ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

September 11, 2022

Miguel A. Cardona
Secretary of Education
U.S. Department of Education
VIA REGULATIONS.GOV

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

The Rule Violates the Freedom of Speech, Imperils the Free Exercise of Religion, and Harms Federally Funded Schools

Dear Secretary Cardona,

Fifty years ago, Congress acted to protect equal opportunity for women by passing Title IX. Now, by radically rewriting federal law, the Biden administration is threatening the advancements that women have long fought to achieve in education and athletics. Along with denying women a fair and level playing field in sports, this new rule seeks to impose widespread harms, including threatening the health of adults and children, denying free speech on campus, trampling parental rights, violating religious liberty, and endangering unborn human life.

Alliance Defending Freedom (ADF) submits these comments on the Notice of Proposed Rulemaking (NPRM) on Title IX of the Education Amendments of 1972, Docket ID ED-2021-OCR-0166. ADF is an alliance-building legal organization that advocates for the right of all people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters involving Title IX, the First Amendment, athletic fairness, student privacy, and other legal principles addressed by the Notice of Proposed Rulemaking.

ADF strongly opposes any effort to redefine sex in federal regulations inconsistent with the text of Title IX itself, or otherwise impair the First Amendment, due process, or parental rights. ADF thus urges the Department of Education to withdraw and abandon the NPRM.

These comments focus on the negative impact of the proposed rule on the freedoms of speech, free exercise of religion, and federally-funded schools. The proposed rule threatens to censor and compel speech, trample religious exercise,

subject students and faculty to campus kangaroo-court procedures, and imperil the educational mission of schools nationwide.

I. Redefining "sex discrimination" under Title IX threatens constitutionally-protected faculty and student speech.

A. By redefining "sex discrimination" and sex stereotypes to include sexual orientation and gender identity, the Department mandates messages about sex and gender.

Under the proposed rules, 34 C.F.R. § 106.10 would provide, "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." This expansion in the context of Title IX itself jeopardizes free speech throughout America's schools, and it is constitutionally flawed when applied in any educational setting to daily conversations.

First, the inclusion of "sexual orientation" in the meaning of "sex" will lead to improper restrictions on protected speech. Just seven years ago, the Supreme Court emphasized the "good faith" in which "reasonable and sincere people here and throughout the world" have held that marriage is a permanent, monogamous, heterosexual union.[1] Despite that assurance, governments now treat the refusal to express messages in support of same-sex marriage as an act of discrimination on the basis of sexual orientation,[2] and at least one school has issued several no-contact orders under Title IX because of students' religious expression in support of traditional marriage.[3] Opinions on marriage, sexual morality, and human identity raised by the issue of sexual orientation are the sort of "things that touch the heart of the existing order" over which the Constitution guarantees "the right to differ," especially in American schools.[4] The Department should not depart from the statutory text by redefining "sex" to include "sexual orientation." At the very least, it should ensure that the regulations expressly preserve the full range of protected expression on this issue and expressly exclude such expression from the definition of "sex-based harassment" in 34 C.F.R. § 106.2.

Second, the inclusion of "gender identity" in the meaning of "sex" will lead to improper restrictions on speech and improper compulsion of speech. Students who

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[1] *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015).

[2] *See, e.g.*, *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021), *cert. granted in part*, 142 S. Ct. 1106 (2022) (Mem.).

[3] *See Perlot v. Green*, No. 3:22-CV-00183-DCN, 2022 WL 2355532, at *3–4 (D. Idaho June 30, 2022).

[4] *West Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

identify as transgender commonly request to be addressed by different names and pronouns. The use of pronouns inconsistent with a person's sex communicates a message: that what makes a person a man or a woman is solely that person's sense of being a man or a woman.[5] Students who take a contrary view of the relationship between biological sex and personal identity (for religious, philosophical, scientific, or other reasons) may be reluctant to use those terms because using them contradicts their own deeply held views. The Department already interprets refusal to use pronouns as the sort of activity it will investigate and punish.[6] Schools around the country are also punishing students and faculty for refusal to use names or pronouns inconsistent with a student's biological sex, often invoking Title IX as their basis for doing so.[7]

Policies compelling staff to use students' preferred names and pronouns have been met with legal challenge.[8] As is evident from these lawsuits, school staff members may hold religious beliefs that prevent them from personally affirming or communicating views about human nature and gender identity that are contrary to their religious beliefs, particularly for those who believe that using "preferred pronouns" communicates a message to and about the child that is untrue.[9] Such teachers are committed to respectfully addressing all students in a way that does not require them to violate their sincerely held religious beliefs, including a commitment

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[5] See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2471–73 (2018) (discussing the essential First Amendment protections for issues of public concern).

[6] *See* U.S. Dep't of Educ., Office for C.R., *Confronting Anti-LGBTQI+ Harassment in Schools* (June 2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf.

[7] *See Meriwether v. Hartop*, 992 F.3d 492, 511 (6th Cir. 2021); *Kluge v. Brownsburg Cmty. Sch. Corp.*, 548 F. Supp. 3d 814, 824 (S.D. Ind. 2021); *Ricard v. USD 475 Geary Cty., Kan. Sch. Bd.*, No. 5:22-cv-0415-HLT-GEB (D. Kan. May 9, 2022); *Loudoun Cty. Sch. Bd. v. Cross*, No. 210584 (Va. Aug. 30, 2021); *see also* Emily Matesic, *Middle Schoolers Accused of Sexual Harassment for Not Using Preferred Pronouns, Parents Say*, KKTV.com (May 15, 2022), https://www.kktv.com/2022/05/16/middle-schoolers-accused-sexual-harassment-not-using-preferred-pronouns-parents-say; Madeline Fox, *Kiel School Board Closes Title IX Investigation Over Wrong Pronouns that Prompted Threats of Violence*, Wis. Pub. Radio (June 3, 2022), https://www.wpr.org/kiel-school-board-closes-title-ix-investigation-over-wrong-pronouns-prompted-threats-violence.

[8] *See, e.g.*, Complaint filed in *D.F. v. Harrisonburg City Pub. Sch. Bd.*, Case No. CL22-1304 (Va. Cir. Ct. June 1, 2022), https://adflegal.org/sites/default/files/2022-06/DF-v-Harrisonburg-City-Public-Schools-2022-06-01-Complaint.pdf; Complaint filed in *Ricard v. USD 475 Geary Cnty., Kan. Sch. Bd.*, Case No. 5:22-cv-0415-HLT-GEB, (D. Kan. Mar. 7, 2022), https://adfmedialegalfiles.blob.core.windows.net/files/RicardComplaint.pdf.

[9] *See* Complaint filed in *D.F. v. Harrisonburg City Pub. Sch. Bd.*, Case No. CL22-1304, at ¶ 72–78.

to not lie to or intentionally deceive parents about how a student is being addressed at school, but are prevented from doing so by the imposition of such policies.[10]

The United States Court of Appeals for the Sixth Circuit recently held that such compulsion, as applied to a university professor, violates the First Amendment.[11] Shawnee State University officials punished a philosophy professor, Dr. Nicholas Meriwether, because he declined a male student's demand to be referred to as a woman with feminine titles and pronouns ("Miss," "she," etc.). Dr. Meriwether offered to use the student's preferred first or last name instead. Initially, the University accepted that compromise, only to reverse course days later. Ultimately, it punished him by putting a written warning in his personnel file and threatened "further corrective actions" unless he spoke contrary to his own philosophical and Christian convictions.[12]

In November 2018, ADF filed a lawsuit on Dr. Meriwether's behalf. Initially, a federal judge dismissed the case, but ADF appealed the decision to the U.S. Court of Appeals for the 6th Circuit. In March 2021, the 6th Circuit ruled in ADF's favor, upholding Dr. Meriwether's First Amendment rights. The 6th Circuit explained that if "professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.' That cannot be."[13]

In April 2022, Dr. Meriwether's case concluded with a favorable settlement, in which the university agreed to pay $400,000 in damages and attorney's fees, rescind the written warning it issued in June 2018, and affirm his right to address students consistent with his beliefs.[14]

B. The proposed rule's mandatory use of pronouns inconsistent with sex is unconstitutional.

As with sexual orientation, the Department should not proceed with the express redefinition of "sex" to include "gender identity." But in any event, it should

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[10] Complaint filed in *D.F. v. Harrisonburg City Pub. Sch. Bd.*, Case No. CL22-1304, at ¶ 81.

[11] *See Meriwether*, 992 F.3d at 511–12.

[12] *Id.* at 501.

[13] *Id.* at 506.

[14] ADF, Meriwether v. The Trustees of Shawnee State University, https://adflegal.org/case/meriwether-v-trustees-shawnee-state-university (last visited Sept. 7, 2022).

clarify that refusal to use names or pronouns inconsistent with sex is not prohibited discrimination, is not "sex-based harassment" as defined in 34 C.F.R. § 106.2, and does not create a hostile environment. Were the Department to fail to clarify this application of the proposed rule, the rule would be fatally vague. And were the Department to finalize the proposed rule without change, it would create conflicts with the First Amendment's free speech clause.

As written, the Department's proposed rule seeks to regulate speech by content and viewpoint, and so its enforcement is overbroad, as well as subject to strict scrutiny, with its compelling interest and narrow tailoring requirements.[15] Content- or viewpoint-based restrictions are "subject to strict scrutiny regardless of the government's benign motive."[16]

Any speech on these topics receives strong protection,[17] and the Department could not satisfy strict scrutiny to justify burdening this speech. After all, "regulating speech because it is discriminatory or offensive is not a compelling state interest."[18] The government lacks any legitimate objective "to produce speakers free" from purported bias,[19] and so any non-discrimination "interest is not sufficiently overriding as to justify compelling" speech.[20] Far from being "always" a "compelling interest," this interest is "comparatively weak" in the context of education and pronouns.[21] And any interest could be achieved in more narrow ways.

II. Redefining "sexual harassment" will harm students and restrict speech.

In the United States, colleges and universities have traditionally been bastions of free speech. People with diverse religious, political, and philosophical beliefs have been able to come together for a free and robust debate in the marketplace of ideas in university classrooms, lecture halls, quads, and dorms. And without question, students should be able to participate in the life of school and universities free of sex-based harassment.

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[15] *Reed*, 135 S. Ct. at 2227–30.

[16] *Id*. at 2228.

[17] *Loudoun Cty. Sch. Bd. v. Cross*, No. 210584, slip op. at *9–10 (Va. Aug. 30, 2021).

[18] *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019).

[19] *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 578–79 (1995).

[20] *Brush & Nib Studio, LC v. City of Phx.*, 448 P.3d 890, 914–15 (Ariz. 2019).

[21] *Meriwether*, 992 F.3d at 509–10.

The proposed rule's redefinition of "sexual harassment," however, does not advance that goal. Instead, it threatens to make universities hostile toward religious, political, and philosophical beliefs that university officials or students disfavor.

A. The proposed rule improperly lowers the threshold for sexual harassment.

All can agree that harassment based on sex is anathema to human dignity. It should not be tolerated in the educational environment, or anywhere else. But by altering the definition of "sex" and by stripping away basic due process protections, the rule creates the conditions where baseless charges of discrimination can be weaponized against objectively non-offensive speech pertaining to commonly debated political and social issues.

As noted above, the proposed rule mandates messages about sex and gender that conflict with many American's deeply held religious and conscientious beliefs. By expanding the definition of sex to require this speech, the rule places in the Title IX crosshairs those whose speech on oft-discussed and frequently debated questions revolving around sex and gender departs from the viewpoint mandated by the rule.

In addition to dramatically expanding the scope of speech and conduct that may be construed as harassment by expanding the definition of "sex," the proposed regulations compound this problem by lowering the threshold for sexual harassment. The proposed regulations define the hostile environment category of sex-based harassment as "[u]nwelcome 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 an education program or activity."[22] In contrast, the Supreme Court has held that, under Title IX, "a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive . . . that the victim-students are effectively denied equal access to an institution's resources and opportunities."[23] The proposed regulations depart from the Supreme Court's definition in (at least) two ways.

First, the proposed regulations insert a totality of circumstances test that will assess the offensiveness of the allegedly unlawful conduct both "subjectively and objectively," while the Supreme Court requires a demonstration of objective offensiveness. There is, of course, "no categorical 'harassment exception' to the First

[22] NPRM at 657–58 (emphasis added).

[23] *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

Amendment's free speech clause," even for objectively offensive expression.[24] The expansion of "harassment" to include even the subjectively offensive speech would create unconstitutional restrictions on speech in the name of prohibiting harassment even more likely[25] and would place recipient institutions between the Scylla of Title IX and the Charybdis of Section 1983. The Department should not expand harassment to include subjective offense. Alternatively, it should explain how recipient institutions can avoid deliberate indifference liability on the one hand without engaging in unconstitutional speech restrictions on the other.

Second, the proposed regulations would find a hostile environment where the harassment "denies or limits" participation or receipt of benefits, while the Supreme Court requires harassment that is "so severe" that a student is "effectively denied equal access to an institution's resources and opportunities."[26] Combined with the ability to consider the totality of circumstances and evaluate offensiveness subjectively, finding liability where there is any limitation, rather than outright denial, will again dramatically expand the scope of actionable harassment and again put recipients in the untenable position of either violating Title IX or restricting too much speech and violating Section 1983. The Department should adhere to the *Davis v. Monroe County Board of Education* standard for harassment, should expressly clarify that constitutionally protected speech is not harassment, and should jettison the totality of circumstances inquiry (or at least explain how this inquiry does not confer unbridled discretion on enforcing officials).

B. The proposed rule authorizes use of supportive measures and other enforcement actions to an unconstitutional degree.

The proposed rule authorizes supportive measures that directly restrict students' constitutional rights to freedom of speech.[27] At the same time, the rules define supportive measures as "non-punitive and non-disciplinary"—an apparent contradiction.[28] At least one school has imposed a no-contact order as a result of the content and viewpoint of a student's speech and then claimed there was no First Amendment violation because of the nominally non-disciplinary character of the

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[24] *Rodriguez v. Maricopa Cty. Comm. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (quotation omitted).

[25] *See 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.").

[26] *Davis*, 526 U.S. at 651.

[27] *See* NPRM at 677 (including "restrictions on contact between the parties" as an approved "supportive measure").

[28] *Id.* at 659.

order.[29] Direct restrictions on speech have a punitive effect even if the recipient institution's *purpose* is to protect one student rather than to discipline or punish another.[30]

Therefore, the Department should remove no-contact orders from the set of authorized non-disciplinary or non-punitive supportive measures. In the alternative, it should at the very least clarify that no-contact orders qualify as "[s]upportive measures that burden a respondent" under Section 106.44(g)(2) and, as such, must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity."[31] Additionally, if the Department decides to retain no-contact orders as a supportive measure, in recognition of the grave constitutional concerns at stake, including Free Speech and Due Process, the proposed rule should afford an immediate opportunity to appeal the decision.

Because no-contact orders impose a prior restraint on speech, they may not "delegate overly broad . . . discretion to a government official" responsible for implementing them.[32] As drafted, the proposed rules authorize use of no-contact orders where the coordinator subjectively finds sex discrimination *may* have occurred "as appropriate" within the coordinator's discretion.[33] In addition, the coordinator is empowered to take "other appropriate prompt and effective steps to ensure that sex discrimination does not continue . . . in addition to remedies provided to an individual complainant."[34] These broad provisions, as applied to any supportive measures that restrict a respondent's speech, do not satisfy the constitutional requirements for prior restraints on speech. In essence, this approach eviscerates any noble intentions of due process. The Department should either modify these provisions, exclude any supportive measures that restrict speech from their scope, or otherwise explain how these do not allow (or even require) coordinators to unconstitutionally restrict speech.

Further, the current rules authorize removal from campus as an emergency measure after a finding that a person's physical health and safety is at risk. The proposed rules notably remove the word "physical," which (1) dramatically expands the circumstances under which a student may be removed from campus, and (2)

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[29] *See Perlot*, No. 3:22-CV-00183-DCN, 2022 WL 2355532, at *13.

[30] *Id.*

[31] NPRM at 677.

[32] *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

[33] *See* NPRM at 676.

[34] *Id.*

directly extends this sanction to a student's words rather than actions.[35] The Department should either require the basis for emergency removal to be a finding of a threat to the *physical* health and safety of a student or clarify that the *source* of the threat cannot be the constitutionally protected speech of another student.

As an example of the kinds of free speech restrictions students already face on many campuses, as a result of this mistaken over-application of Title IX to supportive measures, the University of Idaho censored three law students earlier this year for speaking in accordance with their religious beliefs.[36] The students are members of the University of Idaho College of Law's Christian Legal Society (CLS) chapter.

The situation began when a student asked the chapter members why they believed that marriage is between a man and a woman. Members of CLS respectfully engaged with the question, and one of them explained that this view is the only view of marriage affirmed by the Bible. Another of the CLS members followed up with a handwritten note, offering further discussion so that they could understand one another's views better.

Biblical views, no matter how respectfully expressed, are often unwelcome on public campuses, however. A few days later, the student publicly denounced the CLS members at a panel with members of the American Bar Association. A third CLS member was present and spoke out, explaining that the student's characterization was inaccurate and sharing that from his perspective, religious freedom on campus was in danger.

A few days later, with no warning and no chance for the CLS members to defend themselves, the university issued no-contact orders prohibiting them from having any contact with the student who asked them a question about their religious beliefs. Shortly after, the university issued a no-contact order against one of the student's professors after he reached out to the student to see if she wanted to discuss her concerns.

Consider another example. While a graduate student in Southern Illinois University Edwardsville's Art Therapy program, Maggie DeJong, like many other students, posted materials to her social media accounts, sent messages to fellow students, and engaged in class discussions on an array of topics. But because DeJong's views often differed from those of other students in the program—views informed by her Christian faith and political stance—several of her fellow students

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[35] *Id.* at 679.

[36] Christiana Kiefer, *Title IX Proposed Changes Threaten Free Speech*, Townhall (Aug 02, 2022), https://townhall.com/columnists/christianakiefer/2022/08/02/draft-n2611108.

reported her speech to university officials. The officials then issued no-contact orders against DeJong, prohibiting her from having "any contact" or even "indirect communication" with three fellow graduate students who complained that her expression of religious and political viewpoints constituted "harassment" and "discrimination." Maggie wasn't given a chance to defend herself. When they issued the orders, university officials didn't even disclose the allegations against her, and they did not identify a single law, policy, or rule that she had violated. That's because she hadn't violated any. Despite all this, university officials threatened "disciplinary consequences" if Maggie violated the no-contact orders and copied the school's police lieutenant on each order. DeJong is suing the university for violating her civil and constitutional rights because of her viewpoint.[37]

These incidents may seem like campus squabbles, but they have a significant impact on students' future prospects and on culture as a whole. Being denounced before a panel of the Bar Association and then receiving a no-contact order from your university are not good marks to have on your track record as a law student. The mere threat of such retaliation is enough to chill free speech on campus.

Beyond that, however, what happens on campus does not stay on campus. If students learn in college that holding a traditional view—or even exploring that view—of marriage and sexuality amounts to harassment, they will carry that lesson into their lives as adults. If the Department makes its proposed changes, all such views could be seen as harassment and discrimination on campus, starting in preschool. While biblical views on sexuality may be increasingly at odds with elite cultural orthodoxy, government enforced coercion is anathema to a free society. All speech must be protected if civil discourse is to survive. If the Department implements these changes to Title IX, future professionals, politicians, artists, teachers, doctors, and scientists will all learn, from day one in a K-12 public school setting, that speech isn't really free.

Of all places, public colleges and universities should be open forums where multiple viewpoints and opinions can be freely heard, debated, and discussed. Students on a school campus should not fear violation of their free speech rights or face retaliation because their views are disliked by other students or school officials. And likewise, education officials deserve better clarity on when to defer to First

[37] ADF, Southern Illinois University Silenced Student Maggie DeJong for her 'Harmful' Beliefs, https://adflegal.org/blog/southern-illinois-university-silenced-student-maggie-dejong-her-harmful-beliefs (last visited Sept. 7, 2022); ADF, DeJong v. Pembrook, https://adflegal.org/case/dejong-v-pembrook (last visited Sept. 7, 2022).

Amendment free speech concerns in the course of Title IX proceedings, lest confusion and inconsistency of application spur a proliferation of lawsuits across the country.

On free speech, in its notice, the Department makes the generic claim that its proposed rule will not violate the First Amendment but will merely delete "redundant" provisions from the rule. In 2020, the Department added three references to the First Amendment's primacy in the event of conflict with Title IX's regulations to address "concerns for protecting academic freedom and free speech."[38] The 2022 proposed rule deletes two of the three references. The provision retained is the most prominent and broad reference of the three, indicating that the deleted references might be benign. However, these deletions, coupled with the Department's subdued discussion of the First Amendment in the preamble, and its move away from the *Davis* standard are potential cause for concern. The Department should reverse course and modify its rule to insert even stronger clarity concerning the supremacy of constitutional concerns when they conflict with Title IX. If not, costly, time-consuming, and otherwise avoidable lawsuits are likely to drain public schools' already limited resources and detract from their primary goal of educating America's students.

C. The Department *should* provide a remedy where enforcement unconstitutionally restricts students' protected expression.

In addition to correcting the substantive provisions, the Department should include a procedural mechanism to mitigate the harm of any unconstitutional restrictions on speech that do occur. One special harm resulting from Title IX enforcement actions (both disciplinary and non-disciplinary) is the record of the alleged misconduct. Schools will occasionally claim that, even when an act has been found unlawful, other rules prohibit them from correcting those records. Therefore, the Department should expressly authorize either (1) deletion (where consistent with law) or (2) correction of records (including records dealing with charges, discipline, or non-disciplinary supportive measures) whenever (a) a complaint is dismissed, (b) an informal resolution concludes without a finding or admission of fault, or (c) there's any judicial determination that punishment was unlawfully imposed. The Department should include a section expressly authorizing such action with respect to all records of enforcement, discipline, or non-disciplinary supportive measures.

III. The changes to Title IX grievance procedures are arbitrary, capricious, and reflect a failure of reasoned decision making.

The proposed rule makes a series of related changes to the Title IX grievance procedures, many of which are internally contradictory, fail to show awareness of the

[38] 85 Fed. Reg. 30026, 30373 (May 19, 2020).

changes they make, and are otherwise arbitrary and capricious. The removal of the requirement for a live hearing in postsecondary institutions is particularly egregious, especially when paired with the redefinition of sex discrimination and harassment to include gender identity or sexual orientation. At bottom, the problems and errors in the new proposed procedures are many.

A. Scope of Title IX procedures and off-campus regulatory power. 87 Fed. Reg. at 41402.

The proposed rule asserts that schools must apply their Title IX procedures to sex discrimination occurring "under the school's disciplinary authority." Under this authority, schools that "have codes of conduct that address interactions, separate from discrimination, between students that occur off campus" *also* must have policies that govern "sex discrimination that occurs in a similar context." In short, if a school disciplines for *any* conduct in a particular setting, then the fact of discipline reflects a sufficient degree of control that the school must discipline for sex discrimination in that setting.

This test seems to mean that schools would have to discipline students for sex discrimination occurring anywhere if there is *any* offense among students for which the school would discipline if it occurred anywhere. That is, if a school would discipline a student for any form of off-campus conduct, serious or minor, it must also apply the full panoply of Title IX restrictions and procedures to that activity.

This far-reaching scope of the rule to off-campus activity lacks authority in the statutory text of Title IX, and the test is arbitrary and capricious. That a school may discipline for some conduct in a particular setting does not mean that it effectively controls all conduct in that setting, but the proposed rule assumes the contrary without justification. The proposed rule considers only one side of the equation, noting the benefits of broad Title IX jurisdiction but not its downsides for administrability, cost, and student freedom.

B. Hostile environment harassment. 87 Fed. Reg. at 41413–15.

As discussed above, the proposed rule proposes to change the definition of "hostile environment harassment" to "unwelcome sex-based conduct that is sufficiently severe or pervasive, that . . . [it] denies or limits a person's ability to participate in or benefit from the recipient's education program or activity." The proposed rule acknowledges that the new formulation departs from the Supreme Court's formulation. But it then explains that case law permits it to require some conduct above and beyond what is strictly necessary to avoid sexual harassment. Having established its authority, the Department then adopts its new standard "because the [new] definition of 'sex-based harassment' covers a broader range of

sexual misconduct than that covered . . . in the current regulations," and because "Title IX's plain language prohibits any discrimination on the basis of sex."

In this regard, the proposed rule is arbitrary and capricious because it fails to give an adequate reason for the new formulation. While the Department may adopt prophylactic requirements broader than the requirement to refrain from discrimination on the basis of sex, such prophylaxis must aim to prevent actual sex discrimination. But here the Department is redefining sex discrimination itself. The Department's rationale is question-begging: it justifies a broad definition of sex discrimination by pointing out that the statute forbids sex discrimination—but what conduct amounts to sex discrimination is precisely the point in issue. The proposed rule's failure to give a rational reason for broadening the definition is arbitrary.

The proposed rule is also arbitrary because it does not explain the omission of the requirement of offensiveness. No reason is given for dropping out this critical element.

In addition, the government lacks any justification for imposing a different legal standard under Title IX in administrative enforcement proceedings than in lawsuits by private parties for damages. The constitutional requirements of clear notice and the limitations imposed by federalism are the same. Title IX cannot mean one thing in one enforcement setting, and another thing in another enforcement setting.

The Department also says that its new formulation is closer to the Title VII formulation: "this alignment will better facilitate recipients' ability to comply with their obligations" under both statutes. But the Department simultaneously admits that the analysis of whether a hostile environment exists depends on how a student reasonably perceives the environment at issue versus how an employee would perceive the environment. Given that schools must use a different analysis for students than for employees anyway, it is unclear what benefits accrue to schools from similarity between the Title VII and Title IX formulations (at least where analysis of peer-on-peer discrimination is at issue). The absence of any reason for this decision is also arbitrary.

C. Supportive Measures. 87 Fed. Reg. at 41421.

As this comment notes with serious constitutional concern, the proposed rule permits "supportive measures" that temporarily burden a respondent (but not a complainant) during the proceedings. This provision is arbitrary and capricious too because it is internally contradictory. Elsewhere, in several places, the proposed rule emphasizes the need for equitable treatment in the Title IX process as between

complainants and respondents, insisting that both are subject to the same rules. Yet here equity falls to the wayside, without acknowledgment of the departure.

What is more, permitting supportive measures that burden a respondent (but not a complainant) is irrational because, during the procedures, there is no basis to distinguish between a complainant and respondent based on their conduct (or based on anything else). Indeed, under the proposal, respondents are to be presumed innocent. The proposed rule thus gives no basis for treating respondents less favorably than complainants. This is of particular concern because Title IX complaints may be false, and complainants may seek to weaponize them to impose sex-discriminatory burdens on respondents—thus creating a Title IX violation.

The arbitrariness of this provision is only exacerbated by the fact that there are no limits to how burdensome the supportive measures may be. A respondent may be suspended from all classes and dismissed from campus based on an unproven allegation. A school need not even find that the complainant is likely to prevail on his or her claim of discrimination. This procedure utterly fails to comport with the free speech clause or the due process clause.

D. Printing Requirements. 87 Fed. Reg. at 41428.

The proposed rule would require the printing of the entire notice of nondiscrimination on materials such as handbooks and catalogs, without showing that there is a benefit beyond providing a link in these materials to the nondiscrimination notice and that any such benefit outweighs the costs of printing this statement in millions of paper-copy materials throughout the country.

The Department has failed to consider the environmental cost of this requirement. It should quantify and describe these environmental costs, as well as show why they are justified when a website link admittedly suffices in many recruitment materials. The Department must also research and provide evidence showing that people will read these notices, versus simply discarding repeated notices, and then show that the benefits of actual knowledge will in fact justify these concerns about environmental impacts. The government should also consider alternative means to share this information, such as email or more in-person events during recruitment activities or campus orientations. In the alternative, if the government finds these printing costs justifiable, it should explain why printing costs should not also be imposed to provide for broad notices of statutory and constitutional exemptions in the same policies.

E. Emergency Removals. 87 Fed. Reg. at 41452.

The proposed rule permits emergency removal of a respondent during proceedings upon a determination of an "immediate and serious threat to . . . health and safety" posed by the respondent. By eliminating the word "physical" from this phrase and by declining to clarify how grave must be the threatened harm to constitute a "serious threat," the amendment would allow immediate removal because of the possibility that one student might inflict some mental discomfort on another. The proposed rule is arbitrary and capricious for failing to acknowledge the potential for abuse that this amendment presents, let alone to determine that the potential is outweighed by any benefits it would achieve.

This standard is particularly subject to abuse when paired with the rule's expanded definition of sex discrimination to encompass gender identity, sexual orientation, and abortion. It likely threatens to remove Christian, conservative, and pro-life students from campus simply upon complaint from other students who do not share their views. Many students claim that mere disagreement with other students causes them mental distress. The agency must address this strong potential and assure the public that important safeguards will be added to these procedures to ensure that it cannot be weaponized against those with disfavored viewpoints.

F. Self-Advocacy and Parental Advocacy. 87 Fed. Reg. at 41459–61.

The proposed rule expects that college students would generally "self-advocate" in harassment proceedings. Students would be entitled to an advisor, but colleges need not allow parents to be present in the proceedings. This rule thus directly conflicts with family interests and parental rights. It also sets students up for difficulty and confusion by not permitting them appropriate legal representation during proceedings, by making them choose between their parents' support and their attorneys' help.

The proposed rule is arbitrary and capricious on this point because it gives no meaningful reason for excluding parents, or for limiting advisors to one person, either one parent or one attorney. Some college students, who may have been legally wards of their parents mere days before arriving at college, or may still be wards, may profit from parental presence. All students likely benefit from legal representation. And the proposed rule gives no countervailing interest.

The proposed rule asserts that college students are likely to be more independent than elementary and high school students, but this is not a reason to refuse parental presence for those college students still in fact sufficiently dependent on their parents to request their presence. And every adult is entitled to legal representation.

A parent's legal right to make decisions for a child is a reason to include the parent. But even if parents do not typically have a legal right to make decisions for their college-age children, the lack of a legal right is not a reason to exclude the parent, particularly when parents frequently finance college education for their children. Nor does this factor have any bearing on the right to an attorney. Parental rights and the right to legal representation both should be respected, and any burden on them must be justified to satisfy constitutional scrutiny.

The proposed rule asserts that college students may be expected to self-advocate "as part of their educational experience," but provides no evidence that this is an educational benefit. It also lacks any evidence or argument to support the idea that any claimed benefit to a student's educational experience from being made to face a Title IX proceeding without his or her parents outweighs the negative emotional, psychological, and other consequences. The rule also provides no analysis of the capabilities of students, their training or education for this process, or any proof that students are capable of self-representing. The rule lacks analysis of the value of legal representation or the important aspects of parental involvement, such as through empirical or qualitative assessments. Failure to quantify these important points, including by studies, is arbitrary.

G. Single-Investigative Decision Makers. 87 Fed. Reg. at 41466–67.

The proposed rule would "eliminate the prohibition on the decisionmaker [in harassment proceedings] being the same person as the Title IX Coordinator or investigator." The specter of a lack of due process from this change is obvious and breathtaking.

The proposed rule acknowledges the concerns of the 2020 rule in ensuring that a person's experience investigating a claim of harassment does not bias him or her in a subsequent role of determining whether harassment occurred. But it concluded that uniting the investigatory and adjudicatory roles does not raise such a risk of bias because "the recipient is not in the role of prosecutor seeking to prove a violation of its policy," but "the recipient's role is to ensure that its education program is free of unlawful sex discrimination, a role that does not create an inherent bias or conflict of interest in favor of one party or another."

This rationale is inadequate. The proposed rule's reliance on it is arbitrary and capricious. It defies all experience, as well as all common sense. It unites the role of prosecutor and judge.

Recipients have powerful incentives to err on the side of detecting and eliminating perceived discrimination. After all, if there is discrimination that they do

not adequately redress, they could lose federal funding and/or be sued without capped damages in federal court; but if there is nondiscriminatory conduct that they redress out of an abundance of caution, they lose nothing. Recipients are, if anything, more incentivized against respondents than are prosecutors against defendants, for prosecutors do not lose compensation if they fail to secure a conviction.

In any event, the most relevant question is not about the bias of the recipient institution, but of the employees who investigate and adjudicate. The discussion of the recipient's incentives is secondary to this more important question. It is also common sense that an investigator may form views in favor of one party or another during an investigation. That is why a separate adjudicator is valued in many contexts. To be sure, the need for a separate adjudicator may be overbalanced by other concerns, but that is not the Department's claim. Instead, it claims that a separate adjudicator would not do *any* good. That is implausible and unsupported.

This single-investigator model was thus rejected for good reason in 2020, and the rule does not address the strong policy reasons supporting that change. Instead, the Department just says it has a new policy view, but that is not reasoned decision making.

What is more, the reasons given for favoring a single-investigator model lack support. The Department points to difficulties experienced by small institutions in finding enough competent staff—but then on the same page discusses the use of outside investigators. A small institution could use outside adjudicators to address the concern that it has too few staff to offer separate investigators and adjudicators.

The Department points to the risk of delay because of the time it takes a separate adjudicator to become familiar with the facts the investigator has found, but the Department never contends that this risk would be great enough to outweigh the risk of bias arising from uniting the investigatory and adjudicatory roles; instead, it simply asserts, without support, that there is no such risk. The Department never even explains how long a delay is thus occasioned. Surely some delay is appropriate to ensure due process.

But the biggest problem is constitutional, when the proposed rules authorize a "decisionmaker" in a grievance process to "be the same person as the Title IX Coordinator or investigator."[39] This single-investigator model creates risks of viewpoint discrimination and undermines due process. The Department should not pursue this course.

[39] NPRM at 683.

H. Party and Witness Privacy. 87 Fed. Reg. at 41469–70.

The proposed rule would depart from the 2020 rule by requiring schools to take steps to "protect the privacy of the parties and witnesses" to a harassment proceeding. This procedure amounts to an invitation to impose gag orders.

The proposed rule's reasoning in support of this amendment is arbitrary and capricious. The Department acknowledges that the 2020 rule was concerned about ensuring parties can hold recipients to account through generating publicity about potential mishandling of harassment proceedings (a tactic that can benefit either complainants or respondents). And the proposed rule does not dispute the importance of this ability. Rather, it asserts that the amendment "would not permit a recipient to prohibit parties from criticizing the recipient's handling of the grievance procedures"—but it fails to explain how the draft regulatory text would require this outcome. Even so, that small amount of permitted speech is woefully insufficient to ensure the sunlight necessary for fair procedures.

This proposed change is contrary to the free speech interests of students, and restoring it invites arbitrary censorship of students and their families. The Department must provide a thorough First Amendment analysis. As well, the chill on speech must be quantified, supported by evidence, and discussed in terms of how other benefits outweigh the costs on liberty. It must also address the public interest in the free flow of information, which is an important goal for schools.

I. Access to Evidence. 87 Fed. Reg. at 41482.

In another departure from the 2020 rule, the proposed rule would require that schools merely provide the parties (except for parties in a harassment proceeding involving college students) with a description of the relevant evidence, rather than access to the evidence itself. The proposed rule asserts that this new policy, like the policy of actual access in the 2020 rule, "would likewise provide the parties with sufficient information about the relevant evidence to meaningfully prepare arguments, contest the relevance of evidence, and present additional evidence."

But the ability of parties to defend themselves or press their claims would be significantly compromised if a school may give the parties its subjective interpretation of the evidence rather than the evidence itself. Such a flawed procedure opens the door to bias and human error. The proposed rule does not acknowledge this truth nor does it make a reasoned finding that other considerations outweigh it. Instead, it fails to acknowledge it at all. That is arbitrary and capricious.

Likewise, to preserve college students' abilities to fully defend themselves against accusations of sexual misconduct, the Department should not abandon the

requirement under current 34 C.F.R. § 106.45(b)(6)(i) of a live hearing for postsecondary institutions. To the contrary, it should directly guarantee that right to students so they can secure their opportunity to fully and fairly present all relevant evidence for consideration before the decision-making authority.

J. Evidentiary Standard. 87 Fed. Reg. at 41483–87.

The proposed rule would require schools to use a preponderance of the evidence standard unless it applies a clear and convincing standard "in all other comparable proceedings, including [but presumably not limited to] relating to other discrimination complaints." This requirement is arbitrary and capricious for many reasons.

To begin with, it creates internal contradictions. One reason the proposed rule gives for this provision is that "a singular imposition of a higher standard for sex discrimination complaints would impermissibly discriminate on the basis of sex."[40] But the proposed rule permits using a lower standard for sex discrimination than for other complaints, including for complaints of racial discrimination. That is because it only requires the use of the clear and convincing evidence standard if all other discrimination complaints are held to that high standard. So, on the proposed rule's own theory, the proposed rule permits schools to discriminate on the basis of race by imposing a lower standard for racial than for sex discrimination—but that cannot be the proposed rule's intent.

More generally, it is hard to imagine a justification (and the Department does not offer one) for mandating that sex discrimination complaints be addressed under no higher standard than other complaints *but not mandating that they be also addressed under no lower a standard.*

This change lacks any support. The only conceivable justification is to erode due process requirements—and to substitute bureaucratic convenience for justice to the parties. These interests are arbitrary and capricious, and they set Title IX on a collision course with due process of law.

The proposed rule justifies its preference for the preponderance standard by claiming that the standard "equally balances the interests of the parties in the outcome of the proceedings by giving equal weight to the evidence of each party."[41] But the clear and convincing standard does not give unequal weight to the evidence of both parties. The clear and convincing standard is used for various reasons

[40] 87 Fed. Reg. at 41486.

[41] *Id.* at 41485.

throughout the law (for instance, in cases of fraud), never because one party's evidence is entitled to less weight.

The proposed rule also asserts that "all parties have an equal interest in the outcome of the proceedings."[42] But again, that is also true in other legal cases involving the clear and convincing evidence standard.

The 2020 rule reached a different conclusion on this point than does the proposed rule in part based on its conclusions that Title IX proceedings lack the full panoply of procedural protections available in civil litigation where the preponderance standard is used; the lack of some protections makes it a reasonable choice to use a higher standard of proof. The proposed rule does not dispute that the procedures the 2020 rule identified are indeed absent; nor does it assert that those procedures are unimportant. Instead, it asserts that the procedures the Title IX proceedings do have are enough to guarantee fairness without the added protection of the clear and convincing standard. But the Department fails to explain why it reaches a result contrary to what it reached two years ago. The failure to explain the difference in view is arbitrary and capricious.

K. Appeal rights. 87 Fed. Reg. at 41489.

The proposed rule permits schools to decide whether to allow appeals in cases not involving harassment allegations among college students—except for the dismissal of a complaint, from which an appeal must be allowed.

This one-sided policy, favoring complainants over respondents, contradicts the proposed rule's announced policy in favor of equal treatment of complainants and respondents, and this internal contradiction is in turn arbitrary and capricious.

The lack of any right to appeal again raises serious due process concerns, especially when paired with the proposed rule's consistent weakening of other important procedural safeguards. This provision alone is likely to result in high litigation costs for schools, a cost that the rule must quantify and justify, but the rule fails to do so.

L. Related Discipline. 87 Fed. Reg. at 41491.

The proposed rule bars imposition of discipline for engaging in sexual conduct when information about that conduct is disclosed in a Title IX proceeding. For example, if a code of conduct prohibits certain sexual activity that does not constitute harassment, but the school learns that a student has engaged in that activity during

[42] *Id.*

an investigation, the school would be prohibited from enforcing the code of conduct. This rule fails to address and consider the important reliance interests of schools in maintaining codes of conduct for students, including codes of conduct that reinforce important matters of sexual morality or religious observance. It gives no weight to the interests of other students, families, and community members in the maintenance of these codes of conduct. It threatens to give rise to scandal and to prevent schools from maintaining effective discipline among students.

The proposed rule announces that this policy is needed to encourage Title IX parties and witnesses to come forward, but it does not acknowledge that it is thereby elevating the goals of Title IX over other important objectives (such as religious and moral formation) that a school may reasonably pursue, and the Department has no reason to slight those other goals. Pursuing one factor to the irrational exclusion of other relevant factors is arbitrary and capricious.

M. Student-Employees. 87 Fed. Reg. at 41493.

The proposed rule gives a two-factor test for determining whether a student-employee should be considered a student or an employee to determine which Title IX procedures apply to him or her.

The proposed rule fails to explain how the two factors relate to each other, thereby consigning schools and their students to confusion. The refusal to offer a definition with regard to such an important question is arbitrary and capricious.

N. Restrictions on Advisor Participation. 87 Fed. Reg. at 41496.

The proposed rule says that schools may "establish restrictions regarding the extent to which the advisor may participate in the grievance procedures," but gives no reason for permitting these sorts of restrictions. Failure to give any reason at all for a particular provision is necessarily arbitrary and capricious. This provision also suffers from the same problems identified above on limits on parental involvement, including on putting students to a choice between the help of their parents and the help of an attorney.

O. No Right to Advisor Participation. 87 Fed. Reg. at 41496.

The proposed rule proposes not to demand the admission of advisors in discrimination proceedings involving college students and non-harassment discrimination.

The proposed rule lists several characteristics of harassment proceedings that most especially require the presence of an advisor and that may be absent from most

non-harassment proceedings. But that is no reason to omit advisors from non-harassment proceedings that do involve such attributes.

This exclusion is not supported by any empirical information on the harms of excluding parents and attorneys, nor does it rest on support showing that students are capable of effective self-representation. The Department should expressly consider the benefits and costs of instead allowing students to involve all parents and to include the legal team of their choice.

P. Expert Testimony. 87 Fed. Reg. at 41497.

The proposed rule proposes to amend the 2020 rule by allowing colleges, in their sole discretion, to decide to exclude expert testimony. In the past, students were allowed to present expert testimony to advance their claims or defenses, as they saw fit. No more.

The proposed rule asserts that colleges will be best situated to determine whether expert evidence will be helpful in a particular case. But one topic that experts can explain is why their testimony is relevant when we may not be inclined to think it relevant. It is hard to see why the Department shouldn't just continue to require schools to receive expert evidence and consider it, as they do now, and then to rely on it only as far as it is helpful.

The proposed rule worries that preparing expert evidence may unduly protract the Title IX proceedings, but this concern may be addressed by giving schools the authority to demand that such preparation not unduly protract the proceedings, rather than allowing them to ban expert evidence altogether. The proposed rule fails to consider the important interest in a student's right to present claims or defenses, through the evidence that they wish to present, and the proposed rule should quantify and consider the values at stake in these rights.

Q. Direct Evidence versus Relevant Evidence. 87 Fed. Reg. at 41499.

The proposed rule proposes to jettison the 2020 rule's demand that each party be given access to all evidence in the school's possession that is "directly related" to the allegations, instead requiring access to all "relevant" evidence.

The 2020 rule justified its formulation because the parties should have access even to evidence that the school might consider irrelevant so that they can point out its relevance. The proposed rule claims to address this concern by defining "relevant" to "encompass all evidence related to the allegations."

But in fact, the regulatory text defines "relevant evidence" as evidence that "may aid a decisionmaker in determining whether the alleged sex discrimination occurred."[43] So the proposed rule would create just the same problem the 2020 rule sought to eliminate: it would permit the school to judge what helps resolve the dispute and what does not. Evidence that the school judges not helpful would never be seen by the parties, who would therefore lack opportunity to show why it *is* helpful. This clumsy sleight of hand is arbitrary and capricious.

This has the same problem as the Department's attempt to exclude expert testimony: it seeks to remove due process protections and to reduce the truth-seeking function of the tribunal. This provision also suffers from the same problems about access to evidence above, including on the availability of evidence to form the basis for discipline and other proceedings to ensure maintenance of schools' codes of sexual conduct.

R. Prior Witness Statements. 87 Fed. Reg. at 41502.

The 2020 rule prohibited reliance on prior statements from parties and witnesses who refused to submit to examination in a live hearing, when a live hearing is held. The proposed rule would, for reasons it does not give, eliminate witnesses from the scope of the ban (along with other modifications). It offers no evidence and no cost-benefit analysis for this change. This unreasoned decision-making is arbitrary and capricious.

S. No right to an appeal for error. 87 Fed. Reg. at 41511.

The proposed rule would provide several grounds for appeal—but remarkably, simple error is not one of them. It does not give a reason for this choice.

Removing the right to appeal except for certain limited circumstances only caps a set of procedures that conflict with due process. Determinations resulting from the use of these procedures are not subject to de novo review by other decisionmakers; they are final. This removes any safety valve for a miscarriage of justice, and it requires a presumption that the single investigator using deficient procedures reached the right outcome. The proposed rule does not explain how this comports with due process, or even how the removal of these safeguards are not arbitrary and capricious.

[43] 87 Fed. Reg. at 41568.

IV. Redefining "sex discrimination" under Title IX to include sex stereotypes, sexual orientation, and gender identity hurts federally funded schools.

A. The proposed rule jeopardizes school funding.

Schools that choose to protect their students by maintaining sex-specific private spaces and sports teams, or that choose to respect the First Amendment rights of their students and teachers, risk costly litigation in addition to having their federal funding revoked—to the tune of millions of dollars. That represents funding that will be diverted from the educational mission of the school, including teacher salaries, academic programs, student scholarships, and more. That loss of budgeted funding would be catastrophic for both schools and their students. Indeed, for smaller academic institutions, particularly in preschool, K-12, or rural contexts, the loss of federal funding plus an increase in litigation costs could pose existential threats.

And coercing states to adopt the Department's reimagined version of Title IX or risk losing critical education funding exceeds Congress's Article I enumerated powers and transgresses on the reserved powers of the State under the federal constitution's structural principles of federalism and the Tenth Amendment.[44] Congress did not clearly delegate to the Department the authority to resolve this major question or to rewrite Title IX, and were it to have done so in this way, it would have violated the non-delegation doctrine and the limits of its own enumerated powers.[45]

As discussed in other ADF comments, the U.S. Constitution's clear-notice rule governs any interpretation of federal law in this area because the federal officials displaced traditional state authority over education and educational privacy, with a possible abrogation of state sovereignty from suit, and under a statute that is enacted under the Spending Clause, to extend federal law. Title IX also subjects States and religious organizations to private lawsuits for damages and attorney's fees on new theories, even though States did not know of these liabilities and could not have known or consented to this waiver of their sovereign immunity.

Withholding all federal education funding under the proposed rule also results in unconstitutional coercion and commandeering of the States.[46] The proposed rule improperly directs state officials and coerces states into acquiescing into new

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[44] U.S. Const. art. I, § 8, cl. 1; *id.* amend. X.

[45] *Id.* art. I, § 8, cl. 1.

[46] *Id.* amend. X.

spending conditions by threatening to withhold large sums of funding on which States rely.

In addition to the concerns presented about withholding federal funding, the Department in its proposed rules fails to account for the heightened administrative and compliance-related costs that would result from its sweeping proposed changes. These increased costs with no warning will be particularly consequential for K-12 school districts that operate on an already strained budget where every dollar is carefully scrutinized, publicly debated, and allocated to essential categories such as teacher salaries, student safety measures, and improved learning facilities. The uptick of Title IX complaints and investigations that will necessarily be triggered by the Department's vastly expanded proposed new definitions and categories of "sex" will result in a tangible administrative burden, requiring more time, personnel, and financial resources to manage the increased volume of cases. Additionally, increased legal expenses will likely need to be budgeted to address the nuanced and complex First Amendment challenges that have been raised throughout this comment. Because the federal government does not supply funding for schools to carry out their obligations under Title IX, these burdensome and ever-increasing sets of rules and procedures represent an unfunded mandate that will reduce funds available from other sources of taxpayer-generated public school budgets.

The Department has access to data from the past several years since K-12 schools have attempted compliance with the expansive sexual harassment grievance process dictated in the 2020 rule changes. It should now collect and review that data to assess the estimated compliance costs imposed particularly in K-12 public school districts, as they have had to hire additional staff and expand their budgets for training and legal advice and supportive measures (e.g., offering counseling services), and all other aspects of Title IX compliance. Then the Department must take those estimated costs of compliance and multiply them by the degree to which it can be reasonably anticipated that school districts will face an increased volume of new cases and legal issues under the expanded rules.

Unlike colleges and postsecondary institutions, which have different means of generating revenue to support in-house legal counsel teams and which have increased flexibility to determine their hiring structure based on staffing needs, public school districts often lack the resources to hire multiple staff attorneys or the ability to reallocate funds to hire more centralized administrative positions. Instead, often their urgent priority is filling empty teacher and principal positions—not to mention addressing the shortage of qualified bus drivers or willing custodial staff.

Still, the Department neglected to accurately account for the increase of compliance costs across the board, from preschools to postsecondary institutions. It

should thoroughly account for the projected economic burden and impact of the new Title IX regulations on all types of schools across America before it seeks to roll out such sweeping changes.

Lastly, the Department's sweeping reinterpretation of the statutory term "sex" may have the unintended consequence of causing students and families to flee from the public school system in favor of exempt private religious schools because they are attracted to the opportunity for girls to play on a more even playing field and desire a greater degree of free speech and freedom to exercise sincerely held religious beliefs. An exodus of students from public schools could cause an adverse economic effect on public school districts. In Florida, for example, the full-time equivalent cost allotted to each student seated in the public K-12 system is $8,143.00.[47] For every 100 students who leave the public schools for a more attractive private school option, the school district would lose $814,300.00 in annual funding. Multiplied over the entire course of K-12 education, a Florida public school district would stand to lose $10,585,900.00—not counting inflation—for every 100 students lost to private school.

B. The proposed rule creates administrative chaos.

The proposed rule creates administrative chaos by employing vague and unworkable terms. It expands the definition of "sex discrimination" to include, among others, sex stereotypes and gender identity. The Department does not define these terms. Instead, it vaguely states that they "encompass[ ], at a minimum, discrimination against an individual because . . . they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming."[48]

"Sex stereotype" is far too vague and subjective a term to interpret and apply in any meaningful or consistent manner. It will lead to confusion and chaos across educational institutions.

And a gender identity standard is simply unworkable. Some gender ideology proponents argue that gender exists on a spectrum: it is not limited to identifying as the opposite sex, but instead can encompass a virtually infinite number of genders. For example, the American Academy of Pediatrics defines gender identity as "one's

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[47] See *Governor Ron DeSantis Signs the Freedom First Budget Providing Historic Investments to Support Our Communities, Promote Education, and Protect the Environment* (June 2, 2022), https://www.flgov.com/2022/06/02/governor-ron-desantis-signs-the-freedom-first-budget-providing-historic-investments-to-support-our-communities-promote-education-and-protect-the-environment.

[48] NPRM at 522.

internal sense of who one is, which results from a multifaceted interaction of biological traits, developmental influences, and environmental conditions. It may be male, female, somewhere in between, a combination of both, or neither (i.e., not conforming to a binary conceptualization of gender)."[49] Moreover, some individuals claim that gender can be fluid—changing in different contexts.[50] They allege that how individuals understand it, experience it, and express it can change over time. And there are increasing numbers of individuals known to have detransitioned—to have identified as the opposite sex or nonbinary for a time (even to the extent of taking cross-sex hormones and undergoing surgery), only to later regret their decision and embrace their biological sex.[51]

If gender is a spectrum, then binary classifications are impossible. School administrators are left with no practical means of separating sports teams and private facilities. And if gender is fluid, then school administrators are in a quandary: can a male student participate on the boys' team one day, switch to the girls' team the next, and continue back and forth? What about females who identify as male without medical intervention? And if individuals detransition and embrace their biological sex, why are we exposing women and girls to emotional, psychological, and even physical harm for an identification phenomenon that may cease?

A pure gender-identity classification doesn't work in sports. (Even the International Olympic Committee and the NCAA do not allow *all* males who identify as female to compete on women's teams.) It doesn't work in toilet, locker, and shower facilities. And it doesn't work in overnight accommodations policies either. That just underscores what everyone knows. Sports and private spaces cannot be separated based on gender identity alone.

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[49] Jason Rafferty, MD, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, Am. Acad. of Pediatrics (2018), *available at* https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for?autologincheck=redirected.

[50] *Id.*

[51] *See, e.g.* Grace Lidinsky-Smith, *There's No Standard for Care When it Comes to Trans Medicine*, Newsweek (June 25, 2021), https://www.newsweek.com/theres-no-standard-care-when-it-comes-trans-medicine-opinion-1603450 (young woman describing her detransition story); *see also* www.SexChangeRegret.com (last visited Sept. 7, 2022).

C. The proposed rule imperils dress codes.

According to 2017–2018 data from the National Center for Education Statistics, approximately 20% of public schools require students to wear uniforms.[52] Schools that choose to have dress codes often do so to "prevent in-class distractions, create a workplace-like environment, reduce pressures based on socioeconomic status, and deter gang activity."[53] Others say that school uniforms "provide students with a sense of belonging, help maintain school decorum[,] . . . are a convenient and cost-saving option for parents," and even may help students perform better academically.[54]

But for schools that have in place sex-specific dress codes, those benefits will be imperiled. Schools that have in place one dress code specific to boys, and another dress code specific to girls, may be forced to eliminate them altogether rather than face loss of federal funding if the Department proceeds with redefining sex discrimination to include sex stereotypes and gender identity.

D. The proposed rule creates a legal conflict for schools' and students' constitutional and statutory rights.

The proposed rule also conflicts with the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1(a), and the First Amendment's Free Exercise Clause, insofar as it applies to non-exempt religious schools or insofar as it applies to individual religious teachers, students, and visitors at secular schools. Under the proposed rule, and in particular under its harassment provisions, many religious teachers, students, and visitors either must violate their religious beliefs or be excluded from federally-funded education programs. The government exempts many religious schools under 20 U.S.C. § 1681(a)(3), while it seeks to enforce Title IX against individual religious teachers, students, and visitors who attend secular schools, and so the proposed rule must satisfy strict scrutiny in either case.[55] The government may not treat secular activity better than religious activity.[56]

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[52] Fast Facts: School Uniforms, Nat'l Ctr. for Educ. Statistics, https://nces.ed.gov/fastfacts/display.asp?id=50 (last visited Sept. 7, 2022).

[53] Sasha Jones, *Do School Dress Codes Discriminate Against Girls?,* Educ. Week (Aug. 31, 2018), https://www.edweek.org/leadership/do-school-dress-codes-discriminate-against-girls/2018/08.

[54] Samantha Schmidt, *Black Girls Say D.C. School Dress Codes Unfairly Target Them. Now They're Speaking Up.* Wash. Post (Sept. 5, 2019), https://www.washingtonpost.com/dc-md-va/2019/09/05/black-girls-say-dc-school-dress-codes-unfairly-target-them-now-theyre-speaking-up.

[55] *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1878, 1881 (2021).

[56] *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

The government may not rely on a "broadly formulated" interest in "equal treatment" or in "enforcing its non-discrimination policies generally," but must establish a compelling interest of the highest order "in denying an exception" under these circumstances, and the interest must be narrowly tailored.[57] But here, "[t]he creation of a system of exceptions . . . undermines the [government's] contention that its nondiscrimination policies can brook no departures."[58] Under the First Amendment and RFRA, that should be the end of the proposed rule's effects on individual religious teachers, students, and visitors.

V. Special considerations inadequately addressed in the proposed rules deserve clarification.

The Department's 701-page NPRM raises several concerns that may be addressed through much-needed clarifications.

A. The proposed rule should clarify and confirm its limited reach as to schools receiving federal financial assistance.

The final rule should make abundantly clear that no educational program or activity is subject to Title IX simply because it holds federal tax-exempt status.[59]

Two courts (in California and Maryland) have held that tax-exempt status constitutes "federal financial assistance" for purposes of Title IX of the Education Amendments of 1972, thus potentially subjecting thousands of schools and other nonprofits—including churches—to Title IX's requirements for the first time in history. Those wrongly decided opinions reasoned that the schools took on all the obligations of Title IX simply because their nonprofit status and charitable character exempted them from federal income tax.

These decisions contradict virtually all available precedent. Department of Education regulations list various kinds of aid that qualify as federal financial assistance, including scholarships, grants, and loans. Tax-exempt status is conspicuously absent. The Department of Justice has declared that "[t]ypical tax benefits—tax exemptions, tax deductions, and most tax credits—are not considered federal financial assistance." An exhaustive May 2022 Congressional Research Service report entitled "Federal Financial Assistance and Civil Rights Requirements" does not even mention tax-exempt status as a potential trigger for the application of

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[57] *Fulton*, 141 S. Ct. at 1879, 1881 (citation omitted).

[58] *Id*. at 1882.

[59] See Greg Baylor, *Shoehorning Tax-Exempt Status Into Title IX Threatens Nonprofits That Won't Pretend Boys Are Girls*, The Federalist (Aug. 12, 2022), https://thefederalist.com/2022/08/12/shoehorning-tax-exempt-status-into-title-ix-threatens-nonprofits-that-wont-pretend-boys-are-girls.

Title IX and other nondiscrimination requirements. And only a handful of older court decisions suggest that tax-exempt status might qualify as federal financial assistance. Compounding their errors, neither court grappled with the fact that the Department of Education regulation defining federal financial assistance plainly states that aid qualifies only if it is "authorized or extended under a law administered by the Department [of Education]."[60] The IRS—not the Education Department—administers the laws governing tax-exempt status. But the courts' rationale plausibly extends to a number of additional federal laws, potentially magnifying the unfavorable impact of the courts' decisions.

If these court decisions outline a new rule for the reach of the proposed rule, the application of Title IX to this new category of schools will wreak havoc for a multitude of schools that previously did not have to consider that law's demands. The vast majority of private K-12 schools in the United States do not receive federal grants, loans, or contracts. Until now, they have operated with confidence that they are not recipients of federal financial assistance and thus not subject to the multitude of laws, regulations, and "guidance" federal agencies impose on such recipients. These

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[60] The current Title IX rule states:

> Federal financial assistance means any of the following, when authorized or extended under a law administered by the Department:
>
> (1) A grant or loan of Federal financial assistance, including funds made available for:
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> > (i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and
> >
> > (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
>
> (2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.
>
> (3) Provision of the services of Federal personnel.
>
> (4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.
>
> (5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

34 C.F.R. § 106.2.

schools and countless other nonprofits will now face a no-win choice: either give up their tax-exempt status or take on the burdensome obligation of complying with a host of federal laws and regulations for the first time. Being subject to Title IX, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 is no small thing. Schools and other nonprofits newly subject to these statutes would face comprehensive regulation of their activities—including both student and employee relations. They will incur significant and potentially crippling compliance costs. And they could encounter aggressive enforcement efforts by federal bureaucrats and agenda-driven activist organizations.

America's nonprofits need the Department to restore the certainty they've long enjoyed. Title IX isn't just about avoiding discrimination; it imposes a host of affirmative obligations. America's nonprofits need to know whether they must comply for the first time with these elaborate requirements. And Title IX's religious exemption does nothing to protect secular schools that historically have not accepted federal financial assistance and that object on reasonable grounds to the new notion of allowing males to participate in female sports or to access girls' private spaces.

The Department should thus make clear that it does not agree with these two recent court decisions that conflict with its existing regulation, and it should expressly state that it will not enforce Title IX against schools whose only alleged federal financial assistance is their tax-exempt status. It should also clarify that the Department of Education has never taken the view that federal financial assistance subjecting an entity to Title IX includes the federal recognition of tax-exempt status.

B. The Department should make clear that it does not extend Title IX to impose any constitutionally conflicting requirements on religious student groups who meet on or off campus.

Religious student groups comprise a vibrant part of almost every collegiate or postsecondary institution across America. Take, for instance, Northwestern University, which boasts that it's "religious diversity is reflected in its rich offering of student-led religious and spiritual groups," including:

- 1 Baha'i club,
- 23 Christian groups,
- 2 Hindu student groups,
- 1 Interfaith initiative,
- 5 Jewish organizations,
- 1 Mormon student organization,
- 2 Muslim student associations, and

- 1 Sikh student association.[61]

The university encourages its students to contact the school's Chaplain to explore starting a new religious group if they don't find one that's a good fit.

Northwestern is not alone. Many other colleges celebrate, promote, and encourage the rich diversity of student-led religious groups on their campuses. Moreover, some of these groups have purchased or lease a building in which to congregate, whether on or off campus. It would not be uncommon for one of the above-type of religious student groups—along with religious sororities and fraternities—to own or rent a building where they live in community with one another or regularly meet for fellowship and organizational activities that further their religious mission.

While the NPRM is silent as to the subject of religious student groups on campus, certain proposed changes may have disastrous consequences in particular for religious student groups that lawfully meet on or off public school campuses.[62] Therefore, the Department should expressly state that religious student groups are exempt from any application of Title IX, and the rule should not be altered in such a way as to reach religious student groups either on or off campus.

Particularly concerning is the Department's emphasis in proposed § 106.11 addressing the expansive jurisdictional scope of Title IX. The Department takes pains to reiterate Title IX's coverage in such a manner as to reach "conduct that occurs *in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution* . . . ."[63] In its preamble, the Department offers its intention to "clarif[y] that Title IX obligates a recipient to respond to sex discrimination within the recipient's education program or activity in the United States, *even if it occurs off-campus*, including but not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution."[64]

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[61] *See* Religious Student Organizations, https://www.northwestern.edu/religious-life/find-a-community/religious-student-organizations.html (last visited Sept. 7, 2022).

[62] Religious student groups have well-established constitutional rights to congregate and freely exercise their faith on public school campuses. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

[63] NPRM at 666 (emphasis added).

[64] *Id.* at 30 (emphasis added).

The Department further describes its intention of the new proposed rules to "more clearly and completely describe the circumstances in which Title IX applies."[65]

In that same spirit of transparency, we urge the Department to be equally and abundantly clear as to the circumstances in which Title IX does *not* apply. Should the Department seek to impose application of Title IX to religious student groups—whether Muslim, Jewish, Christian, or any other faith that unifies the group—then a collision course with constitutional rights is inevitable. For example, a Christian sorority that lives together in a building off-campus could be forced under the new rules to open their housing accommodations to a male who identifies as a woman or to a lesbian couple that seeks to share a room, since doing so would contradict the sorority's sincerely held religious beliefs.

This conflict is especially prone to arise in the context of the Department's expanded definitions of the term "sex," which naturally conflict with age-old traditional beliefs on the topics of marriage and sexuality, across various faith groups and religions. Would the statement of faith itself of a religious student group be deemed hostile and offensive under the new Title IX rules? A public school's investigation into a religious group's core theological doctrine implicates church autonomy concerns, as discussed further as related to the religious exemption.

The predictable and inescapable conflict between Title IX application and First Amendment rights under the Religion Clauses is one that can be easily avoided by inserting clarification into the new rules. One way to achieve such clarification would be for the Department to expand application of Title IX's religious exemption to expressly cover religious student groups in addition to religious educational institutions. Another way would be to carve out an express exception for religious student groups from proposed § 106.11.

Either way, students of faith across America who have affiliated with one another in religious student organizations deserve clarity and peace of mind that they are free to continue exercising their First Amendment rights to gather under a unifying set of religious convictions, without fear of reprimand or censorship by their colleges or schools. The First Amendment guarantees these students that their government will not coerce them to compromise on their sincerely held beliefs.

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[65] *Id.* at 43.

C. The Department should clarify that it does not apply Title IX to preschools in the same manner to which it does K-12 schools or postsecondary institutions.

The Title IX statute at 20 U.S.C. § 1681(c) expressly encompasses "any public and private preschool" into the definition of "educational institution." However, the Department must exercise its administrative responsibility to assess how Title IX should apply to the unique context of preschools—the place in society where the youngest and most vulnerable of our children, from birth to age five, are educated. Implementing regulations for Title IX must take into account this sensitive context and specially tailor application of its sex-based discrimination provisions in a manner that is developmentally and age-appropriate, factoring in the lack of social, emotional, mental, and sexual maturity of 2, 3, and 4-year-olds.

As applied to collegiate, high school, and even elementary students, Title IX requires training and awareness among the student population of its full panoply of rights and remedies, including graphic definitions of rape, statutory rape, sodomy, incest, fondling, sexual assault with an object, dating violence, domestic violence, and stalking under the sexual assault category.[66] As discussed above, the Department also intends to encompass "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" as bases for discrimination complaints and investigations in its newly imagined and expanded definition of "sex" as applied under Title IX.

A rocket scientist is not required to conclude that imposition of Title IX's sexually mature content is wildly inappropriate for a preschool audience. Likewise, Title IX's procedurally intensive investigative process and heavy-handed disciplinary scheme for these sexual offenses has no conceivable relevance or application among preschool students—most of whom are still learning to walk and talk.

For instance, should a 2-year-old preschool student be trained and encouraged to understand his or her rights under Title IX to file a formal complaint on the newly established grounds of sexual orientation or gender identity? Should a 4-year-old be subject to a protracted formal investigation of sexual harassment for using the "wrong" pronouns of a playmate?

Absolutely not. A typical 2-year-old is busy learning his "head, shoulders, knees, and toes" as the famous preschool song goes, and he clearly lacks the capacity

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[66] *See* 34 C.F.R. § 106.30(a) (defining categories of "sexual harassment" for Title IX purposes); *see also Questions & Answers on the Title IX Regulations on Sexual Harassment* at 5, U.S. Dep't of Edu. (updated June 28, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.

to engage in intentional sexual assault or sexual discrimination worthy of discipline. To the extent parents desire to introduce their young children to mature sexual topics, it is the fundamental right of the parents in directing the upbringing of their children to decide *if*, *when*, and *how* they will approach it, within the context and privacy of their own home. These are not appropriate topics for the federal government to force onto impressionable, developing minds in preschool classrooms.

And yet, instead of conducting a careful analysis of the fundamental differences between preschool and elementary school-aged students and developing an adapted application of Title IX that is developmentally appropriate for an audience of children aged birth through five, the proposed rule takes a shortcut. It merely seeks to lump the definition of "preschool" into the proposed definition of "elementary school"[67]—treating them the same without regard for the significant and obvious developmental differences between infants, toddlers, and preschool-aged children versus elementary aged students. This one-size-fits-all style of rulemaking is arbitrary and capricious, not to mention alarming.

The Department wholly failed in its NPRM to acknowledge or consider the significant differences that exist between a preschool and elementary school. However, the Department has, in fact, recognized such differences in other contexts.[68] In its Joint Policy Statement issued with the U.S. Department of Health and Human Services, for example, the departments together condemned a "disturbing trend" recognized of exclusionary discipline (e.g., suspensions and expulsions) against children aged birth through five in preschool disciplinary processes.[69] The joint policy statement acknowledges the reality that "early childhood settings differ in context from K-12 settings" and exhorts states and other stakeholders to "work toward a goal of ensuring that all children's social-emotional and behavioral health are fostered in

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[67] See NPRM at 38–39. The Department unconvincingly attempts to explain its reasoning that it seeks consistency with definitions used in another statute, Every Student Succeeds Act (ESEA), which does not define "preschool" for its purposes separately from "elementary school." However, this logic is unpersuasive as applied to the different purposes of Title IX—namely, addressing sex-based discrimination in educational institutions. Regardless, the Department ignores the differences and simply concludes "that a separate definition of 'preschool' is not necessary." *Id.* at 39. This conclusory declaration without justification is woefully inadequate.

[68] *See, e.g.,* Joint U.S. Dep't of Ed. and U.S. Dep't of Health and Human Servs. Policy Statement on Expulsion and Suspension Policies In Early Childhood Settings, https://www2.ed.gov/policy/gen/guid/school-discipline/policy-statement-ece-expulsions-suspensions.pdf (last visited Sept. 7, 2022).

[69] *Id.* at 1.

an appropriate high-quality early learning program, working toward eventually eliminating expulsion and suspension practices across early learning settings."[70]

To make these formal proclamations in a joint policy statement with another federal agency, and then turn around and ignore the previously recognized differences between K-12 settings and preschools, supports the conclusion that the Department's rulemaking as to preschools is arbitrary and capricious. Further, to strongly advocate against exclusionary discipline practices in preschools on the one hand, while on the other hand opening wide the floodgates of the full Title IX sexual harassment grievance process (which often results in suspensions and expulsions), is contradictory and raises serious concerns as to the legitimacy of the Department's position in the NPRM.

As a practical matter, a wide range of differences in context and operations are discernible between preschools and elementary schools, including: ages of the kids; size and scope of program; curriculum content; learning objectives and levels; available mental health or counseling supports; sophistication and resourcing of staff; likelihood of access to in-house legal counsel; access to centralized administrative support services; varying degrees of mental, physical, social, and emotional capacity of the students; budget; and funding structure.

Moreover, if the Department continues down its ill-advised path of imposing full-scale Title IX application in preschools, disastrous economic consequences could unfold. Title IX's significant compliance burden is well-documented and well known to the Department. Indeed, as the Department acknowledged in its preamble:

> Numerous stakeholders, in listening sessions and the June 2021 Title IX Public Hearing, urged the Department to provide greater discretion for elementary school and secondary school recipients. Many stakeholders commented that they have found the current regulations to be *onerous*, *protracted*, and *unworkable* in practice for elementary school and secondary school recipients.[71]

All the more is this anticipated to be true of preschools. Compared to larger K-12 districts and postsecondary institutions, preschools, in general, would suffer a distinct disadvantage in terms of lacking the operational capacity and centralized support necessary to sustain full Title IX compliance.

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[70] *Id.* at 2.

[71] *Id.* at 338 (emphasis added).

Not only have the extensive procedural obligations under the current Title IX grievance process been shown to be ill-suited for younger students in the K-12 setting, but the dizzying array of administrative obligations also demands significant time, resources, personnel, and funding to achieve full compliance with the elaborate regulatory scheme. For example, preschools that have not previously been required to comply with Title IX would suddenly be forced to hire and train a designated Title IX Coordinator; identify and train (or outsource) Investigators, Decision-Makers, and Appellate Decision-Makers; develop and roll out training of all staff and students; post all trainings online; develop and implement policies and procedures that can be upwards of 40 pages to capture all the definitions, due process requirements, and grievance process steps dictated in the federal regulations; and so on (and on).

Think of the typical small-scale, private preschool programs scattered throughout the country that function as essential childcare services for working parents. If the full force of Title IX regulations were to come crashing down on private preschools, the compliance costs and administrative burden could threaten shuttering the doors of these smaller programs. Moreover, church-run preschool programs would face grave constitutional concerns under the First Amendment as discussed elsewhere in this comment. If these small, private preschool programs wanted to stand up under the full weight of Title IX obligations, they would likely have to pass the compliance costs on to the families. Before imposing such a heavy-handed and elaborate system on preschools for no articulable reason, the Department must count the economic costs. In this case, adding any measure of financial or administrative burden stands to either drive the already high costs of childcare up, or drive small, local preschools out of business entirely—either way, causing a crisis of childcare across America in rural and urban communities alike.

To what end? If the Department's desire for imposing Title IX responsibility and obligations onto preschools instead concerns its employees, this too is overreach. State and federal employment discrimination laws—such as Title VII and similar state counterparts—already sufficiently cover protections for employees to be safe from discrimination or harassment on the basis of sex. Let the EEOC do its job and let the 2, 3, and 4-year-olds of America enjoy their playgrounds, naps, and ABCs free from undue interference of an elaborate sex-based grievance scheme that has zero applicability or benefit to infants, toddlers, and preschoolers.

The proposed rules fail to apply logic, reason, or common sense to the application of Title IX in a preschool context. Simply lumping preschools into the same categorical definition of "elementary schools" is wholly ineffective and unreasonable, like pounding a square peg into a round hole. The Department should reconsider its flawed position and redraft its proposed regulations to appropriately

accommodate for a modified application of Title IX as extended to preschools. Given the young ages and early developmental stages of preschool students—from infants to toddlers to preschoolers—the Department should apply Title IX as sparingly and minimally as possible in that unique context.

D. Title IX's religious exemption—embedded in the statute since 1972—must continue to be honored and broadly applied, including through proactive protections for religious schools and deference to the church autonomy doctrine.

Finally, the proposed rule must expressly consider its effect on religious exercise and religious speech—not only for religious student groups on public campuses, as discussed above, but also for exempt religious schools. By redefining sex to address radically new terms and concepts such as abortion, gender identity, and sexual orientation, the Department is setting Title IX on a collision course with constitutionally protected religious views held by more than half the nation.

1. Title IX's statutory exemption is grounded in church autonomy concepts.

The Title IX statute at 20 U.S.C. § 1681(a)(3) states, "this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization." This critical exemption for religious institutions serves as bumpers to keep the Department squarely within the First Amendment's constitutional lane so it does not run afoul of the church autonomy doctrine.

Flowing from the dual Religion Clauses of the First Amendment, the U.S. Supreme Court has long recognized the history and importance of the church autonomy doctrine.[72] As a practical matter, the doctrine reflects how the Free Exercise Clause and Establishment Clause come together to essentially create a sort of "government free zone" over a church or religious organization's internal governance affairs and decisions involving its core religious tenets. The church autonomy doctrine guarantees houses of worship the right to determine—without government interference—their own doctrine, polity, religious services, teaching, relationships with ministers and members, church administration, and other matters

[72] *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712 (2012) (recognizing "a private sphere within which religious bodies are free to govern themselves in accordance with their own [religious] beliefs"); *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (recognizing the church autonomy principle "applies with equal force to church disputes over church polity and church administration").

of internal governance.[73] As the Supreme Court recently affirmed, religious freedom protected by the church autonomy doctrine encompasses the right of religious institutions "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[74]

Given this longstanding and consistently applied set of precedent by the high court concerning the sanctity of ecclesiastical matters as protected by the First Amendment and recognized in the church autonomy doctrine, the Department should continue to apply Title IX's religious exemption consistently and broadly, giving all possible deference due to religious institutions. Even beyond Title IX's statutory exemption, religious schools are shielded from excessive government intrusion into their internal affairs and religious tenets under the clearly established principles of the church autonomy doctrine.

2. The Department has failed to adequately consider the actual and anticipated effects of the proposed rule changes on religious schools.

It is not enough for the Department to assume religious schools are exempt, and then disregard the myriad areas of potential conflict application of these rules could have on religious schools. For example, religious schools always face the danger that the religious exemption may be modified, denied, or wrongfully applied. Further, requiring religious schools to prove applicability of the exemption or raise it as an affirmative defense in investigative proceedings is burdensome and likely to impose administrative and legal costs on religious schools. Perhaps worse, putting religious schools in a position where they must publicly claim a statutory exemption from a purported discrimination law—a process that requires them to expose internal documents and doctrinal positions that otherwise could remain private—imposes the risk of reputational and privacy harms that do not exist for other similarly situated schools. The adverse administrative and reputational consequences must be considered and avoided proactively, now, in rulemaking, before religious schools unnecessarily suffer serious and concrete harms.

3. Grant Park Christian Academy case example.

A vivid example of how religious schools have this concrete interest in more modest Title IX rulemaking and enforcement was recently provided in the case of

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[73] *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Churches in N. Am.*, 344 U.S. 94, 116 (1952) (striking down a state law determining the use of a cathedral).

[74] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff*, 344 U.S. at 116).

ADF client Grant Park Christian Academy.[75] For many children, the food they get at Grant Park Christian Academy is the best meal they eat all day—and sometimes, it's the only meal. Grant Park Christian Academy treats every student with dignity and respect. The school would never turn away a hungry child. Grant Park Christian Academy receives funding for school lunches from the U.S. Department of Agriculture (USDA) through the National School Lunch Program administered by Florida Agriculture Commissioner Nikki Fried. Under Title IX, participating schools agree not to discriminate on sex. Grant Park Christian Academy has participated in the National School Lunch Program for the last five years. At all times, it has fully complied—and continues to comply—with this provision. But federal officials at the USDA, like the Department of Education officials proposing this rule, now have redefined the word "sex" in Title IX to include sexual orientation and gender identity. And, because Title IX applies to all school operations, this new school lunch mandate applies to all school activities. That includes restrooms, dress codes, hiring, and daily conversations—it even requires using pronouns contrary to a student's sex.

Grant Park Christian Academy would never deny any student lunches for any reason, but the new school lunch mandate extends far beyond the lunch line into other areas. Were Grant Park Christian Academy to comply and change its policies for restrooms, dress codes, hiring, or daily conversations, it would violate its religious beliefs. And, just this year, Commissioner Fried was poised to block Grant Park Christian Academy's funding for school lunches—even though Title IX provides a religious exemption. When asked by Grant Park Christian Academy to confirm its religious exemption and that it could stay in the lunch program, her office told Grant Park Christian Academy that the school is "not required to participate in the National School Lunch Program."

The school has been injured by officials' failure to respect Title IX's religious exemption, which applies automatically by statute[76] but which USDA requires schools to publicly "claim" in writing from USDA.[77] The school has had to expend resources and forgo its privacy to "claim" an exemption, even though USDA may never recognize it. This exemption process does not address interim compliance or retroactive liability, nor does it give USDA any duty or timeline to respond. Grant Park Christian Academy has been injured by the government's actions because it has

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[75] ADF, Grant Park Christian Academy v. Fried, https://adflegal.org/case/grant-park-christian-academy-v-fried (last visited Sept. 7, 2022); see *Grant Park Christian Academy v. Fried*, No. 8:22-cv-01696 (M.D. Fla. 2022).

[76] 20 U.S.C. § 1681(a)(3); *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1125 (C.D. Cal. 2020).

[77] 7 C.F.R. § 15a.205.

been forced to respond to requirements that Title IX does not impose and seek an exemption to which it is already entitled. Being forced to seek an exemption through a letter to USDA also created a reputational and privacy injury for Grant Park Christian Academy, while increasing security risks. Activists regularly seek exemption letters through the Freedom of Information Act to subject religious schools to a self-styled name-and-shame harassment campaign, which is why these activists pressure the federal government to require exemption requests from religious schools.[78]

4. The Department should proactively lead the way in this area, encouraging fellow federal agencies to likewise honor and consistently apply Title IX's religious exemption.

The Department of Education thus should avoid imposing similar procedural hurdles. It should keep untouched its current regulation on religious exemptions, which does not purport to require any government permission slip to invoke the exemption. The Department should also urge other agencies to adopt similar regulations as its current regulation, especially USDA. This is of particular concern for federal programs that, like USDA's school lunch program, require up-front compliance with Title IX at the application or award stage or that require one-size-fits-all posters to be displayed with pre-approved government policy language. The potential for error in these settings is high, and the likelihood that religious schools will be deterred from participating in government programs is also high.

The federal government is responsible for ensuring that states do not deter religious schools from participating in federal programs. But state agencies like Florida have applications that require schools to verify blanket compliance with USDA's new policies in the school lunch program, a program over which the Department of Education has concurrent enforcement authority. No information is provided in the applications about religious exemptions and the applications do not provide any obvious way for schools to indicate that they are exempt. Given the mandatory language of the new school lunch mandate and of USDA's religious exemption regulation, it is far from clear that state agencies will not require an up-front assurance of exemption from the federal government to participate in school

[78] *See, e.g.*, Blueprint for Positive Change 2020, Hum. Rts. Campaign, *available at* https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Blueprint-2020.pdf (last visited Sept. 7, 2022); Press Release, Hum. Rts. Campaign, HRC Calls on Department of Education to Take Action Following Anti-LGBT Religious Exemption Requests (Dec. 18, 2015), https://www.hrc.org/press-releases/hrc-calls-on-department-of-education-to-take-action-following-anti-lgb2.

lunch programs. The Department of Education should foreclose that possibility expressly in this forthcoming rule.

How is a religious institution to know if the government will recognize a religious exemption, when applications require up-front evidence of compliance with Title IX to receive funds and when applications do not mention religious exemptions? Nutrition program applications across the state level—indeed, federal programs across the whole of government—should state that a school may invoke a religious exemption and should include a simple indicator, such as a check box, that permits a school to say that it is exempt because it is governed by a religious organization whose tenets conflict with the new policy. This simple check box would also ensure that religious schools are not deterred from participation in any federal program because of uncertainty about the availability of religious exemptions. And religious schools could verify compliance with federal regulations without having to write to the government to obtain an assurance of exemption.

The Department of Education thus should consider this administrative action and take affirmative steps to ensure that religious schools are not adversely affected by its sweeping new government mandate. This up-front clarity is particularly important because the Department of Education has joint enforcement authority with many other agencies over Title IX.

At bottom, the statutory exemption is intended to protect religious schools, not harm them further. The Department should therefore carefully consider how it applies the statutory exemption and continue to do so broadly, deferentially, consistently, and in a manner such as to avoid conflict with the First Amendment and church autonomy doctrine.

Thank you for your consideration of these important concerns.

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