took offense. Even off-campus speech is not safe; staff have a duty to report social media posts that might be considered offensive.[19] Not only will this change impose significant costs on schools as they develop more resources, training sessions, and reporting forms to meet this requirement, but it will also impose a chilling effect on speech.

There is also a real risk of abuse with reporting forms. Just as students have abused COVID reporting forms in the past to silence their peers by falsely reporting them for COVID violations, students will falsely report their peers for discrimination.[20] With reporting forms at their fingertips, students can silence their classmates at the press of a button. Not only does the proposed rule allow this heckler's veto, but it *welcomes* it by forcing schools to maintain reporting systems to track claims of harassment and by removing some of the First Amendment protections specifically expressed in the current rule.

The consequences of being reported for harassment can be devastating, especially because previous safeguards—such as the requirement that perceived harassment be *objectively* offensive and the reminder that schools cannot retaliate against protected speech—have been removed entirely in the proposed rule.[21] The proposed rule will force students to hazard guesses about what could offend their peers. Given the subjectivity infused in the rule, that could mean anything. The proposed rule also establishes a tattletale regime that encourages students and staff to report anything that seems offensive, whether on or off campus. Rather than risk being reported to a school for expressing their views and facing discipline without adequate due process, students will choose to self-censor. This forced censorship is unconstitutional.

Through the proposed rule, the Biden Administration demands conformity to its views.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[22] The government can never

[18] *Id*. at 41436 (emphasis added).

[19] *Id*. at 41440.

[20] *See 1A – University of North Florida*, Southeastern Legal Foundation, www.slfliberty.org/case/1a-university-of-north-florida/.

[21] 87 FR 41410, 41543.

[22] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

promote or discourage speech based on a speaker's message or motivating ideology, nor can it command individuals to affirm beliefs they do not agree with.[23]

Yet the proposed changes to Title IX do exactly that. By using vague and overbroad language that deters students from sharing their views, the Biden Administration is opening the door to viewpoint and content discrimination. Perhaps most egregiously, the proposed rule would "eliminate the prohibition on the decisionmaker being the same person as the Title IX Coordinator or investigator."[24] In other words, a single school official would have the authority to receive reports of harassment, investigate them, and punish them.

Besides raising serious due process concerns, this provision gives school officials unbridled discretion to discriminate against certain views while favoring others. For example, if a student were to express her views that there are only two genders, she could be reported through her school's Title IX reporting system. Reports would likely go to the school's Title IX Coordinator or a similarly situated official, who must then investigate whether her speech was severe or pervasive, whether it seems offensive, and whether the totality of the circumstances indicate harassment. Under the proposed changes to Title IX, the Title IX Coordinator could himself conclude whether harassment occurred and what punishment to dole out. This gives a single school official broad discretion to insert his own biases and views by assessing whether *he* personally would be offended by the student's speech, whether *he* personally finds the student's views unwelcome, and which facts *he* considers relevant when assessing the totality of the circumstances—which could very well include the views of the parties involved. Such unbridled discretion is unconstitutional.[25]

The Department claims that concerns about abuses of power are unwarranted because the role of the Title IX Coordinator "does not create an inherent bias or conflict of interest in favor of one party or another."[26] But that ignores the incentives present that would encourage such officials to find harassment. First, if harassment occurs but a school does not redress it, the school could lose federal funding. But if there is nondiscriminatory conduct that the school nevertheless redresses, it loses nothing. Moreover, a Title IX Department cannot stay relevant on campus unless there is sex-based discrimination to remedy. A Title IX Coordinator will thus be incentivized to find discrimination and harassment on campus to remain employed.

The proposed rule also encourages schools to counter "derogatory" opinions with which they disagree by affirming their commitment to "nondiscrimination" and ensuring that "competing views are heard."[27] In doing so, the rule gives schools the authority to declare what is orthodox on

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[23] *See id*; *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 579 (1995); *Rosenberger*, 515 U.S. at 820; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

[24] 87 FR 41466.

[25] *See Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757 (1988).

[26] 87 FR 41467.

[27] *Id.* at 41415.

campus, what views are acceptable, and what views will not be tolerated. This will not simply chill speech, but it will allow schools to discriminate against both the viewpoint and content of speech. Worse, it undermines the authority of parents to raise their children a certain way. By letting schools demand that students hold certain beliefs and values, this proposed rule will erase parents' rights and duties to bring up their children.

Similarly, the proposed rule gives schools leeway to unconstitutionally compel speech that conforms with the government's views. For example, a school may adopt an anti-harassment policy under this rule that requires students and teachers to use students' preferred pronouns or face punishment. A student or teacher may hold the view that there are only two genders, and that changing the English language to accept an infinite number of pronouns is wrong. But because this arbitrary and capricious rule does not make it abundantly clear that such compulsion is unconstitutional and will not stand, they face the risk of being forced to abandon their beliefs. By vaguely including harassment based on gender identity, stereotypes, and sex characteristics as forms of discrimination, the Biden Administration leaves it open to each school to decide what counts as sex-based harassment. Such a policy thus sweeps protected speech into its purview, allowing schools to set the terms of engagement. But it is well settled that compelling individuals to affirm the government's beliefs is unconstitutional.

The Department has not assessed whether this rule strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children, as required by law.

The Department must assess whether the proposed rule "strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children," as required by the Treasury and General Government Appropriations Act.[28] The Department will no doubt find that the rule erodes parental authority and supervision. In addition to the concerns expressed above, the proposed rule will undermine parental consent, particularly when it comes to the health of their children. Schools frequently withhold information—and instruct teachers to withhold information—about students seeking to change their gender, pronouns, and names.[29] This rule will

[28] Pub. L. No. 105-277, § 654 (1999).

[29] Jessica Chasmer, *Ohio School District Tells Teachers They Don't Have to Inform Parents of Students' Name, Pronoun Changes*, Fox News, (Sept. 8, 2022), www.foxnews.com/politics/ohio-school-district-tells-teachers-they-dont-have-to-inform-parents-students-name-pronoun-changes; Evan Gerstmann, *Court Enjoins School District from Withholding Information from Parents about Their Children's Gender Identity*, Forbes, (Oct. 1, 2020), www.forbes.com/sites/evangerstmann/2020/10/01/court-enjoins-school-district-from-withholdinginformation-from-parents-about-their-childrens-gender-identity/?sh=7fdb50bc5fc9; Jonathan Butcher, *New Jersey Schools Want to Talk to Kids About Sex–and Keep it a Secret*, Fox News, (Apr. 14, 2022), www.foxnews.com/opinion/new-jersey-schools-phil-murphy-sex-education-jonathan-butcher; Topeka Public Schools, *Guidelines for Transgender Students at School*, Regulation No, 8100-03, (Aug. 17, 2015), https://cdn5-ss11.sharpschool.com/UserFiles/Servers/Server_8252759/File/About%20Us/Policies%20and%20Regulations/8000%20-%20Students/Reg%208100-03%20-%20Guidelines%20for%20Transgender%20Students%20at%20School.pdf; Chicago Public Schools, "Supporting Gender Diversity Toolkit," www.cps.edu/globalassets/cps-pages/services-and-supports/health-and-wellness/healthy-cps/healthy-environment/lgbtq-supportive-environments/supportinggenderdiversitytoolkit2.pdf.

only further those efforts, and it is just the tip of the iceberg when it comes to hiding information from parents about their own children.

The proposed rule is arbitrary and capricious.

The Department's proposed changes to Title IX are arbitrary and capricious in several ways. For example, the Department fails to consider the costs of changing the rule so drastically, including costs associated with increasing resources and overseeing implementation and administration. The Department does not adequately justify its departure from the well-established definition for sexual harassment that was formulated in *Davis* and promulgated in the current rule, nor does it adequately justify expanding sex discrimination to include sex characteristics, sex stereotypes, and gender identity. And the Department does not provide a sufficient reason for allowing a Title IX Coordinator, or similarly situated official, to act as both investigator and decisionmaker when it comes to claims of discrimination, nor does it explain how those officials would *not* be biased during that process.

Conclusion

The Department's proposed changes redefine the entire framework for Title IX. The new rule subverts students' constitutional rights to due process and freedom of speech and undermines parents' rights to raise their children in the way they see best. These changes are arbitrary and capricious, wholly lacking an adequate foundation. With these changes, the Biden Administration will set our nation back decades from the progress it has made regarding equality, open discourse, and due process. For these reasons, we urge the Department to reconsider the proposed rule.

Yours in Freedom,

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