PARENTS DEFENDING EDUCATION

Filed Electronically
September 12, 2022

Hon. Miguel Cardona
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Parents Defending Education's Comments on the Office of Civil Rights, Department of Education, Proposed Rulemaking, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 87 Fed. Reg. 41390, Docket ID ED-2021-OCR-0166 (July 12, 2022)

Dear Secretary Cardona:

Parents Defending Education ("PDE") is a nationwide, nonpartisan, grassroots organization, whose members are primarily parents of school-aged children. PDE's mission is to prevent—through advocacy, legislation, and, if necessary, litigation—the politicization of K-12 education. PDE submits these comments to raise serious concerns about Docket ID ED-2021-OCR-0166, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (the "Proposed Rule").

If enacted, the Proposed Rule would be unlawful and unconstitutional for several reasons.

First, the Proposed Rule unlawfully shoehorns amorphous concepts of gender identity onto Title IX's sex discrimination protections, in direct contravention of the plain text of the law. Contra the Department, the Supreme Court has never held that Title IX's ban on discrimination "on the basis of sex" extends to gender identity. In fact, several federal courts have held precisely the opposite. By effectively rewriting the Civil Rights Act of 1964, the Department will usurp Congress's lawmaking authority and enact legislation through administrative fiat. *See* 5 U.S.C. §706(c).

Second, the Proposed Rule would violate the Title IX rights of female athletes to compete in single-sex sports. By requiring schools to allow biological males who identify as female to compete in women's sports, the Proposed Rule would depart from the Department's longstanding precedent, which it reaffirmed as recently as 2020. Ironically, the Proposed Rule would effectively require what Title IX was designed to prevent. That is plainly "not in accordance with law." *See* 5 U.S.C. §706(a).

Third, the Proposed Rule risks violating parents' fundamental rights under the Fourteenth Amendment to guide their children's upbringing. "[T]he interest of parents in the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality). By redefining "sex" to include "gender identity," the Proposed Rule could license K-12 schools to overrule the wishes of a child's parent when it comes to gender identity.

Fourth, the Proposed Rule's definition of actionable "harassment" is unconstitutionally overbroad and conflicts with the Supreme Court's decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, the Court marked the line between harassing *conduct*—which schools may punish—and pure speech, which they may not. In the process, the Court held that schools can forbid conduct that is "so severe, pervasive, and objectively offensive" that it effectively "denies" another student of their right to an education. *Id.* at 652. That standard intentionally omits individual incidents and protected speech from the definition of actionable harassment. *See id.* at 667. By expanding the definition to punish acts that are "severe *or* pervasive," the Proposed Rule sweeps in a vast array of protected speech in violation of the First Amendment.

Fifth, the Proposed Rule would invite schools to unconstitutionally compel student speech by exposing students to Title IX discipline for "misgendering" another student or failing to use that student's "preferred pronouns." In the process, the Proposed Rule would also impose content and viewpoint-based restrictions on protected speech.

Sixth, the Proposed Rule would weaken due process protections for K-12 students accused of misconduct. The Supreme Court has held that students have a due process right regarding their access to public education. That right requires—at a minimum—that a student receives accurate notice of the charges filed against him or her and is given a fair opportunity to defend him or herself from those charges. The Proposed Rule would transform the Constitution's guarantee of due process into a hollow promise. It would, among other things, remove an accused K-12 student's rights to inspect the evidence against him or her, review the Title IX report filed against him or her, and respond to that report. Protecting students from harassment is a noble aim, but the schools may not do so at the expense of the rule of law.

***Finally*,** the Proposed Rule fails to comply with the requirements of Public Law 105-277 and 5 U.S.C. § 601. The Appropriations Act of 1999 requires federal agencies to assess a proposed rule's effect on parental rights. The Proposed Rule contains no such assessment.

I. The Proposed Rule's definition of "sex" is inconsistent with the plain language of Title IX.

Enacted in 1972, Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a).

"At that time, 'sex' was commonly understood to refer to physiological differences between men and women — particularly with respect to reproductive functions." *Neese v. Becerra*, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022); *see also Sex,* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 2081 (1971) ("The sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segmentation and recombination which underlie most evolutionary change …"); *Sex*, AMERICAN HERITAGE DICTIONARY 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions.").

This straightforward interpretation is supported by other sections of the law. *See, e.g.*, 20 U.S.C. §1681(a)(8) (stating if father-son or mother-daughter activities are provided for "one sex," reasonably comparable activities shall be provided for "the other sex"); 20 U.S.C. §1681(a)(2) (requiring same in school admissions context). And the Supreme Court has, for decades, interpreted Title IX to prohibit schools that accept federal funding from treating men better than women (or vice versa). *See, e.g.*, *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979). Thus, "[a]s written and commonly construed, Title IX appears to operate in binary terms — male and female — when it references 'sex.'" *Neese*, 2022 WL 1265925, at *12.

The common sense reading of Title IX's reference to "sex" has been reinforced by Congressional action (and inaction) in recent year. Twice in the past decade, Congress has considered legislation to amend Title IX to apply to gender identity. *See, e.g.*, H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015). Yet "Congress has not amended the law to state as much," and "it is questionable," to put it mildly, "whether the Secretary can alter the term 'sex' by administrative fiat." *Neese*, 2022 WL 1265925 at *13; *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462, (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation.").

The Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), is not to the contrary. There, the Court "proceed[ed] on the assumption that 'sex' … refer[red] only to biological distinctions between male and female." *Id.* at 1739. Importantly, the Court went out of its way to emphasize that its holding did not extend to "other laws [not] before us." *Id.* at 1753. *Bostock* does "not sweep beyond Title VII to

other federal or state laws that prohibit sex discrimination." *Id.* In fact, it does not even apply to every provision of Title VII, much less Title IX. The Court emphasized that "[w]hether policies or practices might or might not qualify as unlawful discrimination or find justifications under Title VII are questions for future cases." *Id.* In short, "[t]he *Bostock* decision only addressed sex discrimination under Title VII; the Supreme Court expressly declined to 'prejudge' how its holding would apply to 'other federal or state laws that prohibit sex discrimination' such as Title IX." *Tennessee v. United States Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *15 (E.D. Tenn. July 15, 2022) (quoting *Bostock*, 140 S. Ct. at 1753); *see also Pelcha v. MW Bancorp, Inc.,* 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he rule in *Bostock* extends no further than Title VII."); *Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, 571 F. Supp. 3d 571, 621 (N.D. Tex. 2021) ("Defendants read *Bostock* as a broad pronouncement that discrimination against homosexual or transgender conduct is always sex discrimination, notwithstanding the Supreme Court's explicit reservation of judgment on other types of policies, like dress codes and separate bathrooms based on biological sex.").

The Department's analysis of Title IX largely repeats its analysis from a 2021 Notice of Interpretation that purported to apply *Bostock* to Title IX. *See* 86 Fed. Reg. at 32637. That document has already been enjoined by a federal court. *See Tennessee*, 2022 WL 2791450 at *31. Thus, far from applying "the Supreme Court's reasoning in *Bostock*" to Title IX, Proposed Rule, 87 Fed. Reg. at 41531, the Department "advance[s] *new* interpretations" and "impose[s] *new* obligations" on states and educational institutions. *Tennessee*, 2022 WL 2791450 at *31 (emphases original).

The Department's attempt to graft *Bostock*'s analysis of Title VII onto Title IX also ignores fundamental differences in the text, purpose, and history of the two laws. Title IX and Title VII of the Civil Rights Act of 1964 are different laws with different statutory language—and the laws were passed by Congress under different Congressional authority. As the Sixth Circuit recognized in *Meriwether v. Hartop*, workplace environments are fundamentally different from educational environments and therefore carry a wholly different set of considerations. 992 F.3d 492, 507 (6th Cir. 2021). Furthermore, Title IX was passed by Congress solely to create educational and athletic opportunities for women and girls. Applying *Bostock* to *all* aspects of Title IX—a standard that *Bostock* did not even apply to Title VII—will result in the elimination of educational opportunities for women and girls, particularly in those areas where biological sex is most relevant.

The Proposed Rule's conflation of Title VII and Title IX would apply workplace standards not only to classroom environments, however, but also to students' personal lives. In the postsecondary context, the Proposed Rule covers "conduct"—which, under the Proposed Rule, includes pure speech—that occurs in students' off-campus residences and in privately-owned buildings with several degrees of separation from the educational context. *See* 87 Fed. Reg. at 41401 ("The proposed regulations would make clear that

conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution."). Adopting that approach would fly in the face of longstanding Supreme Court precedent. The Court has been very clear that speech in private homes and abutting property is entitled to greater protection than workplace speech. *Compare City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("A special respect for individual liberty in the home has long been part of our culture and our law ... that principle has special resonance when the government seeks to constrain a person's ability to *speak* there."), *with NLRB v. Gissel Packing Co.*, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (First Amendment rights in the workplace "must take into account the economic dependence of the employees on their employers").

Finally, the Department's reliance on *Bostock* is also inconsistent with the position the Department publicly adopted less than two years ago, when it concluded that the "Court's opinion in *Bostock* does not affect the Department's position that its regulations authorize single-sex teams based only on biological sex at birth." U.S. Dep't of Educ., Office for Civil Rights, *Memorandum from Principal Deputy General Counsel Delegated the Authority and duties of the General Counsel Reed D. Rubinstein to Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights re Bostock v. Clayton Cnty.*, 36 (Jan. 8, 2021), https://bit.ly/3AsVNw0 ("*Bostock* Letter"). Indeed, the Department noted that *Bostock*'s "logic that an employer must treat males and females as similarly situated comparators for Title VII purposes necessarily relies on the premise that there are only two sexes, and that the biological sex of the individual employee is necessary to determine whether discrimination because of sex occurred." *Id.* at 35. The Department offers no persuasive explanation for this reversal. While the Department is free to change its mind, it may not "depart from a prior policy sub silentio." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

II. The Proposed Rule would unlawfully eliminate female athletes' right to compete in single-sex athletic competitions.

The Proposed Rule purports to reserve any discussion of female athletics for another day, *see* 87 Fed. Reg. at 41537, but that is merely an attempt at misdirection. The Proposed Rule claims that the "Department … plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend §106.41 in the context of sex-separate athletics." *Id.* Yet section 106.41 merely prohibits recipients of federal funds from "discriminat[ing]" against or "exclud[ing]" an individual from athletic opportunities "on the basis of sex." §106.41(a). By elsewhere redefining the term "on the basis of sex" to include "gender identity," the Department will necessarily prohibit schools from basing athletic eligibility on biological sex instead of gender identity.

As the Department previously recognized, that action would be inconsistent not only with text and purpose of Title IX, but also with the logic underlying the Court's decision in *Bostock*:

> In *Bostock*, the Court took the position that "homosexuality and transgender status are inextricably bound up with sex," such that "when an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex." Under that logic, special exceptions from single-sex sports teams based on homosexuality or transgender status would themselves generally constitute unlawful sex discrimination, because homosexuality and transgender status are not physiological differences relevant to the separation of sports teams based on sex. In other words, if *Bostock* applies, it would require that a male student-athlete who identifies as female not be treated better or worse than other male student-athletes. If the school offers separate-sex teams, the male student-athlete who identifies as female must play on the male team, just like any other male student-athlete.

Bostock Letter at 36. Although the Department attempts to memory-hole its initial analysis by "archiv[ing]" it and "mark[ing] [it] not for reliance," 87 Fed. Reg. at 41530, it makes little effort to explain why it is no longer sound. As the Northern District of Texas recognized, "[i]f anything, *Bostock* reinforces the distinction between biological sexes and held that treating one sex worse than the other constitutes sex discrimination. The Supreme Court has long recognized the need for privacy in close quarters, bathrooms, and locker rooms to protect individuals with anatomical differences—differences based on biological sex." *Bear Creek Bible Church*, 571 F. Supp. 3d at 625 (citing *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996)).

Title IX's emphasis on biological sex as the determinative factor for eligibility to compete in women's sports is a matter of common sense. Males and females have inherent physical differences, regardless of how one identifies. Those differences are only magnified post-puberty. The average post-pubescent, biological male is taller, heavier, and has vastly greater muscle mass and lung capacity than the average post-pubescent, biological female. K. Chamari, et al., *The five-jump test for distance as a field test to assess lower limb explosive power in soccer players*, 22 J. Strength & Cond. Res., 944, 944–50 (2008). These physical realities create a significant safety threat when biological males compete against biological females, particularly in high-intensity sports. An elite male lacrosse player, for example, can shoot a lacrosse ball between 85-95 miles-per-hour. For this reason, goalies in male lacrosse games wear helmets and chest protectors. An elite female lacrosse player, in contrast, can shoot a ball anywhere from 45-65 miles-per-hour. Thus, goalies in female lacrosse games do not wear head and chest protection. In short, the Proposed Rule requires schools to allow a biologically male lacrosse player who identifies as a female to

compete against biological females and shoot a hard rubber ball at 90 miles-per-hour towards female athletes who have no head protection. The risk of serious injury, or even death, is obvious.

At bottom, the Proposed Rule is unmoored from elementary biology and basic statutory interpretation. By requiring school districts to allow biological males—with all of their attendant physiological advantages—to compete against biological females based solely on their internal notion of gender identity, the Department will inevitably deprive female student-athletes of achievements, scholarship opportunities, and the satisfaction that comes with winning a fair competition.[1]

III. The Proposed Rule would violate parents' fundamental rights under the Fourteenth Amendment.

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Under binding precedent, the Amendment "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Troxel*, 530 U.S. at 65 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Among these unenumerated rights are those that are "'deeply rooted in this Nation's history and tradition'" and "'implicit in the concept of ordered liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257-58 (2022) (quoting *Glucksburg*, 521 U.S. at 721).

Nearly 100 years ago, the Supreme Court held that the "liberty" protected by the Fourteenth Amendment includes the right of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Two years later, the Court held that the "liberty of parents and guardian" includes the right "to direct the upbringing and education of children under their control." *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510,

[1] Indeed, recent court rulings subjecting independent schools to the Department's interpretation of Title IX only underscore the stakes of the Proposed Rule's radical reinterpretation of federal civil rights law. *See Buettner-Hartsoe v. Baltimore Lutheran High Sch. Ass'n*, 2022 WL 2869041 (D. Md. July 21, 2022); *E.H. v. Valley Christian Acad.*, 2022 WL 2953681 (C.D. Cal. July 25, 2022). While PDE believes these opinions are erroneous, *see M.H.D. v. Westminster Sch.* 172 F.3d 797 (11th Cir 1999); *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n,* 134 F. Supp. 2d 965 (N.D. Ill. 2001); *Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317 (E.D.N.Y. 2012), they highlight a growing risk that the Department's atextual interpretation of Title IX will affect virtually every female student-athlete in the country.

534-35 (1925). Children are "not the mere creature of the state," *id.* at 535, and the "right[] … to raise one's children ha[s] been deemed 'essential'" and one of the "'basic civil rights of man,'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). These parental rights are rooted in the "historical[] … recogni[tion] that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (citing 1 W. Blackstone, Commentaries, 447; 2 J. Kent, Commentaries on American Law, 190). If the Proposed Rule is any indication, the Department appears to have forgotten this basic constitutional principle.

A child's gender identity implicates the most fundamental issues concerning the child, including the child's religion, medical care, mental health, sense of self, and more. Yet despite "extensive precedent" that parents must be involved in decisions concerning these types of issues, *Troxel*, 530 U.S. at 66 (listing cases), the Proposed Rule invites schools to coopt parents' rights to make those decisions. Schools could strip parents' prerogative to make decisions regarding the names and pronouns by which their children are called at school and in government documents like transcripts and diplomas, the bathrooms and locker rooms their children use, and their lodging accommodations on overnight school trips. Because the Proposed Rule redefines "sex" to include "gender identity," schools may insist that they should defer to a child's decisions regarding these issues—regardless of their parents' wishes and constitutional rights.

IV. The Proposed Rule's definition of Title IX "harassment" is unconstitutionally overbroad and foreclosed by Supreme Court precedent.

In *Davis v. Monroe County Board of Education*, the Supreme Court held that schools can violate Title IX's ban on sex-based discrimination if they are deliberately indifferent to sexual harassment by students. 526 U.S. 629, 633 (1999). But *Davis*, recognizing that public schools are constrained by the First Amendment, adopted a narrow definition of sexual harassment: Actionable harassment under Title IX must be "behavior [that] is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." *Id.* at 652.

The Department formally addressed this issue in the 2020 Rule. The 2020 rule "adopt[ed]" the Supreme Court's definition of sexual harassment from *Davis* "verbatim." *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,036 (May 19, 2020). Broader definitions of harassment, the Department found, have "infringed on constitutionally protected speech" and have led "'many potential speakers to conclude that it is better to stay silent.'" *Id.* at 30,164-65 & nn.738-39. The *Davis* standard "ensures that speech … is not peremptorily chilled or restricted" because it applies only when harassment rises to the level of "serious *conduct* unprotected by the First Amendment." *Id.* at 30,151-52 (emphasis added); *see also id.* at 30,162-63. The 2020 Rule thus defined "[s]exual harassment" to mean, in relevant part, "[u]nwelcome conduct determined by a

reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." 34 C.F.R. §106.30(a).

The Proposed Rule goes beyond the Supreme Court's definition of harassment in *Davis*. While the Supreme Court requires harassment to be "severe, pervasive, *and* objectively offensive," the Proposed Rule requires harassment to be "severe *or* pervasive." *Davis*, 526 U.S. at 652 (emphasis added); 87 Fed. Reg. at 41414 (emphasis added). By converting the "and" in the *Davis* standard into an "or," the Proposed Rule necessarily exposes students to discipline for one-off comments and other single instances of pure speech. And while the Supreme Court asks whether harassment "*denies* its victims the equal access to education," the Proposed Rule asks whether harassment "*limits* a person's ability to participate in or benefit from the recipient's education program or activity." *Davis*, 526 U.S. at 652 (emphasis added); 87 Fed. Reg. at 41410 (emphases added).

By defining harassment more broadly than *Davis*, the Proposed Rule sweeps in protected speech. The *Davis* standard marks the line where verbal harassment crosses from speech into conduct. Though *Davis* was not a First Amendment case, the Court had the First Amendment in mind when it defined harassment under Title IX. The Court "repeated the 'severe and pervasive' formulation five times." 85 Fed. Reg. at 30,149. It stressed "these very real limitations" on Title IX in direct response to "the dissent" from Justice Kennedy, which raised First Amendment concerns. 526 U.S. at 652-53 (citing the dissent four times).

Justice Kennedy argued that, if universities are liable for student-on-student harassment, then they will adopt "campus speech codes" that "may infringe students' First Amendment rights." 526 U.S. at 682; *see also id.* at 667 (noting that universities' power to discipline students for harassment is "circumscribed by the First Amendment"). Addressing those concerns, the Court explained that its narrow definition of harassment accounts for "the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored." *Id.* at 652-53 (citing the dissent). Those "practical realities," the Court agreed, include the need to comply with the First Amendment. *See id.* at 649 (agreeing with the dissent that schools face "legal constraints on their disciplinary authority" and explaining that its interpretation of Title IX would not require universities to risk "liability" via "constitutional … claims").

The Department claims that its expansion of the definition of hostile environment harassment is consistent with "the key concepts articulated by the Court in *Davis*." 87 Fed. Reg. at 41414. But the Department fails to explain how, precisely, that is the case. As noted, by expanding actionable harassment to include anything that is "severe *or* pervasive" instead of "severe, pervasive, *and* objectively offensive," *cf. Davis*,

526 U.S. at 652 (emphasis added), the Department dramatically increases the amount of speech prohibited by Title IX, including "single instance[s]" of "one-on-one" interactions—a standard the Court explicitly rejected in *Davis*, *see id.* The Department's only attempt to justify its departure from *Davis* is its contention that, "[a]lthough the *Davis* Court described the conduct at issue in the case as 'persistent,' that term was not part of the Court's analysis or the definition adopted by the Court." 87 Fed. Reg. at 41414. That is simply incorrect. *See Davis*, 526 U.S. at 562 ("In the context of student-on-student harassment," liability only attaches "where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect."). Moreover, it is not for the Department to create a standard it believes to be consistent with the spirit of the rule announced by the Supreme Court instead of simply following the rule "verbatim," as the current Rule does. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,036 (May 19, 2020).

V. The Proposed Rule would unconstitutionally compel student speech and regulate student speech based on content and viewpoint.

The Supreme Court has "held time and again that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'" *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018). "[T]he latter is perhaps the more sacred of the two rights." *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*." *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in most contexts, any such effort would be universally condemned." *Janus*, 138 S. Ct. at 2463.

Although the Proposed Rule does not provide specific examples of harassment based on gender identity, recent history demonstrates that the Rule will necessarily infringe on students' First Amendment rights. In its 2016 Dear Colleague Letter, for instance, the Department announced that it would "treat[] a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations." *2016 Dear Colleague Letter on Title IX and Transgender Students*, *2*, https://bit.ly/3dIcBaz. That guidance was later enjoined by a federal court, *see Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), but it is substantively identical to the position adopted by the Proposed Rule. Based on this tortured reading of the plain meaning of "sex," the Department required the "use [of] pronouns and names consistent with a student's gender identity."

The Proposed Rule invites the same approach. Coupled with the Proposed Rule's new position that even single instances of speech can constitute prohibited harassment, the Proposed Rule poses a grave threat to students' First Amendment rights. Millions of students across the country believe that biological sex is immutable and that a person cannot "transition" from one sex to another. For some of those students, that conviction stems from their religious beliefs. Others believe it to simply be a matter of common sense. Regardless, by forcing students to refer to a biological male by female pronouns or vice versa—or to "affirm" that another student is neither male nor female—the Department will "[c]ompel[] [them] to mouth support for views they find objectionable." *Cf. Janus*, 138 S. Ct. at 2463. Thus, the Proposed Rule is no different from the rule requiring schoolchildren to pledge allegiance to the flag in *Barnette*. Like the West Virginia State Board of Education in *Barnette*, the Proposed Rule would require students to affirmatively declare statements that they believe to be false and affirm ideologies with which they deeply disagree. Like the policy in *Barnette*, the Department's Proposed Rule is therefore unconstitutional.

The Proposed Rule would also impose content and viewpoint-based restrictions on protected speech. "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victim's Bd.*, 502 U.S. 105, 118 (1991). "Content-based regulations" are "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Accordingly, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009); *see, e.g., Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123 (D. Mass. 2003) (school policy allowing only "responsible" speech was a content-based regulation subject to strict scrutiny). In addition, "the First Amendment's hostility to content-based regulation extends" to "restrictions on particular viewpoints." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). Viewpoint discrimination is flatly prohibited. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019); *Mahanoy*, 141 S. Ct. at 2046 (schools cannot "suppress speech simply because it is unpopular").

Here, the Proposed Rule could subject students to discipline for the content and viewpoint of their speech. The Proposed Rule redefines Title IX harassment as "unwelcome sex-based conduct" that is "sufficiently severe or pervasive" that it "creates a hostile environment." 87 Fed. Reg. at 41569. It further specifies that "conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive." 87 Fed. Reg. at 41411. As noted, this new definition expands the scope of Title IX to cover even single instances of pure speech.

Thus, a student could run afoul of Title IX if a listener considers the student's speech about sex-based issues (which now include controversial topics of public debate such as gender identity) to be "unwelcome" and takes "severe" offense to the opinion expressed by the student. This is a classic content-based and viewpoint-based regulation of speech. *See, e.g., Saxe v. State College Area School District*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) (bans on "'harassment'" covering speech impose "'content-based'" and often "'viewpoint-discriminatory'" restrictions on that speech). Moreover, because the Proposed Rule expands the universe of complainants to bystanders who are not directly involved in an incident, students can be disciplined even when their speech is not directed toward the "offen[ded]" individual. In short, the Proposed Rule effectively authorizes a "heckler's veto" whenever a student expresses views that fall outside the campus consensus. *Biden's New Title IX Rule Guts Protections for Women and Girls. Here's How to Fight It*, The Heritage Foundation, (July 18, 2022), https://herit.ag/3R7ryS6. That is anathema to the First Amendment.

VI. The Proposed Rule would violate students' due process rights under the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment forbids the government from "depriv[ing] any person of life, liberty, or property, without due process of law." Through public education laws, students in every state have a property interest in their education, such that it cannot be deprived from them without due process. *See Goss v. Lopez,* 419 U.S. 565, 573 (1975). Inherent in the guarantee of due process is the accused's right to notice of the charges and evidence against him and to a fair and impartial hearing. *See Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399-400 (6th Cir. 2017). As the Supreme Court has observed, due process "concern[s] would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair." *Goss*, 419 U.S. at 579–80. But "[u]nfortunately, that is not the case, and no one suggests that it is." *Id.* "Disciplinarians," even when "proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed." *Id.* Because "the consequences [of a finding of misconduct] are potentially dire and permanent," *Doe v. Univ. of Scis.,* 961 F.3d 203, 213 (3d Cir. 2020), "[t]he risk of error is not at all trivial" and must "be guarded against" by rigid adherence to constitutional requirements, *Goss*, 419 U.S. at 580.

The Proposed Rule would essentially eliminate any semblance of due process in K-12 schools. First, it would eliminate a student's rights to review and respond to the evidence presented to the administrator deciding his or her fate. 87 Fed. Reg. at 41498. It would likewise strip students of their rights to review the report filed against them and to submit a response to the report. 87 Fed. Reg. at 41498. Finally, it eliminates students' rights to file a mandatory appeal to an adverse disciplinary outcome. 87 Fed.

Reg. at 41511. There is simply no justification for removing depriving students of these procedural protections. They pose little to no administrative burden on schools and ensure a small, minimum guarantee of impartial justice.

PDE wholeheartedly supports efforts to make schools safer for children and eliminate threats to student safety. But the solution is not to threaten students' and parents' constitutional rights.

VII. The Proposed Rule fails to comply with Public Law 105-277 and 5 U.S.C. §601.

Section 654 of Public Law 105-277 requires agencies to assess whether a proposed rule "strengthens or erodes the authority and rights of parents in the education, nurture, and upbringing of their children." That requirement is codified in the notes to 5 U.S.C. §601. As discussed above, the Proposed Rule significantly affects parents' abilities to direct the care, custody, and control of their children. *See Troxel*, 530 U.S. at 65. The Proposed Rule makes no attempt to comply with Section 654 or otherwise determine what effect the Department's actions will have on parental rights. Although PDE opposes the rule in its entirety, the Department must, at a minimum, include such an assessment in any final version of the Rule.

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Based on the foregoing concerns, PDE opposes the Proposed Rule in its entirety.

PDE would be happy to supply the Department with additional information regarding any of the matters discussed in this comment.

Respectfully submitted,

/s/ *Nicole Neily*
Nicole Neily
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Parents Defending Education