No. 24A78

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
Applicants,

v.

STATE OF LOUISIANA, BY AND THROUGH ITS ATTORNEY GENERAL, ELIZABETH B. MURRILL, ET AL.,
Respondents.

APPENDIX TO OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING APPEAL

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MONROE DIVISION

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ACADIA PARISH SCHOOL BOARD;

ALLEN PARISH SCHOOL BOARD;

BOSSIER PARISH SCHOOL BOARD;

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GRANT PARISH SCHOOL BOARD;

JEFFERSON DAVIS PARISH SCHOOL BOARD;

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NATCHITOCHES PARISH SCHOOL BOARD;

OUACHITA PARISH SCHOOL BOARD;

RED RIVER PARISH SCHOOL BOARD;

SABINE PARISH SCHOOL BOARD;

ST. TAMMANY PARISH SCHOOL BOARD;

WEBSTER PARISH SCHOOL BOARD;

WEST CARROLL PARISH SCHOOL BOARD;

Civil Action No. 3:24-CV-00563-TAD-KDM

Chief Judge Terry A. Doughty
Magistrate Judge Kayla D. McClusky

THE STATE OF MISSISSIPPI
By and through its Attorney General,
Lynn Fitch;

THE STATE OF MONTANA
By and through its Attorney General,
Austin Knudsen;

THE STATE OF IDAHO
By and through its Attorney General,
Raúl Labrador,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION;

MIGUEL CARDONA, in his official capacity as Secretary of Education;

U.S. DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS;

CATHERINE LHAMON, in her official capacity as the Assistant Secretary for Civil Rights;

U.S. DEPARTMENT OF JUSTICE;

MERRICK B. GARLAND, in his official capacity as the Attorney General of the United States,

DEFENDANTS.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs the State of Louisiana; the Louisiana Department of Education; Acadia Parish School Board; Allen Parish School Board; Bossier Parish School Board; Caddo Parish School Board; Caldwell Parish School Board; DeSoto Parish School Board; Franklin Parish School Board; Grant Parish School Board; Jefferson Davis Parish School Board; LaSalle Parish School Board; Natchitoches Parish School Board; Ouachita Parish School Board; Red River Parish School Board; Sabine Parish

School Board; St. Tammany Parish School Board; Webster Parish School Board; West Carroll Parish School Board; the State of Mississippi; the State of Montana; and the State of Idaho (collectively, "Plaintiffs") bring this action against defendants the U.S. Department of Education; Miguel Cardona, in his official capacity as Secretary of Education; the U.S. Department of Education's Office for Civil Rights; Catherine Lhamon, in her official capacity as Assistant Secretary for Civil Rights; the U.S. Department of Justice; and Merrick B. Garland, in his official capacity as the Attorney General of the United States (collectively, "Defendants") for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. This week, the U.S. Department of Education—by the stroke of a pen and over 400 Federal Register pages drafted in Washington, D.C. conference rooms—published new Title IX regulations intended to transform the classrooms, lunchrooms, bathrooms, and locker rooms of American schools. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (the "Rule" or "Final Rule"), Ex. A. There is normal federal government overreach—and then there is the Final Rule: a naked attempt to strong-arm our schools into molding our children in the current federal government's preferred image of how a child should think, act, and speak. The Final Rule is an affront to the dignity of families and school administrators everywhere, and it is nowhere close to legal.

2. Title IX prohibits educational institutions that receive federal funding from discriminating on the basis of sex in educational programs and activities. That prohibition promotes equal opportunity, dignity, and respect for both sexes—while at the same time recognizing (as both Title IX and longstanding regulations recognize) that equality and dignity occasionally demand differentiation between the two sexes to promote respect for both. Such differentiation is not unlawful discrimination: It furthers the precise goals, and protects the precise values, that undergird Title IX.

And over the past 50 years, that basic understanding has driven remarkable progress and countless opportunities—in particular for women and girls—in American education.

3. The Final Rule drives a dagger through the heart of Title IX's mandate. The central feature of the Final Rule is the Department's extraordinary move to transform Title IX's prohibition of discrimination based on "sex" to include discrimination based on "gender identity"—a wildly ambiguous term that itself is never fully defined in the Final Rule but that the Department describes as a student's subjective and internal "sense" of his or her gender. And based on that key move, the Department sets out to remake our educational system and our children.

4. To take just a few examples: The Final Rule prohibits single-sex bathrooms and locker rooms. The Final Rule likewise compels school officials both to use pronouns associated with a student's claimed "gender identity" and to force students to do so as well. And school officials should be careful about requesting documentation to verify the sincerity of a person's claimed gender identity, the Department ominously warns, because that *itself* might violate the Final Rule. Moreover, although the Department tries to downplay the Rule's impact on athletics—because the Department knows that extending its radical theory to athletics would be political suicide in an election year—the Rule cannot help but sound the death knell for female sports.

5. The consequences will be shocking and severe. Boys and girls will be forced to share bathrooms, locker rooms, and perhaps even lodging on overnight field trips with members of the opposite sex. Adding insult to injury, they will be forced to use "preferred pronouns" or else face punishment, which raises distinct Free Speech and Free Exercise problems. And that's just the students. Consider parents who, for example, may never hear about so-called "gender affirming" counseling that their children receive because the Final Rule allowed a school to conceal that information. Consider also teachers and other school administrators who will be forced to create and carry out employee training programs on the 423-page Rule, change school policies, and likely begin

costly construction projects to modify school bathrooms and locker rooms. And even that will not be enough because they will still be exposed to agency investigations and private litigation when, inevitably, Rule objectors (*e.g.*, parents and students) sue them because of their compliance and Rule proponents file complaints with the Department and sue them for failure to adequately comply. Finally, if States, education agencies, and schools consider resisting the Rule, they will run straight into the Department's awesome coercive power to withhold billions of dollars in federal funding. The Rule is lose-lose-lose across the board.

6. Through all these mandates and many others, the Rule does extraordinary violence to Title IX. Forcing a young girl to change clothes in front of a boy or man in a locker room is entirely antithetical to the dignity and respect that Title IX was intended to preserve and advance. So, too, is forcing children of opposite sexes to share adjoining stalls in the traditionally private space of a bathroom. These are not close questions. And if the Final Rule stands, it will gut the very essence of Title IX and destroy decades of advances in equal educational opportunities, especially for women and girls.

7. This lawsuit is intended to save Title IX and protect the myriad interests threatened by the Final Rule. By any measure, the Final Rule is unlawful. Plaintiffs thus respectfully urge the Court to (a) postpone the Rule's August 1, 2024 effective date, stay the Rule, or grant injunctive relief against the Rule's enforcement; (b) grant declaratory relief stating the Rule is unlawful; (c) vacate and set aside the Rule; and (d) award them all other relief requested herein.

JURISDICTION AND VENUE

8. This action arises under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88, and the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 553, 701–706. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331.

9. This Court has authority to issue declaratory, injunctive, and other relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, and the APA, 5 U.S.C. §§ 702, 705–706.

10. Venue is proper in this District under 28 U.S.C. § 1391(e)(1). Defendants are United States agencies or officers sued in their official capacities. Plaintiffs the State of Louisiana, Caldwell Parish School Board, Franklin Parish School Board, Ouachita Parish School Board, and West Carroll Parish School Board are residents of this District and division, and substantial harm giving rise to this Complaint occurred and will continue to occur within this District and division.

THE PARTIES

11. Plaintiff Louisiana is a sovereign State of the United States. This action is brought on behalf of Louisiana by Attorney General Elizabeth B. Murrill, who is legally authorized to sue on its behalf. Her offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802.

12. Plaintiff Louisiana Department of Education is an agency of the State of Louisiana, which has the Louisiana State Superintendent of Education as its administrative head. La. Rev. Stat. § 17:24(A). The Louisiana Department of Education "administer[s] and distribute[s] all federal funds received" and implements the State's policies and guidelines for Louisiana's public elementary and secondary schools. *Id.* § 17:24(C). The Louisiana Department of Education is located at 1201 North Third Street, Baton Rouge, Louisiana 70802.

13. Plaintiff Acadia Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Acadia Parish School Board is located at 2402 North Parkerson Avenue, Crowley, Louisiana 70526.

14. Plaintiff Allen Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Allen Parish School Board is located at 1111 West 7th Avenue, Oberlin, Louisiana 70655.

15. Plaintiff Bossier Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Bossier Parish School Board is located at 410 Sibley Street, Benton, Louisiana 71006.

16. Plaintiff Caddo Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Caddo Parish School Board is located at 1961 Midway Street, Shreveport, Louisiana 71108.

17. Plaintiff Caldwell Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Caldwell Parish School Board is located at 7112 Hwy 165, Columbia, Louisiana 71418.

18. Plaintiff DeSoto Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Desoto Parish School Board is located at 201 Crosby Street, Mansfield, Louisiana 71052.

19. Plaintiff Franklin Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Franklin Parish School Board is located at 7293 Prairie Road, Winnsboro, Louisiana 71295.

20. Plaintiff Grant Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Grant Parish School Board is located at 512 Main Street, Colfax, Louisiana 71417.

21. Plaintiff Jefferson Davis Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Jeferson Davis Parish School Board is located at 203 E. Plaquemine Street, Jennings, Louisiana 70546.

22. Plaintiff LaSalle Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. LaSalle Parish School Board is located at 3012 North First Street, Jena, Louisiana 71342.

23. Plaintiff Natchitoches Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Natchitoches Parish School Board is located at 310 Royal Street, Natchitoches, Louisiana 71457.

24. Plaintiff Ouachita Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Ouachita Parish School Board is located at 1600 North 7th Street, West Monroe, Louisiana 71291.

25. Plaintiff Red River Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Red River Parish School Board is located at 100 Bulldog Drive, Coushatta, Louisiana 71019.

26. Plaintiff Sabine Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Sabine Parish School Board is located at 695 Peterson Street, Many, Louisiana 71449.

27. Plaintiff St. Tammany Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. St. Tammany Parish School Board is located at 321 N. Theard Street, Covington, Louisiana 70433.

28. Plaintiff Webster Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. Webster Parish School Board is located at 1442 Sheppard Street, Minden, Louisiana 71055.

29. Plaintiff West Carroll Parish School Board operates elementary and secondary schools in Louisiana. It receives federal funding and is subject to Title IX and Title IX regulations. West Carroll Parish School Board is located at 314 East Main Street, Oak Grove, Louisiana 71263.

30. Plaintiff Mississippi is a sovereign State of the United States. This action is brought on behalf of Mississippi by Attorney General Lynn Fitch, who is legally authorized to sue on its behalf. Her offices are located at 550 High Street, Jackson, Mississippi 39201.

31. Plaintiff Montana is a sovereign State of the United States. This action is brought on behalf of Montana by Attorney General Austin Knudsen, who is legally authorized to sue on its behalf. His offices are located at 215 North Sanders Street, Helena, Montana 59601.

32. Plaintiff Idaho is a sovereign State of the United States. This action is brought on behalf of Idaho by Attorney General Raúl Labrador, who is legally authorized to sue on its behalf. His offices are located at 700 W. Jefferson Street, Suite 210, Boise, Idaho 83720.

33. Defendant U.S. Department of Education (the "Department") is an executive agency of the United States with its principal address located at 400 Maryland Avenue, SW, Washington, District of Columbia 20202. The Department issued the Rule that is challenged in this suit.

34. Defendant Miguel Cardona is Secretary of the Department and is sued in his official capacity. His principal address is 400 Maryland Avenue, SW, Washington, District of Columbia 20202. Defendant Cardona is responsible for carrying out the duties of the Department under federal law, including Title IX. Defendant Cardona signed the Rule that is challenged in this suit.

35. Defendant Office for Civil Rights ("OCR") is an office of the Department. Its principal address is 400 Maryland Avenue, SW, Washington, District of Columbia 20202. OCR is responsible for carrying out its duties under federal law, including Title IX.

36. Defendant Catherine Lhamon is the Assistant Secretary for Civil Rights and is sued in her official capacity. Her principal address is 400 Maryland Avenue, SW, Washington, District of Columbia 20202. Defendant Lhamon is responsible for carrying out the duties of OCR under federal law, including Title IX.

37. Defendant U.S. Department of Justice is a federal agency of the United States with its principal office at 950 Pennsylvania Ave., NW, Washington, District of Columbia 20530. Through its Civil Rights Division, the U.S. Department of Justice litigates violations of Title IX under 42 U.S.C. § 2000d-1.

38. Defendant Merrick B. Garland is the Attorney General of the United States and the head of the U.S. Department of Justice. His principal address is 950 Pennsylvania Ave., NW, Washington, District of Columbia 20530. Defendant Garland has responsibilities related to the implementation and enforcement of Title IX. *See* Exec. Order 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY HISTORY

A. Congress Enacted Title IX of the Education Amendments of 1972 to Promote Equal Opportunities in Education for Both Sexes by Imposing Conditions on Federal Funding.

39. In 1969, President Richard Nixon created a task force to study the status of women in American society and to consider federal policies that could improve their opportunities. The task force's findings were disheartening: "So widespread and pervasive are discriminatory practices against women that they have come to be regarded, more often than not, as normal." PRESIDENT'S TASK FORCE ON WOMEN'S RTS. & RESPS., A MATTER OF SIMPLE JUSTICE, III (1970).

40. The task force identified education as an avenue for improving equal opportunities for women and recommended that Congress "authorize the Attorney General to aid women and parents of minor girls in suits seeking equal access to public education, and to require the Office of Education to make a survey concerning the lack of equal educational opportunities for individuals by reason of sex." *Id.* at IV.

41. Representative Patsy Mink, who played a vital role in Title IX's adoption, echoed the task force's concerns about the "insidious" discrimination against women in education that deprived women "of the opportunity for an equal chance" and urged the U.S. House of Representatives to take action. Patsy T. Mink, *Patsy T. Mink Papers: Testimony by Rep. Mink in Support of Elimination of*

Discrimination against Women in Higher Education, during Hearing before the Special Subcomm. on Educ. of the H. Comm. on Educ. and Labor (June 24, 1970), https://tinyurl.com/ya9pejx5.

42. In 1972, Congress finally acted. It passed Title IX to remedy "one of the great failings of the American educational system"—"the continuation of corrosive and unjustified discrimination against women" that "reaches into all facets of education," 118 Cong. Rec. 5803 (Feb. 28, 1972) (statement of Sen. Birch Bayh)—and to "guarantee that women, too, enjoy the educational opportunity every American deserves," 117 Cong. Rec. 32,476 (Sept. 20, 1971) (statement of Sen. Birch Bayh); *see N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526 (1982) (noting that Senator Bayh was "the sponsor of the language ultimately enacted"). President Nixon signed Title IX into law on June 23, 1972. *See* Pub. L. No. 92-318, Title IX, 86 Stat. 235, 373–75 (codified at 20 U.S.C. §§ 1681, *et seq.*).

43. Title IX's text provides: "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 education program or activity receiving Federal financial assistance [with certain statutory exceptions.]" 20 U.S.C. § 1681(a).

44. At the time of Title IX's enactment, the term "sex" meant a person's biological sex—male or female—which "is an immutable characteristic determined" at "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.); *see, e.g.*, *Sex*, *Webster's Third New International Dictionary* 2081 (1966) ("one of the two divisions of organic esp. human beings respectively designated male or female"); *Sex, Webster's New World Dictionary* (1972) ("[E]ither of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions."); *Sex*, *American Heritage Dictionary* 1187 (1969) ("a. The property or quality by which organisms are classified according to their reproduction functions. b. Either of two divisions, designated *male* and *female*, of this classification.").

45. The statute uses this ordinary meaning of "sex." *See, e.g.*, *Neese v. Becerra*, No. 2:21-cv-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'"); 20 U.S.C. §§ 1681(a)(2) (discussing institutions that were "changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes"); 1681(a)(8) (referring to "students of one sex" and "students of the other sex").

46. Title IX thus promotes equal educational opportunities—and dignity and respect for men and women—by generally prohibiting recipients of federal funds from discriminating against a person based on his or her biological sex. At the same time, Title IX respects the biological differences between men and women that occasionally demand differentiation between the two sexes to promote respect for both. Title IX instructs, for example, that "nothing contained herein shall be construed to prohibit" institutions receiving federal funds "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This reflects the congressional understanding that separating the sexes "where personal privacy must be preserved" is not discrimination. *See* 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Birch Bayh) (explaining Title IX "permit[s] differential treatment by sex" when necessary, such as "in sport facilities or other instances where personal privacy must be preserved").

47. Title IX also allows a subset of institutions and programs, such as traditional single-sex schools and certain religious schools, to remain limited to "one sex." 20 U.S.C. § 1681(a)(3), (5). Similarly, it authorizes certain groups and activities to remain limited to one sex, such as sororities, fraternities, Girl Scouts, Boy Scouts, Girls State conference, and Boys State conference. *Id.* § 1681(a)(6)–(7). Title IX additionally permits single-sex activities like "father-son or mother-daughter activities at an educational institution" as long as "opportunities for reasonably comparable activities" are "provided for students of the other sex." *Id.* § 1681(a)(6)-(7), (8).

48. Implementing regulations, including the earliest ones (and those still in effect today), likewise understood that Title IX does not ban all differential treatment based on sex. To the contrary, regulations recognized that differential treatment is sometimes necessary to afford equal opportunities due to biological differences.

B. As Mandated by Statute, the Department's Predecessor Issued Regulations Implementing Title IX.

49. Following Title IX's passage, Congress recognized that more guidance was necessary. Congress therefore passed what is known as the "Javits Amendment" in 1974. That amendment required the Department's predecessor to promulgate regulations to effectuate Title IX, including "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, Title VIII, Part D, § 844, 88 Stat. 612.[1]

50. In compliance with that statutory mandate, the Department's predecessor published regulations implementing Title IX (the "1975 Regulations") on June 4, 1975. *See* U.S. Dep't of Health, Educ., & Welfare, *Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24,128 (Jun. 4, 1975) (codified at 45 C.F.R. pt. 86).

51. Congress subjected the 1975 Regulations to a statutory "laying before" provision, under which Congress could disapprove them by resolution within 45 days if it found them inconsistent with Title IX. *See* General Education Provisions Act, Pub. L. 93-380, 88 Stat. 567.

52. During that time period for congressional review, "[r]esolutions of disapproval were introduced in both Houses of Congress" and discussed. *N. Haven*, 456 U.S. at 532 & n.22. One House subcommittee "held six days of hearings to determine whether the [1975 Regulations] were 'consistent

[1] The Department was created in 1979 through the Department of Education Organization Act, and it formally adopted and recodified the 1975 Regulations without substantive changes when it began operations in 1980. 45 Fed. Reg. 30,802, 30,955–65 (May 9, 1980) (codified at 34 C.F.R. pt. 106).

with the law and with the intent of the Congress in enacting the law.'" *Id.* at 532. Ultimately, the resolutions failed, and the 1975 Regulations went into effect. *Id.* at 533.

53. Given the special congressional scrutiny that the 1975 Regulations endured, the Supreme Court has repeatedly "recognized the probative value" of the 1975 Regulations in light of "Title IX's unique post enactment history." *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984).

54. The 1975 Regulations provide that, "[e]xcept as provided elsewhere . . . no person shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance." 40 Fed. Reg. at 24,140 (codified at 34 C.F.R. § 106.31(a)) (emphasis added).

55. Provisions throughout the 1975 Regulations emphasize three key aspects of Title IX's general prohibition on discrimination based on sex in education programs and activities.

56. *First*, the 1975 Regulations demonstrate that sex discrimination means discrimination against someone based on his or her sex as a male or female. The 1975 Regulations thus referred to "women and men" and "male and female teams," *id.* at 24,132, 24,135, contrasted payment rates between "one sex" and the "opposite sex," *id.* at 24,135, and prohibited discrimination "against members of either sex," *id.* at 24,134.

57. *Second*, the 1975 Regulations underscore that not all differential treatment based on sex is prohibited discrimination. That is why the 1975 Regulations permit funding recipients to "separate toilet, locker room, and shower facilities on the basis of sex" as long as "such facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." *Id.* at 24,141. That is also why the regulations allow the "separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." *Id.* And

it is why they allow "[p]ortions of classes in elementary and secondary schools which deal exclusively with human sexuality" to be "conducted in separate sessions for boys and girls." *Id.*

58. *Third*, the 1975 Regulations show that sometimes biological differences make differential treatment based on sex necessary to provide equal opportunities. That is why the 1975 Regulations "requir[e] the use of standards for measuring skill . . . in physical education which do not impact adversely on members of one sex." *Id.* at 24,132; *see id.* (explaining this requirement is necessary because certain standards "may be virtually out-of-reach for many more women than men because of the difference in strength between the average person of each sex"); *see also id.* at 24,141 ("Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.").

59. Subsequent interpretations and regulations likewise carry forward these three features of Title IX. *See, e.g.*, Dep't of Health, Educ., & Welfare, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) ("athletic interests and abilities of male and female students must be equally effectively accommodated"); *id.* (explaining that most institutions would be obligated to develop "athletic programs that substantially expand opportunities for women to participate and compete at all levels"); *id.* at 71,415 ("Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities."); Dep't of Educ., *Establishment of Title and Chapters*, 45 Fed. Reg. 30,802, 30,960 (May 9, 1980) (discussing "[h]ousing provided by a recipient to students of one sex, when compared to that provided to students of the other sex").

60. Title IX and the early implementing regulations, not to mention current regulations,[2] thus evince Congress's policy decision to promote equal educational opportunities for both sexes

[2] *See, e.g.*, 34 C.F.R. § 106.41(b)-(c) (allowing single-sex teams and requiring recipients to provide "equal athletic opportunity for members of both sexes").

while not disregarding biological differences or mandating identical treatment of males and females in all circumstances—a decision that has proven enormously successful as (among many other things) female college attendance and participation in athletics has skyrocketed. *See, e.g.*, *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818–19 (11th Cir. 2022) (Lagoa, J., concurring) (describing the "remarkable impact Title IX has had on girls and women in sports").

II. ENFORCEMENT AND APPLICATION OF TITLE IX

A. Title IX Is Enforced Through Administrative Enforcement Proceedings and Litigation.

61. Through OCR, the Department enforces Title IX and regulations by, among other things, investigating discrimination complaints and seeking voluntary measures to cure violations. Investigations impose costs and burdens on funding recipients, as do compliance measures.

62. If a recipient of federal funds fails or refuses to comply with Title IX or Title IX regulations, Defendants can pursue administrative enforcement proceedings or refer the matter to the U.S. Department of Justice for litigation. *See* Title IX Legal Manual, V. *Federal Funding Agency Methods to Enforce Compliance*, available at https://tinyurl.com/byjsscde. Both impose costs and can culminate in the termination of federal funding. *See id.*

63. The threat of terminating federal funding is a powerful tool because the Department provides funding to public K-12 schools, colleges, and universities, as well as most private higher educational institutions.

64. In addition to Defendants' enforcement options, private individuals can also enforce Title IX and regulations through private litigation. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 680 (1979) (holding Title IX contains an implied private right of action and a woman could sue medical schools for denying her admission due to her sex).

B. The Department and the Supreme Court Find that Harassment Can Violate Title IX When It Is Based on Sex and Effectively Bars Access to Educational Opportunities.

65. Since the 1980s, the Department has taken the position that sexual harassment can be a form of sex discrimination prohibited by Title IX. *See* U.S. Dep't of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981).

66. The Department stated that sexual harassment can severely interfere with a student's education, not to mention general well-being, and emphasized the importance of ensuring "nondiscriminatory, safe environments in which students can learn." U.S. Dep't of Educ., Office of Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,034 (Mar. 13, 1997).

67. While acknowledging the seriousness of sexual harassment and attempting to remedy that discrimination, the Department also recognized the danger to Free Speech rights if recipients did not properly distinguish between prohibited conduct and protected free speech. It therefore issued guidance stating that "Title IX is intended to protect students from sex discrimination, not to regulate the content of speech." *Id.* at 12,045. It also admonished schools to "formulate, interpret, and apply [Title IX's] rules so as to protect academic freedom and free speech rights." *Id.*

68. The Supreme Court has also concluded that sexual harassment of a student can be discrimination based on sex in education programs and activities that violates Title IX (and creates liability in private damages suits) in certain circumstances. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 63–64, 75 (1992) (describing a teacher's sexual harassment of a student on school property). It has clarified that funding recipients violate Title IX when they have "actual knowledge" of a teacher's sexual harassment of a student and respond with "deliberate indifference" to that discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998).

69. When it comes to student-on-student sexual harassment, a recipient violates Title IX when that harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" and "the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). The Supreme Court explained that liability is limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs," otherwise it cannot be said that the recipient caused the victim to face the sex-based harassment "'under' the recipient's programs." *Id.* at 645.

70. The discriminatory conduct in *Davis* involved more than verbal conduct, so the majority opinion did not need to address First Amendment concerns. *See id.* at 653. The dissent in *Davis*, however, noted that attempts to curb allegedly harassing speech could run afoul of the First Amendment. *See id.* at 667 (Kennedy, J., dissenting) (collecting cases).

III. RECENT EXECUTIVE AND REGULATORY ACTIONS

A. In 2016, the Department Unsuccessfully Attempted to Change the Meaning of "Sex" in Title IX.

71. Recently, the Department dramatically departed from the plain meaning of Title IX, its own longstanding positions, and decades of precedent.

72. In May 2016, OCR and the Civil Rights Division of the U.S. Department of Justice issued a "Dear Colleague" letter that adopted a radical definition of the term "sex" in Title IX. U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter*, at 1 (May 13, 2016), https://tinyurl.com/mt554jvu ("2016 Dear Colleague Letter").

73. That letter instructed schools and universities that the Department would "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations" and referred to gender identity as an "internal sense of gender" that "may be different from or the same as the person's sex assigned at birth." *Id.* at 1–2. That instruction had dramatic

ramifications. To retain federal funding under the 2016 Dear Colleague Letter, State recipients would have to allow males who claim that they are female to use women's restrooms and locker rooms, play on women's teams, and participate in the girls-only sex-education classes. *Id.* at 3–4.

74. For obvious reasons, 22 States, including Louisiana, filed lawsuits to block the Department and other federal defendants from implementing and enforcing the 2016 Dear Colleague Letter. *See* Compl., *Texas et al. v. United States et al.*, No. 7:16-cv-00051 (N.D. Tex. May 25, 2016); Compl., *Nebraska et al. v. United States et al.*, No. 4:16-cv-03117 (D. Neb. July 8, 2016).

75. A district court promptly enjoined enforcement of the 2016 Dear Colleague Letter, *Texas v. United States*, 201 F. Supp. 3d 810, 836 (N.D. Tex. 2016), and the Department (under a new Administration) rescinded the 2016 Dear Colleague Letter shortly thereafter, *see* U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter* (Feb. 22, 2017), https://tinyurl.com/bdhux7sm.

B. In 2020, the Department Issued Title IX Regulations Addressing Sexual Harassment and Grievance Procedures.

76. On May 19, 2020, the Department published Title IX regulations primarily focused on sexual harassment and grievance procedures. *See* U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) ("2020 Regulations").

77. The 2020 Regulations were designed to "obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims." *Id.* at 30,026.

78. Recognizing that alleged sexual harassment can involve verbal and expressive conduct that raises potential First Amendment concerns, the 2020 Regulations adopted the *Davis* formulation

of sexual harassment for "purely verbal harassment." *Id.* at 30,142. Accordingly, it considered verbal harassment to constitute sex discrimination for Title IX purposes when it "is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education." *Id.* at 30,141; *see id.* at 30,033. The 2020 Regulations also defined sexual harassment to expressly include "quid pro quo harassment and Clery Act/[Violence Against Women Act] sex offenses." *Id.* at 30,033. For quid pro quo sexual harassment and sexual assault, the 2020 Regulations imposed no similar severe, pervasive, and objectively offensive requirement, reasoning that "prohibiting such conduct presents no First Amendment concerns" and "such serious misconduct causes denial of equal educational access." *Id.*

79. The 2020 Rule also tracked Supreme Court precedent in other ways, including by recognizing that recipients violate Title IX only when they have "actual knowledge" of sexual harassment and are deliberately indifferent to it. *Id.* at 30,033–34.

C. In 2021, the Department Again Unsuccessfully Attempted to Change the Meaning of "Sex" in Title IX.

80. After the Supreme Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Department (under the Biden Administration) again tried to redefine the meaning of "sex" for purposes of Title IX.

81. In January 2021, President Biden issued an executive order citing *Bostock* and declaring that Title IX likely "prohibit[s] discrimination on the basis of gender identity or sexual orientation" unless it "contain[s] sufficient indications to the contrary." Exec. Order 13,988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,* 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021). The order declared that "[i]t is the policy of [the Biden] Administration to prevent and combat discrimination on the basis of gender identity or sexual orientation" and that agency heads should take action to implement that policy. *Id.* at 7023–24.

82. In March 2021, President Biden issued another executive order that reaffirmed his Administration's policy regarding discrimination on the basis of sexual orientation or gender identity.

See Exec. Order 14,021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, 86 Fed. Reg. 13,803, 13,803 (Mar. 8, 2021). The order also instructed the Secretary of Education specifically to take action to implement that policy. *See id.*

83. Just a few months later, Defendants advanced a new interpretation of Title IX.

84. On June 22, 2021, the Department issued a notice of "interpretation" of Title IX. *See* U.S. Dep't of Educ., *Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021) ("2021 Interpretation").

85. In the 2021 Interpretation, the Department announced that it now "interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." *Id.* at 32,637. It further announced that OCR would "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity." *Id.* at 32,639.

86. The very next day, on June 23, 2021, the Department released a "Dear Educator" letter notifying educators of the 2021 Interpretation and its plans to "fully enforce" its new interpretation. U.S. Dep't of Educ., Office for Civil Rights, *Dear Educator Letter* (Jun. 23, 2021), https://tinyurl.com/ywrf7jb6. The letter also provided links to new guidance documents from OCR and the Department of Justice that "provide examples of the kind of incidents" that the Department can investigate. *See id.* at 2. The examples demonstrated that Defendants would investigate recipients for a Title IX violation based on students' refusal to use a classmate's "preferred pronouns." *See* U.S. Dep't of Justice & U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families*, https://tinyurl.com/58k7pkcd.

87. Once again, States, including Louisiana, Mississippi, Montana, and Idaho, sued to challenge the Department's unlawful rewriting of Title IX. *See* Complaint, *State of Tenn., et al. v. U.S.*

Dep't of Educ., Case No. 3:21-cv-00308 (E.D. Tenn. Aug. 30, 2021). And, once again, the States secured an injunction that prevented Defendants from enforcing their erroneous interpretation of Title IX against the States. *See Tennessee v. U.S. Dep't of Educ.*, 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022).

D. In 2022, the Department Issued a Proposed Rule that Would Redefine "Sex" and When Harassment Constitutes Sex Discrimination under Title IX.

88. On July 12, 2022, the Department published a proposed rule that preceded the Final Rule that is challenged in this lawsuit. *See* U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41,390 (July 12, 2022) ("Proposed Rule").

89. In the Proposed Rule, the Department rejected the longstanding, ordinary meaning of "sex" and proposed to redefine discrimination "on the basis of sex" to mean "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 41,571.

90. Where "'Title IX or this part permits different treatment or separation on the basis of sex," the Department proposed to prohibit recipients from doing so in a manner that "subject[s] a person to more than de minimis harm, unless otherwise permitted." *Id.* The Proposed Rule declares that "[a]dopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." *Id.*

91. In other words, the Department proposed, among other things, prohibiting single-sex bathrooms and locker rooms. That is because a recipient would be required to allow a male who claims to be a female to use girls' bathrooms and locker rooms—otherwise the recipient would subject that student to "more than de minimis harm" that constitutes sex discrimination under the Proposed Rule. *See id.* at 41,534.

92. These provisions of the Proposed Rule have implications for the fate of girls' and women's teams at any schools that receive federal funding: Under the logic of the Proposed Rule, women's and girls' sports teams will cease. That reality—and the political fallout of that result—is why the Proposed Rule purports to defer the question of athletics to a separate rulemaking. *See id.* at 41,537.

93. The Department also proposed to jettison the 2020 Regulations' definition of sexual harassment that drew from the Supreme Court's decision in *Davis*, failing to properly account for the differences between verbal and physical conduct. *See id.* at 41,569. This, combined with the Proposed Rule's redefinition of "sex," would require schools to police and curtail a whole host of protected free speech.

94. The Proposed Rule creates additional constitutional problems, departs from the statute in other ways, and would have serious detrimental harm on recipients, teachers, students, and society at large.

95. Given all the Proposed Rule's flaws, it is no surprise that the Department received 240,203 comments about the Proposed Rule. Plaintiff Montana, joined by Plaintiffs Louisiana and Mississippi, submitted a comment letter that detailed many of the problems with the Proposed Rule. *See* Ex. B (Montana Letter). Plaintiffs Louisiana, Mississippi, and Montana also joined other comments raising serious concerns with the Proposed Rule. *See* Ex. C (Tennessee Letter); Ex. D (Ohio Letter); Ex. E (Indiana Letter).

E. The Department Proposed a Title IX Rule Specifically Related to Athletics in 2023.

96. In April 2023, the Department issued a proposed rule regarding its regulation of sex-separated athletic teams under Title IX. *See* U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in*

Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860 (Apr. 13, 2023) ("Proposed Athletics Rule").

97. The Department stated that "the purpose of this regulatory action . . . is to propose a regulatory standard under Title IX that would govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity." *Id.* at 22,860.

98. It then proposed amending Title IX regulations to impose burdens on recipients that desire to maintain girls-only and boys-only athletic teams and would require recipients to (1) allow boys who claim to be girls to play on some girls' teams and (2) allow girls who claim to be boys to play on some boys' teams. Specifically, the Proposed Athletics Rule provides:

> If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity, those criteria must, for each sport, level of competition, and grade or education level:
> (i) be substantially related to the achievement of an important educational objective, and
> (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

Id. at 22,891.

99. Despite the significance of the Proposed Athletics Rule and the incredibly damaging impact it would likely have on women's sports and female participation in athletics, the Department provided only a month for the public to comment. *Id.* at 22,860.

IV. THE FINAL RULE

100. Fast forward to today: On April 29, 2024, the Department published the Final Rule, which redefines "sex" in Title IX to embrace "gender identity" (and other concepts that are distinct from sex) and still purports to leave the politically nuclear topic of sports—and whether single-sex

teams are permissible—for another day. *See* 89 Fed. Reg. at 33,886. The Final Rule contains the same flaws as the Proposed Rule, *see, e.g.*, Exs. B–E, and then some.

101. The Department cites its "authority to issue rules effectuating [Title IX's] prohibition on sex discrimination consistent with the objectives of the statute." *Id.* at 33,476 (citing 20 U.S.C. § 1682). Yet the Rule upends the entire Title IX framework, beginning with redefining what Title IX's general prohibition against discrimination on the basis of "sex" means.

102. Although 20 U.S.C. § 1681 prohibits funding recipients from subjecting a person "to discrimination under any education program or activity" based on "sex," the Rule expands Title IX to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 33,476. These other grounds are not interchangeable with sex. A recipient that treats a person differently based on some of these grounds does not always discriminate against that person based on sex. And, as explained above, Title IX at times warrants and even demands recognizing and respecting differences between the sexes. Disregarding the differences between "sex" and, for example, "gender identity" (whatever that means) thus creates particular problems and inconsistencies within Title IX and the Rule itself.

103. The Rule fails to define "gender identity," but the Department "understands" it to mean "an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id.* at 33,809. Couched in those capacious terms, discrimination based on gender identity is necessarily different than discrimination based on sex.

104. Nevertheless, the Rule treats gender identity as synonymous with sex in certain scenarios. For example, the Rule requires recipients of federal funds to allow persons to use whichever single-sex bathroom or locker room corresponds with their claimed gender identity at that time. *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.*

(agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm"); *id.* at 33,887 (providing that failing to treat a person "consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex").[3] So under the Rule, every elementary school, middle school, high school, and university that receives federal funding is prohibited from having single-sex bathrooms and locker rooms. This, of course, conflicts with Title IX and the earliest regulations that recognized having single-sex facilities like bathrooms, locker rooms, and dormitories is not prohibited sex discrimination.

105. The Rule gives recipients—along with students and staff—no measures to prevent this requirement (that people be treated consistently with their claimed gender identity) from being abused. Indeed, the Rule suggests recipients cannot impose documentation requirements, such as requiring a diagnosis of gender dysphoria (previously referred to as gender identity disorder), without causing prohibited "more than de minimis harm." *Id.* at 33,819. And the Rule warns that persons cannot be harassed based on gender identity when "access[ing] sex-separate facilities." *Id.* at 33,818; *see id.* at 33,516 ("unwelcome conduct based on gender identity can create a hostile environment when it

[3] The Rule provides no meaningful guidance on how to deal with persons who do not identify with either the male or female sex. *See* 89 Fed. Reg. at 33,818 (noting the Rule does "not specify how a recipient must provide access to sex-separate facilities for students who do not identify as male or female" and suggesting a recipient may "coordinate with the student . . . to best provide the student with safe and nondiscriminatory access to facilities"). But to the extent the Rule treats "sex" and "gender identity" as synonymous, a recipient may violate the Rule if it provides single-sex bathrooms for males and females but declines to provide a single-sex bathroom that corresponds specifically with a multitude of gender identities. *See id.* at 33,816 (noting that "there are stigmatic injuries, associated with treating individuals differently on the basis of sex, and in such circumstances, no additional showing of a more 'material' harm is required under Title IX"); *What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://tinyurl.com/ymwestm3 (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin regardless of what gender they were assigned at birth").

otherwise satisfies the definition of sex-based harassment"); *id.* at 33,884 (defining sex-based harassment to include "other harassment on the basis of sex, including on the bases described [in the expanded scope of Title IX discrimination in § 106.10]").

106. The Rule issues that warning because even comments questioning whether a person belongs in a certain bathroom could be prohibited harassment under the Rule. *See, e.g.*, *id.* at 33,516 ("harassing a student—including acts of verbal . . . aggression, intimidation, or hostility based on the student's nonconformity with stereotypical notions of masculinity and femininity or gender identity—can constitute discrimination on the basis of sex under Title IX in certain circumstances"); *id.* at 33,514 ("a one-off remark . . . alone may not be severe or pervasive enough to create a hostile environment, but if multiple peers repeatedly call the student 'girly,' then that same treatment may create a hostile environment for that student").

107. Such questioning is prohibited under the Rule because, along with redefining what "sex" means in Title IX, the Rule dramatically expands the 2020 Regulations' "sexual harassment" definition (which it terms "sex-based harassment") beyond what the text of Title IX can bear. *Id.* at 33,884.

108. Under the Rule, "sex-based harassment" is harassment based on any of the "bases described in § 106.10," *id.* at 33,884—that is, "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity," *id.* at 33,886—and is "a form of sex discrimination" that includes "hostile environment harassment." *Id.* at 33,884. The Rule then defines hostile environment harassment as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.,* creates a hostile environment)." *Id.*

109. In other words, speech expressing critical views about the concept of gender identity—including views that are mainstream, widely shared, and legitimate—could be prohibited sex-based harassment under the Rule even if it is not "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis*, 526 U.S. at 633; *see* 89 Fed. Reg. at 33,498 (recognizing the Rule's definition is a "broader standard" than the *Davis* standard).[4]

110. Even comments not directed toward a person can give rise to "a complaint of sex-based harassment" under the Rule. *See* 89 Fed. Reg. at 33,654 ("[A] person who witnesses an incident that creates a hostile environment for them may make a complaint on their own behalf."). And much protected First Amendment speech would be viewed as sex-based harassment under the Rule. *See, e.g.*, *id.* at 33,570 ("academic discourse of students or teachers *generally* would not meet this standard" (emphasis added)); *id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, (last accessed May 1, 2024), https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination ("SOGI Guidance")); SOGI Guidance ("Harassment can also include, for example, offensive or derogatory remarks about a person's transgender status or gender transition. Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

[4] Expressing views on sex stereotypes, sex characteristics, pregnancy or related conditions, or sexual orientation could also be classified as harassment. *See, e.g.*, 89 Fed. Reg. at 33,514 (indicating that derogatory comments about pregnancy could "create a hostile environment"). The Rule thus will chill speech on a wide variety of topics.

111. Indeed, the Rule would compel students and teachers to use whatever pronouns a person demands, *see, e.g.*, 89 Fed. Reg. at 33,516, which creates conflicts with Free Speech and Free Exercise rights, *see, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 511–12 (6th Cir. 2021).

112. Similarly, the Rule will lead to the infringement of parental rights and will create Due Process problems. *See, e.g.*, 89 Fed. Reg. at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment); *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,597 (allowing a Title IX Coordinator to override a parent's wishes "with respect to that parent's child" based on the coordinator's judgment about potential harm); *id.* at 33,537 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"); *id.* at 33,893 (requiring recipients to use a "preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings").

113. The Rule accordingly makes it impossible for recipients to avoid liability. If recipients comply with the Rule, they will face private lawsuits alleging they violated constitutional rights. And, if they fail to comply with the Rule or inadequately comply with the Rule, recipients will face Title IX investigations and enforcement actions and private lawsuits alleging Title IX violations.

114. The Rule's redefinition of "sex" and dramatic expansion of what constitutes prohibited discrimination and harassment thus not only departs from Title IX's text and purpose, but

it also substantially increases a funding recipient's liability risk and Title IX obligations. *See, e.g.*, *id.* at 33,563 ("the recipient need not have incontrovertible proof that conduct violates Title IX for it to have an obligation to respond," but rather "if the conduct reasonably *may* be sex discrimination, the recipient must respond in accordance with § 106.44" (emphasis added)).

115. Other aspects of the Rule also increase a recipient's obligations and potential liability, either independently or in conjunction with other portions of the Rule, in a way that is contrary to Title IX and arbitrary and capricious. *See, e.g.*, *id.* at 33,888 (requiring all non-confidential employees at elementary or secondary schools "to notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination" under the Rule); *id.* at 33,548 (imposing extensive training requirements and acknowledging that the Rule "will require recipients' time and effort to update training materials and conduct additional training"); *id.* at 33,563 ("Some of the recipient's duties under § 106.44 arise when the Title IX Coordinator has knowledge of conduct that reasonably may constitute sex discrimination, but the recipient also has duties before such an occurrence."); *id.* at 33,567 (noting that "the obligation to monitor for barriers to reporting is not triggered only when a concern is raised over barriers to reporting," but rather "[t]he Title IX Coordinator must monitor for barriers regardless of whether a concern has been raised about such barriers"); *id.* at 33,598 ("When the Title IX Coordinator is notified of conduct that reasonably may constitute sex discrimination and does not initiate a complaint, the Title IX Coordinator must take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity."); *id.* at 33,682 ("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 and conduct that is subject to the recipient's disciplinary authority."); *id.* at 33,869 ("In some instances, such as when an alleged incident occurred outside of the United States and may have

contributed to a sex-based hostile environment under the recipient's education program or activity domestically, the Department acknowledges that the resulting investigation may be more time consuming.").

116. Finally, the Rule pretends that its dramatic overhaul of Title IX will have no impact on whether it is permissible for schools to have separate athletic teams for women and girls. *See id.* at 33,817 ("Until the [Proposed Athletic Rule] is finalized and issued, the current regulations on athletics continue to apply."). But that cannot be right since the Rule takes the position that treating someone consistent with his or her biological sex when they claim to be of the opposite sex constitutes more than de minimis harm and sex discrimination. *See, e.g.*, *id.* at 33,815, 33,887. That logic means that, in at least some circumstances, recipients would be required to allow males to play on female-only teams to comply with the Rule's interpretation of Title IX's prohibition on sex discrimination. And that position is entirely unsurprising because it is the same position this Administration has urged federal courts to adopt. *See also* Brief for United States as Amicus Curiae, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1, at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex"); *id.* at 21–29. The Department's attempt to run away from the topic of sports now can thus be explained only by the reality that the Department understands its position—if expressly promulgated in the Federal Register—would be political suicide in an election year.

117. The Rule is contrary to law, exceeds Defendants' statutory authority, and is arbitrary and capricious under the Administrative Procedure Act ("APA"). The Rule also imposes conditions in violation of the Spending Clause and is an unlawful exercise of legislative power. And Defendants violated the APA's procedural requirements by not providing a meaningful opportunity to comment on the Rule.

V. THE DETRIMENTAL IMPACT OF THE FINAL RULE

118. Because the Rule disregards and effectively rewrites the statutory text, its issuance undermines our Nation's constitutional structure and flouts the democratic will of the people as reflected in Title IX and duly enacted state laws that conflict with the Rule.

119. In addition, the Rule subverts Title IX's purpose and will particularly harm the precise population that Title IX was meant to help most—women and girls, who will now face increased threats to privacy and safety, not to mention will lose spots on sports teams and podiums. *See Adams*, 57 F.4th at 819–21 (Lagoa, J., concurring).

120. If that were not enough, the Rule will trample Free Speech and Free Exercise rights of students and teachers, "prescrib[ing] what shall be orthodox" and "forc[ing] citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Under the Rule, a funding recipient would risk Title IX enforcement proceedings or private liability if it failed to take action when a student or teacher fails to use biologically inaccurate pronouns or expresses a belief that Genesis 1:27 is true. *See* 89 Fed. Reg. at 33,516; SOGI Guidance (characterizing "misuse" of pronouns as an example of harassment).

121. The Rule causes direct, immediate, and ongoing irreparable harm to Plaintiffs specifically, including by subjecting them to increased regulatory burdens, exposing them to litigation risks, and overriding state laws and local policies on matters of traditional state and local authority.

122. Because each Plaintiff State and its education systems, including elementary schools, secondary schools, and postgraduate schools, receive federal funding for education programs and activities, Plaintiff States are subject to the Rule. Harms to the Plaintiff States' education agencies and public universities are "necessarily . . . direct injur[ies]" to the Plaintiff States themselves. *See Biden v. Nebraska*, 143 S. Ct. 2355, 2366 (2023). And the Rule itself recognizes that States are regulated parties subject to the Rule: "[A]ll 50 States have accepted Federal funding for education programs or activities

and are subject to Title IX as to those programs and activities," and the Rule "appl[ies] to all recipients of Federal financial assistance," including "State educational agencies." 89 Fed. Reg. at 33,490, 33,541, 33,634.

123. Under Louisiana law, Plaintiffs Acadia Parish School Board; Allen Parish School Board; Bossier Parish School Board; Caddo Parish School Board; Caldwell Parish School Board; DeSoto Parish School Board; Franklin Parish School Board; Grant Parish School Board; Jefferson Davis Parish School Board; LaSalle Parish School Board; Natchitoches Parish School Board; Ouachita Parish School Board; Red River Parish School Board; Sabine Parish School Board; St. Tammany Parish School Board; Webster Parish School Board; West Carroll Parish School Board (collectively, "Plaintiff School Boards") are responsible for operating public elementary and secondary schools within their respective districts in Louisiana. They all receive federal funds and are subject to subject to Title IX and Title IX regulations.

124. That means each Plaintiff is "an object of [the] regulation" and suffers an "increased regulatory burden" as a direct result of the Rule. *See Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264, 266 (5th Cir. 2015); *see also Career Colleges & Sch. of Tex. v. United States Dep't of Educ.*, 98 F.4th 220, 234 (5th Cir. 2024).

125. Indeed, the Rule does not dispute that it will impose costs on "all recipients," including "time reading and understanding the final regulations" and "revis[ing] their grievance procedures." 89 Fed. Reg. at 33,866–67. It also concedes that "all regulated entities will experience an increased recordkeeping burden under the final regulations," acknowledges that "recipients would be required to address more complaints," projects "a 10 percent increase in the number of investigations conducted annually," and admits that the Rule "could result in increased costs to recipients." 89 Fed. Reg. at 33,881, 33,492, 33,850, 33,877.

126. The Rule is right that it will impose costs. It will cause Plaintiff States, their education agencies, and their public universities and the Plaintiff School Boards to incur costs to review and understand the Rule, as well as to update policies and procedures. It will also cause ongoing costs as a result of increased Title IX complaints, investigations, and private lawsuits (from Rule proponents) based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment that includes protected speech, and (3) application of Title IX to conduct that occurs outside of the recipient's programs and activities. Plaintiffs will also incur litigation costs to defend themselves against lawsuits from students, parents, and teachers who will allege that Plaintiffs' compliance with the Rule violated parental rights, Free Speech rights, Free Exercise rights, or Due Process rights. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.) ("There is not categorical 'harassment exception' to the First Amendment's free speech clause.").

127. Even putting increased obligations, litigation risks, and compliance costs to one side, the Rule injures Plaintiff States and their educational agencies and Plaintiff School Boards by forcing them into a lose-lose situation: (1) comply with an unlawful bureaucratic rewrite of Title IX with which they do not wish to comply, or (2) lose millions or billions of dollars of federal funding for their students.

128. Louisiana and its local programs received at least $2,774,696,659 of funding from the Department last year and is projected to receive at least $ 2,930,225,942 this year. *See Funds for State Formula-Allocated and Selected Student Aid Programs, by State*, available at https://tinyurl.com/4k2rr5hh (last accessed May 1, 2024); *see also* U.S. Dep't of Educ., *Fiscal Years 2023-2025 State Tables of the U.S. Dep't of Educ.*, https://tinyurl.com/4k2rr5hh (noting the tables "do not reflect all department funds that a State receives").

129. Mississippi and its local programs received at least $1,592,288,396 of funding from the Department last year and is projected to receive at least $ 1,678,255,514 this year. *See Funds for State Formula-Allocated and Selected Student Aid Programs, by State*, available at https://tinyurl.com/4k2rr5hh (last accessed May 1, 2024).

130. Montana and its local programs received at least $496,757,925 of funding from the Department last year and is projected to receive at least $513,671,547 this year. *See id.*

131. Idaho and its local programs received at least $688,106,682 of funding from the Department last year and is projected to receive at least $734,895,238 this year. *See id.*

132. Plaintiff School Boards similarly rely on federal funding to support their schools, which makes up 26% of the total funding for some districts. *See, e.g.*, *Acadia Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/3fwdrpta (showing the district received $30,963,000 in federal funds in 2020-2021, which made up 26% of its revenue); *Allen Parish*, Nat'l Center for Educ. Statistics (showing the district received $6,041,000 in federal funds in 2020–2021, which made up 10% of its revenue) *Bossier Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/2dhw3f7x (showing the district received $31,098,000 in federal funds in 2020-2021, which made up 10% of its revenue); *Caddo Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/mr3jcdcc (showing the district received $78,513,000 in federal funds in 2020-2021, which made up 14% of its revenue); *Caldwell Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/bdenvtnv (showing the district received $5,319,000 in federal funds in 2020-2021, which made up 22% of its revenue); *Desoto Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/2ay7s7mv (showing the district received $12,891,000 in federal funds in 2020-2021, which made up 13% of its revenue); *Franklin Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/bdd6hmeh (showing the district received $10,860,000 in federal funds in 2020-2021, which made up 26% of its revenue); *Grant Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/mr374nuu (showing the district received $6,324,000 in federal funds in 2020-

2021, which made up 13% of its revenue); *Jefferson Davis Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/kbezh7vs (showing the district received $10,457,000 in federal funds in 2020-2021, which made up 13% of its revenue); *LaSalle Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/4vbfvyz5 (showing the district received $5,201,000 in federal funds in 2020-2021, which made up 14% of its revenue); *Natchitoches Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/yc26vrbf (showing the district received $15,578,000 in federal funds in 2020-2021, which made up 19% of its revenue); *Ouachita Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/bd4yv89v (showing the district received $28,535,000 in federal funds in 2020-2021, which made up 11% of its revenue); *Red River Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/24c4fzyx (showing the district received $5,648,000 in federal funds in 2020-2021, which made up 19% of its revenue); *St. Tammany Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/59a3uej2 (showing the district received $61,092,000 in federal funds in 2020-2021, which made up 11% of its revenue); *Webster Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/2wje9347 (showing the district received $11,341,000 in federal funds in 2020-2021, which made up 14% of its revenue); *West Carroll Parish*, Nat'l Center for Educ. Statistics, https://tinyurl.com/4xdfdhzc (showing the district received $4,023,000 in federal funds in 2020-2021, which made up 17% of its revenue).[5]

133. The Rule accordingly could deprive Plaintiff States, along with their education systems and public universities, and Plaintiff School Boards of billions of dollars of federal funding.

134. The Rule also harms the Louisiana Department of Education specifically. The Louisiana Department is often the direct recipient of federal funds and retains a portion of the federal

[5] Audit reports indicate Red River Parish School Board received $5,752,267 in federal funds in school year 2020–21.

funds for administrative costs. But in order to receive the funds, the Louisiana Department must sign an assurance that it will comply with Title IX and regulations issued under Title IX.

135. In addition to hurting the Plaintiffs' financial interests, the Rule also harms the Plaintiff States' sovereign interests, including by interfering with their authority over education in their State, their democratically enacted laws, and their future ability to legislate. *See Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018) (explaining a State's "inability to enforce its duly enacted plans clearly inflicts irreparable harm"); *Arizona v. Yellen*, 34 F.4th 841, 845 (9th Cir. 2022) (concluding a State had standing where it alleged "infringement on its authority to set tax policy and its interest in being free from coercion impacting its tax policy"); *W. Virginia v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1149 (11th Cir. 2023) (concluding States "suffered irreparable harm" where a statutory provision allegedly "affected the States' sovereign authority to tax"); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021) ("The States, too, have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach."); *Tennessee v. Dep't of Educ.*, 615 F. Supp. 3d 807, 841 (E.D. Tenn. 2022) (concluding States "have sovereign interests in enforcing their duly enacted state laws" and plaintiff States "suffered an immediate injury" when the federal government issued guidance that conflicted with state law).

136. Louisiana enacted the Fairness in Women's Sports Act "to promote sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9). It accomplishes these goals, in part, by mandating that state-funded schools' "[a]thletic teams or sporting events designated for females, girls, or women shall not be open to students who are not biologically female." *Id.* § 4:444(B).

137. Mississippi law promotes sex equality by requiring all state "public primary" and "secondary school[s]," and all state schools that are "a member of the Mississippi State High School Activities Association," "a public institution of higher learning," or a "higher education institution that is a member of the NCAA, NAIA, or NJCCA," to "expressly designate[]" their "[i]nterscholastic or intramural athletic teams" and "sports" "based on biological sex." Miss. Code Ann. § 37-97-1(1). Mississippi law prohibits "[a]thletic teams or sports designated for 'females,' 'women' or 'girls'" from allowing participation by "students of the male sex." *Id.* § 37-97-1(2); *see id.* § 37-97-1(1)(a)-(c) (designations). In addition, all "government entit[ies]," "licensing or accrediting organization[s]," and "athletic association[s] or organization[s]" are prohibited from "entertain[ing] a complaint, open[ing] an investigation, or tak[ing] any other adverse action against a primary or secondary school or institution of higher education for maintaining separate interscholastic or intramural athletic teams or sports for students of the female sex." *Id.* § 37-97-3.

138. Montana law defines the term "sex" as biological sex and specifically excludes the concept of gender identity from the definition:

> [T]he organization of the body parts and gametes for reproduction in human beings and other organisms. In human beings, there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male or female, including sex chromosomes, naturally occurring sex chromosomes, gonads, and nonambiguous internal and external genitalia present at birth, without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender.

Mont Code. Ann. § 1-1-201(1)(f).

139. In 2021, Montana enacted the "Save Women's Sports Act." *See* Mont. Code Ann. § 20-7-1306. That act requires athletic teams "sponsored by a public elementary or high school . . . or any school or institution whose students or teams compete against a public school" to be "designated . . . based on biological sex." *Id.* § 1306(1). The Save Women's Sports Act provides that "[a]thletic teams or sports designated for females, women, or girls may not be open to students of the male sex." *Id.*

§ 1306(2). The Save Women's Sports Act defines "female," "male," and "sex" pursuant to Mont. Code. Ann. § 1-1-201(1)(f).

140. Montana's parental involvement in education law protects the rights of students and teachers who refuse to use biologically inaccurate pronouns. Montana requires that a parent "shall provide written consent before the parent's child uses a pronoun that does not align with the child's sex." Mont. Code. Ann. § 40-6-704(1)(f). "If a parent provides written consent . . . a person may not be compelled to use pronouns that do not align with the child's sex." *Id.*

141. Idaho statutorily defines "sex" as "an individual's biological sex, either male or female." Idaho Code § 73-114(2)(n). That definition applies to all of Idaho's laws "unless otherwise apparent from the context." *Id.* § 73-114(2).

142. Finding that there are "inherent differences between men and women" and that those differences "remain cause for celebration," Idaho enacted the Fairness in Women's Sports Act. The Act ensures "sex equality" by protecting "opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors." Idaho Code §§ 33-6201–6202. The Act requires that state-funded school "[a]thletic teams or sports designated for females, women, or girls shall not be open to students of the male sex." *Id.* § 33-6203. Although Idaho's Fairness in Women's Sports Act is currently enjoined, Idaho continues to defend the law and is appealing the injunction.

143. Because "[e]very person has a natural right to privacy and safety in restrooms and changing facilities," Idaho also passed the Protecting the Privacy and Safety of Students in Public Schools Act to ensure that public school restrooms, locker rooms, and overnight accommodations continue to respect sex designations. Idaho Code §§ 33-6701–6707. Idaho Code § 33-6703 is presently enjoined on appeal, but Idaho continues to defend the law.

144. The Rule conflicts with all of the above laws, hampering Plaintiff States' "ability to enforce their conflicting state laws" and placing "substantial pressure" on them to change their laws. *Tennessee*, 615 F. Supp. 3d at 841; *see* 89 Fed. Reg. at 33,885 ("The obligation to comply with Title IX and this part is not obviated or alleviated by any State or local law or other requirement that conflicts with Title IX or this part.").

145. The Rule also harms Plaintiff States by impeding their ability to enact and enforce future laws, including laws that are designed to safeguard women and girls and to safeguard parental rights.

146. Indeed, the Rule conflicts with at least two such bills—the Women's Safety and Protection Act and the Given Name Act—that are currently making their way through the Louisiana State Legislature. *See* H.B. 610, 2024 Leg. Reg. Sess. (La. 2024); H.B. 121, 2024 Leg. Reg. Sess. (La. 2024).

147. The Rule similarly conflicts with a Mississippi bill—the Securing Areas for Females Effectively and Responsibly Act ("SAFER Act")—that recently passed both houses of the state legislature and will go to the Governor next. *See* S.B. 2753, 2024 Leg. Reg. Sess. (Miss. 2024).

148. The Rule also conflicts with Plaintiff School Boards' policies and practices that recognize biological differences between boys and girls require separation based on sex in some circumstances to protect privacy interests and promote respect, dignity, and equal opportunity for both sexes. For example, Plaintiff School Boards have bathrooms and locker rooms that are specifically designated as being for "men" or "boys" and bathrooms and locker rooms that are specifically designated as being for "women" or "girls." Only biological males are allowed in bathrooms designated for "men" or "boys," and only biological females are allowed in bathrooms designated for "women" or "girls." Plaintiff School Boards also follow Louisiana's Fairness in

Women's Sports Act and only permit students who are "biologically female" to play on their school athletic teams that are designated for girls.

149. Accordingly, the Rule harms the Plaintiff School Boards by interfering with their authority to set policies and establish practices for their respective school districts that they think are in the best interests of their students. It will also cause the Plaintiff School Boards to expend time and resources to revise their policies and practices and to train staff regarding compliance. *See* 89 Fed. Reg. at 33,885. It will take a significant amount of effort to review and understand the 423-page Rule and train staff how to comply with it—especially because the Rule repeatedly fails to answer basic questions about how it applies. *See, e.g.*, *id.* at 33,821–22 (failing to answer questions, including "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change" and "whether it would be a potential violation of Title IX for a recipient to treat a student according to their sex assigned at birth if requested by the parents to do so").

150. The Rule will also increase notification, monitoring, and recordkeeping requirements for the Plaintiff School Boards. *See id.* at 33,573, 33,886, 33,888. It also increases Plaintiff School Boards' obligations and costs in a variety of ways, such as requiring their Title IX coordinators to take actions to address potential sex discrimination even when a complainant decides not to initiate a complaint. *See id.* at 33,599.

151. Furthermore, the specific changes that the Plaintiff School Boards will need to make to their policies and practices will cause additional harm. For example, Plaintiff School Boards will need to instruct teachers to monitor and report students for comments that could be construed as discriminatory under the Rule, including a student's expression of religious belief about human nature or a student's refusal to use a classmate's "preferred pronouns." *See id.* at 33,514–16. This, in turn, will

increase the Plaintiff School Board's liability as some students and parents (on behalf of their children) will inevitably sue the school boards for violations of First Amendment rights.

152. The Rule's requirement that schools allow essentially any biological male to use girls-only bathrooms and locker rooms harms students' privacy interests and creates serious risks of sexual assault. *See id.* at 33,816 (explaining the requirement that persons generally be treated consistently with their claimed gender identity "applies to any 'person,' including students, employees, applicants for admission or employment, . . . parents of minor students, . . . visiting lecturers, or other community members"); *id.* at 33,809 (appreciating "that one person may not know another's gender identity without inquiring unless the other person volunteers the information"); *id.* at 33,818 (warning that persons who claim to be the opposite sex cannot be harassed when using bathrooms designated for the opposite sex); *id.* at 33,819 (warning that imposing a medical documentation requirement before allowing someone to use a bathroom that is consistent with claimed gender identity would be discriminatory); *see also* Ex. C at 9–11. Plaintiff School Boards will therefore need to incur significant costs to develop strategies and make physical modifications to their facilities, such as converting bathrooms and locker rooms to single-user facilities, to try to counteract the Rule's threat to students' privacy and security.

153. Additionally, the Rule will create conflicts between parents and Plaintiff School Boards, including by limiting what information can be shared with parents and by requiring schools to address purported harassment even when that child's parents disagree that harassment has occurred and do not wish to file a complaint. *See id.* at 33,821–22, 33,596–97. The Rule would, for example, prohibit Plaintiff School Boards from disclosing a student's gender identity to classmates' parents even when that student will be housed with their children. *See id.* at 33,622. In other words, the Rule will require schools to assign a biological boy (who claims to be a girl) to a girls-only room on an overnight field trip and will prohibit the schools from informing those girls' parents. The Rule thus increases the

risk that Plaintiff School Boards will face lawsuits alleging infringement of parental rights, not to mention undermines Plaintiff School Boards' efforts to build a relationship of trust with parents that results in the best educational outcome for students.

154. The Rule will also harm Plaintiff School Boards by decreasing enrollment in their schools. Many parents will withdraw their children from the public schools to protect their constitutional rights, to protect their children from censorship and infringement of Free Exercise rights, and to protect their children from loss of privacy and serious risks of harm.

155. In sum, the lengthy Rule will cause Plaintiffs to suffer an equally lengthy list of harms, which includes, but is not limited to, the harms listed above. And many of these harms, including coercion and compliance costs, are already happening.

CLAIMS FOR RELIEF

COUNT ONE
The Rule Is Contrary to Law.
(5 U.S.C. § 706; 20 U.S.C. § 1681, *et seq.*)

156. Plaintiffs repeat and incorporate by reference each of the Complaint's allegations stated above.

157. Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

158. Defendants may exercise only authority conferred by statute. *See Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

159. Title IX gives Defendants no authority to: (a) redefine terms like "sex" to include separate concepts, such as "gender identity"; (b) prohibit protected speech based on an unsupportable definition of hostile environment harassment; (c) compel speech and commandeer recipients to police

employee and student's pronoun usage; or (d) override Title IX's text in the myriad of ways the Rule does. And that is especially true in light of other statutory provisions that limit the Department's ability to interfere with the rights of States and local governments on education. *See* 20 U.S.C. § 3403(a)–(b).

160. Defendants thus exceeded their statutory authority by issuing the Rule, which is contrary to the text and structure of Title IX, is otherwise not in accordance with law, and is antithetical to the advancement of equal educational opportunities and the promotion of equal dignity and respect for the two sexes that Title IX aims to promote.

161. Indeed, the Rule would flip Title IX on its head by likely *causing* discrimination against women rather than prohibiting it: Among other things, women (a) will be deprived of equal athletic opportunities, (b) will be forced to accept claims about what makes a person a women that often rely on sex stereotypes,[6] and (c) will likely suffer increased sexual violence as a result of the Rule's failure to provide any safeguards against sexual predators who will exploit the defects in the Rule by claiming a female gender identity even if they do not suffer from gender dysphoria so that they can access women's bathrooms, locker rooms, and showers.[7]

162. Defendants issued the Rule pursuant to 20 U.S.C. § 1682, which gives them no authority to adopt regulations that subvert Title IX.

163. Further, Defendants would need to point to clear authority to issue the Rule because it decides major questions—including whether to treat claimed gender identity as biological sex—that must be decided by "Congress itself" or, at the very least, by "an agency acting pursuant to a clear delegation from that representative body." *West Virginia v. EPA*, 597 U.S. 697, 735 (2022).

[6] *See, e.g.*, Chad Felix Greene, *Being a Woman Requires More Than Makeup, Dresses, and TikTok Theatrics*, The Federalist (Oct. 26, 2022), https://tinyurl.com/56xzj4mt.
[7] *See, e.g.*, Ex. C at 9–11.

164. The Rule answers major questions that belong to Congress or require a clear authorization for at least four reasons. *First*, the Rule has enormous social and political significance. *See id.* at 721. *Second*, the Rule has significant economic consequences. *Third*, the Rule is "novel" and "transformative," and Congress "has consistently rejected proposals" to expand Title IX to prohibit discrimination based on sexual orientation and gender identity. *See id.* at 716, 724, 731–32. And *fourth*, the Rule intrudes on areas of traditional state authority. *See id.* at 744 (Gorsuch, J., concurring).

165. Accordingly, the Department's inability to point to *clear* congressional authority is yet another reason the Rule is unlawful and must be set aside.

COUNT TWO
Spending Clause Violation
(U.S. Constitution, Article I, § 8, cl. 1)

166. Plaintiffs repeat and incorporate by reference each of the Complaint's allegations stated above.

167. The Constitution grants Congress the power to "to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1.

168. Incident to this power, "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). But the Supreme Court has recognized several restrictions on this use of the Spending Clause power, including that: (1) conditions must be "unambiguous[]" so States can "exercise their choice knowingly, cognizant of the consequences of their participation," (2) conditions must be related to the "federal interest in the project," (3) spending must not "induce the States to engage in activities that would themselves be unconstitutional," and (4) spending must not "be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 207–11 (quoting *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

169. Because Title IX was passed under Congress's power to impose conditions on federal funds, *see Davis*, 526 U.S. at 640, the conditions that it and its implementing regulations impose must

comply with each restriction on the use of the Spending Clause power. The Rule's conditions, however, flunk each of the four requirements described above. The Rule imposes conditions that: (1) are not "unambiguously" clear in Title IX, *see B.P.J. v. W. Va. State Bd. of Educ.*, No. 23-1078, 2024 WL 1627008, at *21–22 (4th Cir. Apr. 16, 2024) (Agee, J., dissenting); (2) are unrelated, if not contrary to, the federal interest; (3) will induce recipients to violate the constitutional rights of students, employees, and parents; and (4) impermissibly coerce Plaintiff States, violating their sovereignty, *see Nat'l Fed'n of Indep. Buis. v. Sebelius*, 567 U.S. 519, 577–78, 582 (2012); *id.* at 589 (Scalia, J., dissenting).

170. Finally, even if the Rule accurately reflected Title IX (it does not), Plaintiffs have been deprived of their right to "voluntarily and knowingly accept[] the terms of the 'contract.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Plaintiffs did not know that they would be forced to accept the obligations, liabilities, and other conditions the Rule imposes, *see supra* Part IV, when they accepted federal funds and agreed not to discriminate in their education programs and activities based on biological sex (with certain statutory exceptions).

COUNT THREE
Violation of Article I
(U.S. Constitution, Article I, § 1)

171. Plaintiffs repeat and incorporate by reference each of the Complaint's allegations stated above.

172. The Constitution vests "[*a*]*ll* legislative Powers herein granted" to Congress. U.S. Const. art. I, § 1 (emphasis added); *see, e.g.*, *Forrest Gen. Hosp. v. Azar*, 926 F.3d 221, 228 (5th Cir. 2019) ("The Constitution, after all, vests lawmaking power in Congress. How much lawmaking power? 'All,' declares the Constitution's first substantive word."); Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1141–42 (2023); Jed Handelsman Shugerman, *Vesting*, 74 Stanford L. Rev. 1479, 1506, 1550–51 (2022).

173. Congress thus may not "abdicate or . . . transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). Or, at the very least, Congress must provide "an intelligible principle" so it can be said that "the agency exercises only executive power." *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

174. If Congress delegated the authority to issue the Rule to Defendants—which it did not—that delegation violates Article I and separation-of-powers principles. The Rule embodies major policy decisions that are "the very essence of legislative authority under our system" and "must be made by the elected representatives of the people." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

175. Furthermore, if the directive that the Department effectuate Title IX's "prohibition on sex discrimination consistent with the objectives of the statute," 89 Fed. Reg. at 33,476, allows it to issue the Rule, which subverts the primary purpose of Title IX and undermines the consistency of the statutory scheme, then that directive is not a true "intelligible principle." *See Jarkesy*, 34 F.4th at 461.

176. The Rule, if authorized by statute, is therefore an impermissible exercise of legislative power.

COUNT FOUR
The Rule is Arbitrary, Capricious, and an Abuse of Discretion.
(5 U.S.C. § 706)

177. Plaintiffs repeat and incorporate by reference each of the Complaint's allegations stated above.

178. The APA provides that courts must "hold unlawful and set aside" agency action that is "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

179. This means if an agency action is not "reasonable and reasonably explained," it must be set aside. *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1136 (5th Cir. 2021) (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)); *see Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 224 (2016) ("[A] lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law.").

180. An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). When an agency changes its position, the agency must "recognize[] the change, reason[] through it without factual or legal error, and balance[] all relevant interests affected by the change." *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 469 (5th Cir. 2024).

181. Moreover, an agency cannot "offer[] an explanation for its decision that runs counter to the evidence before the agency," nor can it "fail[] to consider an important aspect of the problem." *Motor Vehicle Mfrs.*, 463 U.S. at 43. And "bare acknowledgement" of a concern "is no substitute for reasoned consideration." *Louisiana*, 90 F.4th at 473. Arbitrary-and-capricious review thus "has 'serious bite.'" *Id.* at 470 (quoting *Data Mktg. P'ship v. DOL*, 45 F.4th 846, 856 (5th Cir. 2022)).

182. The Rule fails arbitrary-and-capricious review multiple times over. To summarize a few flaws, the Rule is internally inconsistent, fails to define key terms, disregards evidence submitted, makes decisions that are counter to the evidence before the Department, fails to properly balance all the relevant interests that would be affected by the Department's changed position, and routinely offers "conclusory statements" rather than real responses to valid and serious concerns submitted by commenters. *See id.* at 473.

183. The Department failed to adequately consider the important interests of individual privacy, dignity, and safety that underlie Title IX. *E.g.*, 118 Cong. Rec. 5807 (explaining Title IX "permit[s] differential treatment by sex" "where personal privacy must be preserved"); *cf.* Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post (Apr. 7, 1975) ("Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."). The Department instead rested on the conclusory statement that it "does not agree" that permitting biological males to access female-only spaces (like bathrooms and locker rooms) will "compromise[]" "legitimate privacy interest[s]." 89 Fed. Reg. at 33,820. The Department also did not meaningfully respond to "evidence that transgender students pose a safety risk to cisgender students";[8] again, it simply states it "does not agree." *Id.* The Department also fails to consider a related important aspect of the problem: how to protect girls and prevent predators, who are not suffering from gender dysphoria, from exploiting the Rule.

184. The Department's failure to adequately assess such interests has produced arbitrary results. For example, the Rule recognizes that Title IX expressly permits sex separation in "living facilities." *Id.* at 33,818 (citing 20 U.S.C. § 1686). On this basis the Department omitted such facilities from the Rule's new mandate. But the Department does not apply the same treatment to bathrooms, locker rooms, or shower facilities—despite longstanding regulations permitting sex separation in such facilities due to the similar implications for privacy, dignity, and safety.

185. The Rule's pretense of leaving the athletics regulations undisturbed even though those regulations conflict with the Rule's stated interpretation of Title IX likewise demonstrates the Rule is not a product of reasoned decisionmaking. The Department purports to sidestep the issue of athletics.

[8] Cisgender is defined by some sources as "a person whose sense of personal identity corresponds to the sex and gender assigned to him or her at birth (in contrast with *transgender*)"; the term "arose in the late 1990s." Katherine Connor Martin, *New words notes June 2015*, https://tinyurl.com/3s5xde8s.

See 89 Fed. Reg. at 33,817. But athletics is one of the core features of the Title IX framework. And the Department's redefinition of "sex" clearly will affect the continued vitality of single-sex facilities (like locker rooms) and athletic teams separated based on biological sex, as the Biden Administration's own litigation position confirms. The Department cannot justify its failure to consider this important aspect of the Title IX regime by saving the issue for another day. That means the Rule's refusal to respond to comments and evidence about athletics, including evidence that males have already taken athletic opportunities and championships away from girls and women, is simply another reason to conclude the Rule is arbitrary and capricious.

186. The Department failed to adequately consider the Rule's impact on parental rights. The Department acknowledged the concerns expressed by many commenters that the Rule will interfere with parents' rights to "direct the upbringing and education of [their] children" and interfere with state laws that safeguard parental rights in schooling. *Id.* at 33,821. In response the Department asserts that "nothing" in the Rule "disturbs parental rights" and "decline[d] to opine on how" the Rule "interacts or conflicts with any specific State laws." *Id.* at 33,821, 33,822. This falls well short of reasoned explication or an adequate consideration of an important part of the problem. Indeed, the Department's many such back-of-the-hand responses to significant concerns are reflected throughout the Rule. They demonstrate the Department's failure to adequately "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015).

187. The Rule's refusal to provide any specific examples of how the new sex-based harassment standard would apply in relation to a student's insistence that his or her classmate use inaccurate pronouns—or insistence that classmates use "neopronouns" like "xe/xir/xirs, ze/zir/zirs, and fae/faer/faers"— also demonstrates its lack of sound basis. *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://tinyurl.com/5nh9bbae.

188. The Department also failed to adequately consider important reliance interests. The Rule will require States, school boards, schools, and other regulated parties to make substantial changes to policies, practices, and procedures (and to make costly modifications to facilities) that were developed based on the longstanding interpretation of Title IX. Yet the Rule barely acknowledges these concerns, *e.g.*, 89 Fed. Reg. at 33,856, and states simply that the proposed changes are nonetheless "warranted," *id.* That is not reasoned consideration.

189. Relatedly, the Rule's cost-benefit analysis is wholly deficient. The Rule assumes the average time to read and understand the final, 423-page regulation will be four hours for a Title IX Coordinator and lawyers. *See id.* at 33,866–67. This assumption defies belief, especially when the Department includes relevant details about recipients' compliance obligations in the preamble. *See, e.g.*, *id.* at 33,516, 33,812–13. The Rule's other cost-and-benefit assumptions are equally absurd, including its failure to include any construction costs based on Defendants' refusal to acknowledge the Rule will require schools to modify bathrooms and locker rooms. *See, e.g.*, *id.* at 33,876. Separate from the Rule's inaccurate monetary cost estimates, it improperly weighs "the non-monetary benefits" and costs because it fails to adequately account for the harms to privacy interests, the increased risks of sexual assault, the loss of opportunities for women athletes, and the constitutional harms (infringement of Free Speech rights, Free Exercise rights, parental rights, and Due Process rights). *Id.* at 33,877.

190. These examples are emblematic of the problems that run throughout the entire Rule.

191. This all shows that the Rule's outcome was improperly pre-determined and tainted by bias, which is further demonstrated by the 2021 Interpretation and Defendant Lhamon's involvement in the rulemaking process. *See* Justin Dillon and Stuart Taylor Jr., *Ending due process: Reinstating Catherine Lhamon at the Dept. of Education is a mistake*, USA Today (June 14, 2021), https://tinyurl.com/3zfr44w4.

COUNT FIVE
Without Observance of Procedure Required by Law
(5 U.S.C. § 706)

192. Plaintiffs repeat and incorporate by reference each of the Complaint's allegations stated above.

193. The APA provides that courts must "hold unlawful and set aside agency action" that is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

194. The APA requires agencies to publish notice of all proposed rulemakings in a manner that "give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c).

195. Because the Department did not provide the public with an opportunity to understand and comment on Proposed Rule in light of the subsequently issued Proposed Athletics Rule, it deprived the public of a meaningful opportunity to comment on these inseparable issues, in defiance of APA requirements.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter an order and judgment that grants the following relief, which it is authorized to do under 5 U.S.C. §§ 702, 705, 28 U.S.C. § 2201, and Federal Rules of Civil Procedure 57 and 65:

a. Declare that the Rule is contrary to law and in excess of statutory authority under the APA;

b. Declare that the Rule violates Article I, § 8, clause 1 of the U.S. Constitution;

c. Declare that the Rule is an unlawful exercise of legislative power under Article I of the Constitution;

d. Declare that the Rule is arbitrary and capricious and an abuse of discretion;

e. Declare that the Rule was issued in violation of the procedural requirements of the APA;

f. Vacate the Rule as unlawful;

g. Postpone the effective date of the Rule and stay the Rule under 5 U.S.C. § 705;

h. Preliminarily and permanently enjoin, without bond, Defendants from enforcing the Rule or Title IX in accordance with the erroneous interpretation of Title IX reflected in the Rule;

i. Grant all other relief to which Plaintiffs are entitled, including but not limited to attorneys' fees and costs.

Dated: May 3, 2024

Respectfully submitted,

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**Admitted Pro Hac Vice or Pro Hac Vice admission application forthcoming*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-CV-00563-TAD-KDM Chief Judge Terry A. Doughty Magistrate Judge Kayla D. McClusky

Motion for a Postponement or Stay Under 5 U.S.C. § 705 or Preliminary Injunction

Plaintiffs the State of Louisiana; the Louisiana Department of Education; Acadia Parish School Board; Allen Parish School Board; Bossier Parish School Board; Caddo Parish School Board; Caldwell Parish School Board; DeSoto Parish School Board; Franklin Parish School Board; Grant Parish School Board; Jefferson Davis Parish School Board; LaSalle Parish School Board; Natchitoches Parish School Board; Ouachita Parish School Board; Red River Parish School Board; Sabine Parish School Board; St. Tammany Parish School Board; Webster Parish School Board; West Carroll Parish School Board; the State of Mississippi; the State of Montana; and the State of Idaho (collectively, "Plaintiffs") respectfully move for an order postponing the effective date of a final rule, titled *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (the "Rule"), staying the Rule, or preliminarily enjoining enforcement of the Rule under 5 U.S.C. § 705 or Federal Rule of Civil Procedure 65.

This Motion is made on the grounds specified in this Motion, the Amended Complaint, the accompanying Memorandum of Law, the exhibits attached to this Motion, all matters of which this

Court may take judicial notice, and on such other and further oral or documentary evidence as may be presented to the Court at or before the hearing on this Motion. As alleged in the Amended Complaint and shown in the attached Memorandum, the Rule is unlawful because it is contrary to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88, and exceeds Defendants' statutory authority. The Rule also violates the Spending Clause, is an unconstitutional exercise of legislative power, and is arbitrary and capricious. Plaintiffs are therefore substantially likely to prevail on the merits of their claims, and a stay or preliminary injunction is necessary to mitigate substantial and irreparable injuries to Plaintiffs. Indeed, Plaintiffs have already suffered and will continue to suffer irreparable harm, including coercion, invasions of state sovereignty, and unrecoverable compliance costs until preliminary relief is granted. Because the bulk of the unrecoverable compliance costs will be incurred in late June and July 2024, expedited consideration of this Motion is justified. Moreover, the requested relief will serve the public interest and not harm Defendants.

For these reasons and those explained in the attached Memorandum, Plaintiffs respectfully request that by June 21, 2024, the Court postpone the Rule's August 1, 2024 effective date or stay the Rule pending resolution of this case on the merits under 5 U.S.C. § 705 or, alternatively, preliminarily enjoin Defendants from enforcing the Rule under Federal Rule of Civil Procedure 65.

Dated: May 13, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document (and all of its attachments) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys. I also caused the foregoing document (and all of its attachments) to be served by Certified Priority Mail, return receipt requested on Defendants at:

Miguel Cardona Secretary U.S. Department of Education 400 Maryland Ave., SW Washington, DC 20202	U.S. Department of Education Office for Civil Rights Lyndon Baines Johnson Dept of Ed. Bldg 400 Maryland Ave., SW Washington, DC 20202
U.S. Department of Education 400 Maryland Ave., SW Washington, DC 20202	United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530
Catherine Lhamon, Assistant Secretary U.S. Department of Education Office for Civil Rights Lyndon Baines Johnson Dept of Ed. Bldg 400 Maryland Ave., SW Washington, DC 20202	Merrick Garland U.S. Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530
Civil Process Clerk U.S. Attorney Office Western District of Louisiana 800 Lafayette Street, Suite 2200 Lafayette, LA 70501	U.S. Attorney General Civil Processing Clerk 950 Pennsylvania Ave. NW Washington, DC 20530

I further certify that I caused the foregoing document (along with all of its attachments) to be emailed to Benjamin T. Takemoto (Benjamin.Takemoto@usdoj.gov).

This the 13th day of May, 2024.

/s/ Tracy Short
Tracy Short (La # 23940)
Assistant Chief Deputy Attorney General

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-CV-00563-TAD-KDM Chief Judge Terry A. Doughty Magistrate Judge Kayla D. McClusky

MEMORANDUM IN SUPPORT OF MOTION FOR A POSTPONEMENT OR STAY UNDER 5 U.S.C. § 705 OR A PRELIMINARY INJUNCTION

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INTRODUCTION

By unilateral executive action, the U.S. Department of Education upended Title IX in a 423-page final rule that will transform the classrooms, lunchrooms, bathrooms, and locker rooms of American schools. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106) (the "Rule"). This Rule is not just typical federal government overreach, but rather an Orwellian attempt to restructure our society, prohibit speech, chill the exercise of religious beliefs, and ultimately control our children's thoughts on existential questions—and to coerce Plaintiffs and their institutions into being the federal government's agents in those efforts.

To promote equal opportunity for both sexes, Title IX prohibits entities that receive federal funding from discriminating on the basis of sex in their education programs. Title IX also promotes dignity and respect for both sexes by recognizing (as do longstanding regulations) that differentiation between the two sexes is sometimes necessary to promote equal opportunities, preserve privacy, and advance safety. The Rule guts it all. One of the Rule's central features is to transform Title IX's prohibition of discrimination based on "sex" to include discrimination based on "gender identity"—a term that itself is never defined in the Rule but that is described as a person's subjective and internal "sense" of gender. And the Rule interferes with schools' ability to verify a person's self-professed "sense" that can be changed at will, including prohibiting schools from requiring documentation of a medical diagnosis that could confirm a person's sincerity. Other key features of the Rule include redefining prohibited harassment to include protected speech and increasing Plaintiffs' obligations, compliance costs, and liability risks in myriad ways.

The consequences of the Rule's rewrite of Title IX are extensive and shocking. To name just a few examples: Boys and girls will be forced to share bathrooms, locker rooms, and lodging on overnight field trips with members of the opposite sex, including adults. Teachers will be forced to

use whatever pronouns or "neopronouns" are demanded based on a student's self-professed "gender identity" and must force students to do so as well. School boards (including Plaintiff School Boards) will be forced to revise policies, ensure schools are complying with the Rule, and undertake costly construction projects. All recipients of Title IX funding (including Plaintiffs) will be forced to face increased compliance costs and increased liability when they are inevitably sued by (1) Rule objectors (*e.g.*, parents and students) for violating constitutional rights in an effort to comply with the Rule, and (2) Rule proponents for failing to adequately comply with the Rule's impossible obligations. Finally, recipients (including Plaintiffs) who wish to resist the Rule will run into Defendants' coercive power to withhold significant federal funding on which they rely.

The Rule is unlawful across the board. It ignores the text, structure, and context of Title IX—not to mention departs from early and longstanding agency regulations—to advance Defendants' political and ideological agenda. Defendants have no authority, much less clear authority, to rewrite Title IX and decide major questions as the Rule does. The Rule also violates the Spending Clause, is an unconstitutional exercise of legislative power, and fails arbitrary-and-capricious review several times over. And to top it off, the Rule causes Plaintiffs immediate irreparable harm and will cause additional irreparable harm, including unrecoverable compliance costs, if this Court does not grant relief quickly. Therefore, Plaintiffs respectfully urge this Court to postpone the Rule's effective date, stay the Rule, or issue a preliminary injunction, and request the Court to grant such relief by June 21, 2024.

BACKGROUND

I. CONGRESS ENACTED TITLE IX TO PROMOTE EQUAL EDUCATIONAL OPPORTUNITIES FOR BOTH SEXES BY IMPOSING CONDITIONS ON FEDERAL FUNDING.

Motivated by the "corrosive and unjustified discrimination against women" in "all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales," 118 Cong. Rec. 5803 (Feb. 28, 1972) (Statement of Sen. Bayh)—Congress enacted Title IX of the Education Amendments "to avoid the use of federal resources to support [such]

discriminatory practices," *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). To that end, Title IX provides that: "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 education program or activity receiving Federal financial assistance [with statutory exceptions]." 20 U.S.C. § 1681(a). Title IX expressly allows a subset of institutions and programs receiving federal funds, such as traditional single-sex schools and certain religious schools, to remain limited to males or females. *Id.* § 1681(a)(3), (5). It also permits single-sex groups like sororities and fraternities, and it permits single-sex activities like "Boys State" and "Girls State" conferences and "father-son or mother-daughter activities at an educational institution" as long as "opportunities for reasonably comparable activities" are "provided for students of the other sex." *Id.* § 1681(a)(6)-(7), (8).

At the time of Title IX's enactment, the term "sex" meant a person's biological sex—male or female—which "is an immutable characteristic determined" at "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.); *see, e.g.*, *Sex*, *Webster's Third New International Dictionary* 2081 (1966) ("one of the two divisions of organic esp. human beings respectively designated male or female"); *Sex, Webster's New World Dictionary* (1972) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *Sex*, *American Heritage Dictionary* 1187 (1969) ("a. The property or quality by which organisms are classified according to their reproduction functions. b. Either of two divisions, designated *male* and *female*, of this classification.").[1] Title IX uses this ordinary meaning of "sex," as reflected throughout its statutory provisions. *See, e.g.*,

[1] During this same time period (and in the ensuing decades), gender could be used as a synonym for sex, *see Sex, Webster's Third New International Dictionary* 944 (1966), including in Supreme Court opinions, *see United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (using the terms "gender classifications" and "sex classifications" when referring to laws and policies that treat people differently depending on whether they are "women" or "men"); *see also id.* at 533 (discussing how "[i]nherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity" (quotations omitted)).

Neese v. Becerra, No. 2:21-cv-163-Z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'"); 20 U.S.C. §§ 1681(a)(2) (discussing institutions that were "changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes"); 1681(a)(8) (referring to "students of one sex" and "students of the other sex"). Title IX's prohibition on sex discrimination in education programs and activities thus promotes equal educational opportunities—and dignity and respect for men and women—by generally prohibiting recipients of federal funds from discriminating against a person based on his or her biological sex.

At the same time, Title IX recognizes the biological differences between men and women that occasionally demand differentiation between the two sexes to promote respect for both. Title IX instructs, for example, that "nothing contained herein shall be construed to prohibit" institutions receiving federal funds "from maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. This demonstrates the congressional understanding that separating the sexes "where personal privacy must be preserved" is not discrimination. *See* 118 Cong. Rec. 5807 (Feb. 28, 1972) (Statement of Sen. Birch Bayh) (explaining Title IX "permit[s] differential treatment by sex" when necessary, such as "in sport facilities or other instances where personal privacy must be preserved"). Title IX accordingly prohibits recipients of federal funds from discriminating on the basis of sex in their educational programs or activities and indicates that not all differential treatment based on sex constitutes such prohibited discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("discrimination means 'less favorable' treatment"); *Bostock v. Clayton County*, 590 U.S. 644, 657 (2020) (discriminating "would seem to mean treating that individual worse than others who are similarly situated").

II. LONGSTANDING REGULATIONS CONFIRMED THAT BIOLOGICAL DIFFERENCES OCCASIONALLY DEMAND DIFFERENTIATION BETWEEN THE TWO SEXES TO PROMOTE EQUAL OPPORTUNITIES AND RESPECT FOR BOTH UNDER TITLE IX.

This understanding that Title IX generally prohibits discrimination based on biological sex and does not prohibit non-discriminatory differentiation that is necessitated by biological differences is confirmed in longstanding Title IX regulations—including ones published shortly after Title IX's passage. In 1974, Congress enacted another statute requiring the publication of Title IX regulations, including "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, Title VIII, Part D, § 844, 88 Stat. 612. The Department's predecessor agency accordingly published Title IX regulations in 1975. *See* U.S. Dep't of Health, Educ., & Welfare, *Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities*, 40 Fed. Reg. 24,128 (Jun. 4, 1975) (codified at 45 C.F.R. pt. 86) (the "1975 Regulations"). The 1975 Regulations were subject to a statutory "laying before" provision, under which Congress could disapprove them by resolution within 45 days if it found them inconsistent with Title IX. *See* General Education Provisions Act, Pub. L. 93-380, 88 Stat. 567.

During that time period for congressional review, "[r]esolutions of disapproval were introduced in both Houses of Congress." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532 & n.32 (1982). One subcommittee "held six days of hearings to determine whether the [1975 Regulations] were 'consistent with the law and with the intent of the Congress in enacting the law.'" *Id.* at 532. The resolutions failed, and the regulations went into effect. *Id.* at 533. Given the special congressional scrutiny that the 1975 Regulations endured, the Supreme Court has repeatedly "recognized the probative value" of the 1975 Regulations in light of "Title IX's unique post enactment history." *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984). So too has the Department itself. *See, e.g.*, Ex. 1 at 7–8.

The 1975 Regulations emphasize key aspects of Title IX's general prohibition on discrimination based on sex in education programs and activities. *First*, the 1975 Regulations further

demonstrate that sex discrimination means discrimination against someone based on his or her biological sex.[2] *Second*, the 1975 Regulations underscore that not all separation based on sex is prohibited discrimination, which is why, among other things, they permit funding recipients to "separate toilet, locker room, and shower facilities on the basis of sex" as long as "such facilities provided for students of one sex" are "comparable to such facilities provided for students of the other sex." 40 Fed. Reg. at 24,141.[3] *Third*, the 1975 Regulations acknowledge that sometimes biological differences make differential treatment based on sex necessary to provide equal opportunities under Title IX. That is why, for example, the 1975 Regulations "requir[e] the use of standards for measuring skill . . . in physical education which do not impact adversely on members of one sex." *Id.* at 24,132.[4]

The 1975 Regulations thus confirm what is plain in Title IX's text and structure: Title IX promotes equal educational opportunities for both sexes while not overlooking biological differences or mandating identical treatment of males and females in all circumstances. And Title IX has been implemented accordingly for decades. *See, e.g.*, U.S. Dep't of Health, Educ., & Welfare, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) ("[A]thletic interests and abilities of male and female students must be equally effectively accommodated."); *id.* (noting most institutions would need to develop "athletic

[2] *See, e.g.*, 40 Fed. Reg. at 24,132 ("women" and "men"); *id.* at 24,135 ("male and female teams"); *id.* at 24,135 (contrasting payment rates between "one sex" and the "opposite sex"); *id.* at 24,134 (prohibiting discrimination "against members of either sex").

[3] *See, e.g.*, *id.* at 24,141 (allowing the "separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact"); *id.* (allowing "[p]ortions of classes in elementary and secondary schools which deal exclusively with human sexuality" to be "conducted in separate sessions for boys and girls").

[4] *See id.* at 24,132 (explaining this requirement is necessary because certain standards "may be virtually out-of-reach for many more women than men because of the difference in strength between the average person of each sex"); *id.* at 24,141 ("Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.").

programs that substantially expand opportunities for women to participate and compete at all levels"); *id.* at 71,415 ("Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities."); U.S. Dep't of Educ., *Establishment of Title and Chapters*, 45 Fed. Reg. 30,802, 30,960 (May 9, 1980) (reissuing regulations, including those allowing "separate housing on the basis of sex" and "separate toilet, locker room, and shower facilities on the basis of sex"); *id.* at 30,962 (allowing sex-specific teams and requiring "equal athletic opportunity for members of both sexes"); Ex. 2 at 1 ("an education to all students, male and female, free of discrimination").[5] This approach—mandated by the statutory text—has proven immensely successful as female college attendance and athletic participation have skyrocketed. *See, e.g.*, Ex. 2; *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 818–19 (11th Cir. 2022) (en banc) (Lagoa, J., concurring).

III. FOR DECADES, TITLE IX HAS BEEN INTERPRETED AS PROHIBITING DISCRIMINATION BASED ON BIOLOGICAL SEX THAT BARS ACCESS TO EDUCATIONAL OPPORTUNITIES.

In accordance with Title IX's plain language and regulations, the Department, its predecessor agency, and courts interpreted Title IX for decades as prohibiting only discrimination based on biological sex. *See, e.g.*, *id.* at 811, 815 (explaining Title IX's "purpose, as derived from its text, is to prohibit sex discrimination in education" and "sex" "mean[s] 'biological sex'"); Ex. 1 at 1 (describing "the Department's longstanding construction of the term 'sex' in Title IX to mean biological sex"); Ex. 3 ("Title IX does not prohibit discrimination on the basis of sexual orientation"); *cf. Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 328–36 (5th Cir. 2019) (Ho, J. concurring) ("For four decades, it has been the uniform law of the land, affirmed in eleven circuits, that Title VII of the 1964 Civil Rights Act prohibits sex discrimination—not sexual orientation or transgender discrimination."). In interpreting

[5] *See also Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993) (explaining "'[a]thletic opportunities' means real opportunities, not illusory ones," which is why school districts make the effort "to equalize the numbers of sports teams offered for boys and girls" as opposed to only allowing "girls to try out for the boys' teams").

statutes that prohibit sex discrimination, courts recognized that evidence of sexual harassment or mistreatment based on sex-related characteristics, such as failure to conform to sex stereotypes, could be used to prove discrimination based on biological sex. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Chisholm v. St. Mary's City Sch. Dist. Bd. of Educ.*, 947 F.3d 342, 350–52 (6th Cir. 2020). But courts recognized that the relevant statutory inquiry remained whether "the conduct at issue . . . actually constituted '*discrimina*[*tion*] . . . because of sex,'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), or "on the basis of sex," 20 U.S.C. § 1681(a).[6]

Moreover, in the Title IX context, courts recognized that not all harassing behavior based on sex violates the statute. When it comes to student-on-student sexual harassment, the Supreme Court concluded that harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" to constitute discrimination. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). The Court explained that Title IX's "provision that the discrimination occur 'under any education program or activity' suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity," and the Court further noted that teasing and offensive names that cause a student to skip school would not qualify. *Id.* at 651–52; *see id.* at 653 (emphasizing that the harassment at issue "was not only verbal," but also "included numerous acts of objectively offensive touching" that led to a conviction for "criminal sexual misconduct"); *id.* at 667 (Kennedy, J., dissenting) (noting that

[6] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) ("In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part."); *Bostock*, 590 U.S. at 699 (Alito, J., dissenting) (explaining Title VII does not "forbid[] discrimination based on sex stereotypes," but "discrimination based on sex stereotypes" is "relevant to prove discrimination because of sex," especially where a trait "would be tolerated and perhaps even valued in a person of the opposite sex"); *Chisholm*, 947 F.3d at 350–52 (reasoning that "an offensive, gendered insult," even if intended to be "an assault on their masculinity," was not sex discrimination where "targeted to a fundamental requirement for football players—toughness"—that the coach would presumably demand of any female player).

attempts to curb allegedly harassing speech could violate the First Amendment).

The Department subsequently issued regulations adopting the *Davis* formulation of sexual harassment for "purely verbal harassment" to address First Amendment concerns. U.S. Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,142 (May 19, 2020). Under current regulations (that the challenged Rule will replace) verbal harassment can constitute discrimination under Title IX only when it is "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)(2).

IV. THE FINAL RULE TRANSFORMS AND SUBVERTS TITLE IX.

On April 29, 2024, the Department published the Final Rule, which redefines "sex" in Title IX to embrace "gender identity" (and other concepts that are distinct from sex) and expands the definition of harassment to include protected speech. *See* 89 Fed. Reg. at 33,884, 33,886. Citing its "authority to issue rules effectuating [Title IX's] prohibition on sex discrimination consistent with the objectives of the statute," *id.* at 33,476, the Rule proceeds to upend the entire Title IX framework.

Although 20 U.S.C. § 1681 prohibits Title IX funding recipients from subjecting a person "to discrimination under any education program or activity" based on "sex," the Rule expands Title IX to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity." *Id.* at 33,476. The Department refuses to define "sex" or "gender identity," *id.* at 33,802, notwithstanding its claimed "expertise on what constitutes sex discrimination," *id.* at 33,815. However, the Department does say it "understands" "gender identity" to mean "an individual's sense of their gender, which may or may not be different from their sex assigned at birth." *Id.* at 33,809.

Despite this acknowledgement that "sex" and "gender identity" are different, the Rule largely requires recipients to treat "sex" and "gender identity" as synonymous. The Rule provides:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

Id. at 33,887. In short, this means that any person's claimed gender identity must generally be treated as if it were his or her sex.[7] For example, the Rule mandates that recipients allow persons to use whichever single-sex bathroom or locker room corresponds with their claimed gender identity at that particular time.[8] And the Rule warns that recipients cannot impose documentation requirements, such as evidence of a valid gender-dysphoria diagnosis, before allowing a male claiming a female gender identity to use a girls' bathroom or locker room.[9]

The Rule's general mandate that a person must be treated consistently with whatever gender identity he or she claims extends to speech. When a person claims a gender identity that differs from biological sex, recipients must compel staff and students to use whatever pronouns are demanded by that person.[10] That is because the Rule defines prohibited discrimination to include harassment based

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[7] *See id.* at 33,816 (applying the de minimis standard to "any 'person,' including students, employees, applicants for admission or employment, and . . . could include parents of minor students, students from other institutions participating in events on a recipient's campus, visiting lecturers, or other community members whom the recipient invites to campus").

[8] *See id.* at 33,818 ("[A] recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm."); *id.* ("[S]tudents experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity.").

[9] *See id.* at 33,819 ("[R]equiring a student to submit to invasive medical inquiries or burdensome documentation requirements to participate in a recipient's education program or activity consistent with their gender identity imposes more than de minimis harm.").

[10] *See, e.g.*, *id.* at 33,516 (noting that "verbal . . . hostility based on the student's . . . gender identity" can be impermissible discrimination); *id.* (citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, (last accessed May 1, 2024), https://tinyurl.com/mrxmwtsf

on any of the "bases described in § 106.10," *id.* at 33,884—that is, "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity," *id.* at 33,886—and to include creation of a "hostile environment," *id.* at 33,884. The Rule then adopts an expansive definition of "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that . . . is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." *Id.* The Department's new "severe or pervasive" standard would require recipients to monitor and censor speech on myriad topics to avoid creating a hostile environment,[11] including speech expressing views critical of the concept of "gender identity" and even speech occurring *outside* of the recipients' education programs or *outside* of the United States that could allegedly contribute to a hostile environment. *See id.* at 33,516, 33,530.

The Rule states it is not changing the current regulations regarding athletics (until a separate, currently pending proposed rule is finalized), and that its prohibition on "prevent[ing] a person from participating . . . consistent with the person's gender identity" does not apply in the context of athletics. *See id.* at 33,817, 33,887. But the Rule interprets the term "sex" in Title IX to include "gender identity," *see id.* at 33,886, so the Department (and male athletes who are self-professed females) will inevitably argue, consistent with the Rule's interpretation of Title IX, that the current regulations prohibit recipients from having a categorical ban on boys (including boys claiming to have a female gender identity) playing on girls' teams, *see* Ex. 5 (reflecting the Administration's current litigating position).

("SOGI Guidance")); SOGI Guidance ("[I]ntentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.") (attached as Ex. 4).

[11] *See, e.g.*, *id.* at 33,514, 33,516 (refusing to use pronouns based on self-professed gender identity, derogatory comments about gender identity or pregnancy, or multiple students calling someone "girly" could "create a hostile environment"); *id.* at 33,570 ("academic discourse of students or teachers *generally* would not meet this standard") (emphasis added).

ARGUMENT

Plaintiffs seek a postponement of the Rule's effective date or stay of the Rule under 5 U.S.C. § 705 or, in the alternative, a preliminary injunction under Federal Rule of Civil Procedure 65. The Administrative Procedure Act authorizes courts to "issue all necessary and appropriate process . . . to preserve status or rights pending [judicial review]." 5 U.S.C. § 705. This includes the power to "suspend *administrative* alteration of the *status quo*." *Wages & White Lion Invs. L.L.C. v. FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (quoting *Nken v. Holder*, 556 U.S. 418, 430 n.1 (2009)); *see also, e.g.*, *Texas v. EPA*, 829 F.3d 405, 411, 435 (5th Cir. 2016). In deciding whether to grant relief under § 705 or a preliminary injunction, courts apply the same basic factors. *See Texas*, 829 F.3d at 405, 424–36 (applying the *Nken* factors when staying an agency's action under § 705); *see also Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 893 (5th Cir. 2012) (per curiam). Those factors are (1) plaintiffs' likelihood of success on the merits; (2) the threat of irreparable harm absent relief; (3) whether relief "will substantially injure the other parties"; and (4) the public interest. *Texas*, 829 F.3d at 424.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. The Rule Is Contrary to Law and Exceeds Statutory Authority.

Because the Rule is contrary to Title IX's text and structure and Defendants have no statutory authority to subvert Title IX or decide major questions, Plaintiffs are likely to succeed in showing that the Rule is "not in accordance with law" and exceeds statutory authority. 5 U.S.C. § 706(2)(A), (C).

1. The Rule's interpretation of "sex" and its requirement that recipients treat self-professed "gender identity" as if it were biological sex flouts Title IX.

The Department does not have the authority to "rewrite clear statutory terms," much less rewrite terms in a way that undercuts a statute's purpose. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014). Yet that is exactly what the Rule does by interpreting "sex" in Title IX to embrace "gender identity" and other concepts that are distinct from biological sex when the term "sex" in Title IX means biological sex. The Rule is therefore contrary to law and exceeds statutory authority.

Title IX provides:

> 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 education program or activity receiving Federal financial assistance [with statutory exceptions].

20 U.S.C. § 1681(a). This prohibition on sex discrimination means recipients generally cannot discriminate based on someone's biological sex; it does not prohibit discrimination based on "gender identity" or other grounds. And where Title IX allows differentiation based on sex due to biological differences, such as for bathrooms, locker rooms, and sports teams, recipients may treat persons in accordance with their biological sex without regard to their self-professed gender identity. The Rule's requirement that recipients consider gender identity and treat people consistent with their self-professed gender identity (in most contexts) is thus at odds with Title IX.

When construing a statute, a court's "job is to interpret the words consistent with their 'ordinary meaning' . . . at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018) (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). That means "look[ing] to dictionary definitions for help in discerning a word's ordinary meaning," *Cascabel Cattle Co., L.L.C. v. United States*, 955 F.3d 445, 451 (5th Cir. 2020), and reading the word in context, "not in isolation," *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022).

Contemporary dictionaries show "sex" had an unambiguous meaning in 1972 and referred to a person's biological sex as a male or a female. *See supra* p. 3; *e.g.*, *Adams*, 57 F.4th at 812 ("Reputable dictionary definitions of 'sex' from the time of Title IX's enactment show that when Congress prohibited discrimination on the basis of 'sex' in education, it meant biological sex, i.e., discrimination between males and females."). And this ordinary meaning is further confirmed by following the "cardinal rule" of reading the statute "as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The statute indicates that "sex" means biological sex and refers to the two divisions of male or female.

See 20 U.S.C. §§ 1681(a)(2) (referring to "one sex" and "both sexes"); 1681(a)(8) (referring to "father-son or mother-daughter activities," "one sex," and "the other sex"). Moreover, the statute refers to "sexual orientation" and "gender identity" not as "sex" but as a separate "status." *See id.* § 1689(a)(6) (directing that a sexual-violence task force be established and "develop recommendations on . . . inclusive approaches to supporting survivors, which include consideration of . . . lesbian, gay, bisexual, or transgender (commonly referred to as 'LGBT') status").

Furthermore, longstanding regulations—including regulations adopted soon after Title IX's enactment and with congressional approval—have consistently interpreted "sex" in Title IX to mean biological sex. *See, e.g.*, 40 Fed. Reg. at 24,132 ("either sex"); *id.* at 24,135 ("male and female"); *id.* (referring to "one sex" and "the opposite sex"); 34 C.F.R. §§ 106.33 (referring to "one sex" and "the other sex"); *id.* 106.41(c) (referring to "both sexes" and "male and female teams"). This is additional "powerful evidence" of the "original public meaning" of Title IX. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring) (emphasis omitted). So too is the fact that adopting a more expansive definition of "sex" renders other provisions of IX meaningless. *See City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). After all, if a recipient must treat a man who claims a female gender identity as a woman, then that man must be allowed to live in women's dormitories, which would render Title IX's provision allowing for sex-specific dormitories meaningless. *See Adams*, 57 F.4th at 813 (discussing § 1686). Defendants try to avoid this problem by making dormitories an exception to the Rule's requirement that persons must be treated according to their gender identity; however, this inconsistency demonstrates the Rule's interpretation of "sex" is untenable. *See id.* at 817. Defendants cannot overcome the presumption that "sex" means "the same thing throughout [the] statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). If "sex" in § 1686 means biological sex, then the general prohibition on sex discrimination in § 1681 means only discrimination

based on biological sex is prohibited under Title IX. And adverse treatment based on other grounds is not necessarily discrimination because of biological sex (even though it can be evidence that prohibited sex discrimination occurred). *See supra* p. 8; *see also* 89 Fed. Reg. at 33,811 ("[N]ot all conduct one might label 'sex stereotyping' necessarily violates Title IX.").

The Rule's contrary claim that discrimination based on "sexual orientation or gender identity . . . always demands consideration of sex" is wrong. 89 Fed. Reg. at 33,807. For example, a religious student group would not be considering sex at all if it excluded students who are bisexual or students who claim a nonbinary[12] gender identity from membership. And that is not contrary to *Bostock*, which simply held that firing a male employee for being homosexual or transgender is sex discrimination, because the employer fired that employee because of "traits or actions" (being attracted to men or presenting as a woman) that the employer tolerates in female employees. 590 U.S. at 660–61; *see id.* at 660 (explaining "Title VII stands silent" if an employer fires a woman for traits that it also "would not have tolerated" in a man).[13] Indeed, the *Bostock* Court assumed "sex" in Title VII meant "biological distinctions between male and female" and agreed that "homosexuality and transgender status are distinct concepts from sex." *Id.* at 655, 669. The Rule's rewrite of Title IX therefore cannot be justified by *Bostock* even if it applies.

In any event, *Bostock* does not apply. The Supreme Court not only expressly limited its opinion to Title VII, but it also refused to even "prejudge" whether sex-specific bathrooms were permissible

[12] *See* Ex. 6 at S80 ("The term nonbinary includes people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)."); *id.* ("Nonbinary also functions as a gender identity in its own right."); *id.* at S88 (explaining some people identify as "eunuchs" and view it as a "distinct gender identity").

[13] Regardless, it is not sex discrimination for religious groups to decline membership to those who maintain beliefs and practices inconsistent with the group's tenets. And *Bostock* does not say otherwise.

under Title VII. *Id.* at 681; *see Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (explaining "the rule in *Bostock* extends no further than Title VII"). Moreover, "Title VII differs from Title IX in important respects," *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021), and the workplace differs from the educational context. Plaintiffs will therefore likely succeed on their claim that the Rule conflicts with Title IX.

2. The Rule's harassment standard that turns recipients into federal-commandeered censors is contrary to Title IX and violates the First Amendment.

The Rule is also contrary to law because its harassment standard is unmoored from Title IX and would require recipients to violate First Amendment rights. Harassment becomes discrimination "'*under*' the recipient's programs" in § 1681 only when it "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" and when "the recipient exercises substantial control over both the harasser and the context." *Davis*, 526 U.S. at 633, 645 (emphasis added); *see Meriwether*, 992 F.3d at 511. The Rule's new broad "severe or pervasive" standard, which considers speech or other expressive conduct that "limits" a person's ability to participate in a program to be discriminatory harassment, thus cannot be squared with Title IX. 89 Fed. Reg. at 33,884. Nor can the Rule's requirement that a recipient consider conduct that occurred *outside* of its program or *outside* of the United States in determining whether a hostile environment has been created *in* its education program and activity. *Id.* at 33,530.

Moreover, the Rule's harassment standard (particularly when combined with its expansion of "sex" to include other concepts) chills and punishes protected speech—an effect that is amplified by the requirement that teachers report any speech that could be considered harassment and that recipients must respond to what may be prohibited harassment. *See* 89 Fed. Reg. at 33,563, 33,888.

The Rule would compel staff and students to use whatever pronouns a person demands[14]—even when those pronouns are grammatically incorrect and express a viewpoint with which the speaker disagrees—and prohibits students from expressing their views, including their religious views, on numerous topics. *See, e.g.*, 89 Fed. Reg. 33,514–16, 33,570; Ex. 4.

The Rule therefore conflicts with the "fixed star in our constitutional constellation" that the government cannot "prescribe what shall be orthodox" or "force citizens to confess by word or act their faith therein," *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), and "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, courts have disapproved of similar attempts to police speech under the guise of preventing discrimination, finding that expansive harassment policies violate Free Speech and Free Exercise rights. *See, e.g.*, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125–27 (11th Cir. 2022) (concluding harassment policy is likely both "impermissibly overbroad" and "a content- and viewpoint-based restriction of speech"); *id.* at 1129–30 (Marcus, J., concurring) (explaining that treating unpopular ideas that offend people as prohibited harassment "is plainly at odds with the First Amendment and our notion of free speech"); *Meriwether*, 992 F.3d at 498, 512 (holding that requiring a professor to use students "preferred pronoun[s]" violated his free-speech rights and the Free Exercise Clause); *cf. Perlot v. Green*, 609 F. Supp. 3d 1106, 1118–21 (D. Idaho). Accordingly, even if Title IX's "provisions could mean what the Government says they mean," the Court must construe those provisions more narrowly "because to do otherwise would raise grave constitutional concerns." *Mexican Gulf Fishing Co. v. U.S. Dep't of Comm.*, 60 F.4th 956, 966 (5th Cir.

[14] *See United States v. Varner*, 948 F.3d 250, 256–57 (5th Cir. 2020) (recognizing that gender dysphoric people claim gender identities other than male or female and use pronouns such as (f)ae, e/ey, per, they, ve, xe, or ze/zie); Ex. 6 at S80 (giving examples of neopronouns that may be used "e/em/eir, ze/zir/hir, er/ers/erself among others"); Ex. 7 (explaining neopronouns are less common pronouns and providing examples while noting the options are "limitless").

2023); *see Speech First, Inc. v. Fenves*, 979 F.3d 319, 337 n.16 (5th Cir. 2020) (noting that the Supreme Court has not decided whether allowing "purely verbal harassment claims" is constitutional and that it "seems self-evidently dubious"). This is yet another reason to conclude the Rule is contrary to law.

3. Defendants have no authority to rewrite Title IX and decide major questions.

The Rule exceeds statutory authority under 5 U.S.C. § 706(2)(C), because the Department has no authority—much less clear authority—to issue regulations that subvert Title IX or require recipients to violate constitutional rights as the Rule does. *See supra* pp. 12–18, Am. Compl. at 27–28. The Department, as an administrative agency, is a "creature[] of statute," and "possess[es] only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. OSHA*, 595 U.S. 109, 117 (2022). It is a "core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp.*, 573 U.S. at 328. Because Congress provided authority only to implement Title IX in § 1682, not to rewrite it and render statutory provisions meaningless, the Department exceeded its authority in issuing the Rule.

This lack of statutory authority is especially egregious here, because the Rule decides major questions—such as whether to force schools, administrators, teachers, and students to treat someone's self-professed, unverifiable, potentially ever-changing gender identity as akin to biological sex—that must be decided by "Congress itself" or, at the very least, by "an agency acting pursuant to a clear delegation from that representative body." *West Virginia v. EPA*, 597 U.S. 697, 735 (2022). The Rule answers major questions that belong to Congress or require a clear authorization for at least four reasons. *First*, the Rule has enormous social and political significance. *See id.* at 721. How to address and treat people claiming a gender identity that differs from their biological sex has prompted state legislation and sparked numerous nationwide and international controversies. *See* Exs. 8–11; *infra* p.26. *Second*, the Rule has significant economic consequences. It threatens millions of dollars of funding for Plaintiff School Boards and billions of dollars of funding for Plaintiff States, *e.g.*, Exs. 12–13, not to

mention imposes enormous compliance costs on Plaintiff School Boards that will need to modify their schools' facilities.[15] *Third*, the Rule is "novel" and "transformative," and Congress "has consistently rejected proposals" to expand Title IX to prohibit discrimination based on sexual orientation and gender identity. *West Virginia*, 597 U.S. 716, 724, 731–32; *see, e.g.*, Equality Act, H.R. 5, 117 Cong. § 9(2) (2021); Title IX Take Responsibility Act of 2021, H.R. 5396, 117 Cong. (2021); *see also* Ex. 25 (touting the proposed rule as "historic"). *Fourth*, the Rule intrudes on education, which is an area "where States historically have been sovereign," *United States v. Lopez*, 514 U.S. 549, 564 (1995), implicating not only the major questions doctrine, but also the federalism canon, *see West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring). The Department's inability to point to any statutory authority for the transformative Rule, much less clear authority, is therefore fatal to the Rule's validity.

B. The Rule's Conditions Violate the Spending Clause.

In addition, the Rule (and Title IX, assuming, arguendo, the Rule is a permissible interpretation of it) violates Spending Clause limits. Title IX was passed under Congress's power to impose conditions on federal funds under the Spending Clause, *Davis*, 526 U.S. at 640, and that "power is of course not unlimited, but is instead subject to several general restrictions," *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). These restrictions include requirements that: (1) conditions must be "unambiguous[]" so States can "exercise their choice knowingly, cognizant of the consequences

[15] *See* Ex. 14 at 7 (explaining cost to "redesign restrooms and showers on 11 campuses" would "be significant"); Ex. 15 at 7–8 (estimating it would cost approximately $1.2 million to construct or renovate gender-neutral facilities, plus the cost of renting portable toilets); Ex. 16 at 7–8 (describing costs as "astronomical"); Ex. 17 at 7 (estimating costs exceeding $2.1 million); Ex. 18 at 8 (describing costs as "significant"); Ex. 19 at 8 ("substantial expense to our district"); Ex. 20 at 7–8 (estimating it would cost between $20.3 million to $27.7 million to renovate or construct new facilities); Ex. 21 at 8 (describing construction process as "lengthy and costly"); Ex. 22 at 8 (estimating it would "cost[] hundreds of millions of dollars"); Ex. 23 at 7 (describing construction projects as "expensive"); *see also* Ex. 24 (describing a pilot program to build new bathrooms to accommodate transgender and nonbinary students at five schools in Loudoun County, Virginia will cost $11 million and noting it could cost over $211.2 million if the program was expanded to each school in the district).

of their participation," (2) conditions must be related to the "federal interest in the project," (3) spending must not "induce the States to engage in activities that would themselves be unconstitutional," and (4) spending must not "be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 207–11. Each requirement is "equally important" and must be "equally" satisfied for a spending condition to be constitutional. *West Virginia v. Dep't of Treasury*, 59 F.4th 1124, 1142 (11th Cir. 2023).

The Rule's conditions flunk these four requirements. *First*, the Rule imposes conditions that are not "unambiguously" clear. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Plaintiffs did not "voluntarily and knowingly" agree to police and punish speech; ignore the difference between biological sex and self-professed gender identity; abolish sex-specific bathrooms, locker rooms, rooming assignments, and sports; or violate staff and students' constitutional rights in exchange for federal funds under Title IX. *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012); *see Adams*, 57 F.4th at 816 ("The notion that the School Board could or should have been on notice that its policy of separating male and female bathrooms violates Title IX and its precepts is untenable."). Moreover, the Department cannot usurp Congress's spending power by imposing conditions that are unauthorized by the statutory text, *see Tex. Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021), and even if it could, the Rule's conditions are still not unambiguously clear as the Department refuses to answer multiple questions about how the Rule will apply, *see, e.g.*, 89 Fed. Reg. at 33,821–22 (failing to answer questions, including "whether it would be a potential violation of Title IX for a recipient to treat a student according to their sex assigned at birth if requested by the parents to do so"). *Second*, the Rule's conditions are contrary to the federal interest in promoting equal opportunities to both sexes, because it will deprive women of opportunities, *see Adams*, 57 F.4th at 819–21; Ex. 26 at 11–13, and increase the risk of sexual assault, Ex. 26 at 9–11; Ex. 27. *Third*, the Rule will impermissibly induce recipients "to engage in activities that would themselves be

unconstitutional," *Dole*, 483 U.S. at 210, including infringing on Free Speech, Free Exercise, Due Process, and parental rights. *See, e.g.*, *supra* pp. 16–18, Am. Compl. at 27–28; Ex. 26 at 6–7; Exs. 28–30. *Fourth*, the "threatened loss" of a significant percentage of Plaintiffs' education funding "is economic dragooning that leaves the States with no real option but to acquiesce," *Sebelius*, 567 U.S. at 582, especially when even offering federal financial aid to college students triggers Title IX. Plaintiffs are thus likely to succeed on their Spending Clause claim as well.

C. The Rule Is an Unconstitutional Exercise of Legislative Power.

If Congress delegated the authority to issue the Rule—which it did not—the delegation violates Article I and separation-of-powers principles. As described above, the Rule embodies major policy decisions, including interpreting "sex" to include a person's self-professed gender identity, abolishing sex-specific facilities, and treating girls and women as similarly situated to males who claim to be females. Such major policy decisions that go to fundamental beliefs about our humanity and will restructure our society are "the very essence of legislative authority under our system" and "must be made by the elected representatives of the people." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); *see Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement regarding denial of certiorari) (indicating "congressional delegations . . . to decide major policy questions" may be impermissible); *see also* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490, 1502-03, 1538, 1554 (2021). At the very least, Congress must have provided "an intelligible principle" so it can be said that "the agency exercises only executive power." *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023). If the Rule, which subverts the purpose of Title IX and destroys the consistency of the statutory scheme, is authorized by statute, then there was no true intelligible principle guiding the Department's discretion. The Rule is therefore an impermissible exercise of legislative power.

D. The Rule Is Arbitrary and Capricious.

The Rule is also arbitrary and capricious under 5 U.S.C. § 706(2)(A). That is because, although deferential, arbitrary-and-capricious review "has 'serious bite.'" *Louisiana v. DOE*, 90 F.4th 461, 470 (5th Cir. 2024). It "requires that agency action be reasonable and reasonably explained," meaning that the agency "has reasonably considered the relevant issues and reasonably explained the decision." *Wages & White Lion*, 16 F.4th at 1136 (quotations omitted). "[B]are acknowledgement" of concerns and "conclusory statements" are "no substitute for reasoned consideration." *Louisiana*, 90 F.4th at 473. And when an agency changes its position, the agency must "recognize[] the change, reason[] through it without factual or legal error, and balance[] all relevant interests affected by the change," *id.* at 469, including reliance interests on the longstanding prior policy, *Wages & White Lion*, 16 F.4th at 1139.

The Rule fails arbitrary-and-capricious review several times over. *See* Am. Compl. at 46–50. For starters, the Department failed to adequately consider important aspects of the problem. In response to concerns the Rule would undermine a recipient's "legitimate interest" in protecting students' privacy and safety, the Department simply stated it "disagree[s]" the Rule would undermine that interest. 89 Fed. Reg. at 33,820. And the Department responded the same way to "evidence that transgender students pose a safety risk" in girls-only spaces; again, it simply stated it "does not agree." *Id.* The Rule is unreasonable for dismissing commenters' safety and privacy concerns out of hand, *see, e.g.*, Ex. 26 at 8–11, Ex. 27, especially when it does not take any steps to mitigate the concerns. Instead, the Rule allows any male, including "other community members," who claims a female gender identity to use girls-only bathrooms and locker rooms without providing any method for recipients to verify the sincerity of a claimed gender identity or to prevent sexual predators from entering girls-only bathrooms and locker rooms. *See* 89 Fed. Reg. at 33,809, 33,816, 33,819.

The Department similarly failed to consider and address concerns that the Rule violates

parents' right to direct the upbringing of their children. *See, e.g.*, Ex. 28 at 5; Ex. 30. The Department merely paid lip service to parental rights, failed to articulate its view regarding the scope of those rights, and refused to answer basic questions like whether "a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change." 89 Fed. Reg. at 33,821–22. Accordingly, the Rule is full of the type of "bare acknowledgement[s]" and "conclusory statements" that "do not constitute adequate agency consideration of an important aspect of a problem." *Louisiana*, 90 F.4th at 473.

Moreover, the Rule's pretense of leaving the current Title IX athletics regulations undisturbed until a separate proposed rule is finalized further demonstrates the Rule is arbitrary and capricious. Although Defendants except athletic teams from the general rule that "preventing a person from participating in an . . . activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex," 89 Fed. Reg. at 33,817, 33,887, the Rule's interpretation of sex discrimination to include discrimination based on "gender identity" still applies, *id.* at 33,886, which will impact the continued viability of sex-specific teams. As will the requirement that persons be allowed to use whatever locker room corresponds to their self-professed gender identity at that particular time. *Id.* at 33,816. Indeed, the Biden Administration's own litigation position confirms that Defendants do not believe a recipient can have a categorical ban on biological males playing on girls-only athletic teams. *See* Ex. 5.

The Rule's inconsistencies likewise show it is not a product of "reasoned decisionmaking" and a "logical and rational" process. *Michigan v. EPA*, 576 U.S. 743, 750 (2015). For example, the Rule states, without explanation, that "sex separation . . . in the context of bathrooms or locker rooms . . . is not presumptively unlawful sex discrimination." *Id.* at 33,818. But the self-evident reason that justifies separating the sexes in those contexts is biological differences that necessitate separation to preserve personal privacy, dignity, and safety. Because the Department ignores the

biological differences whenever a person claims a gender identity of the opposite sex, the Department loses any basis to conclude that sex-specific bathrooms are presumptively nondiscriminatory in the first place. And this is far from the only instance where the Rule is "internally inconsistent," and thus "arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015), *compare, e.g.*, 89 Fed. Reg. at 33,819 (explaining "regulations have always recognized that recipients can separate students on the basis of sex in contexts where separation is generally not harmful"), *with id.* at 33,815 (noting "there are injuries, including stigmatic injuries, associated with treating individuals differently on the basis of sex").

To take another example, the Rule states that "a recipient must not provide sex-separate facilities or activities in a manner that subjects any person to legally cognizable injury—*i.e.,* more than de minimis harm—unless there is a *statutory* basis for allowing otherwise." *Id.* at 33,814 (emphasis added). But the Rule then turns around and says that a *regulatory* basis alone is sufficient to allow sex-separate athletic teams even when that sex separation allegedly causes more than de minimis harm, because the regulations regarding athletics are longstanding. *See id.* at 33,816–17 (citing 34 C.F.R. § 106.41(b)–(c)). (Of course, the Rule fails to mention that the sex-specific bathroom and locker room regulation that it overhauls is equally longstanding, 40 Fed. Reg. at 24,141, or that the Department believes those longstanding regulations do not actually authorize recipients to exclude all males from girls-only teams based on its new interpretation of Title IX that is reflected in the Rule, Ex. 5.). As yet another example of inconsistency, the Rule states recipients are not required to "provide gender-neutral or single-occupancy facilities," but that cannot be right if, as the Rule states, (1) students must generally be treated consistently with their gender identity, including bathroom access, and (2) some students do not identify as male or female. *Id.* at 33,818, 33,820, 33,887. That means, at the very least, recipients must provide gender-neutral bathrooms and may be required to provide a different restroom for every claimed gender identity or expressly

designate all bathrooms as being for all genders. *See* Exs. 6–7 (listing various types of nonbinary gender identities).

These flaws highlight additional problems with the Rule: It misstates its effects and its costs, rendering its cost-benefit analysis wholly deficient. For example, the Department refused to acknowledge the Rule will require recipients to incur significant costs to construct new bathroom and locker room facilities or to modify existing ones. *See* 89 Fed. Reg. at 33,876. It likewise underestimated the time and costs it will take to review and understand such a lengthy and contradictory Rule, to revise policies, and to train employees. *Compare id.* at 33,867–68, *with* Ex. 18 at 6, *and* Ex. 20 at 6, *and* Ex. 22 at 6–7. And separate from the Rule's faulty monetary cost estimates, it improperly weighs "the non-monetary benefits" and costs because it fails to properly account for the harms to privacy interests, the increased risks of sexual assault, the loss of opportunities for women athletes, and the constitutional harms (infringement of Free Speech rights, Free Exercise rights, parental rights, and Due Process rights). *Id.* at 33,877; *see, e.g.*, Ex. 26 at 6–13; Exs. 27–30. Plaintiffs are therefore likely to succeed on the merits of several claims.

II. Plaintiffs Will Suffer Irreparable Harm Without Relief.

Not only is the Rule unlawful across the Board, but it has also caused—and will continue to cause—Plaintiffs to suffer irreparable harm absent preliminary relief. *See Texas*, 829 F.3d at 433–34; Am. Compl. at 31–42. Under well-established precedent, "the nonrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm." *Rest. Law Ctr. v. U.S. Dep't of Labor*, 66 F.4th 593, 597 (5th Cir. 2023). That is because the "key inquiry" is not the magnitude of the costs, but whether they "cannot be recovered in the ordinary course of litigation," *id.*, and "federal agencies generally enjoy sovereign immunity for any monetary damages," *Wages & White Lion*, 16 F.4th at 1142.

Plaintiffs have incurred and will continue to incur unrecoverable compliance costs absent preliminary relief. That is because all Plaintiffs are recipients of federal funds subject to Title IX

regulations, which means they have increased regulatory burdens and compliance costs under the Rule. *See, e.g.*, 89 Fed. Reg. 33,490, 33,541; Exs. 12–13. Indeed, the Rule acknowledges that it will impose immediate costs on recipients, including time and resources to review and understand the Rule, revise policies, and train employees on the changes before the August 1, 2024 effective date. *See* 89 Fed. Reg. at 33,548–49, 33,866–87. This acknowledgement is correct as detailed in the attached declarations. *See* Exs. 14–23; Ex. 31–33. Although some of these costs have already been incurred, the bulk of these upfront costs will be incurred in late June and July absent preliminary relief. *See* Ex. 14 at 6; Ex. 15 at 6; Ex. 16 at 6; Ex. 17 at 6; Ex. 18 at 6; Ex. 19 at 6; Ex. 20 at 6; Ex. 21 at 6; Ex. 22 at 7; Ex. 23 at 6. Plaintiff School Boards must also secure funding and begin the onerous process of designing, modifying, and constructing bathrooms and locker rooms to comply with the Rule and lessen its harmful effects on privacy and safety, which will cost millions and cannot possibly be completed by the Rule's effective date. *See supra* n.15. These types of harms—"increased costs of compliance, necessary alterations in operating procedures," etc.—are exactly the sort of irreparable harm that warrant preliminary relief. *Career Colleges & Sch. of Tex. v. U.S. Dep't of Educ.*, 98 F.4th 220, 235 (5th Cir. 2024); *see, e.g.*, *BST Holdings L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

Furthermore, the Rule conflicts with Plaintiff States' duly enacted laws (and soon-to-be enacted laws) designed to safeguard female sports, safety, privacy, and parental rights. *See, e.g.*, La. Rev. Stat. §§ 4:442, 4:444; Miss. Code Ann. §§ 37-97-1, 37-97-3, Mont. Ann. §§ 1-1-201, 20-7-1306, 40-6-704, Idaho Code §§ 73-114(2), 33-6201–6203, 33-6701–6707; S.B. 2753, 2024 Leg. Reg. Sess. (Miss. 2024); *see also* H.B. 610, 2024 Leg. Reg. Sess. (La. 2024); H.B. 121, 2024 Leg. Reg. Sess. (La. 2024); 89 Fed. Reg. at 33,885.[16] This interference with Plaintiff States' sovereign authority to enforce its laws

[16] *See also* Ex. 14 at 3; Ex. 15 at 3; Ex. 16 at 2–3; Ex. 17 at 3–4; Ex. 18 at 3; Ex. 19 at 3; Ex. 20 at 3; Ex. 21 at 3; Ex. 22 at 3–4; Ex. 23 at 3 (showing Plaintiff School Boards have sex-specific teams, which they believe increases opportunities for girls).

"clearly inflicts irreparable harm." *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018); *see BST Holdings*, 17 F.4th at 618 (recognizing States are harmed by "federal overreach" that interferes with "their constitutionally reserved police power over public health policy"); *Tennessee v. Dep't of Educ.*, 615 F. Supp. 3d 807, 841 (E.D. Tenn. 2022) ("Plaintiffs suffered an immediate injury to their sovereign interests when Defendants issued the challenged guidance, as Defendants' guidance and several of Plaintiffs' statutes conflict.").

Relatedly, Plaintiff States are facing the irreparable harm of "substantial pressure to change their state laws," *Tennessee*, 615 F. Supp. 3d at 841; Ex. 31, and Plaintiff School Boards are similarly being pressured into revising policies and practices that they believe are in the best interests of their students, schools, and communities, *e.g.*, Ex. 20 at 6. The Rule forces Plaintiffs into making a lose-lose choice: (1) lose a significant amount of federal funding or (2) comply with the Rule by revising state laws, policies, and practices and by violating the constitutional rights of students, parents, and employees. Because these intangible harms—"invasions of state sovereignty and coerced compliance"—likely cannot be quantified or "monetarily redressed," they too constitute irreparable harm that merits preliminary relief. *Kentucky v. Biden*, 23 F.4th 585, 611 n.19 (6th Cir. 2022); *see Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *7, *9 (5th Cir. Feb. 17, 2022) (per curiam) (recognizing a "coercive choice" can "impose[] a distinct and irreparable harm" beyond "other tangible and remediable losses"); *Texas v. Yellen*, No. 2:21-CV-079-Z, 2022 WL 989733, at *5 (N.D. Tex. Mar. 4, 2022) (concluding plaintiffs were injured "by being put in the position of having to choose between being injured by the loss of a substantial amount of federal funds or the invasion of their constitutional authority to tax").

If preliminary relief is not granted and the Rule goes into effect, Plaintiffs will suffer additional irreparable harm, including increased recordkeeping obligations, complaints, administrative investigations, and private litigation, not to mention decreased enrollment of students and loss of

teachers. *See, e.g.*, 89 Fed. Reg. at 89 Fed. Reg. at 33,858, 33,868–73; Exs. 14–23.[17] Plaintiffs therefore are currently suffering and will continue to suffer irreparable harm, making it both proper and necessary for this Court to grant preliminary relief.

III. Preliminary Relief Would Not Harm Defendants or Disserve the Public Interest.

Plaintiffs likewise satisfy the third and fourth preliminary-relief factors because postponing or staying the Rule, or alternatively enjoining its enforcement, is in the public interest and would not harm Defendants. *See Texas*, 829 F.3d at 424. As a threshold matter, Defendants will not be harmed by the requested preliminary relief that will simply "maintain[] the status quo while the court considers the issue." *Texas v. United States*, 787 F.3d 733, 768 (5th Cir. 2015). Nor can Defendants plausibly argue otherwise when they delayed the issuance of the Rule multiple times. *See* Ex. 25.

In any event, "any interest" Defendants "may claim in enforcing an unlawful" and unconstitutional Rule "is illegitimate." *BST Holdings*, 17 F.4th at 618. That is because "[t]here is generally no public interest in the perpetuation of unlawful agency action." *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022). And the inverse is true: the public interest is served by forcing Defendants to comply with statutory and constitutional limits on their authority. *See BST Holdings*, 17 F.4th at 618 ("The public interest is also served by maintaining our constitutional structure."); *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021): ("[T]he 'public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations.'").

Moreover, granting preliminary relief furthers the public's interest in the enforcement of duly

[17] *See also* Ex. 17 at 7, 9 (explaining that 35 teachers are considering resigning due to the Rule and several families have expressed a "desire to use homeschooling or private school for their students if the district implements the Rule"); Ex. 18 at 7, 9 (similar); Ex. 21 at 7, 9 (noting that some teachers expressed concerns that using biologically inaccurate pronouns or neopronouns would create "chaos" or create "a moral dilemma" and that parents were expressing concerns about the Rule); Ex. 22 at 7, 9–10 (describing Facebook conversations on parents' pages indicating parents intend to fight the Rule or homeschool their children).

enacted state laws, academic freedom, and in preventing the violation of constitutional rights of students, parents, and teachers. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *supra* p. 25; Exs. 34–35 (illustrating public support). Preliminary relief is also in the best interest of children struggling with gender identity, especially given evidence that social transitioning can be harmful to a child's mental health and is a pathway to dangerous medical procedures that a growing number of experts now publicly acknowledge "will not be the best way to manage their gender-related distress." Ex. 8; *see, e.g.*, Exs. 36–40. And preliminary relief is in the best interest of families who do not want their children to share bathrooms and disrobe in locker rooms with the opposite sex and are scrambling to try to find alternative options to public schools. *See supra* p.28 & n.17.

IV. The Court Should Postpone the Rule's Effective Date or Stay the Rule under 5 U.S.C. § 705 or, Alternatively, Issue a Preliminary Injunction.

The Court should postpone the Rule's effective date (or stay the Rule) until resolution of this case on the merits under 5 U.S.C. § 705. Section 705 specifically authorizes courts to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. A postponement or stay operates on the Rule itself, which "differs from a preliminary injunction, which merely thwarts the enforcement . . . but does not suspend . . . or delay its effective start date." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 951 (2018) (emphasis omitted); *see* Ronald M. Levin, *Federal Courts, Practice & Procedure: History of the Administrative Procedure Act & Judicial Review: Vacatur,*

Nationwide Injunctions, and the Evolving APA, 98 Notre Dame L. Rev. 1997, 2009 (2023) ("A stay of a rule necessarily applies to the rule as a whole, not merely to named parties."); *cf. Nken*, 556 U.S. at 428 ("[I]nstead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself.").

Accordingly, a postponement or stay is necessary to mitigate irreparable harm here. That is because, unlike an injunction, a postponement or stay "under section 705 will immunize those who violate the challenged agency action from subsequent penalties—even if the courts wind up approving the agency's action in the end—because the agency action is formally suspended by the court's preliminary relief." Mitchell, 104 Va. L. Rev. at 1016 (emphasis omitted). Without a postponement or stay, Plaintiffs could face private lawsuits alleging violations of Title IX and regulations while this litigation is pending and could face enforcement actions at the end of these proceedings if they are ultimately unsuccessful on the merits. In the alternative, the Court should grant a preliminary injunction under Federal Rule of Civil Procedure 65 and enjoin Defendants from enforcing the Rule (or Title IX in accordance with Defendants' flawed statutory interpretation that is reflected in the Rule) pending resolution of this case on the merits.

CONCLUSION

For the foregoing reasons, this Court should postpone the Rule's effective date and stay the Rule under 5 U.S.C. § 705 pending the resolution of this case on the merits, or in the alternative, enjoin Defendants from enforcing the Rule. The Court should grant that relief as soon as possible and no later than June 21, 2024, before Plaintiffs incur even more unrecoverable compliance costs.

Dated: May 13, 2024

Respectfully Submitted,

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**Admitted Pro Hac Vice or Pro Hac Vice admission application forthcoming*

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Exhibit 1

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

Date: January 8, 2021

MEMORANDUM FOR KIMBERLY M. RICHEY
ACTING ASSISTANT SECRETARY
OF THE OFFICE FOR CIVIL RIGHTS

Re: Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)

The U.S. Department of Education's (Department) Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681, *et seq*., and its implementing regulations at 34 C.F.R. Part 106, prohibiting discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. You have asked the Office of the General Counsel a series of questions regarding the effect of the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), with respect to Title IX. Our answers are presented below.

Question 1: Does the *Bostock* decision construe Title IX?

Answer: No. *Bostock v. Clayton Cty.,* 140 S. Ct. 1731 (2020) construes the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (Title VII). The Court decided the case narrowly, specifically refusing to extend its holding to Title IX and other differently drafted statutes. *Id.* at 1753. The Department does not have authority to enforce Title VII. Our understanding is OCR occasionally receives cases alleging discrimination filed by employees. OCR's Case Processing Manual describes OCR's views on its jurisdiction over employment-related complaints.

Title IX, which the Department does have authority to enforce, prohibits sex discrimination in education programs or activities receiving Federal financial assistance. But Title IX text is very different from Title VII text in many important respects. Title IX, for example, contains numerous exceptions authorizing or allowing sex-separate activities and intimate facilities to be provided separately on the basis of biological sex or for members of each biological sex. *Compare* 42 U.S.C. §§ 2000e-1, 2000e-2 *with* 20 U.S.C. §§ 1681(a), 1686. However, Title VII and Title IX both use the term "sex", and it is here *Bostock* may have salience. *Bostock* compels us to interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment. *Bostock*, 140 S. Ct. at 1738 (citations omitted). And as explained below, specifically in the answer to Question 2, the Department's longstanding construction of the term "sex" in Title IX to mean biological sex, male or female, is the only construction consistent with the ordinary public meaning of "sex" at the time of Title IX's enactment.

§§ 106.32(b)(1), 106.33, 106.34, 106.40, 106.41, 106.43. 106.52, 106.59, 106.61; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 133; *Yates*, 574 U.S. at 537-38; *Davis*, 489 U.S. at 809.

A. Athletics

We believe the ordinary public meaning of controlling statutory and regulatory text requires a recipient providing separate athletic teams to separate participants solely based on their biological sex, male or female, and not based on transgender status or homosexuality, to comply with Title IX.

Under Title IX and its regulations, a person's biological sex *is* relevant for the considerations involving athletics, and distinctions based thereon are permissible and may be required because the sexes are not similarly situated. 34 CFR § 106.41. Biological females and biological males are different in ways that are relevant to athletics because of physiological differences between males and females. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women, however, are enduring."); *Frontiero*, 411 U.S. at 686 (plurality opinion) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth"). Accordingly, schools must consider students' biological sex when determining whether male and female student athletes have equal opportunities to participate. *See McCormick*, 370 F.3d at 287 ("[I]dentical scheduling for boys and girls is not required. Rather, compliance is assessed by first determining whether a difference in scheduling has a negative impact on one sex, and then determining whether that disparity is substantial enough to deny members of that sex equality of athletic opportunity."); *Clark v. Ariz. Interscholastic Ass'n*, 886 F.2d 1191, 1192 (9th Cir. 1989) (quoting *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) ("The record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished")).

Bostock does not diminish the relevance of biological sex in athletics, and does not address the validity of the Department's historic measures to ensure biological females (girls and women) have equal opportunities to participate in athletics because males and females are not similarly situated with respect to athletic competition.[5] Unlike Title VII, one of Title IX's crucial purposes is protecting women's and girls' athletic opportunities. Indeed, Title IX was enacted, and its regulations promulgated, to prohibit discrimination on the basis of sex in education programs and activities and to protect equal athletic opportunities for students who are biological females, including by providing for sex-segregated athletics.

The fact is, Congress specifically mandated that the Department consider promulgating regulations to address sports. After first enacting Title IX, Congress subsequently passed another

[5]Although the Department does not address Equal Protection Clause claims regarding separate athletic teams for biological females and biological males, the Department's position on such claims is stated in its Brief for the United States as Amicus Curiae Supporting Appellants and Urging Reversal in *Hecox v. Little*, Nos. 20-35813, 20-35815, U.S. Court of Appeals for the Ninth Circuit (filed Nov. 19, 2020).

statute, entitled the Javits Amendment, instructing the Secretary of Health, Education, and Welfare to publish regulations "implementing the provisions of Title IX . . . which shall include with respect to intercollegiate activities reasonable provisions considering the nature of the particular sports." Public Law 93–380 (HR 69), § 844, 88 Stat 484, 612 (August 21, 1974). Congress reserved the right to review the regulations following publication to determine whether they were "inconsistent with the Act from which [they] derive[] [their] authority." *Id.*

The Secretary of Health, Education, and Welfare subsequently published Title IX regulations, including regulatory text identical to the current text of the Department's athletics regulations. *Compare* Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24,128, 21,142–43 (June 4, 1975) (promulgating § 86.41 Athletics) *with* 34 C.F.R. § 106.41. After Congressional review, including over six days of hearings, Congress allowed the regulations to go into effect. *See McCormick*, 370 F.3d at 287 (laying out the history of the Javits Amendment, and the response from Congress to the regulations promulgated thereunder). Consequently, the regulations validly and authoritatively clarify the scope of a recipient's non-discrimination duties under Title IX in the case of sex-specific athletic teams. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("The degree of deference [to the Department of Education] is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.").

34 C.F.R. § 106.41 prohibits a recipient from discriminating on the basis of sex with respect to providing athletic programs or activities, permits a recipient to provide sex-segregated teams for competitive activities or contact sports, and obligates a recipient to provide equal athletic opportunity for members of both sexes.[6] As it has for over forty years, the Department must interpret 34 C.F.R. § 106.41(b), regarding operation of athletic teams "for members of *each sex*," and 34 C.F.R. § 106.41(c), regarding equal athletic opportunity for "members of *both sexes*" (emphasis added), to mean operation of teams and equal opportunity for biological males, and for biological females. Based on statutory text and regulatory history, it seems clear that if a recipient chooses to provide "separate teams for members of each sex" under 34 C.F.R. § 106.41(b), then it must separate those teams solely on the basis of biological sex, male or female, and not on the basis of transgender status or sexual orientation, to comply with Title IX.[7]

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[6] Specifically, 34 C.F.R. § 106.41(a) provides a general rule that recipients shall not provide athletics separately based on sex. However, 34 C.F.R. § 106.41(b) permits a recipient to operate or sponsor separate teams for members of each sex where selection for the teams is based on competitive skill, or the activity is a contact sport, and also provides that where a recipient operates or sponsors a team in a particular sport for members of one sex with no such team for members of the opposite sex, then members of the excluded sex must be allowed to try out for the team unless it is for a contact sport. Finally, 34 C.F.R. § 106.41(c) obligates a recipient to provide "equal athletic opportunity for members of both sexes" by taking into account specified factors in deciding what athletic programs to offer.

[7] Different treatment based on transgender status or homosexuality would generally constitute unlawful sex discrimination because students who do not identify as transgender or homosexual cannot generally be treated worse than students who identify as transgender or homosexual. *See*

Exhibit 2

U.S. Department of Education

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Dear Colleague Letter

OFFICE OF THE ASSISTANT SECRETARY

June 22 , 2007

Dear Colleague:

As we celebrate the 35th anniversary of *Title IX* (*Title IX of the Education Amendments of 1972*, 20 U.S.C. 1681 *et seq.*) on June 23, 2007, it is appropriate to take a moment to consider the significant strides we have made towards providing an education to all students, male and female, free of discrimination. As one of the nation's landmark civil rights laws, *Title IX* has opened countless doors for women and girls. While *Title IX* has attracted much attention in the areas of interscholastic and intercollegiate athletics, it profoundly affects all aspects of education far beyond the playing field. As we continue to work towards the elimination of sex discrimination in education, it is important that we reflect on how much we have accomplished and on what students and educators can achieve when everyone—regardless of sex—is given an equal opportunity to succeed.

Congress entrusted the Office for Civil Rights (OCR) in the United States Department of Education (Department) with the responsibility of enforcing *Title IX* in education programs and activities receiving financial assistance from the Department. In response to growing concern about disparities in the educational experiences of male and female students, Congress enacted the law to eliminate sex discrimination in the classroom, in course offerings, in athletics, in extracurricular activities, and in employment in education programs.

Many of today's students would be quite surprised by our nation's education landscape before *Title IX* was enacted. Back then, there were far fewer female students on college campuses. Female students at the secondary and postsecondary levels often were steered towards courses that were perceived to be "more appropriate" for women to study, and faculty members were overwhelmingly male. Women were much less likely to receive undergraduate, graduate, or postgraduate degrees, particularly in academic areas that were once considered "traditionally male." Women and girls comprised a shockingly low percentage of the student athletes at high schools and colleges, and school support for female athletes and teams was often remarkably inadequate.

Today, in part because of *Title IX*, the Department's vigorous enforcement of the law, and our nation's commitment to the elimination of sex discrimination, we have removed many obstacles and greatly increased the ability of women and girls to take advantage of the opportunities previously denied them. This is also due in no small part to the efforts of our nation's education institutions at the elementary, secondary, and postsecondary levels.

In order for students to access the educational opportunities to which they are entitled, we must first ensure that they are receiving a high-quality education, graduating from high school, and enrolling in colleges and universities. *Title IX* has been an effective and crucial means to these ends. From 1972 to 2005, the percentage of women who enrolled in college immediately after graduating from high school rose from 46 percent to 70 percent. In 1972,

approximately 3,512,000 women were enrolled in undergraduate institutions, making up 44 percent of undergraduate enrollment; by fall 2005, that number had increased to 8,555,000, or 57 percent. Between academic years 1971–72 and 2004–05, the percentage of bachelor's degrees earned by women also increased from 44 percent to 57 percent. Additionally, more and more women have entered the work force with advanced degrees—from 1971–72 to 2004–05, the percentage of master's degrees earned by women increased from 41 percent to 59 percent, and the percentage of doctoral degrees awarded to women increased from 16 percent to 49 percent. Women also are pursuing professional degrees in increasing numbers. In fall 1972, women made up only 11 percent of students enrolled in first-professional degree programs; by fall 2005, that percentage more than quadrupled to 49 percent, and women are projected to have exceeded 50 percent of total first-professional enrollment for the first time in 2006.

Since it was enacted, *Title IX* has drawn a great deal of attention to our schools' athletics programs. It, therefore, comes as no surprise that *Title IX* has had a significant impact on athletics at the secondary and postsecondary levels. *Title IX* has improved and enhanced athletic opportunities for women and girls by allowing students equal opportunity to participate without discrimination based on sex. For example, at the collegiate level in 1972, only 29,977 female student athletes, or 15 percent, participated in sports and recreational programs at National Collegiate Athletic Association (NCAA) member institutions; by 2005–06, the number of intercollegiate female student athletes increased to 170,526, or 43 percent. Additionally, the number of girls participating in high school athletics has increased dramatically. In 1971–72, only 294,015 girls participated in high school athletics; in 2005–06, that number was 2,953,355, representing an increase from 7 percent in 1971–72 to 41 percent in 2005–06.

As our dependence on technology and innovation increases, it has become clear that, while women and girls benefit from increased opportunities in areas such as mathematics and science, our society also benefits overall when women and girls participate in those arenas. The United States cannot remain educationally, economically, or technologically competitive without the contributions of all of its citizens, and *Title IX* has made it possible for more women and girls to make such contributions. In 2004, 71 percent of female high school graduates had completed advanced-level chemistry, biology and-or physics courses, 44 percent had completed mid-level mathematics courses, and 52 percent had completed advanced mathematics courses. We have also seen significant increases in the percentage of bachelor's degrees earned by women in math and science fields, such as biological-biomedical sciences, engineering, physical sciences and science technologies. However, there is still a significant gap between the percentage of degrees awarded to men and those awarded to women in almost all of the math and science fields, particularly in the fields of computer-information sciences and engineering, and the gap increases with successive advanced degrees. In 1971–72, women earned 15 percent of the bachelor's degrees in physical sciences and science technologies, 14 percent of the master's degrees, and 6 percent of the doctoral degrees. In those same fields, in 2004–05, women earned 42 percent of the bachelor's degrees, 39 percent of the master's degrees, and 28 percent of the doctoral degrees. We are seeing similar trends in other math and science fields as well. We must ensure that sex discrimination is not an obstacle to the opportunities in the math and science fields, for the benefit of our students and for the competitive future of our nation.

Title IX also has brought substantial focus to the issue of sexual harassment in schools, and enforcement of *Title IX* principles has made it easier for schools to recognize and address sexual harassment, the elimination of which is essential to provide a safe and secure educational environment for all students. To that end, OCR has published policy that provides schools, faculty, students, and parents with tools to identify, prevent, and remedy sexual harassment. Additionally, since 1975, the *Title IX* regulations have prohibited discrimination based on pregnancy as a form of sex discrimination, and OCR has provided schools with policy guidance that helps schools understand the rights afforded to pregnant students under *Title IX*. I recently issued a letter to postsecondary institutions addressing discrimination against pregnant student athletes in the context of athletic scholarships.

Measurable and undisputable progress has been made since *Title IX* was enacted, due in no small part to the considerable effort and commitment of, and the proactive initiatives taken by, education institutions at all levels to eliminate sex discrimination. Despite significant progress, we still have considerable work before us. Discrimination continues to exist across the nation in education programs and activities.

Exhibit 3

REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES

TITLE IX

January 2001

U.S. Department of Education
Office for Civil Rights

whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

A student may be sexually harassed by a school employee,[9] another student, or a non-employee third party (e.g., a visiting speaker or visiting athletes). Title IX protects any "person" from sex discrimination. Accordingly, both male and female students are protected from sexual harassment[10] engaged in by a school's employees, other students, or third parties. Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.[11] An example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[12]

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[13] sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.[14] For example, if a male student or a group of male students target a gay student for physical sexual advances, serious enough to deny or limit the victim's ability to participate in or benefit from the school's program, the school would need to respond promptly and effectively, as described in this guidance, just as it would if the victim were heterosexual. On the other hand, if students heckle another student with comments based on the student's sexual orientation (e.g., "gay students are not welcome at this table in the cafeteria"), but their actions do not involve conduct of a sexual nature, their actions would not be sexual harassment covered by Title IX.[15]

Though beyond the scope of this guidance, gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping,[16] but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.[17] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. A school must respond to such harassment in accordance with the standards and procedures described in this guidance.[18] In assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.[19]

IV. Title IX Regulatory Compliance Responsibilities

As a condition of receiving funds from the Department, a school is required to comply with Title IX and the Department's Title IX regulations, which spell out prohibitions against sex discrimination. The law is clear that sexual harassment may constitute sex discrimination under Title IX.[20]

Recipients specifically agree, as a condition for receiving Federal financial assistance from the Department, to comply with Title IX and the Department's Title IX regulations. The regulatory provision requiring this agreement, known as an assurance of

Exhibit 4

Sexual Orientation and Gender Identity (SOGI) Discrimination

In *Bostock v. Clayton County, Georgia,* No. 17-1618 (S. Ct. June 15, 2020),**[1]** the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." For example, if an employer fires an employee because she is a woman who is married to a woman, but would not do the same to a man married to a woman, the employer is taking an action because of the employee's sex because the action would not have taken place but for the employee being a woman. Similarly, if an employer fires an employee because that person was identified as male at birth but uses feminine pronouns and identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male.

The Court also noted that its decision did not address various religious liberty issues, such as the First Amendment, Religious Freedom Restoration Act, and exemptions Title VII provides for religious employers.

SOGI Discrimination & Work Situations

The law forbids sexual orientation and gender identity discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

SOGI Discrimination & Harassment

It is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity. Harassment can include, for example, offensive or derogatory remarks about sexual orientation (e.g., being gay or straight). Harassment can also include, for example, offensive or derogatory remarks about a person's transgender status or gender transition.

Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.

While the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is unlawful when it is so frequent or severe that it creates a hostile work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a clientor customer.

SOGI Discrimination & Employment Policies/Practices

As a general matter, an employer covered by Title VII is not allowed to fire, refuse to hire, or take assignments away from someone (or discriminate in any other way)

Exhibit 5

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

B.P.J., by her next friend and mother, HEATHER JACKSON,

Plaintiff-Appellant

v.

WEST VIRGINIA STATE BOARD OF EDUCATION, *et al.*,

Defendants-Appellees

and

THE STATE OF WEST VIRGINIA; LAINEY ARMISTEAD,

Intervenors-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

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cisgender girls in school athletics. Nor does H.B. 3293 substantially relate to the State's asserted interest in student safety. The statute prohibits transgender girls from participating even in sports that involve little to no physical contact and applies to transgender girls who have not gone through endogenous puberty and thus do not fit the State's overbroad generalizations regarding the relative size, speed, and athletic abilities of boys versus girls. As such, H.B. 3293 is not substantially related to the State's asserted justifications, and thus fails intermediate scrutiny.

2. Furthermore, H.B. 3293 violates Title IX because it constitutes a categorical ban on transgender girls' participation on certain athletic teams, which is inconsistent with Title IX's overarching goal of ensuring equal opportunity. Title IX prohibits discrimination on the basis of sex in education programs or activities that receive federal financial assistance. By prohibiting transgender girls from participating on girls' sports teams because their sex assigned at birth was male, and thus causing them harm, H.B. 3293 discriminates on the basis of sex.

Additionally, the district court erred in relying on the Title IX regulation, 34 C.F.R. 106.41(b), to reject B.P.J.'s Title IX claim. That regulation generally allows federal-funding recipients to provide sex-separate teams where selection for such teams is based on competitive skill or the activity involved is a contact sport. Contrary to the court's assumption that Section 106.41(b) authorizes recipients to

require students participating on athletic teams to do so consistent with their sex assigned at birth, the regulation is silent as to the athletic teams on which transgender students may participate. Because neither Title IX nor its regulations authorize recipients to categorically ban transgender girls from participating on girls' teams, such a ban violates Title IX's general nondiscrimination mandate.

ARGUMENT

I

H.B. 3293 VIOLATES THE EQUAL PROTECTION CLAUSE AS APPLIED TO TRANSGENDER GIRLS LIKE B.P.J.

The Equal Protection Clause generally prohibits government actors "from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992); see also *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 606 (4th Cir.), as amended Aug. 28, 2020, cert. denied, 141 S. Ct. 2878 (2021). "When considering an equal protection claim," this Court "first determine[s] what level of scrutiny applies" and then "ask[s] whether the law or policy at issue survives such scrutiny." *Id.* at 607.

H.B. 3293 warrants intermediate scrutiny both because it classifies based on sex and because it discriminates against transgender women and girls as a class. Furthermore, the law fails heightened scrutiny because, given its categorical application to all transgender women and girls, there is an inadequate fit between the means and ends of the statute. As B.P.J.'s case illustrates, H.B. 3293's

II

H.B. 3293 VIOLATES TITLE IX

Title IX provides that "[n]o 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 education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). By categorically prohibiting transgender female students from participating on certain athletic teams designated as being for women or girls, H.B. 3293 creates a substantial obstacle for funding recipients in West Virginia to accomplishing Congress's objective in enacting Title IX: ensuring equal athletic opportunity. And contrary to the district court's reading, the Title IX regulation permitting schools to separate certain athletic teams by sex does not authorize categorical bans on transgender girls' participation in girls' sports.

A. Title IX's Prohibition Of Discrimination "On The Basis Of Sex" Includes Discrimination Based On Gender Identity

In *Bostock* v. *Clayton County*, the Supreme Court held that firing a person who is gay or transgender because of their sexual orientation or gender identity violates Title VII of the Civil Rights Act of 1964 (Title VII) because it constitutes discrimination "because of sex." 140 S. Ct. 1731, 1740-1741 (2020). The Court defined the term "discrimination" in the Title VII context to include "distinctions or differences in treatment that injure protected individuals." *Id.* at 1753 (quoting

Under this Court's binding precedent, it is clear that H.B. 3293 discriminates based on sex. It prohibits transgender girls from participating on girls' sports teams because their sex assigned at birth was male. This is discrimination "on the basis of" sex. *Grimm*, 972 F.3d at 616-617. The question here, then, is whether Title IX regulations, which generally allow schools to provide sex-separate athletic teams where selection is based upon competitive skill or the activity is a contact sport, 34 C.F.R. 106.41(b), actually permit federal-funding recipients to categorically ban *all* transgender girls from participating on those teams consistent with their gender identity. As explained below, they do not.

B. Title IX Regulations Do Not Permit Funding Recipients To Categorically Ban Transgender Girls From Participating In A School's Athletics Program Consistent With Their Gender Identity

Title IX's regulatory scheme is designed to ensure equal opportunity. In most contexts, Title IX requires schools to achieve this goal through coeducation—prohibiting the separation of students by sex. See, *e.g.*, 34 C.F.R. 106.34(a) (providing that except in limited circumstances, "a recipient shall not provide or otherwise carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation therein by any of its students on the basis of sex"). The regulations set forth a similar rule for athletics: "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against

court held that Section 106.41(b) permits funding recipients to require all students who participate on athletic teams to do so consistent with their "biological sex." JA4276-4277. But contrary to the court's pronouncement, Section 106.41(b) does not dictate the athletic teams on which transgender students may participate. Title IX and its regulations do not use the term "biological sex" or define the term "sex," and, more importantly, do not require that federal-funding recipients treat transgender students consistent with their "biological sex."

This Court already has recognized that Title IX's regulations do not mandate separation on the basis of "biological sex" in analogous circumstances in *Grimm* with respect to 34 C.F.R. 106.33, which permits federal-funding recipients to provide separate restrooms on the basis of sex. There, the Court explained that the regulation "suggests * * * that the act of creating sex-separated restrooms in and of itself is not discriminatory—not that, in applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what 'sex' means." 972 F.3d at 618 (citation omitted). The same is true here. Section 106.41(b) is silent as to which athletic teams transgender students may join, and thus does not provide a "safe harbor" for categorical bans from sex-separate athletic teams based on a student's birth-assigned sex.[5]

[5] Because 34 C.F.R. 106.41(b) does not address how to assign transgender students to sex-separate teams, the fact that H.B. 3293 applies only to "teams

Exhibit 6

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REPORT

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Standards of Care for the Health of Transgender and Gender Diverse People, Version 8

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CHAPTER 8 Nonbinary

Nonbinary is used as an umbrella term referring to individuals who experience their gender as outside of the gender binary. The term nonbinary is predominantly but not exclusively associated with global north contexts and may sometimes be used to describe indigenous and non-Western genders. The term nonbinary includes people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid) (Kuper et al., 2014; Richards et al., 2016; Richards et al., 2017; Vincent, 2019). Nonbinary people may identify to varying degrees with binary-associated genders, e.g., nonbinary man/woman, or with multiple gender terms, e.g., nonbinary and genderfluid (James et al., 2016; Kuper et al., 2012). Nonbinary also functions as a gender identity in its own right (Vincent, 2020). It is important to acknowledge this is not an exhaustive list, the same identities can have different meanings for different people, and the use of terms can vary over time and by location.

Genderqueer, first used in the 1990s, is an identity category somewhat older than nonbinary—which first emerged in approximately the late 2000s (Nestle et al., 2002; Wilchins, 1995). Genderqueer may sometimes be used synonymously with nonbinary or may communicate a specific consciously politicized dimension to a person's gender. While transgender is used in many cultural contexts as an umbrella term inclusive of nonbinary people, not all nonbinary people consider themselves to be transgender for a range of reasons, including because they consider being transgender to be exclusively within the gender binary or because they do not feel "trans enough" to describe themselves as transgender (Garrison, 2018). Some nonbinary people are unsure or ambivalent about whether they would describe themselves as transgender (Darwin, 2020; Vincent, 2019).

In the context of the English language, nonbinary people may use the pronouns they/them/theirs, or neopronouns which include e/em/eir, ze/zir/hir, er/ers/erself among others (Moser & Devereux, 2019; Vincent, 2018). Some nonbinary people use a combination of pronouns (either deliberately mixing usage, allowing free choice, or changing with social context), or prefer to avoid gendered pronouns entirely, instead using their name. Additionally, some nonbinary people use she/her/hers, or he/him/his, sometimes or exclusively, whilst in some regions in the world descriptive language for nonbinary people does not (yet) exist. In contexts outside of English, a wide range of culturally specific linguistic adaptations and evolutions can be observed (Attig, 2022; Kirey-Sitnikova, 2021; Zimman, 2020). Also of note, some languages use one pronoun that is not associated with sex or gender while others gender all nouns. These variations in language are likely to influence nonbinary people's experience of gender and how they interact with others.

Recent studies suggest nonbinary people comprise roughly 25% to over 50% of the larger transgender population, with samples of youth reporting the highest percentage of nonbinary people (Burgwal et al., 2019; James et al., 2016; Watson, 2020). In recent studies of transgender adults, nonbinary people tend to be younger than transgender men and transgender women and in studies of both youth and adults, nonbinary people are more likely to have been assigned female at birth (AFAB). However, these findings should be interpreted with caution as there are likely a number of complex, sociocultural factors influencing the quality, representativeness, and accuracy of this data (Burgwal et al., 2019; James et al., 2016; Watson, 2020; Wilson & Meyer, 2021) (see also Chapter 3—Population Estimates).

Understanding gender identities and gender expressions as a non-linear spectrum

Nonbinary genders have long been recognized historically and cross-culturally (Herdt, 1994; McNabb, 2017; Vincent & Manzano, 2017). Many gender identity categories are culturally specific and cannot be easily translated from their context, either linguistically or in relation to the Western paradigm of gender. Historical settler colonial interactions with indigenous people with

CHAPTER 9 Eunuchs

Among the many people who benefit from gender-affirming medical care, those who identify as eunuchs are among the least visible. The 8th version of the Standards of Care (SOC) includes a discussion of eunuch individuals because of their unique presentation and their need for medically necessary gender-affirming care (see Chapter 2—Global Applicability, Statement 2.1).

Eunuch individuals are those assigned male at birth (AMAB) and wish to eliminate masculine physical features, masculine genitals, or genital functioning. They also include those whose testicles have been surgically removed or rendered nonfunctional by chemical or physical means and who identify as eunuch. This identity-based definition for those who embrace the term eunuch does not include others, such as men who have been treated for advanced prostate cancer and reject the designation of eunuch. We focus here on those who identify as eunuchs as part of the gender diverse umbrella.

As with other gender diverse individuals, eunuchs may also seek castration to better align their bodies with their gender identity. As such, eunuch individuals are gender nonconforming individuals who have needs requiring medically necessary gender-affirming care (Brett et al., 2007; Johnson et al., 2007; Roberts et al., 2008). Eunuch individuals identify their gender identities in various ways. Many eunuch individuals see their status as eunuch as their distinct gender identity with no other gender or transgender affiliation. The focus of this chapter is on the treatment and care for those who identify as eunuchs. Health care professionals (HCPs) will encounter eunuchs requesting hormonal interventions, castration, or both to become eunuchs. These individuals may also benefit from a eunuch community because of the identification—with or without actual castration.

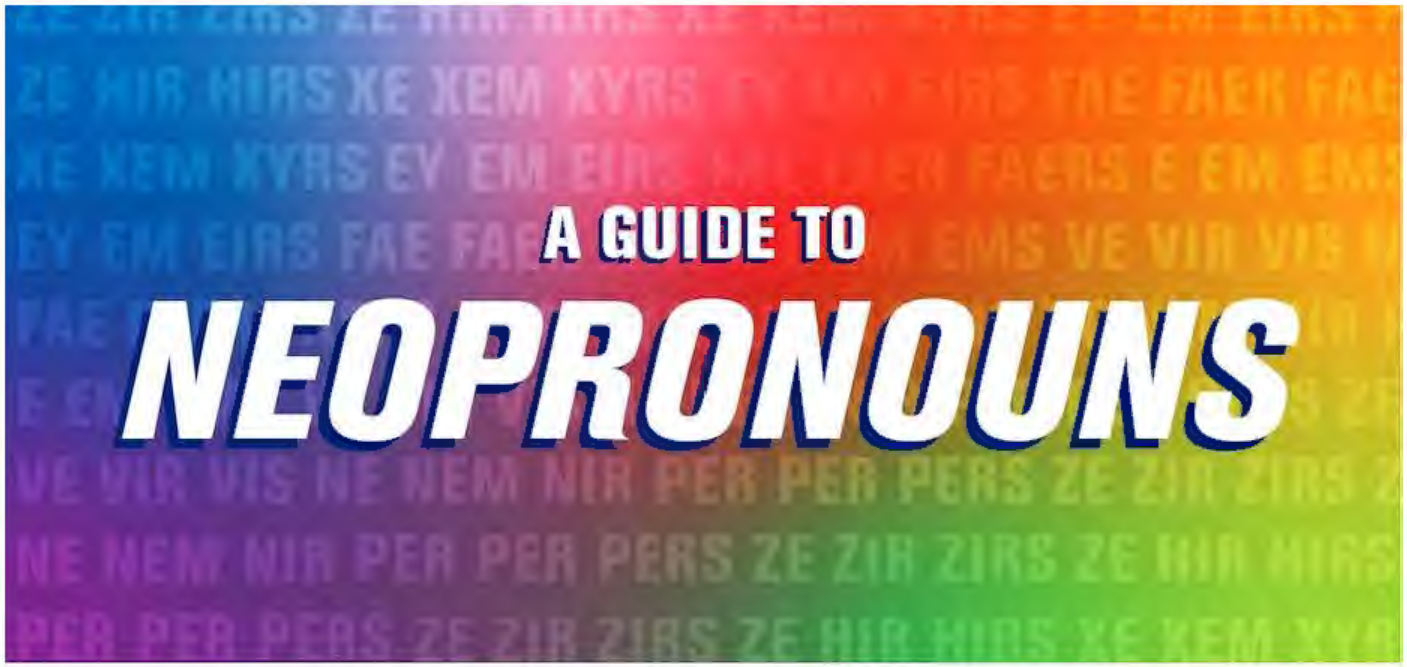
While there is a 4000-year history of eunuchs in society, the greatest wealth of information about contemporary eunuch-identified people is found within the large online peer-support community that congregates on sites such as the Eunuch Archive (www.eunuch.org), which was established in 1998. The moderators of this site attempt to maintain both medical and historical accuracy in its discussion forums, although there is certainly misinformation as well. According to the website, as of January 2022, there have been over 130,000 registered members from various parts of the world and frequently over 90% of those reading the site are "guests" rather than members. The website lists over 23,000 threads and nearly 220,000 posts. For example, two threads giving instructions for self-castration by injection of different toxins directly into the testicles have about 2,500 posts each, and each has been read well over one million times. Beginning in 2001, there have been 20 annual international gatherings of the Eunuch Archive community in Minneapolis in addition to many regional gatherings elsewhere. While the topic of castration is of interest to the great majority of people who participate in the discussions, it is a minority of the membership who seriously seek or have undergone castration. Many former Eunuch Archive members have achieved their goals and no longer participate.

Because of misconceptions and prejudice about historic eunuchs, the invisibility of contemporary eunuchs, and the social stigma that affects all gender and sexual minorities, few eunuch individuals come out publicly as eunuch and many will tell no one and will share only with like-minded people in an online community or are known as such only to close family and friends (Wassersug & Lieberman, 2010). The stereotypes of eunuchs are often highly negative (Lieberman 2018), and eunuchs may suffer the same minority stress as other stigmatized groups (Wassersug & Lieberman, 2010). Research into minority stress affecting gender diverse people should therefore include eunuchs.

The current set of recommendations is directed at professionals working with individuals who identify as eunuchs (Johnson & Wassersug, 2016; Vale et al., 2010) requesting medically necessary gender-affirming medical and/or surgical treatments (GAMSTs). Although not a specific diagnostic category in the ICD or DSM, eunuch is a useful construct as it speaks to the specifics of eunuch experience while also connecting it to the experience of gender incongruence more broadly. Eunuch individuals will present themselves clinically in various ways. They wish for

Exhibit 7

Understanding Neopronouns



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What are Neopronouns?

Pronouns are the words we use to refer to ourselves and others and are an important part of our daily lives. In English, the most common personal pronouns are **he/him/his** and **she/her/hers,** which are typically used to refer to people who identify their gender

(identity) as masculine or feminine, respectively. **They/them/theirs** is another common set of pronouns that is used by many non-binary people.

Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless.

Examples of neopronoun sets include: **xe/xir/xirs**, **ze/zir/zirs** and **fae/faer/faers.**

On this page you will find answers for several common questions about neopronouns as well as a table listing the conjugations of several common neopronouns.

How do I use neopronouns? −

Neopronouns are used much in the same way other pronouns are used.

For example, take the neopronoun xe/xir/xirs (which parallels, respectively, she / her/ hers).

Much like you would say "I saw ***her*** yesterday, and ***she*** said the book was ***hers,"*** you would say

"I saw ***xir*** yesterday, and ***xe*** said the book was ***xirs."***

For the neopronoun ze/zir/zirs you would say:

"***Ze*** will be arriving soon, and bringing ***zir*** famous carrot cake, which was ***zirs*** grandma's recipe!"

For the neopronoun fae/faer/faers, you would say:

I asked ***faer*** what ***fae*** thought of the movie.

Are neopronouns really new? +

Although the term "neopronouns" suggests pronouns that were recently developed, their use has been recorded for several centuries. During the 12th century, the Old English gender pronouns "he" and "heo" naturally evolved to a near indistinguishable pronunciation, which eventually led to the adoption of "she" as a feminine pronoun. The gender-neutral pronoun "ou" was recorded by William H. Marshall in 1789 and traced back to the gender-neutral pronoun "a" in Middle English.

From 1934 to 1961, the Merriam-Webster's Unabridged Dictionary recognized the gender-neutral pronoun "thon," a contraction of the phrase "that one," which was coined by Charles Crozat Converse in 1858.

In the 1990s, the early online community LambdaMOO allowed users to choose the gender-neutral pronoun set E/Em/Eir, called Spivak pronouns after the mathematician Michael Spivak.

The English language has evolved over centuries and continues to evolve even in the present. Neopronouns are another example of this evolution and a step towards a society where people can more fully express all parts of themselves.

What about honorifics? +

People who use neopronouns may prefer not to be addressed with gendered honorifics such as "Ms." /"Mr." / "Mrs." As an alternative, many neopronoun users use "Mx." as an honorific, as in "Mx. Jones."

Similarly, instead of Sir or Ma'am, many use "Zir" as in "Thank you, Zir" or "Yes, Zir."

How do I find out if someone uses neopronouns? +

When you first meet someone, it's best to avoid assuming their pronouns. Instead, create opportunities for them to share their pronouns by first sharing your own. For example, one might introduce themselves by saying:

"Hi! My name's Amelia and my pronouns are she/her/hers. It's a pleasure to meet you!"

Still, others may experiment with using new sets of pronouns. Anyone can experiment with using different pronouns for themselves as a way to further explore their gender identity. Just like other aspects of a person's life, someone's gender identity and expression may evolve over time. Exploring

your gender identity and expression can be a healthy way to better understand your own sense of gender and find new aspects of yourself that you may find enjoyable.

Why is it important to refer to someone by the pronouns they use? +

You should always use someone's correct pronouns, even when they are not around, unless they specifically request that you not do so for reasons such as safety or privacy. When someone chooses to use neopronouns, they are expressing their authentic selves, and deserve our respect. The experience of being misgendered – having someone use the incorrect pronouns to refer to you – can be uncomfortable and hurtful. The experience of accidentally misgendering someone can be difficult for both parties. Neopronouns are a wonderful expression of our society's diversity and using the correct pronouns for someone is a great way to show your allyship.

Some people may also use multiple sets of pronouns (ex. she/they, he/she, they/fae) at all times or in certain situations. Those who use multiple sets of pronouns often feel it is necessary to express different aspects of their gender identity. When you meet someone who uses multiple pronoun sets, you may kindly ask their preferences for when and how to use each of their pronouns.

What if I mess up? +

If you make a mistake, it's best to quickly apologize and move on with the conversation. When you hear someone else misgender someone, you may also correct them so that they are more likely to use the correct pronouns in the future.

Using someone's pronouns may take practice, especially if that person previously used different pronouns or if they are using pronouns that you are unfamiliar with. The best way to avoid using incorrect pronouns for someone is to simply take a moment before speaking or writing to remember how they refer to themselves. With enough use of the correct pronouns, it can become a habit that requires little effort to get right. The payoff will be increased comfort and friendliness between you and those you interact with.

How many people use neopronouns? +

According to a 2020 report by The Trevor Project, among LGBTQ+ youth in the United States (ages 13-24), 4% use neopronouns. Adults also report using neopronouns. In fact, 2% of adults in the 2021

LGBTQ+ Community Survey use various neopronouns including Ey/Em/Eir, Ze/Hir/Hirs, Ze/Zir/Zirs or Xe/Xem/Xyrs.

How do some autistic people use neopronouns? +

Anyone can use neopronouns, but neopronouns are especially popular in the autistic community. Autism is a neurotype, which means autistic folks' brains are wired differently than allistics' (non-autistics) brains. It changes the way that they experience the world around them, as well as how they interact with it.

Since autistic folks experience the world differently from allistic folks, this can also affect how autistic vs. allistic people present or experience their gender. For autistic people, their sensory experiences, emotional expressions, and atypical social skills all play a role in how they perceive their gender identities or how they express them. In many ways, their autism is not separate from their gender.

Similarly, since neopronouns break the mold of traditional pronouns, many autistic folks who experience their gender in this unique way, or who wish to express their gender differently, opt to use neopronouns.

Of course, neopronouns are not limited to just autistic folks. Anyone can express their gender in nonconforming ways and use neopronouns to further express that. But neopronouns have high usage in the autistic community due to the different ways autistic people interpret and engage with themselves and others.

What are nounself pronouns and xenogenders? How do I use them? −

Some neopronouns users may adopt nounself pronouns, which are pronouns referring to pre-existing words. Nounself pronoun users often choose pronouns based on objects or ideas that they have a strong personal connection to. For others, nounself pronouns may also be a reflection of their gender identity.

It may help to see this used in a sentence. In the sentence "**She** brought the coat for **herself**, which was **her** grandmother's coat," the person uses she/her pronouns. If the person doesn't identify with pronouns like these but instead uses the word Kit to identify, you would simply say "**Kit** brought the coat for **kitself**, which was **kit's** grandmother's coat."

When thinking about gender identity, many people think of gender as somewhere on a spectrum of masculinity and femininity. But xenogender is used by some people who feel their gender is neither masculine nor feminine and not related to the understanding of these binary identities. Like nounself pronouns, xenogender may use objects or ideas as metaphors to describe their gender.

The beauty of gender and language lies in their unlimited potential for expressing our truest selves. Xenogenders and nounself pronouns are innovative ways for people to express the fullness of their identities.

Are There Only Neopronouns in English? +

Neopronouns are not just an English invention. In fact, many neopronouns in other languages resemble the English "they/them."

While the definition of neopronouns for English is "anything other than he/she/they," the definition worldwide is "anything other than the conventional pronouns of that language." Since many languages do not have a singular form of "they/them," or any gender neutral pronouns, people are creating neopronouns similar to the English "they/them."

Many Indo European languages such as English, German, and Spanish, as well as other languages, have gendered endings and articles, as well as gendered pronouns. In these languages, no options exist for singular third-person gender neutral pronouns, so people started creating them. Neopronouns exist in just about every language that has a non-binary speaker!

How Would a Neopronoun Work With the Grammar of Other Languages? +

Despite moves toward gender neutral pronouns, many languages still conjugate things on the basis of singular or plural pronouns. This is what makes it awkward for these languages to use their plural "they/them" in the singular form like in English. Plus, wouldn't English neopronouns sound funny in other languages?

The great thing about neopronouns is that they are not just for English, and the neopronouns that are created to sound good in English aren't the only neopronouns that exist. There are neopronouns that exist just in other languages. Neopronouns in other gendered languages are created with the grammar and pronunciation of that language in mind. Let's look at German for an example.

One of the most popular neopronouns in English is Ze/Zir. In German, the letter Z makes more of a "ts" sound, whereas the letter S makes more of a "z" sound. Because of this, Ze/Zir in German would sound more like "Tse/Tsir," which doesn't fit the general flow of pronunciation. Usually, "ts" sounds are in the middle or at the end of words. This is one example of how English neopronouns don't translate over into other languages.

To combat this, many German individuals have combined the word *sie* (which means "she") and *er* (which means "he") to create *sier*. This neopronoun has been created in a way that will conjugate with the other third person singular pronouns. It follows all German conjugational and case rules.

How would you use this? Instead of saying, "**Sie** will verreisen" (she wants to travel) or "**Sie** packt **ihren** Koffer" (she is packing her suitcase), you say, "**Sier** will verreisen," or "**Sier** packt **seisen** Koffer." This pronoun is designed to be used with proper German grammar and pronunciations.

This neopronoun is a great example of how even the newest of pronouns can be created in a way that still works for the complex grammar of different languages.

Spanish, Swedish, Tamil, and French speakers are creating similar forms with neopronouns such as *elle*, *hen*, *avam/ivam*, and *iel*. Some languages, such as Arabic and Hebrew that have gendered forms of "you," have even been using different forms of "you" as well as different third person pronouns. Mandarin Chinese has even begun using the Latin alphabet to create their own neopronouns that have even become common on national television ads.

Neopronouns are diverse and different in every language, but every world language is adaptable enough to fit them so that everyone's gender can be validated through our words.

Neopronoun Examples

BASE PRONOUNS	SUBJECT PRONOUNS	OBJECT PRONOUNS	POSSESSIVE ADJECTIVES	POSSESSIVE
They	They ran	I spoke with them	Their eyes grew wide	The cat
Ze/zir	Ze ran	I spoke with zir	Zir eyes grew wide	The ca

BASE PRONOUNS	SUBJECT PRONOUNS	OBJECT PRONOUNS	POSSESSIVE ADJECTIVES	POSSESSIVE
Ze/hir	Ze ran	I spoke with hir	Hir eyes grew wide	The cat
Xe	Xe ran	I spoke with xem	Xyr eyes grew wide	The cat
Ey	Ey ran	I spoke with em	Eir eyes grew wide	The cat
E	E ran	I spoke with em	Eir eyes grew wide	The cat
Ae	Ae ran	I spoke with aer	Aer eyes grew wide	The cat
Fae	Fae ran	I spoke with faer	Faer eyes grew wide	The cat
Ve	Ve ran	I spoke with ver	Ver eyes grew wide	The cat
Ne	Ne ran	I spoke with nem	Nir eyes grew wide	The cat
Per	Per ran	I spoke with per	Per eyes grew wide	The cat

Additional Resources

- Carrd - Neopronouns Guide
- Tumblr - Neopronoun Conjugation Guides
- All Children, All Families - Pronouns 101

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Exhibit 8

Britain | A landmark judgment

The Cass Review damns England's youth-gender services

A new report urges big changes

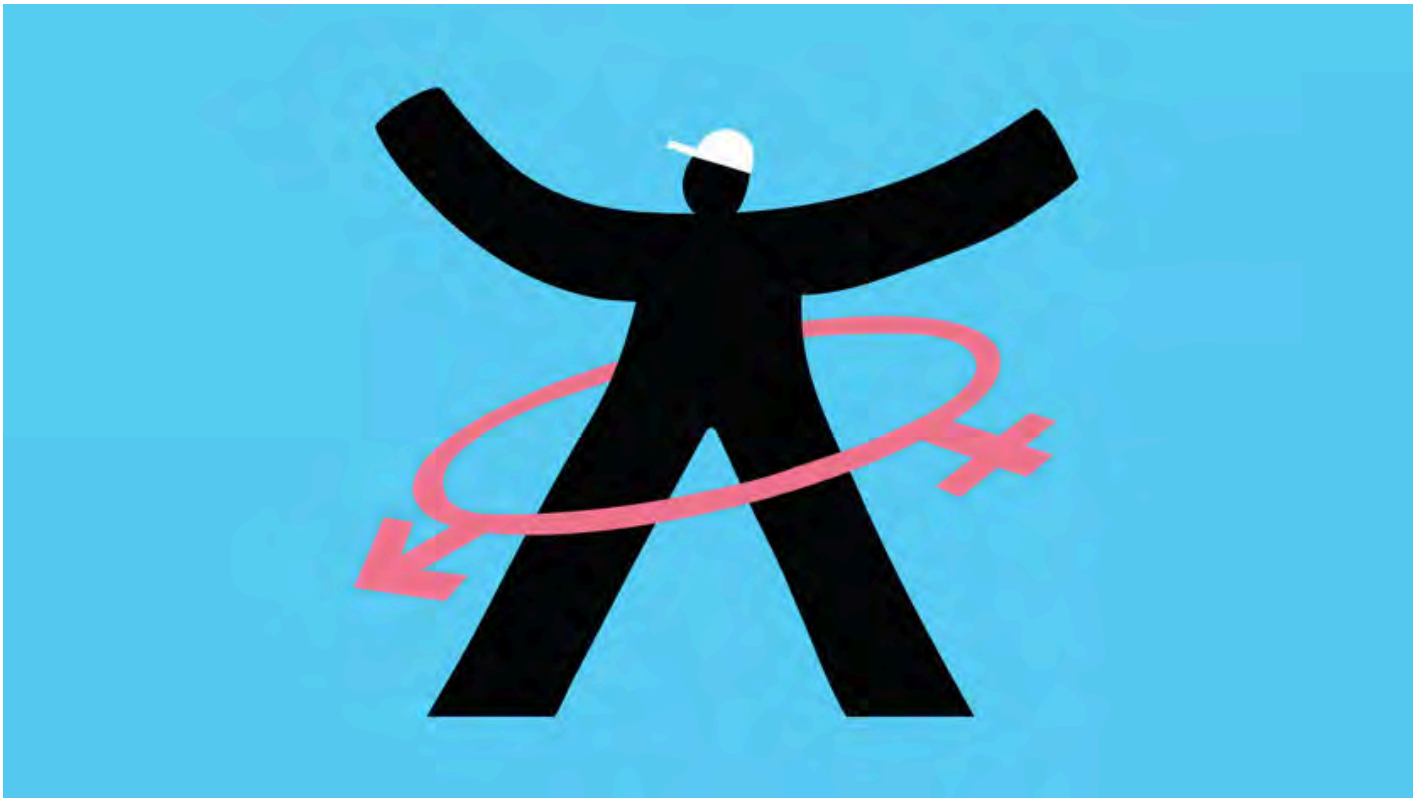
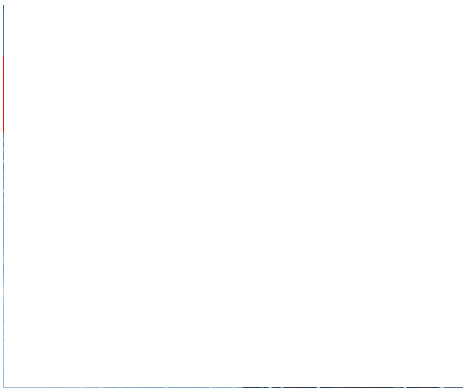


ILLUSTRATION: RYAN CHAPMAN

Apr 10th 2024

THE LARGEST review ever undertaken in the field of transgender health care is out. It is damning of practices that were commonplace in England until recently and remain widespread in other countries, notably America.

The review, which was published on April 9th, was led by Dr Hilary Cass, a former president of the Royal College of Paediatrics. It recommends a shift away from medical intervention for trans-identifying children, "an area of remarkably weak evidence", to a model that prioritises therapy and considers the possibility that other mental-health issues are involved. Dr Cass concludes that "for most young people, a medical pathway will not be the best way to manage their gender-related distress."



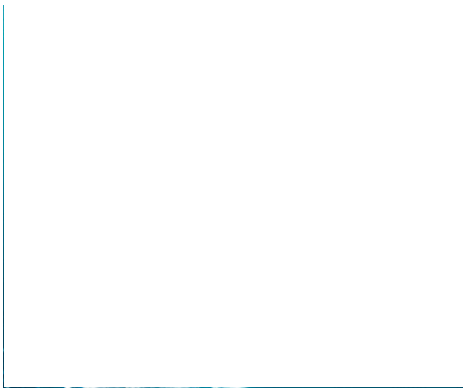
Her review was commissioned in 2020, amid growing concerns about the "affirmation model" of treatment for trans-identifying children being followed by England's only youth-gender clinic, the Gender Identity Development Service (GIDS) at the Tavistock hospital trust in London. On the basis of a single Dutch study in 2011, which suggested that puberty blockers may improve the psychological well-being of such children, GIDS had begun to give these medicines to young people. Their long-term effects are not well-understood; children using them often ended up taking cross-sex hormones, too.

More than 9,000 young people came through the doors of GIDS but the clinic did not keep follow-up data on any of them. It was finally closed down on April 1st and will be replaced by at least two regional centres, which the findings of the Cass Review will help shape.

Dr Cass's report looks at the reasons for the rapid rise in the number of trans-identifying children in Britain over the past five years. She concludes that greater acceptance of trans identities "does not adequately explain" the sharp increase (nor the switch from a preponderance of natal boys affected to a majority of natal girls). She finds that, compared with the general population, children referred to gender services had higher rates of parental loss, trauma and neglect, and she recommends that gender services should consider the

high rates of concurrent mental-health problems, neurodiversity and "adverse childhood experiences".

Many clinicians see the Cass Review as validation of their worries. But some have lingering concerns. Anna Hutchinson, a psychologist at GIDS until she resigned in 2017, says that cross-sex hormones are still available from adult gender services after as few as two appointments; vulnerable 17-year-olds with mental-health issues are no less vulnerable when they turn 18, she says. Dr Cass pointedly notes that England's adult clinics refused to co-operate with her review; NHS England said this week that it will conduct a separate investigation into these services.



A second concern is that private clinics have sprung up to offer drugs to children online. Some former GIDS clinicians now work for them. Dr Cass warns that such clinics are not conducting proper assessments of children; she also wants laws to control prescribing from abroad.

A third worry is well-meaning but flawed legislation to impose a ban on "conversion therapy". Such a ban is already law in Canada; Britain's Labour Party has said it will introduce one if it wins power at the next election. That may risk criminalising any kind of exploratory therapy into why a child is identifying as trans. "The conversion-therapy bill would ban the very therapy that Cass is saying should be prioritised," says Stella O'Malley of Genspect, a group of clinicians concerned about gender issues.

The affirmation model of transgender care for children has been dealt a severe blow by Dr Cass's review. But the gender debate is not yet over. ■

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Britain

This article appeared in the Britain section of the print edition under the headline "Landmark judgment"

Britain
April 13th 2024

→ Britain is moving towards assisted dying

→ The Cass Review damns England's youth-gender services

Exhibit 9

Why disturbing leaks from US gender group WPATH ring alarm bells in the NHS

Hannah Barnes

WPATH is no model in the search for evidence-based care of transgender children

Sat 9 Mar 2024 13.00 EST

Dr Marci Bowers, president of WPATH, commented in the leaked documents about the impact of puberty blocking. Photograph: Everett Collection Inc/© The Daily Wire /Courtesy Everett Collection/Alamy

The medical transitioning of children has become one of the most controversial and polarising issues of our time. For some, it is a medical scandal. For others, life-saving treatment.

So, when hundreds of messages were leaked from an internal forum of doctors and mental health workers from the World Professional Association for Transgender Health, it was bound to spark interest. WPATH describes itself as an "interdisciplinary professional and educational organisation devoted to transgender health". Most significantly, it produces standards of care (SOC) which, it claims, articulate "professional consensus" about how best to help people with gender dysphoria.

Despite its grand title, WPATH is neither solely a professional body - a significant proportion of its membership are activists - nor does it represent the "world" view on how to care for this group of people. There is no global agreement on best practice. The leaked messages (and the odd recording) - dubbed the WPATH files - are disturbing. In one video, doctors acknowledge that patients are sometimes too young to fully understand the consequences of puberty blockers and hormones for their fertility. "It's always a good

theory that you talk about fertility preservation with a 14-year-old, but I know I'm talking to a blank wall," one Canadian endocrinologist says.

WPATH's president, Dr Marci Bowers, comments on the impact of early blocking of puberty on sexual function in adulthood. "To date," she writes, "I'm unaware of an individual claiming ability to orgasm when they were blocked at Tanner 2." Tanner stage 2 is the beginning of puberty. It can be as young as nine in girls.

Elsewhere, there are extraordinary discussions on how to manage "trans clients" with dissociative identity disorder (what used to be called multiple personality disorder) when "not all the alters have the same gender identity". Surgeons talk about procedures that result in bodies that don't exist in nature: those with both sets of genitals - the "phallus-preserving vaginoplasty"; double mastectomies that don't have nipples; "nullification" surgery, where there are no genitals at all, just smooth skin. And doctors discuss the possibility that 16-year-old patients have liver cancer as the result of taking hormones. The problem is not necessarily the discussions themselves, but that the organisation is not so open when speaking publicly.

The views of WPATH matter to the UK. For years, the organisation and its SOC have been cited as a source of "best practice" for trans healthcare by numerous medical bodies, including the British Medical Association and the General Medical Council - and still is. The Royal College of Psychiatrists refers to WPATH in its own recommendations for care.

> ***"The problem is not necessarily the discussions themselves, but that the organisation is not so open when speaking publicly***

Most relevant is that WPATH is cited as "good practice" in the current service specifications underpinning youth and adult gender clinics in England and Scotland, albeit in both cases it is WPATH's previous SOC that is mentioned. The most recent version does away with all age limits from the beginning of puberty for hormones and surgical interventions, other than female to male genital surgery, and contains a chapter on eunuchs.

Several staff at England's NHS adult gender clinics are not just members of WPATH (one is the former president), but authors of that current SOC. So too was Susie Green, the former boss of the young people's charity Mermaids; a lack of medical expertise does not exclude either membership of WPATH or the power to influence policy.

England's only NHS children's gender clinic - the Gender Identity Development Service (Gids) at London's Tavistock and Portman NHS Foundation Trust - will close its doors at the end of March, having been earmarked for closure since July 2022. But the 2016 service specification still underpinning Gids states that "the service will be delivered in line with" WPATH 7. While Gids was generally more cautious than other WPATH practitioners, clinicians I spoke to for my book, *Time to Think*, also relayed how young people claiming to have multiple personalities, or who identified with another race, could be referred for puberty blockers.

Gids staff have also presented at WPATH conferences for the past decade, including the most recent, held in 2022. This doesn't imply agreement with WPATH's principles, but association with the group becomes harder to justify as its views become more extreme.

It is difficult to see how the Department of Health's assertion that NHS England "moved away from WPATH guidelines more than five years ago" holds.

What is true is that there is no mention of WPATH in updated guidance that will underpin the new youth gender services opening on 1 April. What's more, NHS England has made it clear that WPATH's views are irrelevant to its core recommendation that puberty blockers will no longer be available as part of routine clinical practice.

There is a battle raging over how best to care for children and young people struggling with their gender identity, with ever increasing numbers of European countries choosing to take a more cautious, less medical, approach after finding the evidence base underpinning those treatments to be wanting. NHS England insists that new services will operate in accordance with recommendations of the independent Cass review, and that it is well placed to develop policies "in line with clinical evidence and expertise". But it won't be easy. There is already discussion among professionals working in gender services planning a pushback against Cass's as yet unpublished final recommendations.

It was difficult for Gids to stand up to external pressures, allowing the care it offered to suffer. At the same time, NHS England failed in its duty to provide proper oversight. Both they and those in charge of the new services must do better if they are to avoid the mistakes of the past. Without proper, evidence-based guidance on what good practice looks like, organisations like WPATH will continue to have influence.

Hannah Barnes is associate editor at the New Statesman and author of Time to Think: The Inside Story of the Collapse of the Tavistock's Gender Service for Children

Do you have an opinion on the issues raised in this article? If you would like to submit a letter of up to 250 words to be considered for publication, email it to us at observer.letters@observer.co.uk

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Exhibit 10

Democracy Dies in Darkness

Sixteen Penn swimmers say transgender teammate Lia Thomas should not be allowed to compete

By Matt Bonesteel

Updated February 3, 2022 at 4:11 p.m. EST

Sixteen members of the University of Pennsylvania women's swimming team sent a letter to school and Ivy League officials Thursday asking that they not take legal action challenging the NCAA's recently updated transgender policy. That updated directive has the potential to prevent Penn swimmer Lia Thomas from competing at next month's NCAA championships, and the letter indicates the 16 other swimmers believe their teammate should be sidelined.

Thomas, a transgender woman who swims for the Quakers women's team, competed for the Penn men's team for three seasons. After undergoing more than two years of hormone replacement therapy as part of her transition, she has posted the fastest times of any female college swimmer in two events this season. The letter from Thomas's teammates raised the question of fairness and said she was taking "competitive opportunities" away from them — namely spots in the Ivy League championship meet, where schools can only send about half of their rosters to compete.

"We fully support Lia Thomas in her decision to affirm her gender identity and to transition from a man to a woman. Lia has every right to live her life authentically," the letter read. "However, we also recognize that when it comes to sports competition, that the biology of sex is a separate issue from someone's gender identity. Biologically, Lia holds an unfair advantage over competition in the women's category, as evidenced by her rankings that have bounced from #462 as a male to #1 as a female. If she were to be eligible to compete against us, she could now break Penn, Ivy, and NCAA Women's Swimming records; feats she could never have done as a male athlete."

Thomas's teammates did not identify themselves in the letter. It was sent by Nancy Hogshead-Makar, a 1984 Olympic swimming gold medalist, lawyer and chief executive of Champion Women, a women's sports advocacy organization. She said in a telephone interview that she sent the letter on the swimmers' behalf so they could avoid retaliation; in the letter, the swimmers claim they were told "we would be removed from the team or that we would never get a job offer" if they spoke out against Thomas's inclusion in women's competition.

Penn officials did not respond to a request for comment on either the claims raised in the letter or whether the school planned to mount a legal challenge should Thomas be ruled ineligible for the NCAA championships.

On Tuesday, another group of Penn swimmers released a statement supporting Thomas after an unidentified Quakers swimmer spoke to Fox News about her, claiming she had a "monumental" advantage over her teammates after going through male puberty.

"We want to express our full support for Lia in her transition," the athletes said in Tuesday's statement, per ESPN. "We value her as a person, teammate, and friend. The sentiments put forward by an anonymous member of our team are not representative of the feelings, values, and opinions of the entire Penn team, composed of 39 women with diverse backgrounds."

A Penn spokesman told ESPN that Tuesday's statement was sent on behalf of "several" Quakers swimmers. On Thursday, the parent of a Penn swimmer, who did not want to be identified for fear of retaliation against their daughter, said in a telephone interview that they estimated the letter supporting Thomas was sent on behalf of only "two or three" swimmers.

Last month, the NCAA established a new sport-by-sport policy in which transgender athletes' participation will be determined by the policy set by each sport's governing body. On Tuesday, USA Swimming issued a new policy that establishes eligibility criteria for transgender athletes in elite events.

To determine a transgender swimmer's eligibility at the elite level, a three-person panel of independent medical experts will determine whether the swimmer's prior physical development as a man gives the athlete a competitive advantage over her cisgender female competitors. The swimmer also must show the concentration of testosterone in her blood has been less than 5 nanomoles per liter continuously for at least 36 months.

The NCAA swimming championships are scheduled for March 16-19, and Thomas has qualified for multiple events. She seemingly will be allowed by the NCAA to compete because it is phasing in its new transgender policy in three stages, the first of which covers this year's championships in winter and spring sports.

To compete during this first stage, Thomas will not have to meet the standards set this week by USA Swimming. Instead, she will have to submit documentation to the NCAA's Committee on Competitive Safeguards and Medical Aspects of Sports that shows she has undergone at least one year of testosterone-suppression treatment and provide proof of a one-time serum testosterone level that falls below the maximum allowable level for the sport.

The one-year requirement was part of the NCAA's previous transgender policy, which was established in 2010. Hogshead-Makar said the NCAA was wise to update its rules.

"It turns out that it was only based on a hypothesis and that it was just not true," Hogshead-Makar said of the previous NCAA policy that is being phased out. "So now there's been a lot more science on it, more research on it, and it shows that in many cases that … you cannot roll back [male puberty]; you can't take any medication to overcome what male puberty gives you.

"When it became clear, all this new science was coming through, transgender advocates were saying: 'Oh, but it's never going to happen. Nobody's ever going to come and break women's records. ... You're not going to see that at the Olympics or at nationals.' And then Lia came along. It just shows the need to update the NCAA rule."

The second phase of the NCAA's new transgender policy begins with the 2022-23 academic year and will require athletes to have their testosterone tested at the start of their competition season and again six months later. The third phase, in which the NCAA will use the rules established by USA Swimming, will go into effect in the 2023-24 academic year.

The Penn swimming parent, whose daughter is one of the 16 behind Thursday's letter, described the athletes as conflicted over Thomas's presence on the team, with some supporting her, others bothered by the fact that Thomas was taking away their opportunities to compete because of a perceived biological advantage and still others who simply are weary of the distraction the issue is causing.

"There's a swimmer who is a senior. She approached the coach about this. She was, in so many words, told to 'get over it,' " the parent said. "In a subsequent conversation with my daughter, she expressed how she's really unhappy with the situation, she thinks it's wrong, and so on, but she thinks that since we're at this point of the season already, she thinks at this point Lia should just be able to finish out the season. That's another perspective."

Exhibit 11

Harvard Business Review

Marketing

Lessons from the Bud Light Boycott, One Year Later

by Jura Liaukonyte, Anna Tuchman, and Xinrong Zhu

March 20, 2024

Natalie Behring/Getty Images

Summary. Why did the Bud Light boycott affect the beer brand's sales when many other boycotts have only marginal or short-term impact? An analysis of sales data confirms that Bud Light suffered a sustained downturn in sales, more pronounced in Republican-leaning... **more**

Taking a social stance has become a rite of passage for contemporary brands that are hoping to resonate with younger, more socially-conscious audiences. In April 2023, Bud Light tried its hand at this strategy, collaborating with transgender

influencer Dylan Mulvaney on a social media promotional post. This sparked backlash from several prominent conservatives, leading many conservative figures and groups to call for a boycott of Bud Light.

Although several brands like Nike, Pepsi, and Goya have faced criticism for their positions on social issues in recent years, the controversies surrounding these brands quickly fell out of the public eye. Academic research measuring the sales impact of boycott and "buycott" movements has also found small, short-lived effects for the brands involved. Thus, few anticipated the sustained hit to sales that Bud Light has endured.

In this article, we document the impact of the Bud Light boycott and discuss several factors that can make a brand more susceptible to boycotts.

The Aftermath

First, we document the sales impact of the Bud Light boycott using a representative 150,000 household panel from Numerator, a data analytics and market research company that sources purchase data directly from consumers. We measured changes in Bud Light sales (in dollars) and purchase incidence — whether a consumer bought the brand — after the controversy, relative to Bud Light consumption patterns and seasonal trends in 2021 and 2022.

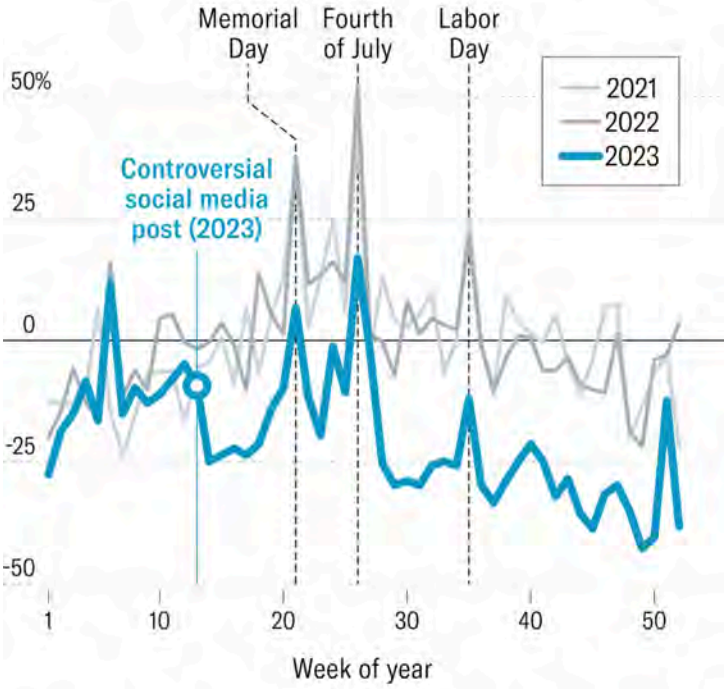
Our findings indicate that in the three months following the controversy, Bud Light sales and purchase incidence were about 28% lower than the same time period in prior years. Notably, this initial decline was more pronounced in predominantly Republican counties (as measured by the 2020 presidential vote) than predominantly Democratic counties. Both sales and purchase incidence decreased by about 32% in more Republican counties versus 22% in more Democratic counties.

However, unlike with other consumer boycotts, Bud Light has not bounced back quickly. The sales decline persisted for close to eight months, with sales and purchase incidence down by 32% in Q4 2023. Interestingly, the sales decline in Democratic counties became even larger over time, shrinking the gap between Republican and Democratic counties. This additional decline in sales is likely a result of retailers and distributors reducing shelf space for Bud Light, illustrating how boycotts can lead to a negative feedback loop. What started as a consumer-led boycott generated downstream adjustments from retailers and distributors. These supply-side adjustments hurt the brand's visibility and further exacerbated the negative impact on Bud Light's performance.

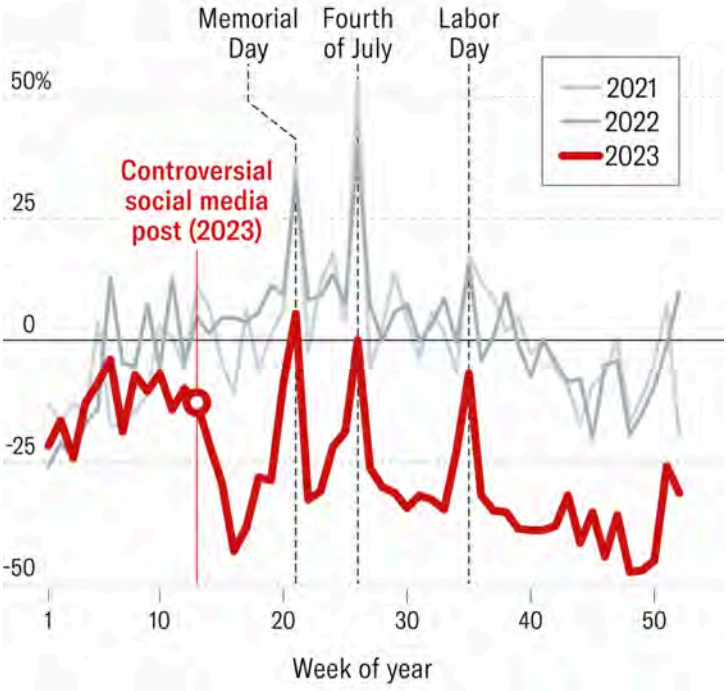
Bud Light Purchases Fell in Both Republican and Democratic Counties

Bud Light purchases fell in Republican- and Democratic-leaning counties following a social media backlash in 2023. The boycott in response to a social media campaign led to a prolonged sales slump — unlike many other such boycotts.

Year-over-year change in Bud Light weekly sales and purchase incidence in highly Democratic counties



Year-over-year change in Bud Light weekly sales and purchase incidence in highly Republican counties



Source: Authors' analysis of Numerator data

HBR

See more HBR charts in Data & Visuals >

Who are the consumers behind the boycott and how have they adjusted their purchase behavior? To study the substitution behavior of consumers, we identified Bud Light "loyalists" in the Numerator household panel as frequent beer drinkers who purchased Bud Light more than any other brand in the first four months of 2023. Comparing purchase behavior post-controversy to the same time period in 2022, we estimated that in the three months immediately succeeding the boycott, 15% of previously loyal Bud Light customers shifted their primary spending to other brands as part of the boycott. Of those boycotters, 38% transitioned to Coors, 23% to Miller, 14% to Yuengling, and 7% to Modelo. The remaining boycotters distributed their spending across various other beer brands.

What Factors Make a Brand More Susceptible to Boycotts?

Why has Bud Light endured more sustained sales decreases than other brands that have been the target of recent boycotts? We see several reasons.

Polarization of consumer base.

One important factor is the degree of polarization in a brand's existing consumer base, and how the views of the core base accord or conflict with the brand's stance on social or political issues. Does the existing customer base skew more liberal or more conservative? Or does it represent an even split of Americans?

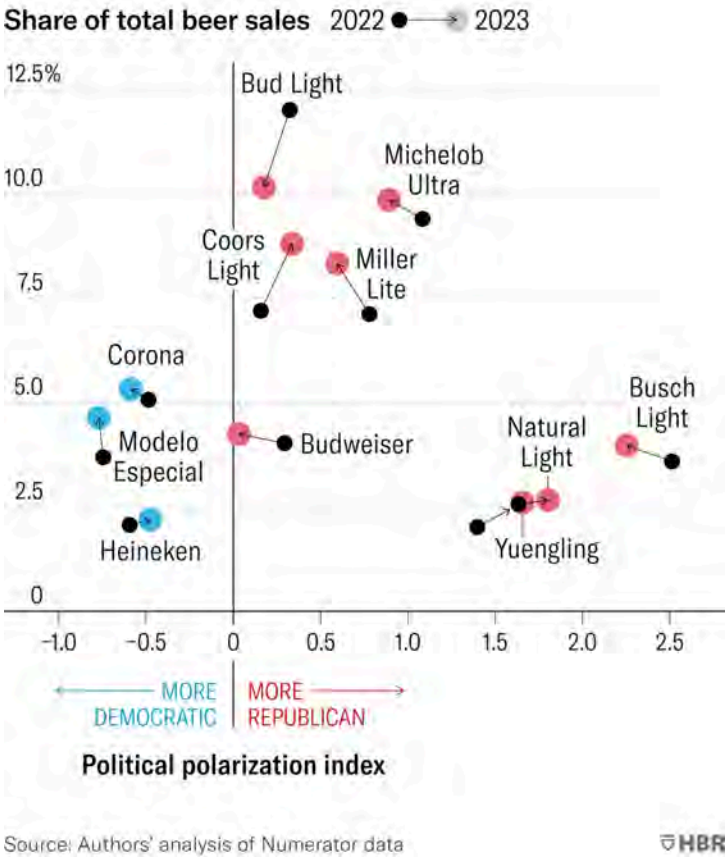
We constructed a political polarization index for the top beer brands and show the positions of brands in 2022 and 2023. We see differences across brands in terms of whether their sales are more concentrated in Republican- or Democrat-leaning counties. Busch, Natural Light, and Yuengling are more popular in

Republican counties, while Modelo, Corona, and Heineken are more popular in Democratic ones. Bud Light, Coors, and Budweiser fall fairly close to the center of the spectrum.

Overall, brands near the middle of the spectrum may be in an especially vulnerable position because taking a stance on any polarizing issue could potentially alienate a large chunk of their customer base. In contrast, brands near the ends of the spectrum can more safely take positions that align with their customers' views, without the risk of angering many existing customers. This requires brands to know who their core customers are and what they value.

The Political Leaning of Beer Brands in the U.S.

Brands positioned further to the right have a higher concentration of their sales in Republican counties while those on the left have more sales concentrated in Democratic counties. A county's political leaning is based on its presidential vote share in the 2020 election.



Source: Authors' analysis of Numerator data

HBR

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Substitutability of the product.

Brands that have many close substitutes are easier to boycott because there are many similar alternatives that consumers can switch to. By contrast, brands that are more unique and do not have good substitutes are harder to boycott because consumers must "give up" more by switching to an alternative or ceasing consumption in the category altogether. In our previous analysis of the Goya Foods boycott and a counter "buycott" movement supporting the brand, we saw more evidence of political consumerism in more commoditized categories like canned beans and less evidence of switching in categories where Goya offered differentiated products, like their unique spice blends in the herbs & seasonings category.

In the case of Bud Light, the presence of many other light beers on the shelf suggests a high degree of substitutability and low switching costs. This is compounded by the brand's lack of taste differentiation from its closest competitors: Blind taste tests on social media show light beer drinkers struggling to distinguish Bud Light from Coors Light and Miller Light. The similarity in flavor profiles among these leading light beer brands suggests that, for consumers, the decision to boycott Bud Light by switching to an alternative like Coors Light or Miller Light involves minimal sacrifice in terms of taste preference.

Observability of consumption.

Some consumers may be intrinsically driven to participate in a boycott, while others may participate in order to outwardly show their support for a set of issues. Thus, the observability of consumption may be an important factor that can determine the strength of boycotting.

Based on a survey and verified purchase data of Numerator panelists who had consumed Bud Light before the controversy, we found that respondents who identified as social drinkers were more likely to have ceased consuming Bud Light following the controversy relative to respondents who mostly drink beer in private. These results suggest that brands primarily consumed in private may be more insulated from consumer backlash. Beer is consumed both in public and private settings, making it more susceptible.

Sense of brand ownership.

Consumer behavior research has shown that individuals often use products to signal their type to others and "psychological ownership" can lead individuals to perceive their possessions as forming part of their identity or an extension of themselves. While psychological ownership can benefit brands by increasing a sense of loyalty, consumers may feel disrespected when a brand with which they identify acts in contrast with their values. Thus, brands that consumers are known to identify with may prefer to take extra care.

Bud Light has historically invested heavily in advertising campaigns, which may have built a strong sense of psychological ownership with their customers that led many to feel personally affronted by the brand supporting an issue they did not agree with. In a survey of Numerator panelists, more than 60% of the respondents that decreased their consumption of Bud Light after the controversy attributed the reason to the brand's values or brand image.

Engagement can prolong the attention.

News coverage can help fuel the flames of a boycott movement. Instead of remaining silent after the controversy broke out, Bud Light eventually addressed the controversy publicly and later put the managers in charge of the campaign on leave. These follow-up

actions may have inadvertently prolonged the media coverage of the boycott, keeping the issue top-of-mind with consumers, and contributing to longer-lasting changes in behavior.

Changes in distribution and shelf space.

While most retailers are willing to tolerate some short-lived sales fluctuations, longer-term changes in demand often lead to a redistribution of scarce shelf space in stores. This supply-side response can further accelerate sales decreases driven by consumers.

Indeed, Bud Light has lost shelf space at retailers and tap handles at bars, which is driving some of the longer-term sales declines. This example shows that the supply-side reaction can amplify the effect of a boycott. As Bud Light lost visibility and accessibility in stores and bars, the opportunity for sales further diminished, creating a feedback loop that deepened the sales decline.

Lessons from the Bud Light Boycott

In the aftermath of the Bud Light controversy, many consumer brand marketing departments have become acutely aware of the potential pitfalls of taking stances on controversial social issues and have become fearful of experiencing a similar backlash and the accompanying financial and reputational costs.

But marketers should keep in mind that not all boycotts are equal. As we have explained, several factors affect how significant they can be. For brand marketers, it is essential to know your consumer base and align your messaging accordingly, assess your vulnerability to close competitors, and avoid actions that will prolong negative attention in the media.

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Exhibit 12

U.S. DEPARTMENT OF EDUCATION Funds for State Formula-Allocated and Selected Student Aid Programs, by State

Index to State Tables

NOTE:

Funds included in the tables below are from programs that allocate funds to States using a statutory formula. The totals do not reflect all Department of Education funds that flow to a State. States and other entities may also receive funds from grants that are awarded on a competitive basis. These tables also include for each State financial support from selected student aid programs that provide funds to the postsecondary institution that a student attends. Also shown for each State is the dollar amount of new federally supported loans made to students attending postsecondary institutions located in the State.

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Program	2023 Actual	2024 Estimate	2025 Estimate	Amount Change FY 2024 to 2025	Percent Change FY 2024 to 2025
Grants to Local Educational Agencies	62,700,869	64,816,707	65,777,267	960,560	1.5%
State Agency Program--Migrant	6,733,263	7,084,189	7,047,796	(36,393)	(0.5)%
State Agency Program--Neglected and Delinquent	501,855	503,240	500,685	(2,555)	(0.5)%
Subtotal, Education for the Disadvantaged	69,935,987	72,404,136	73,325,748	921,612	1.3%
Impact Aid Basic Support Payments	8,288,974	8,288,974	8,288,974	0	0.0%
Impact Aid Payments for Children with Disabilities	297,886	297,886	297,886	0	0.0%
Impact Aid Construction	0	0	0	0	—
Subtotal, Impact Aid	8,586,860	8,586,860	8,586,860	0	0.0%
Supporting Effective Instruction State Grants	10,786,692	10,786,692	10,786,692	0	0.0%
21st Century Community Learning Centers	6,515,398	6,515,398	6,515,398	0	0.0%
State Assessments	4,349,472	4,349,472	4,349,472	0	0.0%
Rural and Low-income Schools Program	58,969	59,283	59,597	314	0.5%
Small, Rural School Achievement Program	2,153,403	2,153,403	2,153,403	0	0.0%
Student Support and Academic Enrichment State Grants	6,659,535	6,659,535	6,659,535	0	0.0%
Indian Education--Grants to Local Educational Agencies	573,719	567,220	567,220	0	0.0%
English Language Acquisition	2,338,485	2,139,380	2,223,792	84,412	3.9%
Homeless Children and Youth Education	436,479	451,090	448,761	(2,329)	(0.5)%
Subtotal	112,394,999	114,672,469	115,676,478	1,004,009	0.9%
Special Education--Grants to States	71,112,494	71,037,693	72,031,346	993,653	1.4%
Special Education--Preschool Grants	2,415,909	2,415,909	2,441,794	25,885	1.1%
Grants for Infants and Families	3,015,179	3,062,354	3,087,137	24,783	0.8%
Subtotal, Special Education	76,543,582	76,515,956	77,560,277	1,044,321	1.4%
Career and Technical Education State Grants	8,751,072	8,803,318	9,078,662	275,344	3.1%
Subtotal, Vocational and Adult Education	8,751,072	8,803,318	9,078,662	275,344	3.1%
Subtotal, All Elementary/Secondary Level Programs	197,689,653	199,991,743	202,315,417	2,323,674	1.2%
Federal Pell Grants	182,400,000	210,200,000	232,800,000	22,600,000	10.8%
Federal Supplemental Educational Opportunity Grants	2,552,584	2,552,584	2,552,584	0	0.0%
Federal Work-Study	3,123,021	3,123,021	3,123,021	0	0.0%
Subtotal, All Postsecondary Education Programs	188,075,605	215,875,605	238,475,605	22,600,000	10.5%
Vocational Rehabilitation State Grants	19,520,692	26,273,231	26,273,231	0	0.0%
Client Assistance State Grants	152,206	131,917	131,917	0	0.0%
Protection and Advocacy of Individual Rights	195,895	195,895	195,895	0	0.0%
Supported Employment State Grants	300,000	300,000	300,000	0	0.0%
Independent Living Services for Older Blind Individuals	225,000	225,000	225,000	0	0.0%
Adult Basic and Literacy Education State Grants	3,178,180	3,058,452	3,058,452	0	0.0%
English Literacy and Civics Education State Grants	201,304	196,685	196,685	0	0.0%
Subtotal, All Other	23,773,277	30,381,180	30,381,180	0	0.0%
Total	409,538,535	446,248,528	471,172,202	24,923,674	5.6%
New Student Loan Volume:					
Federal Direct Student Loans	278,568,148	288,646,710	293,438,443	4,791,734	1.7%
Total, New Student Loan Volume	278,568,148	288,646,710	293,438,443	4,791,734	1.7%
Grand Total	688,106,682	734,895,238	764,610,645	29,715,408	4.0%

NOTES:

1) State allocations for fiscal years 2024 and 2025 are preliminary estimates based on currently available data. Allocations based on new data may result in significant changes from these preliminary estimates.

2) For Grants to States, the 2025 allocations assume enactment of the Administration's proposed appropriations language that authorizes the Department to calculate a State's allocation without regard to a reduction in funding in a prior year resulting from a failure to meet the maintenance of State financial support requirements in section 612 of the IDEA.

3) For Preschool Grants, and Grants for Infants and Families, the FY 2024 estimates are based on 2021 population and poverty data, which is standard practice under a continuing resolution. FY 2024 award amounts will be updated using 2022 data when a full year appropriation is made available by Congress. The FY 2025 estimates are currently based on 2021 population and poverty data. New FY 2025 estimates will be based on 2023 data once it becomes available.

4) Amounts distributed from the fiscal years above are based on the Pell Grant program's estimated cost as of February 2024.

5) For Vocational Rehabilitation State Grants, the FY 2023, FY 2024, and FY 2025 amounts reflect the sequester reduction required for mandatory programs (5.7 percent) pursuant to the Budget Control Act of 2011 (P.L. 112-25). The Vocational Rehabilitation State Grants program is a mandatory appropriated entitlement; therefore, under an FY 2024 annualized Continuing Resolution, the program is entitled to all statutory adjustments provided for in section 110(a) of the Rehabilitation Act, including the statutory Consumer Price Index increase. FY 2025 initial award amounts are equal to FY 2024 initial formula award amounts (prior to reductions for maintenance of effort penalties or changes due to reallotment) in alignment with the FY 2025 President's Budget request.

6) For Client Assistance State Grants, the FY 2023 allotments reflect a one-time increase due to a reprogramming of $2,000 thousand from the Disability Innovation Fund to Client Assistance State Grants. The FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

7) For Protection and Advocacy of Individuals Rights and Supported Employment State Grants, the FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

8) For Independent Living Services for Older Blind Individuals, the FY 2024 estimates are based on the best available 2021 population data for individuals age 55 and older, as required under a continuing resolution. FY 2024 award amounts will be updated using the best available 2022 population data for individuals age 55 and older when a full year appropriation is made available by Congress. State allocations for fiscal year 2025 are estimates based on currently available population data for individuals 55 and older and will be updated when 2023 estimates by age group become available.

9) — means Not Available

10) Compiled for posting on the WEB by the Budget Service on March 11, 2024.

Program	2023 Actual	2024 Estimate	2025 Estimate	Amount Change FY 2024 to 2025	Percent Change FY 2024 to 2025
Grants to Local Educational Agencies	404,061,662	393,061,777	397,076,106	4,014,329	1.0%
State Agency Program--Migrant	1,935,649	1,907,974	1,898,303	(9,671)	(0.5)%
State Agency Program--Neglected and Delinquent	2,812,747	2,811,342	2,797,184	(14,158)	(0.5)%
Subtotal, Education for the Disadvantaged	408,810,058	397,781,093	401,771,593	3,990,500	1.0%
Impact Aid Basic Support Payments	9,305,215	9,305,215	9,305,215	0	0.0%
Impact Aid Payments for Children with Disabilities	368,048	368,048	368,048	0	0.0%
Impact Aid Construction	0	0	0	0	—
Subtotal, Impact Aid	9,673,263	9,673,263	9,673,263	0	0.0%
Supporting Effective Instruction State Grants	44,291,262	43,139,917	43,139,917	0	0.0%
21st Century Community Learning Centers	25,790,973	28,755,942	27,495,186	(1,260,756)	(4.4)%
State Assessments	6,012,803	6,012,803	6,012,803	0	0.0%
Rural and Low-income Schools Program	3,490,023	3,508,580	3,527,149	18,569	0.5%
Small, Rural School Achievement Program	69,144	69,144	69,144	0	0.0%
Student Support and Academic Enrichment State Grants	27,010,752	29,984,349	28,696,377	(1,287,972)	(4.3)%
Indian Education--Grants to Local Educational Agencies	832,075	881,160	881,160	0	0.0%
English Language Acquisition	5,032,305	5,190,639	5,395,443	204,804	3.9%
Homeless Children and Youth Education	2,855,113	2,727,040	2,713,237	(13,803)	(0.5)%
Subtotal	533,867,771	527,723,930	529,375,272	1,651,342	0.3%
Special Education--Grants to States	225,757,277	225,727,879	227,990,902	2,263,023	1.0%
Special Education--Preschool Grants	7,111,602	7,111,602	7,187,798	76,196	1.1%
Grants for Infants and Families	7,591,793	7,639,934	7,701,761	61,827	0.8%
Subtotal, Special Education	240,460,672	240,479,415	242,880,461	2,401,046	1.0%
Career and Technical Education State Grants	24,553,966	24,624,587	25,228,615	604,028	0
Subtotal, Vocational and Adult Education	24,553,966	24,624,587	25,228,615	604,028	2.5%
Subtotal, All Elementary/Secondary Level Programs	798,882,409	792,827,932	797,484,348	4,656,416	0.6%
Federal Pell Grants	514,700,000	593,100,000	656,700,000	63,600,000	10.7%
Federal Supplemental Educational Opportunity Grants	10,469,497	10,469,497	10,469,497	0	0.0%
Federal Work-Study	16,753,781	16,753,781	16,753,781	0	0.0%
Subtotal, All Postsecondary Education Programs	541,923,278	620,323,278	683,923,278	63,600,000	10.3%
Vocational Rehabilitation State Grants	34,778,921	68,225,912	70,381,777	2,155,865	3.2%
Client Assistance State Grants	175,298	151,923	148,937	(2,986)	(2.0)%
Protection and Advocacy of Individual Rights	232,767	232,767	228,170	(4,597)	(2.0)%
Supported Employment State Grants	300,000	300,000	300,000	0	0.0%
Independent Living Services for Older Blind Individuals	419,151	414,291	409,939	(4,352)	(1.1)%
Adult Basic and Literacy Education State Grants	10,644,523	10,229,693	10,229,693	0	0.0%
English Literacy and Civics Education State Grants	378,895	378,632	378,632	0	0.0%
Subtotal, All Other	46,929,555	79,933,218	82,077,148	2,143,930	2.7%
Total	1,387,735,242	1,493,084,428	1,563,484,774	70,400,346	4.7%
New Student Loan Volume:					
Federal Direct Student Loans	1,386,961,417	1,437,141,514	1,460,999,050	23,857,536	1.7%
Total, New Student Loan Volume	1,386,961,417	1,437,141,514	1,460,999,050	23,857,536	1.7%
Grand Total	2,774,696,659	2,930,225,942	3,024,483,824	94,257,882	3.2%

NOTES:

1) State allocations for fiscal years 2024 and 2025 are preliminary estimates based on currently available data. Allocations based on new data may result in significant changes from these preliminary estimates.

2) For Grants to States, the 2025 allocations assume enactment of the Administration's proposed appropriations language that authorizes the Department to calculate a State's allocation without regard to a reduction in funding in a prior year resulting from a failure to meet the maintenance of State financial support requirements in section 612 of the IDEA.

3) For Preschool Grants, and Grants for Infants and Families, the FY 2024 estimates are based on 2021 population and poverty data, which is standard practice under a continuing resolution. FY 2024 award amounts will be updated using 2022 data when a full year appropriation is made available by Congress. The FY 2025 estimates are currently based on 2021 population and poverty data. New FY 2025 estimates will be based on 2023 data once it becomes available.

4) Amounts distributed from the fiscal years above are based on the Pell Grant program's estimated cost as of February 2024.

5) For Vocational Rehabilitation State Grants, the FY 2023, FY 2024, and FY 2025 amounts reflect the sequester reduction required for mandatory programs (5.7 percent) pursuant to the Budget Control Act of 2011 (P.L. 112-25). The Vocational Rehabilitation State Grants program is a mandatory appropriated entitlement; therefore, under an FY 2024 annualized Continuing Resolution, the program is entitled to all statutory adjustments provided for in section 110(a) of the Rehabilitation Act, including the statutory Consumer Price Index increase. FY 2025 initial award amounts are equal to FY 2024 initial formula award amounts (prior to reductions for maintenance of effort penalties or changes due to reallotment) in alignment with the FY 2025 President's Budget request.

6) For Client Assistance State Grants, the FY 2023 allotments reflect a one-time increase due to a reprogramming of $2,000 thousand from the Disability Innovation Fund to Client Assistance State Grants. The FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

7) For Protection and Advocacy of Individuals Rights and Supported Employment State Grants, the FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

8) For Independent Living Services for Older Blind Individuals, the FY 2024 estimates are based on the best available 2021 population data for individuals age 55 and older, as required under a continuing resolution. FY 2024 award amounts will be updated using the best available 2022 population data for individuals age 55 and older when a full year appropriation is made available by Congress. State allocations for fiscal year 2025 are estimates based on currently available population data for individuals 55 and older and will be updated when 2023 estimates by age group become available.

9) — means Not Available

10) Compiled for posting on the WEB by the Budget Service on March 11, 2024.

Program	2023 Actual	2024 Estimate	2025 Estimate	Amount Change FY 2024 to 2025	Percent Change FY 2024 to 2025
Grants to Local Educational Agencies	233,873,060	241,291,126	242,944,251	1,653,125	0.7%
State Agency Program--Migrant	674,088	710,267	706,618	(3,649)	(0.5)%
State Agency Program--Neglected and Delinquent	175,755	176,216	175,332	(884)	(0.5)%
Subtotal, Education for the Disadvantaged	234,722,903	242,177,609	243,826,201	1,648,592	0.7%
Impact Aid Basic Support Payments	2,406,217	2,406,217	2,406,217	0	0.0%
Impact Aid Payments for Children with Disabilities	174,191	174,191	174,191	0	0.0%
Impact Aid Construction	0	0	0	0	—
Subtotal, Impact Aid	2,580,408	2,580,408	2,580,408	0	0.0%
Supporting Effective Instruction State Grants	28,422,618	29,461,097	29,461,097	0	0.0%
21st Century Community Learning Centers	16,870,143	15,877,219	16,630,984	753,765	4.7%
State Assessments	4,940,806	4,940,806	4,940,806	0	0.0%
Rural and Low-income Schools Program	6,545,321	6,580,124	6,614,949	34,825	0.5%
Small, Rural School Achievement Program	0	0	0	0	—
Student Support and Academic Enrichment State Grants	17,668,012	16,555,468	17,357,547	802,079	4.8%
Indian Education--Grants to Local Educational Agencies	582,612	557,633	557,633	0	0.0%
English Language Acquisition	2,050,775	2,193,120	2,279,653	86,533	3.9%
Homeless Children and Youth Education	1,576,170	1,649,662	1,641,036	(8,626)	(0.5)%
Subtotal	315,959,768	322,573,146	325,890,314	3,317,168	1.0%
Special Education--Grants to States	145,303,206	145,144,795	146,616,707	1,471,912	1.0%
Special Education--Preschool Grants	4,649,156	4,649,156	4,698,968	49,812	1.1%
Grants for Infants and Families	4,739,894	4,740,020	4,778,379	38,359	0.8%
Subtotal, Special Education	154,692,256	154,533,971	156,094,054	1,560,083	1.0%
Career and Technical Education State Grants	15,828,881	15,853,807	16,273,660	419,853	2.6%
Subtotal, Vocational and Adult Education	15,828,881	15,853,807	16,273,660	419,853	2.6%
Subtotal, All Elementary/Secondary Level Programs	486,480,905	492,960,924	498,258,028	5,297,104	1.1%
Federal Pell Grants	345,300,000	397,900,000	440,600,000	42,700,000	10.7%
Federal Supplemental Educational Opportunity Grants	9,059,967	9,059,967	9,059,967	0	0.0%
Federal Work-Study	12,672,701	12,672,701	12,672,701	0	0.0%
Subtotal, All Postsecondary Education Programs	367,032,668	419,632,668	462,332,668	42,700,000	10.2%
Vocational Rehabilitation State Grants	50,623,992	53,234,754	53,234,754	0	0.0%
Client Assistance State Grants	152,206	131,917	131,917	0	0.0%
Protection and Advocacy of Individual Rights	195,895	195,895	195,895	0	0.0%
Supported Employment State Grants	300,000	300,000	300,000	0	0.0%
Independent Living Services for Older Blind Individuals	269,651	266,524	264,938	(1,586)	(0.6)%
Adult Basic and Literacy Education State Grants	6,929,749	6,619,479	6,619,479	0	0.0%
English Literacy and Civics Education State Grants	136,379	138,044	138,044	0	0.0%
Subtotal, All Other	58,607,872	60,886,613	60,885,027	(1,586)	0.0%
Total	912,121,445	973,480,205	1,021,475,723	47,995,518	4.9%
New Student Loan Volume:					
Federal Direct Student Loans	680,166,951	704,775,309	716,475,064	11,699,754	1.7%
Total, New Student Loan Volume	680,166,951	704,775,309	716,475,064	11,699,754	1.7%
Grand Total	1,592,288,396	1,678,255,514	1,737,950,787	59,695,272	3.6%

NOTES:

1) State allocations for fiscal years 2024 and 2025 are preliminary estimates based on currently available data. Allocations based on new data may result in significant changes from these preliminary estimates.

2) For Grants to States, the 2025 allocations assume enactment of the Administration's proposed appropriations language that authorizes the Department to calculate a State's allocation without regard to a reduction in funding in a prior year resulting from a failure to meet the maintenance of State financial support requirements in section 612 of the IDEA.

3) For Preschool Grants, and Grants for Infants and Families, the FY 2024 estimates are based on 2021 population and poverty data, which is standard practice under a continuing resolution. FY 2024 award amounts will be updated using 2022 data when a full year appropriation is made available by Congress. The FY 2025 estimates are currently based on 2021 population and poverty data. New FY 2025 estimates will be based on 2023 data once it becomes available.

4) Amounts distributed from the fiscal years above are based on the Pell Grant program's estimated cost as of February 2024.

5) For Vocational Rehabilitation State Grants, the FY 2023, FY 2024, and FY 2025 amounts reflect the sequester reduction required for mandatory programs (5.7 percent) pursuant to the Budget Control Act of 2011 (P.L. 112-25). The Vocational Rehabilitation State Grants program is a mandatory appropriated entitlement; therefore, under an FY 2024 annualized Continuing Resolution, the program is entitled to all statutory adjustments provided for in section 110(a) of the Rehabilitation Act, including the statutory Consumer Price Index increase. FY 2025 initial award amounts are equal to FY 2024 initial formula award amounts (prior to reductions for maintenance of effort penalties or changes due to reallotment) in alignment with the FY 2025 President's Budget request.

6) For Client Assistance State Grants, the FY 2023 allotments reflect a one-time increase due to a reprogramming of $2,000 thousand from the Disability Innovation Fund to Client Assistance State Grants. The FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

7) For Protection and Advocacy of Individuals Rights and Supported Employment State Grants, the FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

8) For Independent Living Services for Older Blind Individuals, the FY 2024 estimates are based on the best available 2021 population data for individuals age 55 and older, as required under a continuing resolution. FY 2024 award amounts will be updated using the best available 2022 population data for individuals age 55 and older when a full year appropriation is made available by Congress. State allocations for fiscal year 2025 are estimates based on currently available population data for individuals 55 and older and will be updated when 2023 estimates by age group become available.

7) — means Not Available

Program	2023 Actual	2024 Estimate	2025 Estimate	Amount Change FY 2024 to 2025	Percent Change FY 2024 to 2025
Grants to Local Educational Agencies	57,693,671	57,693,671	58,385,971	692,300	1.2%
State Agency Program--Migrant	1,889,145	1,859,647	1,850,221	(9,426)	(0.5)%
State Agency Program--Neglected and Delinquent	315,758	293,325	291,849	(1,476)	(0.5)%
Subtotal, Education for the Disadvantaged	59,898,574	59,846,643	60,528,041	681,398	1.1%
Impact Aid Basic Support Payments	76,111,166	76,111,166	76,111,166	0	0.0%
Impact Aid Payments for Children with Disabilities	1,470,058	1,470,058	1,470,058	0	0.0%
Impact Aid Construction	0	0	0	0	—
Subtotal, Impact Aid	77,581,224	77,581,224	77,581,224	0	0.0%
Supporting Effective Instruction State Grants	10,786,692	10,786,692	10,786,692	0	0.0%
21st Century Community Learning Centers	6,515,398	6,515,398	6,515,398	0	0.0%
State Assessments	3,678,769	3,678,769	3,678,769	0	0.0%
Rural and Low-income Schools Program	767,694	710,742	653,759	(56,983)	(8.0)%
Small, Rural School Achievement Program	4,409,526	4,409,526	4,409,526	0	0.0%
Student Support and Academic Enrichment State Grants	6,659,535	6,659,535	6,659,535	0	0.0%
Indian Education--Grants to Local Educational Agencies	4,134,168	3,970,895	3,970,895	0	0.0%
English Language Acquisition	500,000	500,000	500,000	0	0.0%
Homeless Children and Youth Education	399,527	399,241	397,629	(1,612)	(0.4)%
Subtotal	175,331,107	175,058,665	175,681,468	622,803	0.4%
Special Education--Grants to States	46,076,539	46,041,624	46,607,617	565,993	1.2%
Special Education--Preschool Grants	1,315,398	1,315,398	1,332,064	16,666	1.3%
Grants for Infants and Families	2,587,723	2,587,723	2,608,664	20,941	0.8%
Subtotal, Special Education	49,979,660	49,944,745	50,548,345	603,600	1.2%
Career and Technical Education State Grants	6,742,407	6,742,407	6,939,147	196,740	2.9%
Subtotal, Vocational and Adult Education	6,742,407	6,742,407	6,939,147	196,740	2.9%
Subtotal, All Elementary/Secondary Level Programs	232,053,174	231,745,817	233,168,960	1,423,143	0.6%
Federal Pell Grants	56,700,000	65,300,000	72,300,000	7,000,000	10.7%
Federal Supplemental Educational Opportunity Grants	1,509,134	1,509,134	1,509,134	0	0.0%
Federal Work-Study	3,211,027	3,211,027	3,211,027	0	0.0%
Subtotal, All Postsecondary Education Programs	61,420,161	70,020,161	77,020,161	7,000,000	10.0%
Vocational Rehabilitation State Grants	13,168,208	14,886,804	14,886,804	0	0.0%
Client Assistance State Grants	152,206	131,917	131,917	0	0.0%
Protection and Advocacy of Individual Rights	195,895	195,895	195,895	0	0.0%
Supported Employment State Grants	300,000	300,000	300,000	0	0.0%
Independent Living Services for Older Blind Individuals	225,000	225,000	225,000	0	0.0%
Adult Basic and Literacy Education State Grants	1,411,203	1,540,303	1,540,303	0	0.0%
English Literacy and Civics Education State Grants	60,000	60,000	60,000	0	0.0%
Subtotal, All Other	15,512,512	17,339,919	17,339,919	0	0.0%
Total	308,985,847	319,105,897	327,529,040	8,423,143	2.6%
New Student Loan Volume:					
Federal Direct Student Loans	187,772,078	194,565,650	197,795,573	3,229,923	1.7%
Total, New Student Loan Volume	187,772,078	194,565,650	197,795,573	3,229,923	1.7%
Grand Total	496,757,925	513,671,547	525,324,613	11,653,066	2.3%

NOTES:

1) State allocations for fiscal years 2024 and 2025 are preliminary estimates based on currently available data. Allocations based on new data may result in significant changes from these preliminary estimates.

2) For Grants to States, the 2025 allocations assume enactment of the Administration's proposed appropriations language that authorizes the Department to calculate a State's allocation without regard to a reduction in funding in a prior year resulting from a failure to meet the maintenance of State financial support requirements in section 612 of the IDEA.

3) For Preschool Grants, and Grants for Infants and Families, the FY 2024 estimates are based on 2021 population and poverty data, which is standard practice under a continuing resolution. FY 2024 award amounts will be updated using 2022 data when a full year appropriation is made available by Congress. The FY 2025 estimates are currently based on 2021 population and poverty data. New FY 2025 estimates will be based on 2023 data once it becomes available.

4) Amounts distributed from the fiscal years above are based on the Pell Grant program's estimated cost as of February 2024.

5) For Vocational Rehabilitation State Grants, the FY 2023, FY 2024, and FY 2025 amounts reflect the sequester reduction required for mandatory programs (5.7 percent) pursuant to the Budget Control Act of 2011 (P.L. 112-25). The Vocational Rehabilitation State Grants program is a mandatory appropriated entitlement; therefore, under an FY 2024 annualized Continuing Resolution, the program is entitled to all statutory adjustments provided for in section 110(a) of the Rehabilitation Act, including the statutory Consumer Price Index increase. FY 2025 initial award amounts are equal to FY 2024 initial formula award amounts (prior to reductions for maintenance of effort penalties or changes due to reallotment) in alignment with the FY 2025 President's Budget request.

6) For Client Assistance State Grants, the FY 2023 allotments reflect a one-time increase due to a reprogramming of $2,000 thousand from the Disability Innovation Fund to Client Assistance State Grants. The FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

7) For Protection and Advocacy of Individuals Rights and Supported Employment State Grants, the FY 2024 estimates are based on July 2021 population data, as required under a continuing resolution. FY 2024 award amounts will be updated using July 2022 population data when a full year appropriation is made available by Congress. The FY 2025 estimates are based on July 2023 population data.

8) For Independent Living Services for Older Blind Individuals, the FY 2024 estimates are based on the best available 2021 population data for individuals age 55 and older, as required under a continuing resolution. FY 2024 award amounts will be updated using the best available 2022 population data for individuals age 55 and older when a full year appropriation is made available by Congress. State allocations for fiscal year 2025 are estimates based on currently available population data for individuals 55 and older and will be updated when 2023 estimates by age group become available.

9) — means Not Available

10) Compiled for posting on the WEB by the Budget Service on March 11, 2024.

Exhibit 13

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Acadia Parish
schools for this district

NCES District ID: 2200030

State District ID: LA-001

Mailing Address: P.O. Drawer 309
Crowley, LA 70527-0309

Physical Address: 2402 North Parkerson Avenue
Crowley, LA 70526-2015

Phone: (337)783-3664

Type: Regular local school district

Status: Open

Total Schools: 27

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12
■	■	■	■	■	■	■	■	■	■	■	■	■	■

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

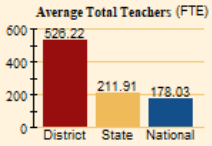
County: Acadia Parish

County ID: 22001

Locale: Rural: Distant (42)
CSA/CBSA: 29180

Total Students:	9,601
Classroom Teachers (FTE):	526.22
Student/Teacher Ratio:	18.25

Staff



Teachers (FTE)

Total:	526.22
Prekindergarten:	18.33
Kindergarten:	31.83
Elementary:	318.50
Secondary:	157.56
Ungraded:	†

Total Staff (FTE): 1,109.06

Other Staff (FTE)

Total:	582.84
Instructional Aides:	178.12
Instruc. Coordinators & Supervisors:	18.17
Total Guidance Counselors:	27.00
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	2.00
Librarians/Media Specialists:	20.00
Library/Media Support:	0.00
District Administrators:	0.00
District Administrative Support:	1.00
School Administrators:	53.33
School Administrative Support:	47.70
Student Support Services (w/o Psychology):	35.76
Other Support Services:	199.76

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$120,997,000	$12,600	
Revenue by Source			
Federal:	$30,963,000	$3,224	26%
Local:	$33,237,000	$3,461	27%
State:	$56,797,000	$5,915	47%
Total Expenditures:	$113,539,000	$11,823	
Total Current Expenditures:	$108,518,000	$11,300	
Instructional Expenditures:	$64,947,000	$6,763	60%
Student and Staff Support:	$12,543,000	$1,306	12%
Administration:	$9,293,000	$968	9%
Operations, Food Service, other:	$21,735,000	$2,263	20%
Total Capital Outlay:	$4,087,000	$426	
Construction:	$2,651,000	$276	
Total Non El-Sec Education & Other:	$301,000	$31	
Interest on Debt:	$75,000	$8	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name:	NCES District ID:	State District ID:
Allen Parish schools for this district	2200060	LA-002
Mailing Address:	**Physical Address:**	**Phone:**
P O Drawer C Oberlin, LA 70655	1111 West 7th Avenue Oberlin, LA 70655	(337)639-4311
Type:	**Status:**	**Total Schools:**
Regular local school district	Open	11
Supervisory Union #:	**Grade Span:** (grades PK - 12)	
N/A	PK KG 1 2 3 4 5 6 7 8 9 10 11 12	

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$62,039,000	$14,982	
Revenue by Source			
Federal:	$6,041,000	$1,459	10%
Local:	$25,574,000	$6,176	41%
State:	$30,424,000	$7,347	49%
Total Expenditures:	$62,619,000	$15,122	
Total Current Expenditures:	$54,730,000	$13,217	
Instructional Expenditures:	$30,384,000	$7,337	56%
Student and Staff Support:	$5,044,000	$1,218	9%
Administration:	$5,111,000	$1,234	9%
Operations, Food Service, other:	$14,191,000	$3,427	26%
Total Capital Outlay:	$6,757,000	$1,632	
Construction:	$6,606,000	$1,595	
Total Non El-Sec Education & Other:	$29,000	$7	
Interest on Debt:	$796,000	$192	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

National Center for Education Statistics
Office of Educational Research & Improvement, U.S. Dept. of Education
1990 K Street, NW, Washington, DC 20006, USA, Phone: (202) 502-7300

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Bossier Parish
schools for this district

NCES District ID: 2200270

State District ID: LA-008

Mailing Address: P.O. Box 2000
Benton, LA 71006-8351

Physical Address: 316 Sibley Street
Benton, LA 71006-8351

Phone: (318)549-5000

Type: Regular local school district

Status: Open

Total Schools: 34

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

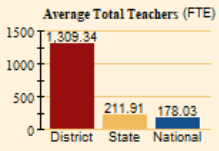
County: Bossier Parish

County ID: 22015

Locale: City: Small (13)
CSA/CBSA: 43340

Total Students:	23,918
Classroom Teachers (FTE):	1,309.34
Student/Teacher Ratio:	18.27

Staff



Teachers (FTE)

Total:	1,309.34
Prekindergarten:	6.00
Kindergarten:	92.65
Elementary:	830.12
Secondary:	380.57
Ungraded:	†

Total Staff (FTE): 2,594.93

Other Staff (FTE)

Total:	1,285.59
Instructional Aides:	308.64
Instruc. Coordinators & Supervisors:	35.48
Total Guidance Counselors:	60.33
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	0.50
Librarians/Media Specialists:	37.00
Library/Media Support:	28.12
District Administrators:	0.00
District Administrative Support:	0.25
School Administrators:	81.84
School Administrative Support:	76.58
Student Support Services (w/o Psychology):	69.60
Other Support Services:	587.25

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$309,060,000	$13,778	
Revenue by Source			
Federal:	$31,098,000	$1,386	10%
Local:	$139,524,000	$6,220	45%
State:	$138,438,000	$6,172	45%
Total Expenditures:	$294,042,000	$13,109	
Total Current Expenditures:	$272,813,000	$12,162	
Instructional Expenditures:	$160,077,000	$7,136	59%
Student and Staff Support:	$35,320,000	$1,575	13%
Administration:	$25,706,000	$1,146	9%
Operations, Food Service, other:	$51,710,000	$2,305	19%
Total Capital Outlay:	$14,321,000	$638	
Construction:	$8,780,000	$391	
Total Non El-Sec Education & Other:	$87,000	$4	
Interest on Debt:	$6,236,000	$278	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Caddo Parish
schools for this district

NCES District ID: 2200300

State District ID: LA-009

Mailing Address: P.O. Box 32000
Shreveport, LA 71130-2000

Physical Address: 1961 Midway Street
Shreveport, LA 71108-2201

Phone: (318)603-7106

Type: Regular local school district

Status: Open

Total Schools: 59

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

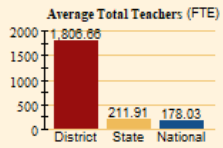
County: Caddo Parish

County ID: 22017

Locale: City: Midsize (12)
CSA/CBSA: 43340

Total Students:	36,147
Classroom Teachers (FTE):	1,806.66
Student/Teacher Ratio:	20.01

Staff



Teachers (FTE)

Total:	**1,806.66**
Prekindergarten:	18.50
Kindergarten:	89.69
Elementary:	1,118.33
Secondary:	580.14
Ungraded:	†

Total Staff (FTE): 3,546.12

Other Staff (FTE)

Total:	**1,739.46**
Instructional Aides:	630.61
Instruc. Coordinators & Supervisors:	61.37
Total Guidance Counselors:	96.26
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	0.00
Librarians/Media Specialists:	50.33
Library/Media Support:	14.37
District Administrators:	0.00
District Administrative Support:	2.02
School Administrators:	127.42
School Administrative Support:	158.51
Student Support Services (w/o Psychology):	87.64
Other Support Services:	510.93

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$545,379,000	$15,085	
Revenue by Source			
Federal:	$78,513,000	$2,172	14%
Local:	$256,648,000	$7,099	47%
State:	$210,218,000	$5,815	39%
Total Expenditures:	$506,696,000	$14,015	
Total Current Expenditures:	$465,300,000	$12,870	
Instructional Expenditures:	$267,031,000	$7,386	57%
Student and Staff Support:	$64,069,000	$1,772	14%
Administration:	$48,805,000	$1,350	10%
Operations, Food Service, other:	$85,395,000	$2,362	18%
Total Capital Outlay:	$29,105,000	$805	
Construction:	$23,868,000	$660	
Total Non El-Sec Education & Other:	$554,000	$15	
Interest on Debt:	$5,773,000	$160	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name:	NCES District ID:	State District ID:
Caldwell Parish schools for this district	2200360	LA-011
Mailing Address:	**Physical Address:**	**Phone:**
P.O. Box 1019 Columbia, LA 71418-1019	7112 Hwy 165 Columbia, LA 71418-0001	(318)649-2689
Type:	**Status:**	**Total Schools:**
Regular local school district	Open	5
Supervisory Union #:	**Grade Span:** (grades KG - 12)	
N/A	KG 1 2 3 4 5 6 7 8 9 10 11 12	
	District Demographics: School District Demographic Dashboard	

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$24,649,000	$17,082	
Revenue by Source			
Federal:	$5,319,000	$3,686	22%
Local:	$6,832,000	$4,735	28%
State:	$12,498,000	$8,661	51%
Total Expenditures:	$24,002,000	$16,633	
Total Current Expenditures:	$23,675,000	$16,407	
Instructional Expenditures:	$13,348,000	$9,250	56%
Student and Staff Support:	$3,625,000	$2,512	15%
Administration:	$2,400,000	$1,663	10%
Operations, Food Service, other:	$4,302,000	$2,981	18%
Total Capital Outlay:	$111,000	$77	
Construction:	$0	$0	
Total Non El-Sec Education & Other:	$2,000	$1	
Interest on Debt:	$178,000	$123	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

National Center for Education Statistics
Office of Educational Research & Improvement, U.S. Dept. of Education
1990 K Street, NW, Washington, DC 20006, USA, Phone: (202) 502-7300

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: DeSoto Parish
schools for this district

NCES District ID: 2200510

State District ID: LA-016

Mailing Address: 201 Crosby Street
Mansfield, LA 71052

Physical Address: 201 Crosby Street
Mansfield, LA 71052-2613

Phone: (318)872-2836

Type: Regular local school district

Status: Open

Total Schools: 9

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

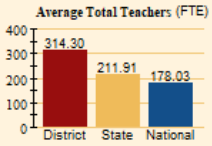
County: De Soto Parish

County ID: 22031

Locale: Rural: Distant (42)
CSA/CBSA: 43340

Total Students:	5,126
Classroom Teachers (FTE):	314.30
Student/Teacher Ratio:	16.31

Staff



Teachers (FTE)

Total:	314.30
Prekindergarten:	10.90
Kindergarten:	19.03
Elementary:	184.26
Secondary:	100.11
Ungraded:	†

Total Staff (FTE): 651.73

Other Staff (FTE)

Total:	337.43
Instructional Aides:	79.13
Instruc. Coordinators & Supervisors:	0.50
Total Guidance Counselors:	10.00
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	0.00
Librarians/Media Specialists:	4.00
Library/Media Support:	0.00
District Administrators:	0.00
District Administrative Support:	0.00
School Administrators:	24.65
School Administrative Support:	25.46
Student Support Services (w/o Psychology):	22.65
Other Support Services:	171.04

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$97,912,000	$20,293	
Revenue by Source			
Federal:	$12,891,000	$2,672	13%
Local:	$69,788,000	$14,464	71%
State:	$15,233,000	$3,157	16%
Total Expenditures:	$86,320,000	$17,890	
Total Current Expenditures:	$81,183,000	$16,825	
Instructional Expenditures:	$46,480,000	$9,633	57%
Student and Staff Support:	$8,139,000	$1,687	10%
Administration:	$9,204,000	$1,908	11%
Operations, Food Service, other:	$17,360,000	$3,598	21%
Total Capital Outlay:	$3,679,000	$762	
Construction:	$2,792,000	$579	
Total Non El-Sec Education & Other:	$0	$0	
Interest on Debt:	$1,102,000	$228	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name:	NCES District ID:	State District ID:
Franklin Parish schools for this district	2200660	LA-021
Mailing Address:	**Physical Address:**	**Phone:**
7293 Prairie Road Winnsboro, LA 71295	7293 Prairie Road Winnsboro, LA 71295-3923	(318)435-9046
Type:	**Status:**	**Total Schools:**
Regular local school district	Open	6
Supervisory Union #:	**Grade Span:** (grades PK - 12)	
N/A	PK KG 1 2 3 4 5 6 7 8 9 10 11 12	
	District Demographics: School District Demographic Dashboard	

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$41,481,000	$14,596	
Revenue by Source			
Federal:	$10,860,000	$3,821	26%
Local:	$10,191,000	$3,586	25%
State:	$20,430,000	$7,189	49%
Total Expenditures:	$38,962,000	$13,709	
Total Current Expenditures:	$38,197,000	$13,440	
Instructional Expenditures:	$22,619,000	$7,959	59%
Student and Staff Support:	$4,194,000	$1,476	11%
Administration:	$3,514,000	$1,236	9%
Operations, Food Service, other:	$7,870,000	$2,769	21%
Total Capital Outlay:	$319,000	$112	
Construction:	$248,000	$87	
Total Non El-Sec Education & Other:	$8,000	$3	
Interest on Debt:	$347,000	$122	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

National Center for Education Statistics
Office of Educational Research & Improvement, U.S. Dept. of Education
1990 K Street, NW, Washington, DC 20006, USA, Phone: (202) 502-7300

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name:	NCES District ID:	State District ID:
Grant Parish schools for this district	2200690	LA-022
Mailing Address:	**Physical Address:**	**Phone:**
P.O. Box 208 Colfax, LA 71417-0208	512 Main Street Colfax, LA 71417-1523	(318)627-3274
Type:	**Status:**	**Total Schools:**
Regular local school district	Open	8
Supervisory Union #:	**Grade Span:** (grades PK - 12)	
N/A	PK KG 1 2 3 4 5 6 7 8 9 10 11 12	
	District Demographics: School District Demographic Dashboard	

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$49,869,000	$17,114	
Revenue by Source			
Federal:	$6,324,000	$2,170	13%
Local:	$21,020,000	$7,213	42%
State:	$22,525,000	$7,730	45%
Total Expenditures:	$48,456,000	$16,629	
Total Current Expenditures:	$44,595,000	$15,304	
Instructional Expenditures:	$17,768,000	$6,097	40%
Student and Staff Support:	$4,170,000	$1,431	9%
Administration:	$3,418,000	$1,173	8%
Operations, Food Service, other:	$19,239,000	$6,602	43%
Total Capital Outlay:	$3,414,000	$1,172	
Construction:	$613,000	$210	
Total Non El-Sec Education & Other:	$30,000	$10	
Interest on Debt:	$356,000	$122	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

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Source: CCD Public school district data for the 2022-2023 school year

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Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Jefferson Davis Parish schools for this district	**NCES District ID:** 2200810	**State District ID:** LA-027
Mailing Address: P.O. Box 640 Jennings, LA 70546-0640	**Physical Address:** 203 East Plaquemine Street Jennings, LA 70546-5853	**Phone:** (337)824-1834
Type: Regular local school district	**Status:** Open	**Total Schools:** 12
Supervisory Union #: N/A	**Grade Span:** (grades PK - 12) PK KG 1 2 3 4 5 6 7 8 9 10 11 12	
	District Demographics: School District Demographic Dashboard	

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$78,722,000	$13,926	
Revenue by Source			
Federal:	$10,457,000	$1,850	13%
Local:	$29,417,000	$5,204	37%
State:	$38,848,000	$6,872	49%
Total Expenditures:	$79,547,000	$14,072	
Total Current Expenditures:	$68,372,000	$12,095	
Instructional Expenditures:	$39,183,000	$6,931	57%
Student and Staff Support:	$7,378,000	$1,305	11%
Administration:	$7,426,000	$1,314	11%
Operations, Food Service, other:	$14,385,000	$2,545	21%
Total Capital Outlay:	$8,974,000	$1,587	
Construction:	$309,000	$55	
Total Non El-Sec Education & Other:	$8,000	$1	
Interest on Debt:	$1,571,000	$278	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

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- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

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Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: LaSalle Parish schools for this district	**NCES District ID:** 2200960	**State District ID:** LA-030
Mailing Address: P.O. Drawer 90 Jena, LA 71342-0090	**Physical Address:** 3012 North First Street Jena, LA 71342-4188	**Phone:** (318)992-2161
Type: Regular local school district	**Status:** Open	**Total Schools:** 9
Supervisory Union #: N/A	**Grade Span:** (grades PK - 12) PK KG 1 2 3 4 5 6 7 8 9 10 11 12	
	District Demographics: School District Demographic Dashboard	

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$36,942,000	$14,230	
Revenue by Source			
Federal:	$5,201,000	$2,003	14%
Local:	$14,045,000	$5,410	38%
State:	$17,696,000	$6,817	48%
Total Expenditures:	$34,229,000	$13,185	
Total Current Expenditures:	$33,176,000	$12,780	
Instructional Expenditures:	$19,118,000	$7,364	58%
Student and Staff Support:	$2,773,000	$1,068	8%
Administration:	$4,004,000	$1,542	12%
Operations, Food Service, other:	$7,281,000	$2,805	22%
Total Capital Outlay:	$909,000	$350	
Construction:	$520,000	$200	
Total Non El-Sec Education & Other:	$0	$0	
Interest on Debt:	$84,000	$32	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

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Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Natchitoches Parish
schools for this district

NCES District ID: 2201140

State District ID: LA-035

Mailing Address:
P.O. Box 16
Natchitoches, LA 71458-0016

Physical Address:
310 Royal Street
Natchitoches, LA 71457-5709

Phone: (318)352-2358

Type: Regular local school district

Status: Open

Total Schools: 14

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

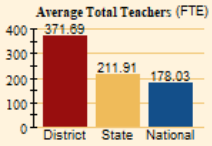
County: Natchitoches Parish

County ID: 22069

Locale: Town: Remote (33)
CSA/CBSA: 35060

Total Students:	5,527
Classroom Teachers (FTE):	371.69
Student/Teacher Ratio:	14.87

Staff



Teachers (FTE)

Total:	**371.69**
Prekindergarten:	10.79
Kindergarten:	20.96
Elementary:	226.00
Secondary:	113.94
Ungraded:	†

Total Staff (FTE): 648.25

Other Staff (FTE)

Total:	**276.56**
Instructional Aides:	46.98
Instruc. Coordinators & Supervisors:	0.04
Total Guidance Counselors:	7.90
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	1.38
Librarians/Media Specialists:	7.52
Library/Media Support:	0.00
District Administrators:	0.00
District Administrative Support:	1.00
School Administrators:	29.29
School Administrative Support:	22.37
Student Support Services (w/o Psychology):	39.73
Other Support Services:	120.35

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$80,619,000	$14,487	
Revenue by Source			
Federal:	$15,578,000	$2,799	19%
Local:	$32,320,000	$5,808	40%
State:	$32,721,000	$5,880	41%
Total Expenditures:	$83,162,000	$14,944	
Total Current Expenditures:	$76,271,000	$13,705	
Instructional Expenditures:	$45,954,000	$8,258	60%
Student and Staff Support:	$7,806,000	$1,403	10%
Administration:	$7,458,000	$1,340	10%
Operations, Food Service, other:	$15,053,000	$2,705	20%
Total Capital Outlay:	$5,582,000	$1,003	
Construction:	$5,051,000	$908	
Total Non El-Sec Education & Other:	$0	$0	
Interest on Debt:	$1,161,000	$209	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

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- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information
(2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Ouachita Parish
schools for this district

NCES District ID: 2201200

State District ID: LA-037

Mailing Address:
P.O. Box 1642
Monroe, LA 71210-1642

Physical Address:
100 Bry Street
Monroe, LA 71201-8406

Phone: (318)432-5000

Type: Regular local school district

Status: Open

Total Schools: 36

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

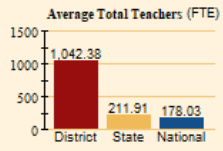
County: Ouachita Parish

County ID: 22073

Locale: Suburb: Midsize (22)
CSA/CBSA: 33740

Total Students:	19,136
Classroom Teachers (FTE):	1,042.38
Student/Teacher Ratio:	18.36

Staff



Teachers (FTE)

Total:	1,042.38
Prekindergarten:	30.11
Kindergarten:	73.50
Elementary:	604.57
Secondary:	334.20
Ungraded:	†

Total Staff (FTE): 2,315.73

Other Staff (FTE)

Total:	1,273.35
Instructional Aides:	193.20
Instruc. Coordinators & Supervisors:	37.30
Total Guidance Counselors:	46.80
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	2.13
Librarians/Media Specialists:	37.40
Library/Media Support:	24.88
District Administrators:	0.00
District Administrative Support:	2.00
School Administrators:	87.48
School Administrative Support:	86.91
Student Support Services (w/o Psychology):	98.07
Other Support Services:	657.18

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$259,810,000	$14,155	
Revenue by Source			
Federal:	$28,535,000	$1,555	11%
Local:	$107,699,000	$5,868	41%
State:	$123,576,000	$6,733	48%
Total Expenditures:	$232,530,000	$12,668	
Total Current Expenditures:	$215,112,000	$11,720	
Instructional Expenditures:	$116,672,000	$6,356	54%
Student and Staff Support:	$28,812,000	$1,570	13%
Administration:	$24,344,000	$1,326	11%
Operations, Food Service, other:	$45,284,000	$2,467	21%
Total Capital Outlay:	$12,268,000	$668	
Construction:	$9,291,000	$506	
Total Non El-Sec Education & Other:	$26,000	$1	
Interest on Debt:	$4,089,000	$223	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

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Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information
(2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name:
Red River Parish
schools for this district

NCES District ID:
2201320

State District ID:
LA-041

Mailing Address:
P.O. Box 1369
Coushatta, LA 71019-1369

Physical Address:
1922 Alonzo Street
Coushatta, LA 71019-9411

Phone:
(318)932-4081

Type:
Regular local school district

Status:
Open

Total Schools:
5

Supervisory Union #:
N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$29,181,000	$20,933	
Revenue by Source			
Federal:	$5,648,000	$4,052	19%
Local:	$18,422,000	$13,215	63%
State:	$5,111,000	$3,666	18%
Total Expenditures:	$34,952,000	$25,073	
Total Current Expenditures:	$25,407,000	$18,226	
Instructional Expenditures:	$13,438,000	$9,640	53%
Student and Staff Support:	$3,293,000	$2,362	13%
Administration:	$3,956,000	$2,838	16%
Operations, Food Service, other:	$4,720,000	$3,386	19%
Total Capital Outlay:	$8,406,000	$6,030	
Construction:	$187,000	$134	
Total Non El-Sec Education & Other:	$0	$0	
Interest on Debt:	$1,074,000	$770	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

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- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

National Center for Education Statistics
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Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Search Results Modify Search Data Notes/Grant IDs Help

District Name: Sabine Parish
schools for this district

NCES District ID: 2201380

State District ID: LA-043

Mailing Address: P.O. Box 1079, Many, LA 71449-1079

Physical Address: 695 Peterson Street, Many, LA 71449-2647

Phone: (318)256-9228

Type: Regular local school district

Status: Open

Total Schools: 10

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics: School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics Staff Fiscal Show All

	Amount	Amount per Student	Percent
Total Revenue:	$63,544,000	$15,012	
Revenue by Source			
Federal:	$13,054,000	$3,084	21%
Local:	$22,645,000	$5,350	36%
State:	$27,845,000	$6,578	44%
Total Expenditures:	$61,218,000	$14,462	
Total Current Expenditures:	$56,715,000	$13,398	
Instructional Expenditures:	$32,625,000	$7,707	58%
Student and Staff Support:	$6,326,000	$1,494	11%
Administration:	$6,125,000	$1,447	11%
Operations, Food Service, other:	$11,639,000	$2,750	21%
Total Capital Outlay:	$3,438,000	$812	
Construction:	$2,732,000	$645	
Total Non El-Sec Education & Other:	$90,000	$21	
Interest on Debt:	$795,000	$188	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

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Source: CCD Public school district data for the 2022-2023 school year

National Center for Education Statistics
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Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: St. Tammany Parish
schools for this district

NCES District ID: 2201650

State District ID: LA-052

Mailing Address: P.O. Box 940
Covington, LA 70434-0940

Physical Address: 321 N Theard Street
Covington, LA 70433-2835

Phone: (985)892-2276

Type: Regular local school district

Status: Open

Total Schools: 55

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics: School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

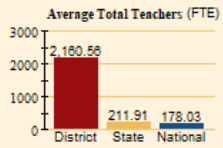
County: ST. Tammany Parish

County ID: 22103

Locale: Suburb: Small (23)
CSA/CBSA: 35380

Total Students:	39,559
Classroom Teachers (FTE):	2,160.56
Student/Teacher Ratio:	18.31

Staff



Teachers (FTE)

Total:	2,160.56
Prekindergarten:	47.61
Kindergarten:	144.29
Elementary:	1,352.88
Secondary:	615.78
Ungraded:	†

Total Staff (FTE): 4,353.13

Other Staff (FTE)

Total:	2,192.57
Instructional Aides:	733.51
Instruc. Coordinators & Supervisors:	1.15
Total Guidance Counselors:	83.41
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	72.44
Librarians/Media Specialists:	47.07
Library/Media Support:	5.22
District Administrators:	0.00
District Administrative Support:	24.92
School Administrators:	153.28
School Administrative Support:	165.72
Student Support Services (w/o Psychology):	247.27
Other Support Services:	658.58

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$580,759,000	$15,773	
Revenue by Source			
Federal:	$61,092,000	$1,659	11%
Local:	$290,857,000	$7,899	50%
State:	$228,810,000	$6,214	39%
Total Expenditures:	$573,201,000	$15,568	
Total Current Expenditures:	$512,753,000	$13,926	
Instructional Expenditures:	$309,632,000	$8,409	60%
Student and Staff Support:	$50,057,000	$1,360	10%
Administration:	$47,403,000	$1,287	9%
Operations, Food Service, other:	$105,661,000	$2,870	21%
Total Capital Outlay:	$45,880,000	$1,246	
Construction:	$30,891,000	$839	
Total Non El-Sec Education & Other:	$828,000	$22	
Interest on Debt:	$9,945,000	$270	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name: Webster Parish
schools for this district

NCES District ID: 2201890

State District ID: LA-060

Mailing Address:
P.O. Box 520
Minden, LA 71058-0520

Physical Address:
1442 Sheppard Street
Minden, LA 71055-3509

Phone: (318)377-7052

Type: Regular local school district

Status: Open

Total Schools: 14

Supervisory Union #: N/A

Grade Span: (grades PK - 12)

PK	KG	1	2	3	4	5	6	7	8	9	10	11	12

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics

Show Less

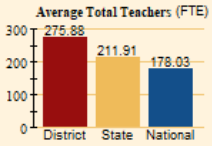
County: Webster Parish

County ID: 22119

Locale: Town: Distant (32)
CSA/CBSA: 33380

Total Students:	5,549
Classroom Teachers (FTE):	275.88
Student/Teacher Ratio:	20.11

Staff



Teachers (FTE)

Total:	**275.88**
Prekindergarten:	6.55
Kindergarten:	18.21
Elementary:	154.48
Secondary:	96.64
Ungraded:	†

Total Staff (FTE): 609.93

Other Staff (FTE)

Total:	**334.05**
Instructional Aides:	77.15
Instruc. Coordinators & Supervisors:	1.00
Total Guidance Counselors:	10.99
Elementary Guidance Counselors:	0.00
Secondary Guidance Counselors:	0.00
School Psychologists:	0.75
Librarians/Media Specialists:	7.49
Library/Media Support:	0.47
District Administrators:	0.00
District Administrative Support:	0.33
School Administrators:	27.92
School Administrative Support:	18.96
Student Support Services (w/o Psychology):	17.65
Other Support Services:	171.34

Fiscal

	Amount	Amount per Student	Percent
Total Revenue:	$81,753,000	$14,343	
Revenue by Source			
Federal:	$11,341,000	$1,990	14%
Local:	$32,671,000	$5,732	40%
State:	$37,741,000	$6,621	46%
Total Expenditures:	$81,111,000	$14,230	
Total Current Expenditures:	$70,604,000	$12,387	
Instructional Expenditures:	$41,366,000	$7,257	59%
Student and Staff Support:	$7,500,000	$1,316	11%
Administration:	$6,877,000	$1,206	10%
Operations, Food Service, other:	$14,861,000	$2,607	21%
Total Capital Outlay:	$7,245,000	$1,271	
Construction:	$6,394,000	$1,122	
Total Non El-Sec Education & Other:	$25,000	$4	
Interest on Debt:	$2,012,000	$353	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

Search for Public School Districts

CCD Common Core of Data

District Directory Information (2022-2023 school year)

Modify Search | Data Notes/Grant IDs | Help

District Name:	NCES District ID:	State District ID:
West Carroll Parish schools for this district	2201950	LA-062
Mailing Address:	**Physical Address:**	**Phone:**
314 East Main Street Oak Grove, LA 71263-2540	314 East Main Street Oak Grove, LA 71263-2540	(318)428-2378
Type:	**Status:**	**Total Schools:**
Regular local school district	Open	5
Supervisory Union #:	**Grade Span:** (grades PK - 12)	
N/A	PK KG 1 2 3 4 5 6 7 8 9 10 11 12	

District Demographics:
School District Demographic Dashboard

District Details (2022-2023 school year; Fiscal data from 2020-2021)

Characteristics | Staff | Fiscal — Show All

	Amount	Amount per Student	Percent
Total Revenue:	$23,895,000	$12,484	
Revenue by Source			
Federal:	$4,023,000	$2,102	17%
Local:	$6,386,000	$3,336	27%
State:	$13,486,000	$7,046	56%
Total Expenditures:	$22,771,000	$11,897	
Total Current Expenditures:	$22,524,000	$11,768	
Instructional Expenditures:	$12,683,000	$6,626	56%
Student and Staff Support:	$2,886,000	$1,508	13%
Administration:	$2,225,000	$1,162	10%
Operations, Food Service, other:	$4,730,000	$2,471	21%
Total Capital Outlay:	$145,000	$76	
Construction:	$110,000	$57	
Total Non El-Sec Education & Other:	$10,000	$5	
Interest on Debt:	$47,000	$25	

Note: Details do not add to totals due to rounding.
Note: Fiscal data (including per pupil count used in this table) from 2020-2021.

NOTES

- [†] indicates that the data are not applicable.
- [–] indicates that the data are missing.
- [‡] indicates that the data do not meet NCES data quality standards.

Source: CCD Public school district data for the 2022-2023 school year

National Center for Education Statistics
Office of Educational Research & Improvement, U.S. Dept. of Education
1990 K Street, NW, Washington, DC 20006, USA, Phone: (202) 502-7300

Exhibit 14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA,
By and through its Attorney General,
Elizabeth B. Murrill; et al.,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION; et al.,

DEFENDANTS.

Civil Action No. 3:24-cv-00563

Chief Judge Terry A Doughty
Magistrate Judge Kayla D. McClusky

DECLARATION OF ALLEN PARISH SCHOOLS

Under 28 U.S.C. § 1746, I, BRAD SOILEAU, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am Superintendent of the ALLEN PARISH SCHOOL BOARD ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("Allen Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 11 schools, which provide education for approximately 3936 students in pre-kindergarten/kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $7,743,911 of federal funding subject to Title IX. It has received approximately $6,500,00 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $5,000,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

CURRENT POLICIES AND PRACTICES

6. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

7. ALLEN PARISH SCHOOLS accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

8. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom.

9. ALLEN PARISH SCHOOLS also have some sex-specific classes and activities. ALLEN PARISH SCHOOLS have extracurricular opportunities for junior high and high school students. Many of the athletic teams are designated as being for only boys or only girls.

10. ALLEN PARISH SCHOOLS provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, ALLEN PARISH SCHOOLS have separate girls' teams for basketball, softball, track and field, cross country and tennis and boys' teams for basketball, baseball, football, track and field, cross country, golf and tennis.

11. ALLEN PARISH SCHOOLS follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

12. Accordingly, ALLEN PARISH SCHOOLS teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

13. ALLEN PARISH SCHOOLS occasionally have overnight field trips. On those field trips, Allen Parish Schools assigns chaperones and students to rooms based on sex.

14. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

15. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

THE RULE'S IMPACT

16. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

17. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing

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[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities

speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

18. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

19. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

20. Moreover, requiring the School Board to change policies and implement new procedures across Allen Parish Schools will impose the following imminent and irreparable compliance costs:

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consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

a. Costs and time to review and understand the Rule, which will take approximately 100 hours of employee time and cost approximately $8,000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by general funds rather through federal funds.

b. Costs and time to revise school district policies, which will take approximately 40 hours of employee time and cost approximately $3,200. The school district policies will need to be completed and approved by no later than July 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 100 clock hours of employee time and cost approximately $10,000. This will need to be completed by July 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 500 hours of employee time and cost approximately $40,000. This training will need to be completed at the end of July 2024 in order for it to be enforced in A.

21. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights.

22. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or

burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

23. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

24. Our district will have to hire an architect to redesign restrooms and showers on 11 campuses. We would have to send this project out for bid which will require a request for proposal (RFP). The cost would be significant.

25. The Rule also will create conflicts between ALLEN PARISH SCHOOLS and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g., id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

26. Additionally, the Rule limits what information ALLEN PARISH SCHOOLS can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,5366 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places Allen Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require ALLEN PARISH SCHOOLS to assign boys who claim to be girls to a girls-only room and to prohibit the Allen Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

27. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school.

28. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the Allen Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender

identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

29. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

30. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9 day of May, 2024 in Oberlin, Louisiana.

Brad Soileau
Superintendent
Allen Parish School Board

Exhibit 15

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF CALDWELL PARISH SCHOOL BOARD

Under 28 U.S.C. § 1746, I, Nicki McCann, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am Superintendent of the Caldwell Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("Caldwell Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 7 schools, which provide education for approximately 1,514 students in pre-kindergarten/kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $7,139,327 of federal funding subject to Title IX. It has received approximately $4,653,933 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $4,140,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

6. Currently, I am aware of employees and students in the district that claim a gender identity other than one that corresponds with their biological sex.

Current Policies and Practices

7. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

8. Caldwell Parish Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

9. The girls' locker room in the gym has three (3) private showers with two (2) partitioned toilets. The girls' softball locker room is completely open, with no privacy. The girls'

dressing rooms for cheer and dance are completely open, however they have access to the multipurpose building bathroom stalls. The boys' locker room in the gym has one (1) open shower unit and one (1) partitioned toilet with an open set of urinals. The boys' football locker room has an open shower room and three (3) urinals with partial partitions and four (4) enclosed toilets. The boys' baseball locker room is completely open, with no privacy.

10. Caldwell Parish Schools also have some sex-specific classes such as PE in the secondary schools.

11. Caldwell Parish Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, Caldwell Parish Schools have separate girls' teams for softball, basketball, track, cross-country, cheer/dance, tennis, powerlifting, and golf and boys' teams for baseball, basketball, track, cross-country, football, tennis, powerlifting, and golf.

12. Caldwell Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

13. Accordingly, Caldwell Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

14. Caldwell Parish Schools occasionally have overnight field trips. On those field trips, Caldwell Parish Schools assign chaperones and students to rooms based on sex. Generally, students

are assigned to rooms in groups of four (4) in which students share beds with other students in a hotel. In some cases, especially for middle school students, adult chaperones of the same sex are required to share a room with children. The only exceptions are for members of the same family.

15. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

16. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

17. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

18. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the

gender identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

19. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

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traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

20. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

21. Moreover, requiring the School Board to change policies and implement new procedures across Caldwell Parish Schools will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will take approximately 50 hours of employee time and cost approximately $5,000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by May 30, 2024.

b. Costs and time to revise school district policies, which will take approximately 30 hours of employee time and cost approximately $3,600. The school district policies will need to be completed and approved by no later than June 21, 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 30 hours of employee time and cost approximately $14,400. This will need to be completed by July 19, 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 2 hours of employee time and cost approximately $19,500. This training will need to be completed on August 1, 2024 when the school district does its yearly training/before August 1, 2024.

22. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using

accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights.

23. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

24. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

25. Specifically, in order to construct a gender-neutral bathroom at each of the five (5) PreK and K-5 schools, including costs for architectural plans, permits, materials, labor, and inspections, it will cost approximately $100,000 each, totaling $500,000. Additionally, the middle

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

school renovations for gender neutral facilities would include locker rooms, totaling $200,000 and the high school renovations are estimated at $500,000. Furthermore, it is unlikely renovations would be completed by August 1st, requiring the district to make temporary arrangements for students in the form of gender-neutral portable restroom rentals at each site, costing approximately $1,000 per month.

26. The Rule also will create conflicts between Caldwell Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g., id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

27. Additionally, the Rule limits what information Caldwell Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,536 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title

IX"). This places Caldwell Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require Caldwell Parish Schools to assign boys who claim to be girls to a girls-only room and to prohibit the Caldwell Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

28. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school. Constituents have reached out to the superintendent affirming that they will not allow their children to attend public school in Caldwell Parish if this is allowed.

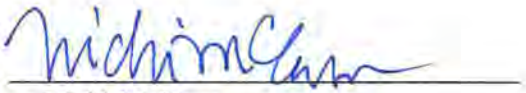
29. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the Caldwell Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

30. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

31. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2024 in Columbia, Louisiana.



Nicki McCann

Exhibit 16

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA,
By and through its Attorney General,
Elizabeth B. Murrill; et al.,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION; et al.,

DEFENDANTS.

Civil Action No. 3:24-cv-00563

Chief Judge Terry A Doughty
Magistrate Judge Kayla D. McClusky

DECLARATION OF JOHN GULLATT

Under 28 U.S.C. § 1746, I, John Gullatt, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Superintendent of the Franklin Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("Franklin Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 6 schools, which provide education for approximately 2,600 students in Pre-Kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $3,996,039 of federal funding. It has received approximately $2,137,305 of federal funding so far this fiscal year (July 2023 to June 2024), and estimates it will receive at least $5,000,000 of federal funding next fiscal year (July 2024 to June 2025).

CURRENT POLICIES AND PRACTICES

6. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

7. All Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

8. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom.

9. Franklin Parish Schools also have some sex-specific classes and activities. PE classes are divided by sex. Activities include boys' football, boys' basketball, girls' basketball, boys' baseball, girls' softball, boys' track, and girls' track.

10. Franklin Parish Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams

are designated as being for boys or girls. For example, Franklin Parish Schools have separate girls' teams for basketball, softball, track, tennis, soccer, and boys' teams for football, basketball, track, baseball, tennis, golf.

11. Franklin Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

12. Accordingly, Franklin Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

13. Franklin Parish Schools occasionally have overnight field trips. On those field trips, Franklin Parish Schools assigns chaperones and students to rooms based on sex. Males room with males and females room with females. Chaperones use a separate room not including students for lodging. Male chaperones room with male chaperons and female chaperones room with female chaperones.

14. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

15. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

THE RULE'S IMPACT

16. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

17. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing

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[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities

speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

18. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

19. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change to its current policies and practices, which the School Board does not wish to do.

20. Moreover, requiring the School Board to change policies and implement new procedures across Franklin Parish Schools will impose the following imminent and irreparable compliance costs:

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consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

21. Costs and time to review and understand the Rule, which will take approximately 10 hours of employee time and cost approximately $250.00. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by August 1, 2024.

22. Costs and time to revise school district policies, which will take approximately 4-6 hours of employee time and cost approximately $1,500.00. The school district policies will need to be completed and approved by no later than August 1, 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

23. Costs and time to revise employee training, which take approximately 10 hours of employee time and cost approximately $250.00. This will need to be completed by August 1, 2024.

24. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 10 hours of employee time and cost approximately $250.00 (for the employees doing the training, not to mention the cost of employees attending the training). This training will be conducted on August 1, 2024, during in school training meeting before the start of school.

25. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. Time would be allotted for professional development for teachers in the realm. This policy will also likely lead to private litigation. Some

teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights. All types of litigation will be deferred to legal counsel.

26. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

27. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

28. Due to the age of the Franklin Parish facilities, being required to convert from sex-specific restrooms to single user restroom/facilities would be astronomical. Most of our older elementary/junior high buildings only have limited restrooms to upgrade to single users would require the schools to eliminate current classrooms. Most of our schools are at capacity which would require major renovation. Expenses would include architect and construction companies, and a project supervisor. These expenses would occur at all seven campuses. During renovations of our existing

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

restrooms, we would be required to have alternative type of restrooms, such as portable toilets, which would require us to incur additional cost.

29. The Rule also will create conflicts between Franklin Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

30. Additionally, the Rule limits what information Franklin Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,536 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places Franklin Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require Franklin Parish Schools to assign boys who claim to be girls to a girls-

only room and to prohibit the Franklin Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

31. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school.

32. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the Franklin Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

33. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

34. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8 day of May, 2024 in Winnsboro, Louisiana.

John Gullatt, Superintendent

Exhibit 17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF GRANT PARISH SCHOOL BOARD

Under 28 U.S.C. § 1746, I, Mason Briggs, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am Board President of the Grant Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("Grant Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees Grant Parish schools, which provide education for approximately 2768 students in pre-kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $8,273,279 of federal funding subject to Title IX. It has received approximately $3,499,048 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $3,500,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

6. As of May 9, 2024, some students and staff claim a gender identity other than one that corresponds with their biological sex, including a gender identity other than male or female.

CURRENT POLICIES AND PRACTICES

7. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

8. Grant Parish Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

9. Elementary schools do not require students to change clothes. Bathrooms are sex-specific. Please see below for information concerning the changing areas and restrooms at our secondary schools:

a. School A: Two locker rooms one for girls and one for boys. All Bathroom facilities are separated according to boy or girl.

b. School B: Four shower stalls in the girls' gym bathroom, only one has a shower. There will be three in the football locker room after current construction is complete.

c. School C: The showers are stalls with curtains in the locker rooms. Each locker room has three to four private stalls for restrooms. The locker rooms are open air. Students do not dress out for daily PE, but they do dress out for athletic practices and athletic competitions.

d. We have open showers. The locker rooms are open changing rooms. There are bathroom stalls inside which could be used for privacy. We have five individual bathrooms on campus plus two handicapped bathrooms that are individual.

10. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom.

11. Grant Parish Schools also have some sex-specific classes and activities, such as PE.

12. Grant Parish Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, Grant Parish Schools have separate girls' teams for basketball, softball, cross country, track and field, powerlifting, soccer, and golf and boys' teams for basketball, baseball, soccer, cross country, track and field, powerlifting, and golf.

13. Grant Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

14. Accordingly, Grant Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy

advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

15. Grant Parish Schools occasionally have overnight field trips. On those field trips, Grant Parish Schools assign chaperones and students to rooms based on sex. Students either share a bed or have the option to sleep on the couch or floor if they feel uncomfortable.

16. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

17. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

18. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

19. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can

identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

20. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity

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have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

21. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

22. Moreover, requiring the School Board to change policies and implement new procedures across Grant Parish Schools will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will take approximately 50 hours of employee time and cost approximately $5,000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by May 30, 2024.

b. Costs and time to revise school district policies, which will take approximately 30 hours of employee time and cost approximately $3,600. The school district policies will need to be completed and approved by no later than June 21,2024 so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 30 hours of employee time and cost approximately $15,000. This will need to be completed by July 26, 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 2 hours of employee time and cost approximately $20,000. This training will need to be completed on August 1, 2024 when the school district does its yearly training/before August 1, 2024.

23. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy

and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. Around 35 teachers have indicated that they would consider resigning. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights.

24. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

25. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

26. Changes to the physical layout of locker rooms would include creating a private showering and changing spaces to increase students' privacy at the four secondary schools. Elementary schools would need to have individual bathrooms that are separate and not sex specific. The bidding process would occur after an architect draws the project, which takes months. The estimated cost for construction on additional bathrooms for elementary schools is $150,000 per school. The estimated cost for construction for the middle school would be $200,000, and for the three high schools it would be $500,000 for each school. This would total $2,150,000 in construction costs alone. Our construction manager would also charge a fee. If we started this process now, it is likely construction would not finish before December 12, 2024.

27. The Rule also will create conflicts between Grant Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–96 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

28. Additionally, the Rule limits what information Grant Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,536 (emphasizing that, "[t]o the extent that a

conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places Grant Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require Grant Parish Schools to assign boys who claim to be girls to a girls-only room and to prohibit the Grant Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

29. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school. Several constituents have expressed to board members and school personnel their desire to use homeschooling or private school for their students if the district implements the Rule.

30. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the Grant Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that

categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

31. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

32. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2024 in Colfax, Louisiana.

Mason Briggs

[Name]

Exhibit 18

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF JEFFERSON DAVIS PARISH SCHOOL BOARD

Under 28 U.S.C. § 1746, I, JOHN G. HALL, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Superintendent of the JEFFERSON DAVIS PARISH SCHOOL BOARD ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district JEFFERSON DAVIS PARISH SCHOOLS.

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 13 schools, which provide education for approximately 5,250 students in pre-kindergarten/kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $13,528,322.00 of federal funding subject to Title IX. It has received approximately $10,448,496.16 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $11,000,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

CURRENT POLICIES AND PRACTICES

6. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

7. JEFFERSON DAVIS PARISH SCHOOLS accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

8. There are not currently any gender-neutral bathrooms, changing rooms, or showers for students. Likewise, there are no stalls in locker-rooms that allow privacy for individuals who do not want to change in an open locker room.

9. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom.

10. JEFFERSON DAVIS PARISH SCHOOLS also have some sex-specific classes and activities. JEFFERSON DAVIS PARISH SCHOOLS have extracurricular opportunities for junior high and high school students. Many of the athletic teams are designated as being for only boys or only girls.

11. JEFFERSON DAVIS PARISH SCHOOLS provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, JEFFERSON DAVIS PARISH SCHOOLS have separate girls' teams for volleyball, track, softball, basketball, tennis, golf, swimming and boys' teams for track, baseball, football, basketball, golf, swimming, power lifting and tennis.

12. JEFFERSON DAVIS PARISH SCHOOLS follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

13. Accordingly, JEFFERSON DAVIS PARISH SCHOOLS' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

14. JEFFERSON DAVIS PARISH SCHOOLS occasionally have overnight field trips. On those field trips, JEFFERSON DAVIS PARISH SCHOOLS assigns chaperones and students to rooms based on sex. Students may be asked to sleep in the same bed when funds or hotel availability

is limited. Exceptions are only made when the parents of students attend and choose to have their students share a room with them.

15. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

16. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

17. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

18. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female,"

identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

19. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

"[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.,* creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

20. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

21. Moreover, requiring the School Board to change policies and implement new procedures across JEFFERSON DAVIS PARISH SCHOOLS will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will take approximately 100 hours of employee time and cost approximately $8,000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by our general fund rather than through Federal funds.

b. Costs and time to revise school district policies, which will take approximately 40 hours of employee time and cost approximately $3,200. The school district policies will need to be completed and approved by no later than July 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 100 clock hours of employee time and cost approximately $10,000. This will need to be completed by July 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 500 hours of employee time and cost approximately $40,000. This training will need to be completed at the end of July 2024 in order for it to be enforced in August of 2024.

22. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate

pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. This policy will lead to litigation directed at our school board. I believe parents and teachers would sue on the behalf of their children, would sue the school district claiming infringement of free speech and free exercise rights. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights

23. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

24. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

25. Our district will have to hire an architect to redesign restrooms and showers on all 13 campuses. We would have to send this project out for bid which will require a request for proposal (RFP). The cost could be significant based off of a recent request for a proposal to turn only one classroom into a new restroom at a cost of $400.000.

26. The Rule also will create conflicts between JEFFERSON DAVIS PARISH SCHOOLS and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

27. Additionally, the Rule limits what information JEFFERSON DAVIS PARISH SCHOOLS can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,566 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX").

This places JEFFERSON DAVIS PARISH SCHOOLS in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require JEFFERSON DAVIS PARISH SCHOOLS to assign boys who claim to be girls to a girls-only room and to prohibit the JEFFERSON DAVIS PARISH SCHOOLS from informing those girls' parents of the biological sex of their children's roommate.

28. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school. Local families have expressed their disagreement with these changes and have stated when this day comes, they will not send their children or grandchildren to public school if the public schools will be forced to enforce the Rule.

29. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the JEFFERSON DAVIS PARISH SCHOOLS' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "discrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

30. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

31. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11 day of May, 2024 in Jennings, Louisiana.

JOHN G. HALL
SUPERINTENDENT
JEFFERSON DAVIS PARISH SCHOOL BOARD

Exhibit 19

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF LASALLE PARISH SCHOOL SYSTEM

Under 28 U.S.C. § 1746, I, Jonathan Garrett, Superintendent, LaSalle Parish School System, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am Jonathan Garrett, Superintendent of the Lasalle Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("LaSalle Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 9 schools, which provide education for approximately 2,500 students in Pre-kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $2,907,104.00 of federal funding subject to Title IX. It has received approximately $5,385,769.00 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $1,735,723.00 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

CURRENT POLICIES AND PRACTICES

6. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

7. All nine of our schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

8. All LaSalle Parish Schools locker rooms are open and have no individual stalls. The shower areas are all open also, with no private shower areas. We do not have individual locker rooms for students to use for private dressing.

9. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom.

10. All of our schools also have some sex-specific classes and activities. PE classes in grades six through twelve are separated by sex, dress in separate dressing rooms, and are taught by separate teachers. In addition, we teach topics related to sex education in grades 6 through 12 in classes that are separated by sex and taught by separate teachers.

11. All nine LaSalle Parish schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, LaSalle Parish Schools have separate girls' teams for basketball, cross country, danceline, golf, powerlifting, softball, tennis and track. And, separate boys' teams for basketball, baseball, cross country, football, golf, powerlifting, tennis, and track.

12. LaSalle Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

13. Accordingly, LaSalle Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

14. LaSalle Parish Schools occasionally have overnight field trips. On such field trips, LaSalle Parish Schools assign chaperones and students to rooms based on sex. Occasionally, a parent volunteers to chaperone their own child, and we make allowances for such exceptions. However, in

all other cases, students are assigned to rooms based on their sex. Girls will share a room with other girls; boys will share a room with other boys. We typically do not have chaperones staying in the same room as a student, unless it is a parent chaperoning their own child, as indicated previously.

15. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neopronouns based on an individual's claimed gender identity.[1]

16. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

17. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

18. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the

gender identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

19. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

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traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

20. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

21. Moreover, requiring the School Board to change policies and implement new procedures across LaSalle Parish Schools will impose the following imminent and irreparable compliance costs:

a. The sheer length of the ruling will lead to a substantial amount of time to review it and properly understand the contents, taking hours of employee time to do so. This is in addition to the current responsibilities of the employees tasked with review, leading to additional work hours and overtime.

b. There will also be a cost associated with revising school district policies in accordance with this change, not only in the production of new policy manuals but the employee hours required to do it. The school district policies will need to be completed and approved by no later than June 4, 2024 so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. LaSalle Parish Schools will also incur costs and time requirements to revise employee training, which would take many hours of employee time, again on top of the current day to day responsibilities of employees tasked with this responsibility. There is also a difficult deadline associated with this task, as this will need to be completed by the end of June, 2024.

d. LaSalle Parish Schools will also incur costs and time requirements to train employees regarding new obligations under the Rule and changes to school district policies and practices. Our adopted school calendar has the first day for teachers and faculty on August 1st, 2024. We would need to revise this start date and pay the entire district for an extra day in order to have all employees trained before August 1st, 2024. This would require the training to be completed by July 31, 2024. This would be a substantial cost to the school system.

22. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who

can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights.

23. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

24. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

25. Eight of our nine campuses were built decades ago, and therefore would need extensive remodeling to meet these new requirements. Previous restroom renovations undertaken due to age and wear and tear have cost on average $30,000. A district-wide project to bring restrooms at all nine of our schools in line with these new requirements would be a substantial expense to our district. In addition, the renovation timeline to have them all completed would take up to a year or more. Meeting the new requirements while the projects wait to be completed would be difficult. Furthermore, it would raise logistical issues for our schools, including having a limited number of available restrooms for an entire student body to use, causing us to potentially violate the new requirements while attempting to get in compliance with the new requirements.

26. The Rule also will create conflicts between LaSalle Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

27. Additionally, the Rule limits what information LaSalle Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,5366 (emphasizing that, "[t]o

the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places LaSalle Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require LaSalle Parish Schools to assign boys who claim to be girls to a girls-only room and to prohibit the LaSalle Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

28. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school.

29. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the LaSalle Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating

on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

30. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

31. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2024 in Jena, Louisiana.

Jonathan Garett,
Superintendent, LaSalle Parish Schools

Exhibit 20

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA,
By and through its Attorney General,
Elizabeth B. Murrill; et al.,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION; et al.,

DEFENDANTS.

Civil Action No. 3:24-cv-00563

Chief Judge Terry A Doughty
Magistrate Judge Kayla D. McClusky

DECLARATION OF OUACHITA PARISH SCHOOL BOARD

Under 28 U.S.C. § 1746, I, Todd Guice, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Superintendent of the Ouachita Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("Ouachita Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 37 schools, which provide education for approximately 18,000 students in pre-kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $49.2 million of federal funding subject to Title IX. It has received approximately $46.4 million of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $56 million of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

6. Ouachita Parish Schools does not keep a record of staff or students that claim a gender identity other than one that corresponds with their biological sex. The district is aware that some students claim a gender identity that does not correspond with their biological sex.

CURRENT POLICIES AND PRACTICES

7. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

8. Ouachita Parish Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

9. Locker room facilities in Ouachita Parish Schools include individual bathroom stalls and a group shower area. For individuals who do not wish to change in a large open locker room,

girls' locker rooms feature 10 individual stalls, while three individual stalls are available in boys' locker rooms.

10. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom. Ouachita Parish Schools would incur a cost of approximately $22.2 million to provide a single-user bathroom on each wing of our 37 schools.

11. Ouachita Parish Schools also have some sex-specific classes and activities. Physical education classes in the district are separated by biological sex.

12. Ouachita Parish Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, Ouachita Parish Schools have separate girls' teams for volleyball, cross country, basketball, tennis, track, swimming, softball and golf and boys' teams for football, cross country, basketball, tennis, swimming, golf, track and baseball.

13. Ouachita Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

14. Accordingly, Ouachita Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

15. Ouachita Parish Schools occasionally have overnight field trips. On those field trips, Ouachita Parish Schools assigns chaperones and students to rooms based on sex. Exceptions have

been made for family members. For example, a male student is allowed to share a room with his biological mother. The district prefers for each student have their own bed, but if that request cannot be accommodated, students of the same sex can share a bed if the parents have given their permission.

16. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neopronouns based on an individual's claimed gender identity.[1]

17. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

18. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

19. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes

identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

20. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

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someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

21. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

22. Moreover, requiring the School Board to change policies and implement new procedures across Ouachita Parish Schools will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will cost approximately $25,000 to provide an outside company to facilitate training. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by Aug. 1.

b. Costs and time to revise school district policies, which will take at least 2 hours of employee time for each member of a 14-person committee and cost approximately $1,288. The school district policies will need to be completed and approved by no later than Aug. 1, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take at least 2 hours of employee time for each member of a 14-person committee and cost approximately $1,288. This will need to be completed by Aug. 1.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take at least 8 hours of employee time for the district's 2,600 employees and cost approximately $676,000. This training will need to be completed by Aug. 1.

23. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would

hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would likely sue the school district claiming infringement of Free Speech and Free Exercise rights.

24. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

25. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

26. Ouachita Parish Schools follows all State laws and requirements for construction projects. The district will contract an architecture firm to design each new facility or building update at 37 schools. The design process takes two weeks at a cost of 8% of the total project cost. Design for bathrooms and locker rooms at 37 schools would cost the district between $1.6 million and $2.2 million. Once

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

the facilities have been designed to the district's satisfaction, the school board must approve bidding for the project. The bidding process lasts for one month and is subject to the State's low-bid law. Construction will last at least 120 days at 37 schools, with a cost of approximately $20.3 million for renovations and approximately $27.7 million to construct additional bathrooms and locker rooms. The district will employ a consultant for these projects to mitigate any other logistical issues at a total cost of approximately $185,000.

27. The Rule also will create conflicts between Ouachita Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

28. Additionally, the Rule limits what information Ouachita Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,5366 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that

a recipient must not use FERPA as a shield from compliance with Title IX"). This places Ouachita Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require Ouachita Parish Schools to assign boys who claim to be girls to a girls-only room and to prohibit the Ouachita Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

29. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school.

30. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the Ouachita Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

31. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and

(3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

32. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2024 in West Monroe, Louisiana.

Todd Guice, Superintendent

Exhibit 21

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA,
By and through its Attorney General,
Elizabeth B. Murrill; et al.,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION; et al.,

DEFENDANTS.

Civil Action No. 3:24-cv-00563

Chief Judge Terry A Doughty
Magistrate Judge Kayla D. McClusky

DECLARATION OF SHANE WRIGHT, SABINE PARISH SCHOOLS SUPERINTENDENT

Under 28 U.S.C. § 1746, I, Shane Wright, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Superintendent of the Sabine Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("Sabine Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 10 schools, which provide education for approximately 3800 students in pre-kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $3,891,961 of federal funding subject to Title IX. It has received approximately $4,181707 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $3,500,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

6. Over the last few years, we have seen an increase in students claiming a gender identity other than the gender that identifies with their biological sex.

CURRENT POLICIES AND PRACTICES

7. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

8. Sabine Parish Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

9. Sabine Parish Schools are small campuses with older buildings. Due to this, bathrooms and locker rooms are small and minimalist. Within locker rooms, there is little to no privacy due to the restrictions based on the room size.

10. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom. No additional costs has be incurred since we have used existing individual restrooms.

11. Sabine Parish Schools also have some sex-specific classes and activities. PE/Health and sometimes mandatory trainings (e.g., dating violence) are taught in sex-specific classes due to the nature of the content being shared.

12. Sabine Parish Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, Sabine Parish Schools have separate girls' teams for Cheer, Cross Country, Volleyball, Basketball, Powerlifting, Golf, Softball, Track, Tennis, Bass Fishing and boys' teams for Football, Basketball, Powerlifting, Golf, Baseball, Track, Tennis, Bass Fishing.

13. Sabine Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

14. Accordingly, Sabine Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(B). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

15. Sabine Parish Schools occasionally have overnight field trips. On those field trips, Sabine Parish Schools assign chaperones and students to rooms based on sex. Students on overnight

stays are expected to share beds with classmates of the same biological sex. The only deviation to this practice would be if a student stayed in the room with siblings or their parents.

16. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

17. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

18. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

19. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin irrespective of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female,"

identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

20. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

"[x]enogender identities . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

21. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change its current policies and practices, which the School Board does not wish to do.

22. Moreover, requiring the School Board to change policies and implement new procedures across Sabine Parish Schools will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will take approximately 8 hours of employee time and cost approximately $2000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by August 1, 2024.

b. Costs and time to revise school district policies, which will take approximately 8 hours of employee time and cost approximately $1000. The school district policies will need to be completed and approved by no later than July 8, 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 4 hours of employee time and cost approximately $2000. This will need to be completed by June 15, 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 8 hours of employee time and cost approximately $85,000. This training will need to be completed on July 15, 2024 when the school district does its yearly training/before August 1, 2024.

23. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate

pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. Sabine Parish teachers are student centered educators, but they have expressed concern for the chaos created due to insertion of neopronouns in everyday class. Teachers have also expressed a moral dilemma with calling a male a name that does not align with the student's biological gender. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights.

24. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

25. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

26. Any needed campus construction would not/could not occur prior to August 1, 2024 to comply with these new regulations. Construction to comply with these guidelines would be a lengthy and costly process due to the age and size of our existing campuses.

27. The Rule also will create conflicts between Sabine Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

28. Additionally, the Rule limits what information Sabine Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,536 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places Sabine Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require Sabine Parish Schools to assign boys who claim to be girls to a girls-only

room and to prohibit the Sabine Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

29. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school. At this time, many parents have already expressed concern about the implementation and implications of the Rule. Imposing these new guidelines would definitely exacerbate an already contentious situation with our constituents.

30. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the Sabine Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "[d]iscrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

31. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and

(3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

32. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting").

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of May, 2024 in Many, Louisiana.

Shane Wright

Exhibit 22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA,
By and through its Attorney General,
Elizabeth B. Murrill; et al.,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION; et al.,

DEFENDANTS.

Civil Action No. 3:24-cv-00563

Chief Judge Terry A Doughty
Magistrate Judge Kayla D. McClusky

DECLARATION OF FRANK JABBIA

Under 28 U.S.C. § 1746, I, Frank Jabbia, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Superintendent of the St. Tammany Parish Public School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district "St. Tammany Parish Public Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees 55 schools, which provide education for approximately 37,212 students in pre-kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $75,635,132 of federal funding subject to Title IX. It has received approximately $54,016,651 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $50,000,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

6. More than 70 students and at least one staff member in St. Tammany Parish Public Schools claim a gender identity other than the one that corresponds with their biological sex. However, the student number fluctuates from day to day due to uncertainty within gender identity.

CURRENT POLICIES AND PRACTICES

7. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

8. St. Tammany Parish Public Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

9. In all eight of the St. Tammany Parish Public high schools and all 13 junior high schools, the district has group locker rooms and facilities. In high school PE locker rooms, there are

individual showers separated by a curtain with no way to secure the area. The boy's restrooms in the PE locker rooms typically contain open urinals or open troughs in addition to toilet stalls that contain a locking door. Field houses used for sports contain a common area for group showers. This is an open room with shower spigots staggered across the wall with no dividers or doors. The changing area is an open room with lockers or cubbies for storing items. In field houses there is no place to privately shower or change clothing. On junior high school campuses, most schools have one large changing area with no privacy, a few bathroom stalls with locking doors, and open shower stalls that are separated by a curtain.

10. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom. Previously the school system accommodated a student who claimed a gender identity that differs from their biological sex by creating a new single-user bathroom at a high school. The cost of installing one single-user bathroom was $88,000.

11. St. Tammany Parish Public Schools also have some sex-specific classes and activities. Some schools have PE classes that are separated by sex and all eight high schools offer athletic PE that is based on sex-specific sports teams.

12. St. Tammany Parish Public Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, St. Tammany Parish Public Schools have separate girls' teams for basketball, cross country, soccer, softball, track and volleyball, and separate boys' teams for baseball, basketball, cross country, football, soccer, track, volleyball, and wrestling.

13. St. Tammany Parish Public Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate

their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

14. Accordingly, St. Tammany Parish Public Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(A)(3). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

15. St. Tammany Parish Public Schools occasionally have overnight field trips and sports team trips. On those trips, St. Tammany Parish Public Schools assigns chaperones and students to rooms based on sex. Typical practice is that on these overnight trips students share rooms and share beds. In previous situations when a student claimed a gender identity that differs from their biological sex, a separate room was provided at an additional cost to the school system or to the parent.

16. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neoprouns based on an individual's claimed gender identity.[1]

17. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

18. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an

[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

19. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin regardless of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* at 33,818 (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

20. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

21. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change to its current policies and practices, which the School Board does not wish to do.

22. Moreover, requiring the School Board to change policies and implement new procedures across St. Tammany Parish Public Schools will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will take approximately 40 hours of employee time and cost approximately $7,000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by the St. Tammany Parish Public School System's general fund.

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[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.,* creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

b. Costs and time to revise school district policies, which will take approximately 20 hours of employee time and cost approximately $3,500. The school district policies will need to be completed and approved by no later than June 1, 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 80 hours of employee time and cost approximately $14,000. This will need to be completed by July 1, 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 28,000 hours of employee time and cost approximately $1,680,000. This training will need to be completed by August 1, 2024.

23. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from teaching and would likely lead some teachers to resign. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights. On local Facebook mom pages people have commented in regards to the rule, "This is so concerning on so many levels!" and "How do we fight this?"

24. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender

identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

25. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

26. The district would have to convert all bathroom, PE, and athletic facilities into single-user enclosed facilities and remove all bathroom troughs and urinals in order to provide single-user bathroom stalls in boy's restrooms. The St. Tammany school board would have to identify funding for these projects, as school systems do not receive any building construction or maintenance funds from the state of Louisiana. Once the funding is identified, the school board would have to vote to approve the use of those funds for construction and renovations. The school system construction department would have to consult with architects and put each project out to bid, costing hundreds of millions of dollars to the school district. This process would take at least 10 years if funding could even be located.

27. The Rule also will create conflicts between St. Tammany Parish Public Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*,

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

id. at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents could lead to lawsuits alleging the school district has violated parental rights.

28. Additionally, the Rule limits what information St. Tammany Parish Public Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,537 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places St. Tammany Parish Public Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require St. Tammany Parish Public Schools to assign boys who claim to be girls to a girls-only room and to prohibit the St. Tammany Parish Public Schools from informing those girls' parents of the biological sex of their children's roommate.

29. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to

homeschool their children or enroll them in a religious school. On Facebook one woman stated, "I don't even have school age kids but if I did, especially a girl, it would be time to move to home schooling if this does go into effect." Another woman responded to her comment saying, "We are seriously considering this (homeschool) for next school year. It is just awful what is occurring in our public schools." Another parent commented, "Homeschooling just keeps looking better." And another stating, "And this is one of the reasons why I'm no(t) sending my kids to public school."

30. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the St. Tammany Parish Public Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "discrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

31. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

32. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at

33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 9th day of May, 2024 in Covington, Louisiana.

Frank J. Jabbia, Superintendent
St. Tammany Parish School Board

Exhibit 23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA,
By and through its Attorney General,
Elizabeth B. Murrill; et al.,

PLAINTIFFS,

v.

U.S. DEPARTMENT OF EDUCATION; et al.,

DEFENDANTS.

Civil Action No. 3:24-cv-00563

Chief Judge Terry A Doughty
Magistrate Judge Kayla D. McClusky

DECLARATION OF THE WEST CARROLL PARISH SCHOOL BOARD

Under 28 U.S.C. § 1746, I, Laura Perkins, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the President of the West Carroll Parish School Board ("School Board" or "the Board"). Under Louisiana law, the School Board is elected and has policymaking, financial, and administrative power over schools within its district ("West Carroll Parish Schools" or the "school district").

2. Among its powers and responsibilities, the School Board secures funds for the school district, including by applying for grants, levying authorized taxes, and issuing bonds, and administers those funds. The School Board is also responsible for all school facilities within the district, including determining whether improvements are necessary, authorizing construction projects, and overseeing those projects.

3. The School Board oversees three (3) schools, which provide education for approximately 1,560 students in pre-kindergarten through 12th grade.

4. The School Board receives federal funding, including funds distributed under the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act. Because it is a recipient of federal funds, the School Board is subject to Title IX and Title IX regulations and has a Title IX coordinator.

5. During the last fiscal year (from July 2022 to June 2023) the School Board received $7,233,141 of federal funding subject to Title IX. It has received approximately $5,000,000 of federal funding so far this fiscal year (July 2023 to June 2024) that is subject to Title IX, and estimates it will receive at least $6,000,000 of federal funding next fiscal year (July 2024 to June 2025) that is subject to Title IX.

CURRENT POLICIES AND PRACTICES

6. Consistent with Title IX and current Title IX regulations, the School Board recognizes that biological differences between boys and girls demand differentiation based on sex in some circumstances to preserve privacy and promote respect, dignity, and equal opportunity for both sexes.

7. West Carroll Parish Schools accordingly have sex-specific bathrooms and locker rooms. Only biological males are allowed in bathrooms and locker rooms designated for "men" or "boys," and only biological females are allowed in bathrooms and locker rooms designated for "women" or "girls."

8. There are not currently any gender-neutral bathrooms, changing rooms, or showers for students. Likewise, there are no stalls in locker-rooms that allow privacy for individuals who do not want to change in an open locker room.

9. When students and employees claim a gender identity that differs from their biological sex, those students and employees may use a single-user bathroom. However, these are limited in all school locations, and they are currently designated for faculty and staff.

10. West Carroll Parish Schools also have some sex-specific classes and activities. For example, physical education teachers are typically assigned according to the gender of students.

11. West Carroll Parish Schools provide students with enriching extracurricular opportunities, including interscholastic athletics for junior high and high school levels. Many of the athletic teams are designated as being for boys or girls. For example, West Carroll Parish Schools have separate girls' teams for softball, basketball, and tennis and boys' teams for football, basketball, baseball, and tennis.

12. West Carroll Parish Schools follow Louisiana's Fairness in Women's Sports Act, which "promote[s] sex equality" by "providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition, accolades, scholarships, better physical and mental health, and the numerous other long-term benefits that flow from success in athletic endeavors." La. Rev. Stat. § 4:442(9).

13. Accordingly, West Carroll Parish Schools' teams designated for girls are not "open to students who are not biologically female." *Id.* § 4:444(A)(3). The School Board believes this policy advances equal athletic opportunities for girls, increases girls' participation in athletics, and reduces the chances that girls will be seriously injured by competing in contact sports with biological boys.

14. West Carroll Parish Schools occasionally have overnight field trips. On those field trips, West Carroll Parish Schools assigns chaperones and students to rooms based on sex. Students may be asked to sleep in the same bed when funds or hotel availability is limited. Exceptions are only made when the parents of students attend and choose to have their students share a room with them.

15. The School Board does not have a policy that requires students and staff to use biologically inaccurate pronouns or neopronouns based on an individual's claimed gender identity.[1]

16. The School Board believes its policies and practices are in the best interest of students, staff, community, and its educational mission.

THE RULE'S IMPACT

17. On April 29, 2024, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). Although the Rule has an effective date of August 1, 2024, *see id.* at 33,549, the Rule has already caused and will continue to cause the School Board and school district irreparable harm well before that date.

18. The Rule harms the school district by dramatically increasing its federal obligations, compliance costs, and litigation risks. It does so by, among other things, (1) revising Title IX's prohibition on sex discrimination to include discrimination based on other grounds,[2] such as "gender identity,"[3] (2) generally requiring persons to be treated consistently with his or her claimed gender

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[1] *See Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), https://www.hrc.org/resources/understanding-neopronouns ("Neopronouns are also pronouns, and include those pronouns besides the ones most commonly used in a particular language. As one's pronouns are ultimately a reflection of their personal identity, the number and types of (neo)pronouns a person may use is limitless. Examples of neopronoun sets include: xe/xir/xirs, ze/zir/zirs and fae/faer/faers.").

[2] *See* 89 Fed. Reg. at 33,886 ("Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.").

[3] *See id.* at 33,809 (disagreeing that the term "gender identity" needs to be defined in the regulations and "understand[ing] gender identity to describe an individual's sense of their gender, which may or may not be different from their sex assigned at birth" or "subjective, deep-core sense of self as being a particular gender"); *id.* at 33,818 (recognizing that someone can have a gender identity other than "male or female"); *see also What Are the 72 Other Genders?*, MedicineNet (medically reviewed on Feb. 9, 2024), https://www.medicinenet.com/what_are_the_72_other_genders/article.htm (explaining that there are 72 other genders "[b]eside male and female," and "[t]he idea is to make everyone feel comfortable in their skin regardless of what gender they were assigned at birth"); *What you need to know about xenogender*, LGBTQNation (updated on July 26, 2022), https://www.lgbtqnation.com/2022/03/need-know-xenogender/ (explaining that "xenogender" "describes someone who doesn't' feel like their gender identity fits into any of the traditional categories of male or female," "[x]enogender identities . . . fill a 'lexical gap' . . . by comparing their gender identities to certain concepts – pre-existing or imaginary," and that "[t]here dozens of different types of xenogenders out there").

identity,[4] which includes allowing persons to use bathrooms and locker rooms that are inconsistent with their biological sex,[5] and (3) expanding prohibited discrimination to include allegedly harassing speech that limits educational opportunities,[6] which can include a refusal to refer to a student by whatever pronouns that student demands.[7]

19. The Rule thus conflicts with many of the school district's policies and practices, including the ones detailed above that provide for sex-specific facilities, classes, and athletic teams. It will also require the school district to adopt a policy ("New Speech Policy") that, among other things, (1) prohibits students and staff from using accurate pronouns for persons who claim a gender identity that is different from their biological sex and (2) requires students and staff to use biological inaccurate pronouns or neopronouns based on an individual's claimed gender identity.

20. That means, as a threshold matter, the Rule imminently harms the school district by interfering with the authority of the duly elected School Board to set policies and establish practices

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[4] *See* 89 Fed. Reg. at 33,809 ("To comply with the prohibition on gender identity discrimination, a recipient[,] . . . as described in more detail in the discussion of § 106.31(a)(2), generally may not prevent a person from participating in its education program or activity consistent with the person's gender identity."); *id.* at 33,887 (§ 106.31(a)(2)) ("In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, [with limited exceptions.] Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.").

[5] *See id.* at 33,818 (denying "a transgender student access to a sex-separate facility or activity consistent with that student's gender identity . . . would violate Title IX's general nondiscrimination mandate"); *id.* at 33,818 (agreeing that "students experience sex-based harm that violates Title IX when a recipient bars them from accessing sex-separate facilities or activities consistent with their gender identity"); *id.* ("a recipient must provide access to sex-separate facilities, including bathrooms, in a manner that does not cause more than de minimis harm").

[6] *See id.* at 33,882, 33,884 (defining "[s]ex-based discrimination" to include harassment based on "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"); *id.* at 33,884 (defining "[h]ostile environment harassment" as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)").

[7] *See id.* at 33,516 (discussing "unwelcome conduct based on gender identity" and citing U.S. Equal Emp. Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination, https://www.eeoc.gov/sexualorientation-and-gender-identity-sogidiscrimination* ("SOGI Guidance")); *see also* SOGI Guidance ("Although accidental misuse of a transgender employee's name and pronouns does not violate Title VII, intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee could contribute to an unlawful hostile work environment.").

that it believes are in the best interest of its students, staff, community, and its educational mission. The Rule will require the School Board to start taking steps to change to its current policies and practices, which the School Board does not wish to do.

21. Moreover, requiring the School Board to change policies and implement new procedures across Students may be asked to sleep in the same bed when funds or hotel availability is limited. Schools will impose the following imminent and irreparable compliance costs:

a. Costs and time to review and understand the Rule, which will take approximately 100 hours of employee time and cost approximately $10,000. Some of these costs have already been incurred; however, the bulk of these costs will be incurred by the general operating account rather than through Federal funds.

b. Costs and time to revise school district policies, which will take approximately 250 hours of employee time and cost approximately $25,000. The school district policies will need to be completed and approved by no later than June 2024, so that the school district has time to revise employee training materials and train employees before the Rule's effective date.

c. Costs and time to revise employee training, which take approximately 100 hours of employee time and cost approximately $10,000. This will need to be completed by July 2024.

d. Costs and time to train employees regarding new obligations under the Rule and changes to school district policies and practices, which will take approximately 1,200 hours of employee time and cost approximately $120,000. This training will need to be completed by the end of July in order for it to be enforced in August of 2024.

22. Furthermore, the specific policy changes that are required by the Rule will impose additional costs on the school district. For example, the New Speech Policy will chill academic discourse and detract from the school district's ability to teach students to be critical thinkers who can engage with ideas from a variety of viewpoints. Teachers will be conscripted into enforcing this policy and to report any speech that "reasonably may" constitute harassment under the Rule, 89 Fed. Reg. at 38,888, which could include students expressing a religious belief about humanity or using accurate pronouns for a classmate who demands everyone use neopronouns, *see id.* at 33,514–16. This would hurt the school district (and the students) from diverting teachers' time and attention away from

teaching and would likely lead some teachers to resign. This policy will also likely lead to private litigation. Some teachers and parents (on behalf of their children) would sue the school district claiming infringement of Free Speech and Free Exercise rights.

23. To take another example, the school district will need to change its policy and practices so that men or boys who claim to have a female gender identity can use girls' bathrooms and locker rooms. The Rule warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation requirements" before treating a student consistently with claimed gender identity "imposes more than de minimis harm" and would be discrimination. *Id.* at 33,819. The school district therefore cannot prevent male predators from insincerely asserting a female gender identity to access girls' bathrooms and locker rooms. They cannot, for example—without risking enforcement proceedings and liability under the Rule—require a diagnosis of gender dysphoria (previously referred to as gender identity disorder) before allowing a male to enter a girls' bathroom or locker room.

24. In an effort to lessen the harms caused by the Rule (and possibly to comply with the Rule itself),[8] the school district would be compelled to undertake expensive construction projects to convert all bathroom and locker rooms into single-user facilities or to otherwise make modifications to increase students' privacy and safety.

25. The district will be forced to install additional restrooms and showers on all three campuses, and the total cost will require an RFP process. The district would need a 12-month time allowance to complete these projects.

26. The Rule also will create conflicts between West Carroll Parish Schools and parents, such as by requiring school districts to take steps to address purported harassment even when that

[8] The Rule requires school districts to provide "nondiscriminatory access to facilities" to students who "do not identify as male or female." *See id.* at 33,818. If school districts designate certain bathrooms as "girls" bathrooms and certain bathrooms as "boys" bathrooms, they may need to likewise designate other bathrooms in accordance with multiple other gender identities.

child's parents do not wish to file a complaint and believe that no harassment occurred. *See, e.g.*, *id.* at 33,821–22 (refusing to answer "whether a recipient should comply with a request by a minor student to change their name or pronouns used at school if their parent opposes the change"); *id.* at 33,596–97 (noting that even where the Title IX coordinator defers to the parent about whether to file a complaint, "the Title IX Coordinator may still be required to, as necessary, take other steps," such as training about harassment). This harms the school district that believes in partnering with parents and could lead to lawsuits alleging the school district has violated parental rights.

27. Additionally, the Rule limits what information West Carroll Parish Schools can share with parents and warns that schools could be guilty of harassment if they disclose someone's gender identity (such as informing parents that a biological boy identifies as a girl). *See id.* at 33,622 (explaining that schools could violate the Rule if they "disclose personally identifiable information about a student's sexual orientation or gender identity broadly to other students or employees, which resulted in the student experiencing sex-based harassment"); *id.* at 33,537 (emphasizing that, "[t]o the extent that a conflict exists between a recipient's obligations under Title IX and under FERPA [the Family Educational Rights and Privacy Act], § 106.6(e) [of the Rule] expressly states that the obligation to comply with the Title IX regulations is not obviated or alleviated by the FERPA statute or regulations" and "that a recipient must not use FERPA as a shield from compliance with Title IX"). This places West Carroll Parish Schools in an untenable position, especially when it comes to overnight field trips. The Rule seems to both require West Carroll Parish Schools to assign boys who claim to be girls to a girls-only room and to prohibit the West Carroll Parish Schools from informing those girls' parents of the biological sex of their children's roommate.

28. The Rule will likely harm the school district by reducing enrollment. Many parents in our community will not want their children to have to share bathrooms, locker rooms, and overnight accommodations with members of the opposite sex or have their children's speech and religious

exercise to be chilled. Accordingly, the Rule will cause an increased number of families to decide to homeschool their children or enroll them in a religious school. Local families have already expressed their disgust with and concern about The Rule and have stated that they will not allow their students to attend public schools required to enforce it.

29. Additionally, the Rule will increase the School Board's obligations and risks of liability related to the West Carroll Parish Schools' compliance with Louisiana law prohibiting boys from playing on girls' teams. Because the Rule defines "discrimination on the basis of sex" to include "gender identity" and generally requires schools to treat children according to their claimed gender identity, *id.* at 33,815, 33,886, the school district's refusal to allow a boy who identifies as a girl from playing on a girls' team would be conduct that "reasonably may be sex" discrimination under the Rule that will trigger the school district's obligations to "respond promptly and effectively" and increase liability risks, *id.* at 33,563, 33,888; *see* Brief of U.S. Dep't of Justice, Civil Rights Division, *B.P.J. v. West Va. State Bd. of Educ.*, No. 23-1078, ECF No. 68-1 at 12–13 (4th Cir. Apr. 3, 2023) (arguing that categorically prohibiting boys who claim a female gender identity from "participating on girls' sports teams because their sex assigned at birth was male . . . discriminates on the basis of sex").

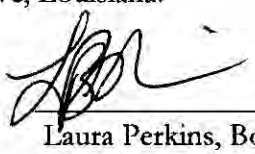
30. The Rule will also impose ongoing costs on the school as a result of increased Title IX complaints, investigations, and private lawsuits based on, among other things, the (1) expanded scope of what constitutes discrimination on the basis of sex, (2) expanded definition of harassment, and (3) application of Title IX to conduct that occurs outside of the school district's programs and activities.

31. Other provisions of the Rule will also require the school district to expend more time and resources. For example, the Rule increases monitoring and recordkeeping requirements. *See id.* at 33,886 (requiring recipient to keep "each notification" "about conduct that reasonably may constitute

discrimination" and "actions the recipient too" in response for seven years); 33,888 (requiring Title IX Coordinator to monitor recipient's programs and activities "for barriers to reporting).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 6th day of May, 2024 in Oak Grove, Louisiana.



Laura Perkins, Board President
West Carroll Parish School Board

Exhibit 24

All-gender, single stalls for Loudoun Co. school bathrooms could cost hundreds of millions

by Nick Minock
Wed, April 26th 2023 at 6:01 PM
Updated Wed, April 26th 2023 at 6:34 PM

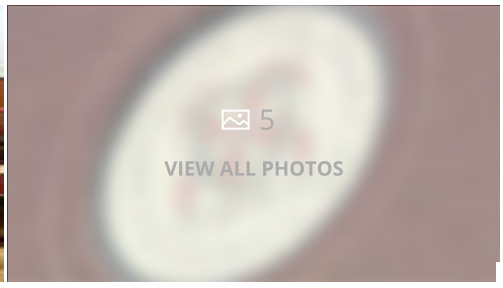


Photo illustration (Nick Minock/7News)

LOUDOUN COUNTY, Va. (7News) — At Tuesday's Loudoun County School Board meeting, parents were vocal in their opposition to Loudoun County school cuts that include online learning and some special education positions. And parents expressed their outrage at the school board for spending $11 million on new bathrooms.

"It is devasting to me that the majority of the school board is focused on flushing millions of dollars down the toilet in unneeded bathrooms in the name of affirmation and inclusion," one parent told school board members Tuesday.

"For all the students that don't feel comfortable with sharing the restroom with the opposite sex, I see you. You are loved," another Loudoun County resident told the school board.

The Loudoun County School Board spends $11 million on a new bathroom design while special education teachers plea for more hires. (7News)

RELATED | Loudoun schools explore replacing boys and girls bathrooms with all-gender, single stalls

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As part of a pilot program, the Loudoun County School Board is reconstructing a handful of bathrooms at five schools which costs Loudoun County Public Schools $11 million, according to LCPS' plan.

If the school board decided to reconstruct bathrooms at every Loudoun County school at the same price, it could cost the county more than $211.2 million.

READ THIS | **Loudoun County School Board spends $11M on new bathroom design, cuts special ed funds**

One of the bathroom design options that the Loudoun County School Board is considering is gender-neutral bathrooms with floor-to-ceiling bathroom stalls.

"I would say it's financially irresponsible. I would say it's financially negligent," Loudoun County father Brandon Michon told 7News. "I would say it is ludicrous. Our board of supervisors should be vocal and say this is a waste of money as well and they should vocally come out and say 'We will reject your budget if this even goes through'. This school board in my mind has been agents of chaos, pushing political agendas, and they make it seem like every student in this county just doesn't know that they don't identify as something yet. Yet, the statistics prove that's not the case."

The majority of the school board is looking at new bathroom designs to accommodate transgender and nonbinary students.

Here is the link to Loudoun County Public School's Policy 8040 on the rights on transgender and gender-expansive students.

On Tuesday night, school board member Harris Mahedavi pushed back against the backlash from parents who are upset about cuts to special education while the school board spends money on new bathrooms.

"We've gotten beat up tonight. And for the last month we've been beaten up because somehow we cannot communicate all the good things we are doing," said Mahedavi. "Tonight was really sad for me getting beat up for things we are doing above and beyond. We are trying to do our best."

Exhibit 25

HOMEROOM

THE OFFICIAL BLOG OF THE U.S. DEPARTMENT OF EDUCATION

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From the Secretary (https://blog.ed.gov/author/mcardona/)

A Timing Update on Title IX Rulemaking

Posted by U.S. Department of Education (https://blog.ed.gov/author/bloged/) May 26, 2023 (2023-05-26T12:00:00-04:00) (https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/) Headlines (https://blog.ed.gov/topic/headlines/), News (https://blog.ed.gov/topic/news/), Title IX (https://blog.ed.gov/topic/title-ix/)

The Biden-Harris Administration is committed to ensuring all students are guaranteed an educational environment free from discrimination on the basis of sex. To that end, amending the Department of Education's (Department's) regulations that implement Title IX of the Education Amendments of 1972 (Title IX) is a top priority to ensure full protection against sex discrimination for all students in federally funded education programs and activities.

The Title IX proposed regulations that the Department released in July 2022 are historic. They would strengthen protections for students who experience sexual harassment and assault at school, and they would help protect LGBTQI+ students from discrimination. The Department received more than 240,000 public comments on the proposed rule – nearly twice as many comments as the Department received during its last rulemaking on Title IX.Carefully considering and reviewing these comments takes time, and is essential to ensuring the final rule is enduring. That is why the Department is updating its Spring Unified Agenda to now reflect an anticipated date of October 2023 for the final Title IX rule. In addition, the Department is updating its Spring Unified Agenda to reflect an anticipated date of October 2023 for its proposed Athletics regulation, which received over 150,000 comments during its recent public comment period from April 12 – May 15, 2023. The Department is currently reviewing each of these comments, and is grateful for the extensive public participation and comments received in this rulemaking process.

You can access the July 2022 NPRM here (https://www.govinfo.gov/content/pkg/FR-2022-07-12/pdf/2022-13734.pdf), view submitted comments here (https://www.regulations.gov/docket/ED-2021-OCR-0166/comments) and find a fact sheet about the July 2022 NPRM here (https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf). You can access the Athletics NPRM here (https://www.govinfo.gov/content/pkg/FR-2023-04-13/pdf/2023-07601.pdf), view submitted comments here (https://www.regulations.gov/docket/ED-2022-OCR-0143/comments), and find a fact sheet about the Athletics NPRM here (https://www2.ed.gov/about/offices/list/ocr/docs/t9-ath-nprm-factsheet.pdf).

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Exhibit 26

STATE OF TENNESSEE

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September 12, 2022

SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV

The Honorable Miguel Cardona
Secretary of Education
Department of Education Building
400 Maryland Ave., SW
Washington, D.C. 20202

Re: Docket No. ED-2021-OCR-0166 ("Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance")

Dear Secretary Cardona,

The People and State of Tennessee, joined by nineteen co-signing States, appreciate the opportunity to comment on the U.S. Department of Education's recent proposal to amend the federal regulations implementing Title IX. *See* Dep't of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* ("Proposal"), 87 Fed. Reg. 41,390 (July 12, 2022). We share the Department's interest in providing every primary, secondary, and post-secondary student an educational environment free from harassment and incongruous discrimination. Unfortunately, the Department's proposed rule changes would force educators to pursue that end through unreasonable, unlawful, and counter-productive means.

As you are doubtless aware, Title IX's general prohibition on sex-based discrimination, *see* 20 U.S.C. § 1681(a), applies to "all the operations" of nearly every school in the country, *id.* § 1687; *see* 34 C.F.R. § 106.2(g). Read in that light, the Department's proposed amendments to 34 C.F.R. Part § 106 give us pause. In particular, the Department intends to expand the "scope" of Title IX by specifying that "[d]iscrimination on the basis of sex" in 20 U.S.C. § 1681 includes "discrimination on the basis of … gender identity," Proposal at 41,571 (proposed 34 C.F.R. § 106.10), despite Congress omitting the term "gender identity" from all of Title IX's numerous provisions.

The Department has also proposed equally atextual additions to 34 C.F.R. § 106.31(a). At present, 34 C.F.R. § 106.31(a) largely tracks the language of Title IX itself, stating in relevant part that:

> Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.

To this, the Department proposes adding:

> In the limited circumstances in which Title IX or [34 C.F.R. pt. 106] permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

Proposal at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)).

These new rules lack statutory foundation and will trench on constitutional rights. They will also negatively impact countless students, teachers, and school administrators in ways the Department has failed to address — or even recognize. We thus offer the following comments with the hope that the Department will reconsider the proposed rules and avoid potential litigation:

I. The Department's proposed rules conflict with Title IX and violate the Constitution.

The Department has an obligation to "reasonably explain[]" how its rules fit within its lawful administrative authority. *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 596 (D.C. Cir. 2022) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)). But because the Department has disregarded the text of Title IX and multiple constitutional restraints, there can be no reasonable explanation for its proposals.

A. The Department has not grounded its proposed rules in the text, structure, or purpose of Title IX.

The Department cannot lawfully promulgate rules that conflict with Title IX. *E.g.*, *Children's Health Def. v. FCC*, 25 F.4th 1045, 1052 (D.C. Cir. 2022). Title IX's meaning comes from its terms, "read in context," and in light of "the problem Congress sought to solve." *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) (quoting *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004)). On every level of analysis, however, the Department's proposed rules run counter to the statute. *See Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-00308, 2022 WL 2791450, at *21 (E.D. Tenn. July 15, 2022) (noting that the Department's proposed policies "create[] rights for students and obligations for regulated entities … that appear nowhere in … Title IX").

To begin with, Title IX explicitly addresses "sex," not gender identity. It starts by prohibiting discrimination "on the basis of sex" and "sex" alone. 20 U.S.C. § 1681. It then identifies examples of "sex"-based discrimination to which the prohibition does *not* apply. *See id.* § 1681(a). Following this, the statute clarifies that discrimination "on the basis of sex" does *not* encompass the "maintain[ence of] separate living facilities for the different sexes." 20 U.S.C. § 1686.

These repeated references to "sex" must be read "in accord with the ordinary public meaning of ['sex'] at the time of [Title IX was] enact[ed]." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). And at that time, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J. dissenting), *cert. denied*, 141 S. Ct. 2878 (2021). In 1961, the Oxford English Dictionary defined "Sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." 9 Oxford English Dictionary 578 (1961). In 1970, the American College Dictionary defined "Sex" to mean "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished." The American College Dictionary 1109 (1970). A year later, Webster's Third New International Dictionary defined "Sex" to mean "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction." Webster's Third New International Dictionary 2081 (1971). The year after Title IX became law, Random House defined "Sex" as "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions." The Random House College Dictionary 1206 (rev. ed. 1973). And a few years after that, the American Heritage Dictionary defined "Sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions." American Heritage Dictionary 1187 (1976). Each of these sources indicates that Title IX uses "sex" as a reference to the categories of "male" and "female," which "simply are not physiologically the same." *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (citing and discussing *United States v. Virginia*, 518 U.S. 515 (1996)).

Linguistic context and statutory structure both confirm that Congress meant "sex" as a reference to this biological dichotomy, not the abstruse concept of gender identity. Advocates for gender-identity-based public policy often stress that a person's "innermost concept of" gender may fluctuate over time and defy biology's "male" or "female" binary. *See, e.g.*, *Sexual Orientation and Gender Identity Definitions*, Human Rights Campaign (last visited Sept. 8, 2022).[1] Title IX, by contrast, speaks of permitting sex-based discrimination among "Men's" and "Women's" associations and organizations for "Boy[s]" and "Girls," "the membership of which has traditionally been limited to persons of one [or the other] sex." 20 U.S.C. § 1681(a)(6)(B). The statute also describes how an institution may change "from ... admit[ting] only students of one sex" (that is, male *or* female) "to ... admit[ting] students of both sexes," (male *and* female). 20 U.S.C. § 1681(a)(2). In addition to implying that "sex" means "sex," those provisions foreclose any reading of "sex" that incorporates gender identity. It would make no sense to reference schools that "admit students of *both* [gender identities]," *id.*, if in fact such "identities" have "no fixed number" and populate an "infinite" spectrum of "possibilities,"

[1] https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions (attached hereto as Exhibit A).

Veronica Zambon, *What Are Some Different Types of Gender Identity?*, Medical News Today (Updated May 12, 2022) ("Medically reviewed by Francis Kuehnle, NSN, RN-BC").[2]

Clues from history cut against the Department as well. To begin with, "[t]he phrase 'gender identity' did not exist" in 1972 "outside of some esoteric psychological publications." Ryan T. Anderson, Ph.D, & Melody Wood, *Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do* (Heritage Found. Backgrounder No. 3201, 2017).[3] In fact, "the word 'gender'" itself "had been coined only recently in contradistinction to sex." *Id.* It thus comes as no surprise that the earliest Title IX rulemaking codified sex-separated "toilet, locker room, and shower facilities" without a whiff of discussion about gender identity. HEW, *Nondiscrimination on Basis of Sex*, 40 Fed. Reg. 24,127, 24,141 (June 4, 1975) (now codified at 34 C.F.R. § 106.33); *see* HEW, *Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, 39 Fed. Reg. 22,227, 22,230 (June 20, 1974) (proposing the rule without explanation); 40 Fed. Reg. at 24,141 (finalizing the rule without justification or response to commentary). And those same regulations (again) implied that "sex" would naturally differentiate athletes by virtue of "competitive skill" and raise safety issues when "the activity involved is a contact sport" — something that cannot be said of gender identity. 40 Fed. Reg. at 24,134 (discussing 45 C.F.R. § 86.41, predecessor to 34 C.F.R. § 106.41).

Finally, reading "sex" to mean "sex" neatly aligns with Title IX's indisputable aim: ending the "corrosive and unjustified discrimination against *women*" that was "overt and socially acceptable within the academic community" in the early 1970s. 118 Cong. Rec. 5803 (1972) (remarks of Senator Bayh) (emphasis added). *That* invidious, sex-based discrimination prompted a series of congressional hearings, which eventually inspired the legislation. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 n.16 (1979). And in recognition of this fact, the courts have long construed Title IX as conferring a "special benefit" on "persons discriminated against" because they are biologically female — not because they *identify* as women. *Id.* at 694; *see also id.* at 680 ("Petitioner's complaints allege that her applications for admission to medical school were denied by the respondents because she *is* a woman." (emphasis added)).

The Department nonetheless insists that discrimination "on the basis of sex" necessarily *includes* discrimination "on the basis of gender identity" under the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See, e.g.*, Proposal at 41,530–32. That's wrong. The *Bostock* case concerned a funeral home employee who had been fired "simply for being … transgender." 140 S. Ct. at 1737. The question was whether that firing constituted discrimination "because of ... sex" under Title VII. *Id.* at 1738 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court "proceed[ed] on the assumption that 'sex'" was a "biological distinction[] between male and female," nothing more or less. *Id.* at 1739. In fact, it explicitly "agree[d]" with the defendants that "transgender status" is a "distinct concept[] from sex." *Id.* at 1747. Even so, the Court held that the firing violated Title VII specifically because a male employee was punished for behavior permitted for the employee's female colleagues. *Id.* at 1744.

In reaching that holding, however, the Court explicitly declined to address sex segregation at schools under Title IX. *See id.* at 1753; *see also Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021)

[2] https://www.medicalnewstoday.com/articles/types-of-gender-identity (attached hereto as Exhibit B).
[3] https://www.heritage.org/sites/default/files/2017-03/BG3201.pdf (attached hereto as Exhibit C).

(recognizing *Bostock*'s "narrow reach"). And for good reason: Title VII is *not* Title IX. *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). Whereas Title VII prohibits any adverse employment action "because of … sex," full stop, 42 U.S.C. § 2000e-2, Title IX explicitly *permits* discrimination "on the basis of sex" in numerous circumstances, 20 U.S.C. § 1681(a)(1)–(9). More importantly, Title IX dictates that "maintaining separate living facilities for the different sexes" is *not* sex-based discrimination in the first place. 20 U.S.C. § 1686. The Department fails to account for those distinctions in its misapplication of *Bostock*.

Moreover, even if the Department had the correct reading of *Bostock*, its rules would still conflict with Title IX. Most strikingly, the Department wants to mandate accommodation of a person's gender identity *even* when "Title IX … permits different treatment or separation on the basis of sex." Proposal at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)). The Department has neither identified a textual basis for that rule nor explained how it follows from *Bostock* or any other precedent. And although the rule includes a carveout in cases where discrimination is "otherwise permitted by Title IX or [34 C.F.R. part 106]," *id.*, the Department has not explained how the rule's general prohibition and exception work together. The regulation seems to contemplate circumstances where "Title IX … permits different treatment … on the basis of sex" but does *not* "otherwise permit" a failure to accommodate "gender identity." *Id.* What are those circumstances? If the Department believes they exist, it should specify them now rather than cause "unfair surprise" through sporadic, after-the-fact applications. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2404 (2019) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 159 (2007)).

Indeed, the Department's "erratic[]" and "inconsistent[]" approach to the gender-identity issue only heightens the need for a cogent and clearly articulated interpretation of Title IX, grounded in the statute's actual terms. *Nat'l Treasury Emps. Union v. FLRA*, 399 F.3d 334, 337 (D.C. Cir. 2005) (quoting *Am. Fed'n of Gov't Employees v. FLRA*, 712 F.2d 640, 643 n.17 (D.C.Cir.1983)). If the Department cannot provide that logical underpinning, it must abandon its rulemaking proposal.

Further, the Department repeatedly relies upon a 2021 Notice of Interpretation that the U.S. District Court for the Eastern District of Tennessee has preliminarily enjoined the Department from enforcing against twenty States, including Tennessee and several other signatories to this letter. *E.g.*, Proposal at 41,531–33 (citing Dep't of Educ., *Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of* Bostock v. Clayton County, 86 Fed. Reg. 32,637 (June 22, 2021)); *see Tennessee*, 2022 WL 2791450, at *24. In its filings in that case, the Department has agreed that it may "not cite, reference, treat as binding, or otherwise rely upon" the 2021 Notice of Interpretation in any enforcement or administrative action against the twenty States. Notice of Compliance at 2, *Tennessee*, ECF No. 97. To comply with the preliminary injunction, the Department cannot continue to treat the enjoined 2021 Notice of Interpretation as binding. Further, if the Department insists on pursuing its rulemaking proposal, the Department must "make appropriate changes" to the proposed rule, *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022), that acknowledge how such proposed rulemaking "creates rights for students and obligations for regulated entities not to discriminate based on … gender identity that appear nowhere in *Bostock*, Title IX, or its [current] implementing regulations." *Tennessee*, 2022 WL 2791450, at *21.

B. The proposed rules would infringe on the constitutional rights and interests of students, parents, school faculty, and the States.

The Department has also failed to account for the impact its proposed rules will have on fundamental constitutional rights and interests. Attempting to expand the reach of its preferred policies, the Department says it will require schools to "take prompt and effective action to end any sex discrimination …, prevent its recurrence, and remedy its effects." Proposal at 41,572 (proposed 34 C.F.R. § 106.44(a)). In practice, that means policing interactions among students, parents, and faculty to compel public accommodation of each person's highly individualized, potentially fluid, and unverifiable gender identity. *See id.* at 41,571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)). This will trench on multiple constitutional rights and interests in ways that are easy to predict.

First, state-run public colleges will have to compel speech in violation of the First Amendment. This issue will predictably arise from the forced used of certain pronouns and other referential terms. *Meriwether*, 992 F.3d at 498. Advocates for transgender rights have repeatedly stressed that the language others use to refer to a person is "pivotal to [that person's] gender identity and how [he or she] relate[s] to the world," *Pronouns*, The Center (last visited Sept. 8, 2022),[4] and that referring to someone with language that does *not* fit that person's gender identity can thus cause feelings of "exhaust[ion]," "demoralize[ation]," and "invalidat[ion]," Sabra L. Katz-Wise, *Misgendering: What It Is and Why It Matters*, Harvard Health Blog (July 23, 2021).[5] In light of this, the Department's rules suggest that any failure to police referential speech could be considered "sex discrimination" if it "prevents a person from participating in an education program or activity consistent with the person's gender." Proposal at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)). If that is the case, however, the new prohibitions will necessarily compel public schools to violate the First Amendment. There can be no doubt that some college faculty will resist referring to students and colleagues by their "preferred pronouns." *See, e.g.*, *Meriwether*, 992 F.3d at 498–503. And whether motivated by faith, pedagogical theory, or simple disagreement, those speakers will have a right to express themselves under the First Amendment. *See id.* at 506. Indeed, "[i]f professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity." *Id.* Yet the Department's rules *require* schools to wield such power without so much as acknowledging the ensuing First Amendment problem.

Second, school administrators may feel forced — or empowered — to insert themselves into constitutionally protected family affairs. The Department must recognize that "[t]here [is] a 'private realm of family life which the state cannot enter,' that has been afforded both substantive and procedural protection[s]" under our Constitution. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 842 (1977) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (citation and footnote calls omitted). Those protections extend to cover the rights of parents to "bring up" their children as they deem fit, including through instruction on matters of behavior and ethics. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *see also Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 822 (2011) (Thomas, J., dissenting) (explaining "the founding generation['s]" fundamental belief that "parents had absolute authority … to direct the proper development of their

[4] https://gaycenter.org/pronouns/#more (attached hereto as Exhibit D).
[5] https://www.health.harvard.edu/blog/misgendering-what-it-is-and-why-it-matters-202107232553 (attached hereto as Exhibit E).

[minor] children"). All parents thus retain a constitutionally protected right to guide their own children on matters of identity, including the decision to adopt or reject various gender norms and behaviors.

The Department's proposed rules threaten that right by requiring school administrators to "take prompt and effective action" to accommodate the stated gender identity of each student — including very small children. Proposal at 41,571–72 (proposed 34 C.F.R. § 106.44(a)). At a minimum, those provisions bind school faculty to treat such children "consistent with [their] gender ident[ies]" on school grounds, even if that conflicts with a parent's preferences or nurturing judgment. *Id.* at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)). But the rules could go much further. For example, parents have already reported instances of school administrators, clothed in Title IX's auspices, taking extreme measures to ensure gender-identity "affirmance" in the *home*. *See* Kaylee McGhee White, *Biden's New Title IX Rules Deputize Teachers to Override Parents on Gender Identity*, Independent Women's Forum (Aug. 16, 2022).[6] Nothing could be more noxious to the "enduring American tradition" that grants parents the "primary role … in the upbringing of their children." *Barrett v. Steubenville City Sch.*, 388 F.3d 967, 972 (6th Cir. 2004) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)).

Finally, the Department's novel attempt to expand Title IX would push the statute beyond Congress's lawmaking authority. Congress does not have the ability to set education policy directly. Instead, it enacted Title IX through its broader power to tax and spend in pursuit of the "general Welfare." U.S. Const. art. I, § 8, cl. 1. But the exercise of that power comes with special limitations. Most notably, when Congress aims to direct State and local policy via the Spending Clause, it must do so through "clear[ ]statement[s]" in the legislation itself. *Haight v. Thompson*, 763 F.3d 554, 568 (6th Cir. 2014) ("Clarity is demanded *whenever* Congress legislates through the spending power …."); *see also Texas Educ. Agency v. U.S. Dep't of Educ.*, 992 F.3d 350, 361 (5th Cir. 2021) ("Relying on regulations to present the clear condition, therefore, is an acknowledgment that Congress's condition was not unambiguous …."). Only then can States "voluntarily and knowingly accept[]" or decline any obligations attached to federal funds. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). In this case, however, the Department wants to read new gender identity protections into Title IX without grounding them in clear statutory text. *See supra* Part I.A; *Tennessee*, 2022 WL 2791450, at *21. And the Department's reliance on *Bostock* provides no retort, for reasons already stated. *See supra* at 4–5. The upshot is that the new regulations would push Title IX beyond what the Constitution allows.

These constitutional concerns warrant greater attention if the Department intends to defend its new rules as anything other than arbitrary. The bedrock principles of administrative law require that all Title IX regulations reasonably fit the statute's language after the "ordinary tools of statutory construction" have been brought to bear. *Air Transp. Ass'n of Am., Inc. v. USDA*, 37 F.4th 667, 672 (D.C. Cir. 2022). One of those tools is the canon of constitutional avoidance, which requires that statutes "be construed to avoid serious constitutional doubts," whenever possible. *Brawner v. Scott Cnty.*, 14 F.4th 585, 592 (6th Cir. 2021) (quoting *FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 516 (2009)). Yet the constitutional issues just discussed receive scant, if any, consideration in the Department's rulemaking proposal. We urge the Department to consider and address those issues or else abandon this rulemaking exercise.

[6] https://www.iwf.org/2022/08/16/bidens-new-title-ix-rules-deputize-teachers-to-override-parents-on-gender-identity/ (attached hereto as Exhibit F).

II. The Department has ignored crucial policy issues that undermine its proposed rules.

Even if the Department could fit its new regulations within the proper constitutional and statutory boundaries, it still has not grappled with several knotty issues of policy. In wielding its rulemaking authority, the Department must "'reasonably consider[] the relevant issues' and factors" bearing on its course, *Advocates*, 41 F.4th at 586 (quoting *Prometheus*, 141 S. Ct. at 1158), and it must draw "rational connection[s] between the facts" and its proposed rules, *id.* (quoting *State Farm*, 463 U.S. at 43). The Proposal fails to do so in multiple critical respects.

A. The Department has not considered or addressed the difficulties of authenticating gender identity.

The Department's first and most fundamental error is a failure to consider how school administrators can put these new rules into practice. Specifically, although the Department wants students to "participat[e] in … education program[s and] activit[ies] consistent with th[ier] gender identit[ies]," Proposal at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)), it does not explain how school faculty should go about *determining* each student's gender identity.

That is no small feat. As already mentioned, the proponents of transgender rights often stress that gender identity "differ[s] from sex" precisely because it cannot be "define[d]" or verified as a matter of "genetic[s]" or biology. Zambon, *supra.* Instead, gender identity comes from "the inside," and "only the person themselves can determine what their gender identity is." *Id.*; *see also id.* ("The term gender identity refers to the personal sense of an individual's own gender."); Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 862 (Dec. 2015) ("[G]ender identity is internal ….").[7] Although "[p]eople *may* use clothing, appearances, and behaviors to express the gender that they identify with," they also may not — it is up to them. Zambon, *supra.* In addition, and again unlike sex, gender identity cannot be "divided along the binary lines of 'man' and 'woman.'" *Id.* Instead, it is thought to exist on a "spectrum," from which a person may choose any number of gender identities — or none at all — and may alter that choice at a moment's notice, "shift[ing] between, or … outside of, society's expectations." *Id.*; *accord* Jason Rafferty, *Ensuring Comprehensive Care & Support for Transgender & Gender-Diverse Children & Adolescents*, Pediatrics, Oct. 2018, at 2[8]; *see also* Zambon, *supra* (identifying and defining various gender identities, including "agender," "bigender," "omnigender," "polygender," "genderqueer," and "gender outlaw," to name just a few).

How, then, can teachers and school administrators determine and accommodate each student's gender identity? Should students be required "to meet with … trained and licensed … counselors" and be assigned to sex-separated facilities, events, and activities on a "case-by-case basis"? *Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 524 (3d Cir. 2018). Or should faculty simply accept and rely on each student's own reporting of what it means to live "consistent with [that student's] gender identity"? Proposal at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)). If the Department proposes the latter, then how (if at all) should schools account for a student's mental and emotional maturity or possible ulterior motives? More pointedly, if *outwardly* identifying as a girl grants access to the girls' locker room after gym class, what will stop pubescent males from taking advantage of that means of

[7] https://www.apa.org/practice/guidelines/transgender.pdf (attached hereto as Exhibit G)
[8] https://perma.cc/EE6U-PN66 (attached hereto as Exhibit H).

access? *Cf.* Expert Declaration and Report of Kenneth V. Lanning at 10, 13, *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 1:16-cv-00236-TDS-JEP), ECF No. 149-14 [hereinafter "Lanning Report"] (attached hereto as Exhibit I) (noting that "some adolescent high school boys or college males … might want to get into the girls' locker room" without "realiz[ing] that such activity is illegal" or "consider[ing] its effect on victims," *id.* at 10). The Department's proposed rules seem to require "prompt and effective action" to enable that very scenario. Proposal at 41,572 (proposed 34 C.F.R. § 106.44(a)).

Unless the Department addresses this problem, it cannot claim to have "reasonably considered" every "relevant issue[]" arising from its Proposal. *Advocates*, 41 F.4th at 586 (quoting *Prometheus*, 141 S. Ct. at 1158). And until the Department can produce a cogent response, it should refrain from finalizing new rules.

B. The Department's proposal dismisses well-founded concerns regarding student and faculty safety.

On a related note, the Department has not adequately accounted for the risks these new regulations could pose to student and faculty safety. Schools at every level of the education system have long provided sex-separated facilities — including locker rooms, restrooms, and dormitories — as a means of protecting *all* students, staff, and visitors in their most vulnerable moments. But what makes these places private also makes them susceptible to abuse by bad actors. Public restrooms and locker rooms, in particular, have long been designed to feature deliberately obstructed sightlines, few entrances or exits, and a categorical exemption from most forms of surveillance. Add the fact that most people using these facilities are partially or completely undressed, and the potential for voyeurism, harassment, and even violent crime should be obvious.

Contrary to the Department's apparent assumptions, last year's nationally recognized story of a "15-year-old [Virginia] boy" who "sexually assault[ed] a female classmate in a school bathroom" was no anomaly. Laura Wainman & Nicole DiAntoniao, *Teen Boy Sexually Assaulted Classmate in a School Bathroom, Judge Says*, WUSA 9 (Oct. 26, 2021).[9] News reports and court records have long illustrated the unfortunate truth "that public toilets … are often the locale of [numerous crimes]," *People v. Young*, 214 Cal. App. 2d 131, 135 (Cal. Dist. Ct. App. 1963), specifically because they provide offenders the opportunity to "seek out victims in a planned and deliberate way," Expert Opinion of Sheriff Tim Hutchinson (Retired) at 6, *Carcaño*, ECF No. 149-15 [hereinafter "Hutchinson Report"] (attached hereto as Exhibit K). Take, for example, the recent report from Detroit of a fifteen-year-old male suspect "hid[ing] inside a stall" in a women's restroom "for about 20 minutes" before attacking a twenty-nine-year-old female. *See, e.g.*, Amber Ainsworth, *15-Year-Old Boy Charged After Trying to Sexually Assault Woman in Downtown Plymouth Public Bathroom*, Fox 2 Detroit (Nov. 24, 2021).[10] And the sixteen-year-old Michigan girl allegedly groped by "a man [who] came up behind her in the women's bathroom" at a bookstore. Roxanne Werly, *Surveillance Video Released Following Alleged Bathroom Assault*,

[9] https://www.wusa9.com/article/news/legal/teen-found-guilty-loudoun-county-bathroom-sexual-assault/65-e383c241-afd1-4539-8fa3-4ccb01562ea9 (attached hereto as Exhibit J).
[10] https://www.fox2detroit.com/news/15-year-old-boy-charged-after-trying-to-sexually-assault-woman-in-downtown-plymouth-public-bathroom (attached hereto as Exhibit L).

UpNorthLive (Nov. 9, 2017).[11] And the seven-year-old San Francisco girl accosted by a male suspect "in the female restroom at [a public] park." Nick Smith, *Young Girl Assaulted in SF Park Bathroom*, ABC 7 News (Nov. 22, 2014).[12] And the Los Angeles man who reportedly "walked into the women's restroom" at a restaurant "and sexually assaulted" a ten-year-old "as she got out of a stall." Juan Flores, *Man Sought in Sexual Assault of Girl, 10, in Denny's Restroom*, DTLA 5 Morning News (updated Jan. 7, 2014).[13] And the nightmare experienced by the eight-year-old Oklahoma girl locked inside a restroom by "a mostly naked man" who reportedly "got between her and the door[,] … wrapped a … coat around her neck[,] and began choking her." *Update: Homeless Man Suspected of Attacking Child in Gas Station Bathroom*, Oklahoma's News 4 (Sept. 16, 2013).[14] In each of those instances, and countless others, *see, e.g.*, Hutchinson Report at 7–8, 20–23, a male perpetrator exploited a bathroom's privacy-enhancing features to prey on a vulnerable female victim.

The Department nonetheless fails to recognize that its new rules will *enable* this nefarious conduct. At present, a woman encountering a male in a "sex-segregated space … do[es] not have to wait until the man has already assaulted her before she can fetch security." Cambridge Radical Feminist Network, *There Is Nothing Progressive About Removing Women-Only Bathrooms*, Medium (Jan. 13, 2019) [hereinafter "CRFM"].[15] But if a person's self-reported (and potentially multifaceted or shifting) gender identity can determine the bathrooms he may use, that safety valve will be bolted shut. *See id.* Some women may not even have recourse *following* abuse if their male perpetrators had every right to be present, expose themselves, or witness others changing in a restroom or locker room space. *See, e.g.*, *Man in Women's Locker Room Cites Gender Rule*, King 5 Seattle (Feb. 16, 2016).[16] In fact, the victims of voyeurism might not even realize when it has occurred or have any hope of identifying a suspect afterwards. *See, e.g.*, *Man Dressed as Woman Arrested for Spying into Mall Bathroom Stall, Police Say*, 4 Washington (last updated Nov. 18, 2015).[17]

Given that "children often delay reporting of sexual abuse until adulthood" and "only about 30% of sex crimes are reported overall," Hutchinson Report at 10, the Department cannot credibly dismiss these security concerns as "unsubstantiated," Proposal at 41,535; *see also* Hutchinson Report at 11 (noting additional reasons why schools and localities may not observe "an increase in reported offenses" following implementation of a gender-identity-based bathroom policy, including the ever-

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[11] https://upnorthlive.com/news/local/gallery/surveillance-video-released-following-bathroom-assault (attached hereto as Exhibit M).
[12] https://abc7news.com/sfpd-search-suspect-man/407219/ (attached hereto as Exhibit N).
[13] https://ktla.com/news/man-sought-in-sexual-assault-of-girl-10-in-palmdale-restroom/ (attached hereto as Exhibit O).
[14] https://kfor.com/news/police-okc-homeless-man-attacks-8-year-old-girl-in-bathroom/ (attached hereto as Exhibit P).
[15] https://medium.com/@camradfems/there-is-nothing-progressive-about-removing-women-only-bathrooms-37729064cfb7 (attached hereto as Exhibit Q).
[16] https://www.king5.com/article/news/local/seattle/man-in-womens-locker-room-cites-gender-rule/281-65533111 (attached hereto as Exhibit R).
[17] https://www.nbcwashington.com/news/local/man-dressed-as-woman-arrested-for-spying-into-mall-bathroom-stall-police-say/1979766/#:~:text=Richard%20Rodriguez%2C%2030%2C%20filmed%20a,been%20filming%20her%2C%20police%20said (attached hereto as Exhibit S).

present incentive "to minimize the appearance of a sex offense problem"); Lanning Report at 10–11 (explaining the many reasons why "nuisance" sex offenses go unreported, unrecorded, uninvestigated, and unprosecuted). Rather, they are the factually grounded and predictable outgrowth of an all-comers approach to bathrooms and other living facilities. And although "many women and young children would choose to leave a facility without reporting a sex offense, the scars from the crime would live on forever with these victims." Hutchinson Report at 11.

The Department will doubtless respond that these crimes can occur with or without sex-segregated living spaces. It may even note that most sexual crimes and offenses against children occur at home, not in public restrooms or locker rooms. Respectfully, that is no response at all. The problem with the Proposal is *not* that it fails to prevent these crimes in all instances; the problem with the Proposal is that it demonstrably *facilitates* these crimes in at least *some* instances by stripping away crucial safeguards. "[E]xisting trespassing, indecent exposure, peeping and other laws deter at least some" of the abovementioned offenses if and when facilities have clear and enforced sex designations. *Id.* But "[i]f someone c[an] enter a public facility based entirely upon their 'internal sense of gender,' then law enforcement personnel, bystanders, and potential victims would have to be able to read minds … to determine whether a man entering a women's facility was really transgender or was instead there to commit a sex offense." *Id.* And even after an incident — particularly voyeurism or exposure — has occurred, "offenders aren't as likely to be observed by or reported to police." *Id.*; *see id.* at 12.

Nor can the Department counter with any hard, contradictory data to allay these concerns. The law requires the Department to identify "the most critical factual material … used to support" its new rules *before* they are finalized, specifically for the purpose of "expos[ing]" such material "to refutation" in the public comment process. *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984)). "An agency commits serious procedural error when it fails to reveal … the technical basis for a proposed rule in time to allow for meaningful commentary." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530–31 (D.C. Cir. 1982). In this instance, the Department has declined to provide any credible empirical analysis supporting its new policies. That silence speaks volumes. Indeed, how can the Department conclude that "the benefits" of these new rules "far outweigh [their] estimated costs," Proposal at 41,547, when it fails to account for even the possibility that abolishing sex-separated facilities could increase crime and deter students and faculty from using public accommodations? *See id.* at 41,561.

C. The Department has not adequately accounted for the sex-based discrimination that will *result* from its proposed rule.

Finally, the Department has all but ignored the discrimination its new rules will visit on Title IX's primary intended beneficiaries: female students. Despite generally prohibiting invidious sex-based discrimination, the law has long preserved certain female-only spaces and activities precisely because they *benefit* female students and enrich their educational experiences. *See* 20 U.S.C. § 1681(a)(1)–(9); *id.* § 1686; *see also* Proposal at 41,534 ("The Department's regulations have recognized limited contexts in which recipients are permitted to employ sex-specific rules or to separate students on the basis of sex because the Department has determined that in those contexts such treatment does not generally impose harm on students." (citing 34 CFR §§ 106.33, 106.34(a)(3))). If male students can nonetheless enter those same spaces and engage in those same activities by merely professing a particular gender identity, female students will necessarily be harmed.

First, female students will suffer mental, emotional, and developmental harm from the loss of female-only dormitories, bathrooms, locker rooms, and showers. "[L]eaving aside the risk of assault, sex-segregated bathrooms give women the peace of mind of knowing they can use the bathroom, attend to their menstrual needs and to small children, with a degree of privacy and dignity that would otherwise not exist." CRFM, *supra*. And the loss of that private space will fall most heavily on "those individuals who — due to having a history of sexual assault, or for religious reasons — do not feel comfortable using a shared intimate space with male strangers." *Id.* Some female students may thus feel compelled to avoid certain bathrooms and other facilities, or even school altogether, which would undermine Title IX's principal aim. This concern is not hypothetical. By way of example, a group of young female students in Nebraska recently walked out of their high school classes to protest the loss of their sex-segregated bathrooms under a policy inspired by the statements of this Department. *See* Tara Campbell, *Transgender Rights Clash Prompts Walkout at CB Abraham Lincoln High*, 6 News WOWT (Apr. 11, 2019).[18] Yet the Department's proposal does not acknowledge this issue, much less explain why the purported interest of transgender students should take precedence over the interest of the female students that Title IX was enacted to serve.

Second, female students will be deprived of opportunities to participate in safe and fair athletics. The Department once championed those opportunities, *see, e.g.*, U.S. Dep't of Ed., *Athletics* (last visited Sept. 8, 2022),[19] and its Proposal apparently contemplates a separate rulemaking on "the question of what criteria, if any, [schools] should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team," Proposal at 41,537. Nevertheless, an overarching policy allowing all students to "participat[e] in" school "program[s and] activit[ies] consistent with th[eir] gender identity" could effectively guarantee male students an absolute right to play women's sports. Proposal at 41,571. That is not fair to female athletes.

Following puberty, in particular, the androgenized bodies of male athletes give them "categorically different strength, speed, and endurance" as measured by both elite and average performance. Doriane Lambelet Coleman & Wickliffe Shreve, Comparing Athletic Performances the Best Women to Boys and Men (last visited Sept. 9, 2022)[20]; *see also* Lydia C. Hallam & Fabiano T. Amorim, *Expanding the Gap: an Updated Look into Sex Differences in Running Performance*, Frontiers in Physiology, Jan. 2022, at 2 (explaining that "[t]he sex gap in sports performance is primarily rooted in biological differences between the sexes, namely in relation to male[s'] superior skeletal muscle mass, oxidative capacities and lower fat mass").[21] To illustrate, the Olympic gold medalist Tori Bowie — an incredible female sprinter — has run the one-hundred-meters in a lifetime-best 10.78 seconds. *Id.* In 2017, no fewer than 15,000 male runners beat that mark in recorded competition. *Id.* That example "is far from the exception. It's the rule." *Id.* In fact, "the sex gap is smaller between elite males and females compared to sub-elite and recreational runners." Hallam & Amorim, *supra*. And it persists "across sporting

[18] https://www.wowt.com/content/news/Transgender-rights-clash-prompts-walkout-at-CB-Abraham-Lincoln-High-508449271.html (attached hereto as Exhibit T).
[19] https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue04.html (attached hereto as Exhibit U).
[20] https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf (attached hereto as Exhibit V).
[21] https://www.frontiersin.org/articles/10.3389/fphys.2021.804149/full (attached hereto as Exhibit W).

events," with "the best male athletes consistently outperform[ing] their female peers" by anywhere "between 5 and 17%, depending on the sporting discipline, event duration and competitive standard." *Id.* Both the National Collegiate Athletic Association and the U.S. Olympic and Paralympic Committee have recognized this, which is why those organizations seek to "balanc[e] fairness, inclusion and safety for all who compete" by limiting the participation of transgender athletes based on testosterone levels. *Board of Governors Updates Transgender Participation Policy*, NCAA Media Center (Jan. 19, 2022).[22]

The Department's rules, by contrast, could push schools to allow students to choose their sports and teams based on self-reported gender identity alone. *See* Proposal at 41,571 (proposed 34 C.F.R. § 106.31(a)(2)). The result would threaten decades worth of gains in women's athletics and all the character-building benefits that have come along with those gains. For every male athlete permitted in women's competition, a female athlete is denied that same opportunity. *See* Editorial Staff, *16 Penn Swim Team Members Ask School, Ivy League to Refrain from Litigation to Allow Lia Thomas to Race at NCAAs*, Swimming World (Feb. 3, 2022).[23] For every male athlete who sets a new women's performance record, a female predecessor is robbed of a signature achievement. *See id.* And for every new policy implemented to ensure these results, legions of female athletes are affirmed in their belief that speaking out for their own rights and interests will only invite hostility and ridicule. *See id.*

Again, the Department has not delineated clear limits to its new policies. *See supra* at 5. But if its past pronouncements are any indication, it would rather dictate orthodoxy with respect to gender identity than actually prohibit discrimination in education on the basis of sex. Be that as it may, the law requires the Department to reason through the abovementioned issues before promulgating its new rules. To do any less would be an arbitrary and capricious exercise of administrative power and would have no legitimacy in our constitutional system.

* * *

Thank you, again, for your consideration of these concerns. Any further failure to "clearly disclose[]" or "adequately sustain[]" the new rules, especially in light of the deficiencies detailed above, will justify Tennessee and the co-signing States in taking further action to protect their citizens' rights and interests under the Administrative Procedure Act. *Oncor Elec. Delivery Co. LLC v. NLRB*, 887 F.3d 488, 493 (D.C. Cir. 2018) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)); *see also Cytori Therapeutics, Inc. v. FDA*, 715 F.3d 922, 926 (D.C. Cir. 2013) (noting that agency action must be both "reasonable and reasonably explained" (citing *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983)). We therefore urge the Department to comply with the law or else abandon this misguided rulemaking.

[22] https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx (attached hereto as Exhibit X).
[23] https://www.swimmingworldmagazine.com/news/penn-swim-team-members-ask-school-ivy-league-to-refrain-from-litigation-to-allow-lia-thomas-to-race-at-ncaas/ (attached hereto as Exhibit Y).

Sincerely,

Jonathan Skrmetti
Tennessee Attorney General & Reporter

Steve Marshall
Alabama Attorney General

Treg R. Taylor
Alaska Attorney General

Mark Brnovich
Arizona Attorney General

Leslie C. Rutledge
Arkansas Attorney General

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Alan Wilson
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Mark Vargo
South Dakota Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
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Jason S. Miyares
Virginia Attorney General

Patrick Morrisey
West Virginia Attorney General

Exhibit 27

Exhibit I

Carcaño v. McCrory, U.S. District Court for the Middle District of North Carolina, No. 1:16-cv-00236-TDS-JEP, ECF No. 149-14

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA et al., Defendants.	Case No. 1:16-cv-00425-TDS-JEP

EXPERT DECLARATION AND REPORT OF KENNETH V. LANNING

This is a preliminary report. As discovery is still underway, there may be a need for this report to be amended or supplemented. I am including a portion of my Curriculum Vitae in this report detailing my education, qualifications, law enforcement training and experience in the public safety field. I have been retained as an expert for the defense in this litigation. A list of materials I reviewed while making this opinion is attached as Exhibit A.

Summary of Opinions

1. Multi-occupant public facilities present a special class of public safety risks in connection with the activities of male sex offenders. These public safety risks are magnified substantially by the imposition of gender-identity based access policies or social norms ("GIBAPs") that purport to create access rights to showers, locker rooms, and restrooms based solely upon patrons' unverifiable self-declarations of their gender identities. It is not because transgender individuals use facilities that do not correspond with their biological sex that GIBAPs increase public safety risks, but rather because GIBAPs offer increased opportunities for improper and illegal conduct to both situational and preferential sex offenders.

2. By providing a clear objective criterion for who is legally entitled to use women-only facilities, Part I of North Carolina's HB2 makes it more difficult for male sex offenders to access female victims in public facilities without detection, and makes it more feasible for law enforcement personnel to report, investigate, and prosecute those offenses. Part I of HB2 also sends a clear message to society about what is unlawful in public facilities designated for women and girls and what kinds of activities should be reported to law enforcement officials.

coprophilia (feces), klismaphilia (enemas), urophilia (urine), infantilism (baby-related behaviors), hebephilia (acts involving female youth), and ephebophilia (acts involving male youth) and many others.

29. As previously noted, sexual behavior related to paraphilias sometimes results in what law enforcement refers to as "nuisance" (*i.e.,* high volume, low physical harm) sex offenses—but which can inflict psychological and emotional trauma on their victims. Many of these sex offenses take place in public areas where preferred and vulnerable victims are easily found. An issue in such sex offense investigations is often the possibility of progression to more serious offenses. Some nuisance sex offenders progress little over the years in their criminal sexual behavior. Some progress to more serious sex crimes and some move back and forth. In addition, depending on such things as social and economic status, some "nuisance" sex offenders might be more likely to resort to violence to avoid identification.

30. Such "nuisance" cases are usually given a low investigative priority and not solved because

    - Most incidents are not reported to law enforcement.
    - The sexual nature is often not recognized.
    - When they are reported they are either not recorded or recorded in a way that makes retrieval difficult.
    - Little, if any, manpower and resources are committed to the investigation.
    - Law-enforcement agencies frequently do not communicate and cooperate with each other concerning these cases.
    - The specific crimes often involve comparatively minor and hard to prove violations of the law.

    Although these cases are often given a low investigative priority, they should be taken seriously, as they can inflict psychological and emotional damage upon their victims.

31. As mentioned, sexual activity involving things such as rubbing, peeping, exposure, urination, and defecation is bizarre and repulsive for most to contemplate and discuss. Many are not aware that such behavior could even be sexual in nature. Society struggles to pass laws to deal with behavior it is not prepared to admit goes on. It is hard to pass laws to define, enforce, track, and count such questionable and distasteful behavior. It is these types of sex offenses that are most likely to increase as a result of expanded access to previously gender-isolated public facilities, whether as a result of an express policy or GIBAP, or as a result of changing social norms.

32. The risk that allowing biological males into facilities reserved for women and girls is real, and is illustrated by behavior already engaged in by some male sex offenders in facilities reserved for men. In my career, I have been involved in cases in which male sex offenders:

    - Went into male public restrooms with a video camera hidden in a bag to surreptitiously record partially dressed and urinating boys
    - Arranged to meet male partners, including children, in the male public restroom to engage in sexual activity
    - Went into male restrooms to get sexually aroused from the sound of males urinating

- Used "horseplay" in male locker rooms and showers as part of their grooming of male victims
- Touched and rubbed males napping at male athletic facilities
- Set up cameras in dressing rooms to record people changing clothing
- Stole women's or children's underwear from locker rooms
- Joined youth-serving organizations to use showers, restrooms, and sleeping arrangements to groom and sexually victimize boys
- Exposed their genitals for sexual gratification in male athletic facilities

33. Most of the above-described activity was learned not from reports of this activity to law enforcement, but from corroborative evidence seized from offenders during investigations into other criminal activity. If women's facilities become available to heterosexual males who merely claim or pretend to be transgender, I would reasonably expect similar sexual offenses to occur in those facilities as well.

Normal but Immature Males

34. Even ignoring sex offenders, we as a society have traditionally and typically separated people by sex in certain sensitive situations (e.g., rest rooms, dressing rooms, locker rooms, showers, and sleeping arrangements). These situations are clearly sensitive for many pubescent individuals and are the reason sex separation rules have traditionally been applied to Multi-Occupant Public Facilities. To help establish social customs and limit inappropriate behavior, application to young prepubescent children is also common.

35. These rules and social customs are not only because of potential deviant or criminal abuses, but also due to the "normal" sexual interest and attraction of the vast majority of society. For example, some adolescent high school boys or college males (who are not abnormal or sexual predators) might want to get into the girls' locker room. They may or may not realize that such activity is illegal, and they may or may not consider its effect on victims. The raging hormones and immaturity of young males drive the activity.

36. This interest is reflected in modern media. Movies particularly targeted at young males often have scenes focusing on males finding clever ways to observe females in various stages of undress in restrooms, locker rooms, and dorm rooms because these types of behaviors occur in real life. This is fiction based on reality. Co-educational schools, swimming pools, summer camps, and similar facilities have never been eager to gather or publicize data on the frequency with which such behavior is reported internally, but the phenomena are well known to those who operate such facilities and to those who have perpetrated or been victimized by such activity.

37. For these reasons, changes in access policies made to accommodate a very small minority of society ignore the reality of the sex drive of a very large majority. Allowing a man to use woman's rest room, locker room, dressing room, shower, or dormitory room simply because he says he *feels* like a woman would seem to be reckless, to ignore thousands of years of human experience, and to ignore potential criminal activity.

Opinions

1. Sexual Offenses In and Around Multi-User Public Facilities Would Likely Increase as a Result of GIBAPs or Similar Social Customs

38. As someone with over forty years experience investigating, consulting about, studying, and teaching about sex crimes and sex offenders, I have been following the debate regarding revised access to Multi-occupant Public Facilities for some time. I observed the polarizing emotion that dominated much of the discourse (discrimination/hate vs. enabling sexual predators) and the lack of clear and consistent definitions of terms.

39. I am aware that many advocates for new access guidelines based on gender identity argue that the claimed fear of GIBAP opponents--of male sexual predators now entering women's or girl's rest rooms--is absurd or blown out of proportion. They sometimes follow up this argument with the claim no transgendered person has sexually assaulted someone in a restroom or changing facility. But the problem with potential sex offenses is not crimes by transgendered persons. The problem, rather, is offenses by males who are not really transgendered but who would exploit the entirely subjective provisions of a GIBAP—or even changed social norms about facility access-- to facilitate their sexual behavior or offenses. A list of recent media-reported incidents of this nature is attached as Exhibit C.

40. As an example, the NY Times reported on 7/14/16 that a "transgender woman" was charged with secretly taking pictures of an 18-year-old woman changing in a Target fitting room. The national retail chain had announced in April that it would allow customers to use the restroom or fitting room corresponding to their gender identity. The suspect told a detective that he (or she) had made videos in the past of women undressing for the "same reason men go online to look at pornography." This admission makes clear that the suspect acted for sexual gratification, thereby satisfying that element of a peeping sex crime.

41. Most of those dismissing the possibility of the access guidelines being exploited by sex offenders neither define "sexual assault" nor consider the wide diversity of sexual behavior engaged in by sex offenders. Much of it is too repulsive to openly discuss. They certainly do not want to hear graphic details of sexually motivated public lewdness, surreptitious filming, or listening to people urinate or defecate—even though these are all significant violations of the victims' privacy, at a minimum.

42. Those dismissing the possibility of GIBAPs being exploited by sex offenders also overlook the reality that many serious sex offenses are not committed in an overt and violent manner by individuals fitting common stereotypes. Referring to all sex offenders as "sexually violent predators" fuels inaccurate stereotypes and denies the diversity of such offenders. Looking for "evil sexual predators" can hinder recognizing many serious sex offenders. Many such offenders seem to be nice guys because, in other respects, they are nice guys.

43. Although I cannot precisely quantify it, based on my more than 40 years of studying sex offender behavior, I know that males have for a long time repeatedly used male rest rooms and other similar facilities (*e.g.,* YMCA, athletic clubs) to sexually interact (contact & non-

contact behavior) with male partners and victims. Since most male sex offenders against adults prefer female victims, the problem until now was somewhat limited and dealt with on a case-by-case basis. A few male (non-transgendered) sex offenders have even dressed as females to facilitate their crimes. I am aware of some unlucky few who were so identified.

44. The risk of these and other behaviors will be substantially higher if GIBAPs or similar social conventions are adopted. In my opinion, allowing a man, based only on his claim to be transgendered woman, to have unlimited access to women's rest rooms, locker rooms, changing rooms, showers, etc. will make it easier for the type of sex offense behavior previously described to happen to more women and children. Such access would create an additional risk for potential victims in a previously protected setting and a new defense for a wide variety of sexual victimization, especially so-called nuisance sex offenses related to compulsive paraphilic disorders.

45. One reason for this conclusion is the fact that some sex offenders take advantage of the types of behavior (e.g., adding, removing, changing clothing) that typically occur in Multi-Occupant Public Facilities. Although sex separation in such Multi-Occupant Public Facilities often focuses on individuals who are pubescent, by definition, pedophiles are adults with a preference for prepubescent children. Child molesters, in particular, often work toward situations in which the target child has to change clothing, spend the night, or both. Such situations are described in my presentations and publications as "high-risk." If the child molester achieves either of these two objectives, the success of the seduction is almost assured. The objective of changing clothes can be accomplished by such ploys as squirting with the garden hose, turning up the heat in the house, exercising, taking a bath or shower, physical examination of the child, or swimming in a pool.

46. Such activity can be part of the grooming process to lower inhibitions as well as placing a focus on sexual activity. By itself, grooming activity can sometimes also provide sexual gratification for the adult. In addition, the goal of the grooming is not always to eventually engage in sexual intercourse with a child. Some offenders are content with or even prefer other types of sexual activity (e.g., paraphilias). Touching that might be foreplay (fondling) for most offenders can be the ultimate objective for some offenders (e.g., those with a preference for frotteurism).

47. As the term indicates, multi-user public facilities are *public*. While violent sexual assaults are possible in such facilities, the ruse of falsely claiming to be a transgendered person would be less useful to a violent rapist attempting to escape prosecution.

48. GIBAPs are more likely to be exploited by sex offenders in order to act out their paraphilic disorders and by immature males who consider it fun to look at naked girls and women or to expose themselves to girls and women in these settings. They will use the cover of gender-identity-based rules or conventions to engage in peeping, indecent exposure, and other offenses and behaviors in which the connection to sex is less obvious.

49. I recognize that many of the behaviors involved in so-called “nuisance” sex offenses may already be against the law but they are typically a low investigative priority and difficult to

identify and prove in court. As they have been for over a hundred years, such crimes are now at least limited to some degree by restricted access to women and girls in certain vulnerable situations, especially bathroom, locker room and shower facilities. The kinds of access now being demanded by those seeking to adopt GIBAPs or encourage similar social customs would, to some extent, decriminalize some of these crimes (*e.g.,* peeping indecent exposure, and lewd and lascivious conduct) by making it even harder to prove intent. Sex offenders are often good at effectively using deception, trickery, and ruses to facilitate their sexual activity.

50. For example, the enactment of GIBAPs or the adoption of similar social customs makes it even more difficult to catch those who would otherwise be clearly violating laws prohibiting indecent exposure or peeping. Under such policies, the very real victims of such conduct—women deliberately exposed to the male genitals of an exhibitionist, for example—would be forced to consider whether the exposure was merely the innocent or inadvertent act of a transgendered individual. Moreover, because GIBAPs and similar social conventions link facility access to self-reported gender *identity*, a victim may be unwilling to report an exhibitionist appearing to be a male for fear of being accused of bigotry or gender identity discrimination. As a result, reporting of public-facility sex crimes is likely to *decrease* as a result of GIBAPs and similar social conventions, even as the actual number of offenses *increases*.

51. I am already aware of male sex offenders who have dressed as women only to reduce suspicion when touching and rubbing against women in crowded public places for sexual gratification (*i.e.,* frotteurism). In addition, as mentioned, some so-called "nuisance" sex offenders progress to more violent activity or become violent to avoid identification and discovery. One problem in evaluating escalation of such sexual behavior is the fact that cases an investigator believes are the first, second, and third, may actually be the tenth, sixteenth, and twenty-second.

52. It is also my opinion that if these new guidelines and social customs become more widespread and well known, the risk of such sex offenses will increase.

2. Current Laws Will Have Limited Effect in Preventing This Increase

53. Current laws are not up to the task of preventing or prosecuting many of the sex offenses—especially so-called "nuisance" offenses—that will likely result from adoption of a GIDAP or even a similar social convention allowing biological men access to women's facilities. For example, sex offenses that require proof of the defendant's intent can be difficult to investigate and prosecute. As stated, in my experience, sex offenders charged with such offenses routinely admit committing the act, but deny that they had the requisite intent.

54. Moreover, sex offenses that require proof of intent are also often extremely difficult to detect. Many victims of such crimes may not ever learn that a sex offender targeted them. Or they may realize they have been targeted only later, after reflecting on a particular interaction with someone they encountered in a women-only facility. And it is then that the victim may feel the emotional and psychological sensation of realizing that sexual privacy was violated.

Exhibit C: List of Relevant Incidents

Year (Press Report)	State/Province	City/County	Offender Name	Description	Source
2016	TX	Cedar Park	Roel Anthony Vasquez	Indecent exposure to child in Target store (appears to have been in men's room)	Austin American Statesman
2016	WA	Seattle	Unknown	Just after NDO goes into effect, man uses women's locker room at public pool	NY Daily News; King 5 News
2016	VA	Prince William County	Richard Rodriguez	Man dressed as woman arrested for filming women at Potomac Mills Mall	NBC Washington
2016	TN	Smyrna	William Ted Davis	Man arrested for filming in women's restroom at public park/softball complex	WKRN

2016	CA	Fullerton	Jihwhoo Ahn	Man arrested for placing cell phone to record video in women's restroom on University campus	Orange County Register
2016	CA	San Jose	Andrew Donahue	Man arrested for recording others in his bathroom	Mercury News
2016	NJ	Pitman	Thomas Guzzi, Jr.	Man nabbed in child pornography ring sting operation also placed tablet computer in theater rehearsal space restroom	Courier-Post
2016	WA	Colfax	Michael A. Novak	Man arrested for filming women in bathrooms in his home, their homes	KHQ
2016	FL	Miami	Hajime Maruyana	Restaurant manager arrested for installing camera in women's restroom.	WPLG

2016	OH	Perrysburg	Undisclosed	Junior high boy tapes junior high girl in school restroom; distributes video to others	Cleveland Plain Dealer
2016	MD	Prince Georges County	Deonte Carraway	Volunteer teacher and choir leader directed children in sexually explicit videos filmed in school bathroom	WPGC
2016	FL	Wilton Manors	Marek Amann	Man tapes women using his restroom	Local10 (ABC affiliate)
2016	IN	Martinsville	Justin Carl Behnke	Former Chili's manager charded with videotaping 8 women changing clothes/using restroom	WBIW
2016	OK	Logan County	James Curt Rose	Man videotapes 13-year-old taking a shower with cell phone (saw lens poking out through a sleeve that was hanging in bathroom)	KFOR

2016	IA	Iowa City	Undisclosed	Police locate "person of interest" in connection with man videotaping woman while showering in residence hall	KCRG
2016	PA	Lancaster	James Thomas Shoemaker	Man arrested after being caught hiding in stall of women's bathroom, taking photos of young girls	WGAL
2016	ID	Ammon	Sean/Shauna Smith	Man dressed as woman accused of taking photos of women undressing in Target changing room	East Idaho News
2016	CT	Stamford	Isaiah Johnson	Transvestite Johnson and two other transvestites arrested for luring special needs teen into bathroom and sexually assaulting him	The Hour
2016	NY	Huntington	Jose Rivas	Dishwasher places cellphone camera in employee restroom	Bryan-College Station Eagle

2016	LA	Baton Rouge	Michael Lee Jackson	Man arrested for placing mirror and cell phone under stall in women's restroom.	The Advocate
2016	IL	Alton	Matthew Banks	Man arrested for photographing woman up her dress and watching group of children at swimming class (already registered sex offender)	KSDK
2015	NJ	Lyndhurst	Mitchell Morreale	Former fire captain/youth football coach videotaped girls as they used his restroom during pool party	The Record

2015	AL	Marshall County	David Barrow	Former girls' soccer coach pled guilty to human trafficking and producing pornography with minors. Used hidden cameras in locker room and restroom.	WAFF
2015	CA	Brea	Melcher Carillo Alvarado	Man arrested for placing hidden camera in Starbucks unisex bathroom	NBC Los Angeles
2015	Ont.	Toronto	Unknown	Two separate incidents of voyeurism in gender neutral restrooms cause U of T to retreat from hardline gender neutrality	The Varsity
2015	CA	La Habra	Unknown	Camera found in Del Taco restaurant restroom	NBC Los Angeles

2015	NY	New York	Sean Shaynak	Crossdressing high school teacher charged with preying on 6 female students.	NY Daily News
2014	CA	Clairemont	Gregory Philip Schwartz	Schwartz dressed in a Barbie costume before entering a women's restroom and attempting to rape a female occupant.	NBC San Diego
2014	PA	Halifax Township	Austin Christopher Wikels	Crossdresser accused of taking part in luring woman to hotel room and taking part in group sexual assault	Pennlive
2014	AK	Anchorage	Travis Felder	Crossdressing man charged with sexual and other assault, burglary, etc.	ADN.com

2013	CA	Palmdale	Jason Pomare	Man dressed as woman arrested for filming women in Antelope Valley Mall Macy's restroom	NBC Los Angeles
2013	CA	San Bernadino County	Rodney Kenneth Petersen	Man dressed as woman arrested after attempting to take cell phone photos of women in women's-only areas of college campuses	LA Times
2013	OK	Oklahoma City	Christopher Todd Gard	Man wearing only women's panties assaulted 8-year-old girl inside convenience store bathroom	News9
2013	AR	Bergman	Carl Dahn	Man arrested for child pornography and internet stalking of child wearing women's clothing when police arrive	Harrison Daily

2013	MI	Onsted	Sean Gossman	Crossdresser appears in court to face child pornography charges dressed as woman	ClickOnDetroit
2013	OR	Portland	Michael Leroy Moore	Crossdresser accused of placing sexually explicit ad about little girl on Craigslist	Oregon Live
2013	VA	Falls Church	Carlos Guillermo Suarez Diaz	Man dressed as woman sexually assaulted 17-year old girl	Washington Post
2013	FL	Fort Myers	John Maatsch	Married man with master's degree and good job attacks woman in apartment, stabbing her three times. Later returns to scene dressed in women's clothing (plea deal for 15 year sentence)	nbc-2.com

2013	Ont.	Toronto	Darren Cottrelle	Man dressed as woman arrested for using mirror to peer under bathroom stall	Toronto Star
2012	Ont.	Toronto	Christopher Hambrook	Man claiming to be transgendered assaulted two women at shelters	Toronto Sun
2012	WA	Everett	Taylor J. Buehler	Man in bra and wig found in women's restroom; later admitted to officers he was suspect in earlier voyeurism incident at Everett Community College	Seattle Post-Intelligencer
2012	WA	Olympia	Undisclosed	45-year-old transgender college student with male genitalia exposes self in women's locker room and sauna	ABC

2012	OH	Lisbon	Aaron L. LaGrand	Crossdressing man gained trust of Ohio family, then molested children	Review Online
2012	CA	Thousand Oaks	Unknown	Man dressed as woman approaches children playing; exposes self to them.	CBS Los Angeles
2011	OR	Milwaukie	Thomas Lee Benson	Convicted sex offender dressed as woman went into women's locker room at public pool and talked to several children before being chased down	Oregon Live
2011	CA	La Mesa	Unknown	Middle-aged man dressed as woman enters women's restroom asking to shake hands with women	Patch.com

2011	CA	Sacramento	Renell Thorp	Crossdressing man arrested for rape after home invasion	CBS Local Sacramento
2010	CA	Berkeley	Gregorio Hernandez	Man dressed as woman to access Berkeley locker room, used cell phone to photgraph women	Boston.com
2010	GA	Duluth	Donnie Lee	Crossdressing man arrested for looking into apartment windows; second arrest	WSBTV
2010	GA	Calhoun	Norwood Smith Burnes	Man dressed as woman in Wal-Mart arrested for taking clothes off in front of children	Northwest Georgia News

2010	CO	Boulder	Wesley Francis Cox	Serial sex offender admits to "decades" of offenses including photographing teenagers, videotaping couples having sex and stealing women's panties	Daily Camera
2009	CA	San Jose	Richard Rendler	Man dressed as woman arrested for wearing fake breasts and wig while loitering in women's restroom. Previously arrested on child molestation and indecent exposure charges	Mercury News
2009	AR	North Little Rock	Scotty Vest	Man dressed as woman masturbates in public, attempts to lure 10 and 12 year old girls into restroom	Fox16

2009	OK	Oklahoma City	Philip John Ortega	Crossdressing man exposes himself to woman on street	News9.com
2008	IN	West Lafayette	Unknown	Man dressed as woman takes photos in women's restroom on Purdue campus (flip phone camera under stall door	Purdue University News
2004	PA	Greensburg	Robert Domasky	Man dressed as cheerleader enters girls locker room at high school	Tribune-Review

Exhibit K

Carcaño v. McCrory, U.S. District Court for the Middle District of North Carolina, No. 1:16-cv-00236-TDS-JEP, ECF No. 149-15

EXHIBIT N

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUIN CARCANO; PAYTON GREY MCGARRY; H.S., by her next friend and mother, KATHRYN SCHAFER; ANGELA GILMIORE; KELLY TRENT; BEVERLY NEWELL; and AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, *Plaintiffs,* v. PATRICK MCCRORY, in his official capacity as Governor of North Carolina; UNIVERSITY OF NORTH CAROLINA; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; and W. LOUIS BISSETTE, JR., in his official capacity as Chairman of the Board of Governors of the University of North Carolina, *Defendants.*	No. 1:16-cv-00236-TDS-JEP

EXPERT OPINION OF SHERIFF TIM HUTCHISON (RETIRED)

Introduction

I have been retained as an expert for the defense in this litigation to provide opinions relating to the public safety and privacy effects of what defendants describe as "GIBAPs"—"gender-identity"-based access policies for public facilities—and regarding the public safety and privacy implications of the North Carolina General Assembly's response to GIBAPs in H.B.2. I have enclosed my Curriculum Vitae (attached as Exhibit A) as well. That document details my

8. The Department of Justice demanded that North Carolina ensure that transgender persons were entitled to use multiple occupancy bathrooms and changing facilities based on their "gender identity," and threatened to take enforcement action against North Carolina if the state refused to comply.
9. The United States Department of Justice and private plaintiffs working with the ACLU filed separate federal lawsuits against North Carolina officials and institutions. The plaintiffs claim that H.B.2 intentionally discriminates against the transgendered.
10. I have reviewed the Complaints in both the ACLU and DOJ cases and am aware that the plaintiffs claim that "gender identity" (which they define as someone's "internal sense" of what gender they are) should be the only thing that matters in determining who can use which public facilities (restrooms, changing rooms, locker rooms, etc.). I am also aware that the U.S. Department of Education and Department of Justice have recently issued guidelines for schools receiving public funds in which they make the same argument.

OPINIONS AND BASIS FOR OPINIONS

My opinion is based upon the 17 years I spent as the Chief Law Enforcement Officer in Knox County, Tennessee, and upon my experience as the primary public safety policy maker for the county while in that position. It is also based upon on my 33 total years of experience as a Certified Policeman, and on the law enforcement and public safety training I received during my law enforcement career. In addition, I have personally been on the scene of sexual assaults and have personally arrested and helped prosecute male sex offenders, and those experiences have helped develop my opinions as well.

I have also considered various materials in forming my opinions, including the Complaints in the captioned cases and several other documents. All material I considered in forming my opinions is listed in Exhibit B and is attached as an appendix to this report.

I have formed the following opinions regarding the public safety effects of policies like the Charlotte Ordinance and the DOJ/DOE guidance, and the passage of North Carolina General Assembly House Bill 2 on March 23, 2016:

A. Gender-Identity-Based Access Policies (GIBAPs) Pose a Genuine and Serious Public Safety and Privacy Threat

1. H.B. 2 was made necessary when the City of Charlotte passed its "gender identity" ordinance ("GIBAP"). Public restrooms are crime attractors, and have long been well-known as areas in which offenders seek out victims in a planned and deliberate

way. Access policies to restrooms based on "gender identity" create real and significant public safety and privacy risks, especially in women's and children's restrooms/dressing rooms. These incidents are already occurring. For example, shortly after Target Corporation announced that it would adopt a GIBAP for its stores, two men were caught filming women in the women's dressing rooms. These criminal acts were committed in two different states, North Dakota and New Hampshire,

2. Specifically, GIBAPs increase the risk of the full range of sex offenses in and near public facilities, from relatively minor offenses like peeping and indecent exposure to major offenses like forcible rape.
3. The Charlotte Ordinance and other similar GIBAPs (like the recently-announced DOJ and DOE access policy for schools) consider only one side of the equation. But by focusing completely on the transgendered, they totally ignore the safety and privacy risks these policies inevitably create. The Charlotte Ordinance and other GIBAPs provide fertile ground for those individuals already seeking ways to commit abuses against women and children. For example, on July 13, 2016, police arrested a man who identified as a transgender woman, after he was discovered taking pictures of women changing clothes in a Target dressing room in Idaho.
4. Anyone with responsibility for setting public safety policy has to consider all sides of every public safety problem. For example, as Sheriff, I was constantly having to balance the jail population under crowded conditions while creating a safe environment for the citizens. People pushing for the adoption of GIBAPs are downplaying or dismissing serious and legitimate public safety concerns because they do not see (or maybe do not want to see) the problem.
5. Once you see all sides of the problem in this case, a law like H.B.2 makes perfect sense from a law enforcement and public safety perspective.
6. The North Carolina Sheriffs Association agrees. Just before the General Assembly passed H.B.2, the NCSA Executive Committee issued a unanimous statement indicating that they "support legislation that would overturn local ordinances that allow persons of one gender to use the restroom of the other gender."

B. Transgender Individuals Are Not the Source of This Threat

7. The risks of GIBAPs do not come from transgender use of public facilities that do not line up with birth certificates. Rather, non-transgender male sex offenders who prefer female victims will use GIBAPs to obtain better access to their victims for different types of sex crimes.
8. In my experience, male sex offenders will take every opportunity they can to gratify their desires. They manipulate and abuse existing rules to gain access to their victims, and to keep their activities from being discovered whenever possible. Rape survivor Kaeley Triller captures the essence of my experiences and expectations perfectly: "They can't be serious. Let me be clear: I am not saying that transgender people are predators. Not by a long shot. What I am saying is that there are countless deviant men in this world who pretend to be transgender as a means of gaining access to the people they want to exploit, namely women and children". She further writes: "Don't they know that one in every four little girls will be sexually abused during childhood, and that's without giving predator's free access to them while in the shower?" Kaeley Triller, "A Rape Survivor Speaks Out About Transgender Bathrooms," *The Federalist*, November 23, 2015.

C. GIBAPs Threaten Public Safety Because They Embolden Non-Transgender Male Sex Offenders Attracted to Women and Children

9. Under GIBAPs like the Charlotte Ordinance (or like the DOJ/DOE policy in many educational settings), pedophiles, sex offenders and voyeurs would now have a free "ticket" to enter spaces that should be private and safe.
10. They would no longer fear the local laws that currently help keep them out of women's public facilities.

D. GIBAPs Will Increase Sex Offenses Ranging from "Nuisance" Offenses to Violent Sexual Assault

11. By some conservative estimates, 96% of single-victim assaults are committed by males. And the overwhelming majority of male sex offenders prefer female victims.
12. Women and girls using public facilities are often in a vulnerable location and position. These areas are already a target for sex crime predators.
13. "Gender-identity"-based access policies would allow non-transgender men, who are now forbidden by law to go into a women's restroom, to walk in and commit sex offenses without being as concerned about being confronted or arrested because of their apparent self-identified gender. There are numerous publicly-reported examples of that

happening in jurisdictions and facilities with GIBAPs in place. A partial list of such incidents is attached to this report as Exhibit B, but it is just the tip of the iceberg.

14. Sex offenders have to be good liars in order to avoid punishment, and they always have an excuse to explain what they are doing and why they are where they should not be.
15. My experience and training have taught me that many sex offenders start by peeping, stealing female under clothing, and other similar low-level offenses. But some start graduating to more serious sexual crimes and many move on to actual rape if they are not stopped early.
16. I have personally worked on complaints where an individual begins with lower-level sex crimes and escalates to rape/sexual assault over a period of a few years. For example, while I was a patrol officer, I started receiving multiple calls about a "peeping Tom" in a subdivision. We caught this individual numerous times. Then we started getting calls of exhibition by the same person, then eventually received rape complaints. This escalation of crime and increase in sexual assault violations took place over about a 3-year period. He was convicted and is still in prison. This person would target many of these people around women's restroom/changing rooms, but even he was afraid of trespassing by going in those public facilities for fear of being caught.
17. Sadly, even if caught early, many offenders still will move up to actual rape, in my experience.
18. Like most criminals, sex offenders know that U.S. jails and prison systems are at or over capacity. As a result, sex offenders face less deterrence that they otherwise would face, since they know that, for the most part, they will not spend a day behind bars for anything other than a serious offense.
19. As crowding in correctional facilities creates an atmosphere of them not likely to be jailed for most offenses, it minimizes current laws that keep them from trying to gain entrance into women's restroom and locker rooms.
20. Incentives for offending are also increasing along with improvements in technology. Small, easily hidden handheld electronic devices like smartphones have excellent cameras and video capture capabilities. The images captured by a sex offender on a modern smartphone are extremely high-quality, and can be uploaded to the internet almost instantly. This increases sex offenders' interest in accessing women's facilities.
21. These technological advances also increase the amount of potential harm GIBAPs cause women and children, both short term and long term.
22. With a GIBAP in place it opens the door to male sex offenders by handing them a target rich environment.

E. Contentions that GIBAPs Have No Effect on Sex Offenses Are Highly Speculative and Almost Certainly Incorrect

23. Some law enforcement personnel have claimed that the adoption of a GIBAP in their jurisdiction had no effect on the underlying rate of sex offenses. This is highly speculative and almost certainly untrue. In 2006 there were 300,000 college women raped. Among College women only 12% of rapes were reported to law enforcement.
24. According to the federal government's own statistics, only about 30% of sex crimes are reported overall. And many of those that *are* reported are serious sexual assaults. The reporting rate for so-called "nuisance offenses" (which are certainly not nuisances to the victims) is almost certainly even lower.
25. Many women do not report sex crimes for fear of being labeled in some way, because of the hassle of dealing with the court system, and/or because they do not want to testify publicly while having to face the sex offender again (even in the safety of the courtroom).
26. With a GIBAP in effect, sex crimes would increase, but an even larger percentage of those crimes would go unreported. In fact, children often delay reporting of sexual abuse until adulthood.
27. The decrease in reporting would not just be because victims and bystanders would be less certain that a violation had occurred. Most women are already afraid to report suspected crime or suspicious activity if they think that people will label them for making a report.
28. Even without formal GIBAPs in place, changing social norms have made people much less certain about gender issues, and more reluctant to report behavior that seems suspicious, like seeing a man in a women's facility. While it is good that society is becoming more accepting of different people, the fear of being accused of bigotry creates a public safety risk.
29. Non-transgender male sex offenders take advantage of every opportunity to increase their chances of successfully committing an offense. With a formal GIBAP in place, people will be even more worried about being accused of bias or bigotry if they report an offense.
30. Many of the offenses that are committed, including many that police do investigate—never result in charges being filed.
31. In some jurisdictions, if law enforcement doesn't charge an individual on a sex offense, they don't record it as a crime occurring. This further skews the reported statistics.
32. Some jurisdictions do not report crimes in their statistics if they are not solvable.

33. Though many women and young children would choose to leave a facility without reporting a sex offense, the scars from the crime would live on forever with these victims.
34. All of this explains in part why jurisdictions that have implemented GIBAPs might not see an increase in reported offenses.
35. Jurisdictions and organizations that have implemented GIBAPs also sometimes have incentives to understate their sex crime statistics, and will make reporting decisions designed to minimize the appearance of a sex offense problem. For example, colleges and universities interested in recruiting women for diversity purposes have an incentive to avoid reporting sex offenses whenever possible. In addition, if too many offenses are reported, enrollment would go down from parents not letting their daughters attend there.
36. Municipalities in which the police chief is an employee of an elected mayor may also underreport offenses, especially if accurate reporting would not line up with the mayor's politics.

F. Current Laws Are Inadequate to Prevent Abuse of GIBAPs by Non-Transgender Male Sex Offenders

37. In a world without GIBAPs, existing trespassing, indecent exposure, peeping and other laws deter at least some non-transgender male sex offenders (but not all) from entering women's facilities to commit offenses. It is really the only deterrent standing between the offenders entering the women's public facilities or not.
38. Some people who favor the adoption of GIBAPs claim that existing laws prohibiting trespassing, indecent exposure, peeping, and other sex offenses will keep problems from happening. That just isn't true. If someone could enter a public facility based entirely upon their "internal sense of gender," then law enforcement personnel, bystanders, and potential victims would have to be able to read minds in order to determine whether a man entering a women's facility was really transgender or was instead there to commit a sex offense.
39. To prove trespassing, you generally have to prove that the offender intentionally entered an area without permission. To prove trespassing based upon someone's presence in a public facility of the opposite sex, you have to prove that they were in fact the wrong sex, such that the signage outside the facility served as a "no trespassing" sign for that person. With a GIBAP in place, this becomes almost impossible to do, because the non-transgender male sex offender would simply have to claim that his "gender identity" was female to make successful prosecution difficult if not practically impossible.
40. And successful prosecution isn't the only problem. Another huge problem is that with a GIBAP in place, offenders aren't as likely to be observed by or reported to police in

the first place. Bystanders, victims, and even police will not have any reliable way of determining whether someone who appears to be male has a right to be in a female-only facility—even someone dressed in men's clothing can claim a female "gender identity."

41. The same is true for laws like peeping and indecent exposure. With a GIBAP in place, bystanders and victims will be less certain that offenders were actually getting sexual gratification from their acts. Is a biological male who displays his private parts to a woman while coming out of a women's restroom stall a flasher or transgendered? What about the biological male whose eyes wander while in a women's locker room?
42. Because the laws prohibiting indecent exposure and peeping also require proof of intent, it gets much harder to prove violations when a jurisdiction has adopted a GIBAP. And it gets much harder for victims and bystanders to be certain that an offense has been committed, and that their privacy has been violated.
43. While I was Sheriff, I saw an increasing number of sex crimes, and an increasing need for resources dedicated to sex crime investigations and sex offender monitoring. I started a Sex Crimes Task Force unit dedicating investigators assigned to that unit full time. Most agencies assign an investigator to sex crimes as a crime occurs and do not have those investigators working on that problem full time. They also carry a workload of other crime investigations. In the countless jurisdictions without the resources or political ability to create a dedicated sex crimes unit, sex offenses of all types will remain even more difficult to detect, prosecute, punish, and deter. This would make the problems caused by a GIBAP even worse.

G. H.B.2 Was a Reasonable and Important Public Safety Response

44. Laws like North Carolina H.B.2 are a reasonable and much needed response to the public safety issues created by policies like Charlotte's ordinance and the DOJ and DOE guidance letters.

45. These laws create an objective baseline for facility access, as opposed to GIBAPs, which instead require law enforcement officers, potential victims, and bystanders to be mind-readers.

46. Consistent and clear definitions are extremely important to effective law enforcement. It is very important for law enforcement to have a clear definition of when someone who was born a biological male should be treated as a female. H.B.2 helps law enforcement and others who might be responsible for securing safe environment by creating an objective standard.

Exhibit Q

Available at

https://medium.com/@camradfems/there-is-nothing-progressive-about-removing-women-only-bathrooms-37729064cfb7

Cambridge Radical Feminist Network

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Jan 13, 2019

13 min read

There is nothing progressive about removing women-only bathrooms

The importance of giving women a space in which they have privacy and freedom from the risk of sexual violence has, over recent years, been overtaken by a new political narrative: ‘gender neutrality’. Arising broadly from (or at least gaining traction due to) a liberal commitment to formal equality, this narrative has shunted feminist concerns over women’s dignity and safety, so much so that the Conservative Party — which previously committed to the abolition of mixed-sex wards following a series of highly publicised sexual assaults against women — has felt comfortable in apparently abandoning this promise entirely. Meanwhile, supposedly progressive circles on Twitter are re-tweeting comments like this, suggesting that women’s concerns are a product of silliness, hysteria and paranoia:

On multiple fronts, feminists are fnding themselves having to re-litigate battles that previously might have been thought done and dusted, many of which will no doubt be the subject of future blog posts. Here, we will lay out the feminist case for women-only bathrooms.

The risk of sexual assault

As most of us as now aware, the majority of sexual assaults are carried out in a private space by someone the victim knows. Unfortunately, enough assaults against women and girls are indeed carried out in public that women both have reason to fear them and do take precautions against them. A recent report by the House of Commons Women and Equalities Committee on sexual harassment and sexual violence in schools found that it is endemic in public schools, and often considered — by both students and teachers — as simply a part of daily life. Almost a third of 16–18 year old girls have reported having experienced unwanted sexual touching at school, and far more so had been victims of or witnesses to verbal sexual slurs and harassment.

Is a single-sex bathroom or changing room sufcient to guard against a man or boy who wants to physically assault a girl in such a facility? One common refrain heard against women expressing concern about gender neutral toilets is: if a man was determined to rape you, he isn't going to care about whether the bathroom is female only or not. But, the numbers say otherwise.

Just under 90% of sexual assault complaints in public changing rooms took place in unisex facilities [1]. One obvious conclusion to be drawn from this is that single-sex spaces at the very least provide a reduction of opportunity for would-be predators. If we see someone in a bathroom who shouldn't be there, for example, security can be alerted without frst having to wait for an assault to take place.

Such arguments have resurfaced over recent days after a female patient who had been in a persistent vegetative state for ten years suddenly gave birth in her hospital bed. The facility in that case has now reportedly implemented a new policy under which male staf are no longer allowed in female patients' rooms unless they are accompanied by a female staf member . Similar opportunistic abuse has also been seen, for example, at the University of Toronto in September 2015, after two reported instances of voyeurism in a single week resulted in the University reducing its gender neutral bathroom provision. This is the state of the world in which women still live: women in positions of vulnerability are seen as targets by predatory men.

Finally, leaving aside the risk of assault, sex-segregated bathrooms give women the peace of mind of knowing they can use the bathroom, attend to their menstrual needs and to small children, with a degree of privacy and dignity that would otherwise not exist.

Architecture and structural issues: what toilets are we discussing?

Women face an issue of unequal bathroom provision versus men generally. While architects generally allocate equal space for male and female bathrooms, women — for reasons of biology, child-care responsibilities, and clothing — will need to use them both more frequently and for longer; and fewer stalls than urinals can be ftted into the same square footage.

These issues have sometimes been a result of old design — women were previously not part of public life to anywhere near the same degree, and thus buildings did not have to include equal toilet provision — and sometimes a result of male architectures not taking into account women's diferent usage of bathrooms.[2] This is also partly an issue of space. A greater number of urinals can be ftted into a given area than stalls. It has not gone without notice, therefore, that many 'gender neutral bathrooms' are efectively taking the place of women's bathrooms, not men's, because women will not use the urinals.

The de facto result in any event is a smaller toilet provision for women, with both men and women using women's facilities without women having the ability to use men's facilities. Indeed, men are able to use both stalls and urinals — and with no increased risk of assault.

Luc Bovens and Alexandru Marcoci have written that if *all* bathrooms were to be made gender neutral — and not only the women's — *and* if urinals were removed and replaced with stalls, then waiting times for all would be equalised. That would absolutely be an improvement upon the sexist implementation of gender-neutral toilets in places such as the Barbican.[3] But the 'stalls' question raises its own issues.

One difculty with this debate is that participants can have very diferent things in mind. Some people, when imagining 'gender neutral bathrooms' imagine enclosed, lockable rooms, similar to the way in which disabled toilets are often organised — an extra addition to standard male-female stalls. This is what now a handful of US States have mandated — that single-occupancy bathrooms be converted to gender-neutral facilities. Where enclosed bathrooms are the *only* facilities available, one assumes that this could somewhat protect against the risk of immediate sexual violence — though not only does this not address the unequal need by men and women of those facilities, it also fails to address the growing epidemic of crimes such as those that women in South Korea have marched against (discussed below): voyeurism by spy camera. In fact, an enclosed bathroom would likely be the absolute ideal place for such an ofender to work.

Nonetheless, enclosed stalls are often inevitably the only available facilities in certain locations for reasons of space and expense, such as restaurants, small to medium cafes, and petrol stations. But such locations are very diferent environments for women compared to — say — shopping centres, town centres and parks, not to mention pubs and nightclubs. A bathroom in a small cafe is unlikely to have heavy foot trafc, while almost always having bystanders in close proximity (other customers and staf). A shopping centre bathroom, by contrast, is publicly accessible, and may frequently lack bystanders and security throughout the day. Despite this, shopping centres (and town centres, parks, pubs and nightclubs, the latter two posing the addition risk of having inebriated clientele) likely utilise not enclosed bathrooms, but *stalls*. It is such facilities which pose a particularly high risk for women. The University of Toronto's experience of gender neutral toilets mentioned above is a case in point. However, by simply searching 'bathroom voyeurism' on any search engine, the full scale and frequency of the problem becomes clear. [4]

The impact upon women is compounded for those individuals who — due to having a history of sexual assault, or for religious reasons — do not feel comfortable using a shared intimate space with male strangers. The result is that these groups of women are themselves less able to engage in public life.

If gender neutral toilets are implemented, it should therefore only be in a similar manner to disabled toilets — as an *option* for those who feel the need to use it, without removal of sex-segregated toilets for women generally. If an additional enclosed room is not possible, then it is the men's facilities which should be converted *only*, not the women's.

Inconsistent narratives for home and abroad

Curiously, the need for women's toilets is often freely recognised in regards to countries other than one's own. Amnesty International has called sex-segregated toilets a human rights issue in respect of women housed in refugee facilities, who are leered at, verbally and sexually abused by the men — including security staf — in European camps. [5] In India, inadequate access to private bathrooms for women is similarly regarded. Indian women face the single greatest risk of rape and sexual abuse outside the home when they are forced to go out to use the toilet at night. Women will avoid drinking water, even during heatwaves, out of fear they will need to urinate, because predatory men use the opportunity to assault women in a position of vulnerability. 30,000 women in South Korea marched in June to protest against the epidemic of spy camera technology being used by predatory men to create "molka" porn — an increasingly popular genre involving the flming of women without their consent.

In certain developing countries, the UN Special Rapporteur on the human right to safe drinking water and sanitation has reported that the absence of sex-segregated bathroom facilities constitutes one of the 'primary barriers preventing young girls from claiming their right to education'[6]. An absence of privacy for girls in dealing with menstruation can be a major factor in determining whether those girls stay in school or drop out entirely. Beyond the toilet issue, there are famous examples of sex-segregated facilities that Western media still (so far) passively accepts as a necessary fact of life in patriarchal societies. From 2000 and 2010, Women in Tokyo and New Delhi (amongst numerous other cities throughout the world) have had the option of taking women-only carriages to protect them from the risk of sexual assault when travelling.

In regards to the assertion that 'if men want to sneak into women's bathrooms, they already can', one doubts whether this would be dared against those women who support the above initiatives. The rebuttal is so obvious — in a sex-segregated space, the women do not have to wait until the man has already assaulted her before she can fetch security — that one has reason to doubt whether the criticism is honestly made. Sex ofenders thrive on opportunity. Not only do the numbers (mentioned earlier) not lie, but proponents of liberalising bathroom regulations occasionally let the cat out of the bag with regards to their own motivations. A certain Canadian activist[8] had social media conversations leaked in which he mused about whether he could help a 10 year old girl put in a tampon, and asked whether women in changing rooms have their "vaginas and tits" out. Those who claim, like Paris Lees, that women's fear of sexual predators is 'all in the mind', rather than borne from a life-time of living as a woman in a patriarchal society, would do well to read the news more often.

Inconsistent narratives with mixed-sex wards

It is interesting also to compare gender-neutral bathrooms with the issue of mixed-sexed hospital wards. In the UK, the issue of sex-segregated wards has long been regarded as a matter of securing the safety and dignity of female patients. It is worth noting however that it has not *always* been the case. Louise Hide, examining mixed-sex wards in psychiatric hospitals between 1950 and 1990 found that hospitals allowed mixing for male patients' beneft, and ignored the reality of sexual abuse until the rise

of feminist and patient activism from the 1960s onwards . Mixed-sex wards were condemned by a judge in 2008 after a 81 year old woman was subjected to a horrifying sexual assault by the man in the bed next to her[7], and were formally banned in 2010 (although today, ironically, their prevalence remains higher than ever, thanks to a consistent shortage of beds across an underfunded NHS). Reported sexual assaults in hospital wards rose 17% between 2010–11 and 2016–17, and health charities such as Rethink Mental Illness have in response reiterated the importance of eliminating mixed wards.

It is curious, therefore, that when the issue of bathrooms is raised by feminist campaigners in the UK, even by sexual assault survivors themselves, it is dismissed as a matter of female hysteria, or as Lees called it, "panicking about imaginary fears". Another popular response is to ask whether these silly women have a gender neutral bathroom in their own homes, like the tweet quoted in the introduction. Of course, this involves brushing over the glaringly obvious fact that the bathrooms in our own homes are used exclusively by our family and invited guests. Not random, unknown members of the public. As the Conservatives have faced criticism over their abandonment of the single-sex ward policy by rival parties, one wonders whether the left's growing impatience with single-sex spaces might present them with something of an opportunity. As Catherine Bennett has asked: "What if [then Health Secretary] Hunt reimagined his privacy-free wards, washrooms and lavatories, as not so much a system in collapse as a success for the concerned, gender aware progressives who used to be called the Tory party?"

Why the inconsistency?

I suspect a signifcant reason is simply the fact that it is far easier for Westerners to accept that sex inequality is an issue for *other* countries. It is far easier for one to suppose that the largely theoretical group of women who live 'overseas' might base criticisms of their own country on good sense and lived experience, than it is for many to suppose that women in one's immediate vicinity (and white, especially Anglosphere countries we see as being 'like us') who express concern about the risk of sexual assault *they too* face might actually have a point.[9] When a woman's criticisms hit too close to home, they risk challenging the listener's *own* impression of the state of the world. Worse still, they challenge the prevailing power structure that situates predominantly

white male violence as an 'overblown', 'lied about' problem, and one which — to the extent it *is* admitted — is one that women must put up with and shut up about. The emotional damage caused to the male half of society by women saying 'no' is simply too great. The debate surrounding gender neutral toilets follows this dynamic closely. Women's fear of violence is inherently suspect, automatically doubted, and women's insistence upon their boundaries is recast as 'cruelty'.

Then again, if the above is all true, how can it be that so many people accusing women of engaging in a 'moral panic' claim themselves to be fghting for a 'progressive' cause?

The other contributing aspect is the increasing tendency of popular progressive narratives to start with a set of 'socially acceptable conclusions', and work backwards, ignoring any and all facts that don't ft the correct narrative — even resorting to misogynist tropes in order to do so. While feminists of previous generations might have begun with an undesirable fact — such as women's economic position — and worked on possible solutions to that, much political discourse in Western 'socially progressive' circles today seems to reverse that. It begins instead with a series of *substantive policy demands* (for example: bathrooms *should* be gender neutral), any deviation from which is automatically suspect, *no matter what* the factual basis is for doing so. If reaching the 'wrong conclusion' is not an option (say, because of a risk of ostracisation), facts become less and less relevant to the discussion — ex ante justifcations rather than starting points. Another likely contribution, of course, is the fact that a disregard for women's safety and concerns permeates society generally, even those circles that regard themselves as socially liberal. It is notable that the only risk of violence mentioned by CUSU LGBT+ in its 'Implementation Guide' is the risk "AMAB" (male) students may be the *victims* of violence. Safeguarding women against male violence is not even paid lip service to.

A common feature of responses to women who are *too* challenging (even *within* the left) is for their detractors to retreat back to old-fashioned misogyny as a quick and easy way to dismiss them. The temptation to leverage structures of social power to win a battle that one — genuinely — believes to be morally right is often too strong to resist. It is a phenomenon faced by other marginalised groups as well, not simply women. It is important, however, for us to be alive to that phenomenon, and not to allow narratives

of hysteria and 'over-emotionalism' to act as excuses not to engage with the substance of what women are saying.

Needless to say, an aversion to the facts surrounding male violence is neither progressive nor is it feminist. Instead, it is a refection of a developing culture in which people adopt political positions to avoid censure and achieve social acceptability as an end in itself, rather than as principled responses to actual material injustices in the world.

Conclusion

Sex segregation in spaces where women are in positions of vulnerability is a legitimate and important precaution for women. Women exist in society where the risk of sexual assault is a simple reality of their lives — even young girls within UK schools are experiencing what has been described as an 'epidemic' of sexual violence *from young boys*. I could go into these statistics in more detail if it had not already been done countless times before. But the fact it *has* been done countless times before is the disturbing thing about the entire gender neutral toilets issue. Supposedly progressive commentators and politicians have seemingly decided that publicly supporting a postmodernist view of gender is more important even than these facts. Perhaps it is cowardice in the face of a vitriolic social-media 'take down' culture.

But perhaps it is something more simple, and depressing, than that: feminism — and other equality movements — have to deal with the difcult problem of 'latent prejudice'. It can be tricky to tell when there is a true change of popular attitudes, or when instead there is a understanding that some attitudes cannot be expressed *explicitly*. Sometimes we only fnd out once people feel they have been *given permission* to express those attitudes. We saw that to some degree with the Bernie-Bro phenomenon — certain US leftists felt that their support for a 'progressive' Bernie Sanders meant they were able to criticise 'not-as-progressive' Hillary Clinton in sometimes violently sexist terms. The gender neutral and gender identity debates seem to represent something similar in the UK. Blatantly misogynistic tropes and a lazy disregard for women's safety and concerns are being overlooked because it is in the service of a supposedly progressive cause.

. . .

The above article was written by a member of the Cambridge Radical Feminist Network. If you would like to write an article for the Network, please get in touch, and please follow us on social media.

Notes

1. In addition, '[i]n 2009, Channel 4 discovered that almost two-thirds of sexual assaults by patients in hospitals (21 out of 33 in 2007/8), occurred in mixed-sex wards': https://www.theguardian.com/commentisfree/2017/jul/30/mixed-sexed-wards-endanger-and-humiliate-women
2. https://www.theguardian.com/lifeandstyle/shortcuts/2018/mar/21/why-women-face-longer-toilet-queues-and-how-we-can-achieve-potty-parity.
   See more specifcally: https://americanrestroom.org/potty-parity/;
   See also: http://time.com/3653871/womens-bathroom-lines-sexist-potty-parity/
3. The CUSU LGBT+ 'Guide for the Implementation of Gender-Neutral Toilets' recommends a similarly fawed implementation: https://www.lgbt.cusu.cam.ac.uk/wp-content/uploads/2018/05/GN-Bathrooms-Guide.pdf
4. A couple of examples, among many:
   https://www.harrogateadvertiser.co.uk/news/crime/harrogate-man-jailed-for-flming-girls-and-women-as-they-got-undressed-in-bathrooms-and-cubicles-1-9451417
   https://www.pressandjournal.co.uk/fp/news/scotland/1599842/nightclub-voyeur-spared-jail-after-being-caught-flming-women-in-a-toilet-cubicle/
5. Amnesty also recommends separate sleeping facilities for women refugees, for the same reason.
6. See p. 153, Discussion Box 3.13
7. There were also a number of other cases which made national news. For example: https://www.dailymail.co.uk/news/article-124838/Second-woman-raped-mixed-sex-NHS-ward.html
8. JY. Even the mention of his name has resulted in posts being taken down on Medium and Twitter, but a quick internet search will allow you to fnd him.

9. An example of this phenomenon is discussed by Reni Eddo-Lodge in *Why I am No Longer Talking to White People About Race* (pp.174–175) The 'surprising' mention by David Cameron of 'patriarchal societies' was — less surprisingly — mentioned in regards to Muslim countries 'described in direct opposition to our own advanced, so-called egalitarian and meritocratic British sense of self.'

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Exhibit 28

AUSTIN KNUDSEN

STATE OF MONTANA

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

September 12, 2022

Re: Docket ID ED-2021-OCR-0166, RIN 1870-AA16

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona:

We submit these formal comments to duly note our opposition to the Department of Education's proposed rulemaking on Title IX of the Education Amendments of 1972 ("Title IX"). As a general matter, the Department has not provided sufficient reasoning for why it's embarking on a new Title IX rulemaking less than two years after the 2020 regulations went into effect. In May 2020, after thoroughly considering over 124,000 public comments, the Department issued its historic Title IX Regulations, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) ("2020 Rule"), to better align the Title IX regulations with the text and purpose of 20 U.S.C. § 1681, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and schools with respect to sexual harassment allegations. For the first time in history, regulations regarding sexual harassment under Title IX were codified into law. The Department has not presented sufficient evidence that the current Title IX system requires modification. In many instances, moreover, the Department's Proposed Rule conflicts with the text, purpose, and longstanding interpretation of Title IX. It also negatively impacts free speech, academic freedom, and campus life. We also once again call for Assistant Secretary Lhamon to recuse herself from the rulemaking process.

Several of the states have enacted legislation to protect athletic opportunities for women by prohibiting biological males from competing in female athletics. *See, e.g.*, H.B. 112, 2021 Leg. (Mt. 2021); H.B. 25, 87th Sess. (Tx. 2021); H.B. 3293, 2021 Leg., H.B. 500, 65th Leg., 2d Sess. (*Id.* 2020). Those laws undoubtedly conflict with the Department's Proposed Rule. *Cf. City of L.A. v. Barr*, 929 F.3d 1163, 1174 (9th Cir. 2019) ("[I]f Congress decides to impose conditions on the allocation of funds to the states, it 'must do so unambiguously … enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'") (quoting *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

D. The Proposed Rule infringes on parental rights.

Even more pernicious, the Proposed Rule would federally coerce schools to indoctrinate children into gender identity theories that are heavy on political asperity and light on scientific corroboration. This would require everyone in the school environment to accept that being a boy, girl, both, or neither is only a matter of subjective identity. Under this Proposed Rule, schools would have to treat any skepticism of "gender identity" as discrimination/harassment, which would effectively override the fundamental rights of parents to rear their own children in matters of reason, morality, and faith. Because it treats failure to affirm gender identity the same as traditional forms of discrimination (*e.g.*, excluding girls from the debate team), a school wouldn't need to obtain parental consent before pushing "gender affirmation" of whatever self-declared identity a child announces in school; the school would never have to disclose that affirmation program to the child's parents, and must—at any rate—pursue it even over parents' objections.

II. The Proposed Rule will infringe upon and chill free speech by vastly expanding the definition of sexual harassment in 34 C.F.R § 106.30.

The Department proposes changing the current definition of "sexual harassment" contained in 34 C.F.R § 106.30. The Department's new definition of hostile environment sexual harassment not only conflicts with Supreme Court precedent, but will have a detrimental impact on free speech, campus life, and the free exchange of ideas. When combined with the Department's proposed changes to the current due process protections, the proposed rule will chill protected speech—allowing unscrupulous students and ideologically biased bureaucrats to weaponize Title IX against those with whom they disagree on hotly contested issues of political, societal, religious, and moral importance. At private schools, where the First Amendment does not apply, the Department still lacks the power to compel schools to suppress speech that would violate the First Amendment.

> participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

87 Fed. Reg. at 41410. The Department's "tentative view" that this proposed hostile environment framework appropriately captures the key concepts articulated by the Supreme Court in *Davis* and protects the First Amendment rights and interests of students and employees is sorely mistaken. *Id.* at 41413.

The Department should withdraw its proposal to change the definition of hostile environment sexual harassment.

2. The proposed definition of sexual harassment lowers the threshold for what counts as "harassment."

Title IX prohibits *discrimination*—not offensive speech. The *Davis* standard forces recipients to punish true harassment under Title IX while leaving lesser disciplinary matters to school conduct codes (and applicable legal requirements such as the First Amendment). Incidents such as so-called "microaggressions," offensive jokes, and social media banter are not *per se,* or even putative, federal civil rights violations. But the proposed new definition radically lowers the threshold for what counts as "harassment." This will allow schools to investigate speech that is subjectively offensive to anyone—even if it is neither severe, nor pervasive, or nor objectively offensive. This will massively chill academic and campus debates over sex, gender identity, and other issues implicated by the Proposed Rule.[5]

Offensive speech is protected in many instances and contexts. Indeed, the preamble to the current regulations emphasizes that offensive speech is protected, particularly at the postsecondary level:

> The Supreme Court has also rejected the idea that "because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citations omitted). Further, these protections apply even to highly offensive speech on campus: "[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (internal citations omitted).

[5] *See, e.g.*, Cantu and Jussim, *Microaggressions, Questionable Science, and Free Speech*, TEX. REV. L. & POL. (Feb. 2021), *available at* https://ssrn.com/abstract=3822628.

85 Fed. Reg. at 30141 n. 623. Higher education institutions differ from the workplace. In workplaces, it may be natural to ban offensive speech to maximize efficiency or prevent a hostile or offensive environment. Colleges, however, exist for the very purpose of exchanging ideas and pursuing the truth—even if words and ideas offend listeners. *See, e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (holding hostile environment harassment code was unconstitutionally vague and overbroad and was not a valid prohibition of fighting words). The Proposed Rule's new lower threshold will no doubt stifle the airing of controversial (but protected) ideas on campus.

As for elementary and secondary education, the *Davis* Court expressly required that conduct be severe *and* pervasive for Title IX liability. This is because, unlike workplace conduct under Title VII, elementary and secondary school students frequently behave in ways that would be unacceptable among adult workers. *Davis*, 526 U.S. at 651–52 (citing *Meritor*, 477 U.S. at 67).

3. The Department has failed to provide adequate reasoning for the definition change to sexual harassment in § 106.30.

The Proposed Rule recognizes that the new definition of hostile environment sexual harassment abandons the verbatim *Davis* standard used in the current regulations, but reasons that that caselaw allows the Department to promulgate rules requiring conduct that—in its absence—would not constitute sex discrimination. 87 Fed. Reg. at 41413. 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." *Id.* To be sure, the Department may adopt prophylactic requirements that are broader than the requirement to refrain from discrimination on the basis of sex. But such prophylaxis must be designed to prevent *discrimination on the basis of sex*—not some other undefined classification. Here, instead, the Department is attempting to redefine sex discrimination itself, broadening that discernable concept beyond recognition. Because the NPRM neither defines the concept nor explains why it must be expanded so dramatically, the Proposed Rule reveals its own arbitrariness.

Next, the Department fails to explain why it dropped the "objectively offensive" element from the current definition. *See* 34 C.F.R. 106.30 ("(2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity"). The objectively offensive element is important because it judges the content by the standards of what a reasonable person would observe. Thus, in order for speech to create a hostile environment, it must offend a reasonable person. The Department has no good reason for dropping this crucial element of the *Davis* standard.

Finally, the Department fails to adequately explain why its new definition is tied to the Title VII framework. In fact, the only insight provided is the Department's tentative assertion that "this alignment will better facilitate recipients' ability to comply with their obligations" under both statutes. 87 Fed. Reg. at 41415. But elsewhere, the Department also admits that the analysis of whether a hostile environment exists is necessarily fact-specific and, among other things, must consider how a student—versus an employee—reasonably perceives the environment. Since the analyses differ for students and employees, it's unclear what benefits accrue to schools from similarity between the Title VII and Title IX formulations (especially where analysis of peer-on-peer discrimination is at issue). In contrast, the Preamble to the current regulations explained that aligning the Title VII and Title IX definitions of sexual harassment didn't further the purpose of Title IX or benefit students and employees participating in education programs or activities. 85 Fed. Reg. at 30151 (citing, *e.g.*, Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J. COLL. & UNIV. L. 385, 449 (2009) (arguing that restrictions on workplace speech "ultimately do not take away from the workplace's essential functions—to achieve the desired results, make the client happy, and get the job done" and free expression in the workplace "is typically not necessary for that purpose" such that workplaces are often "highly regulated environments" while "[o]n the other hand, freedom of speech and unfettered discussion are so essential to a college or university that compromising them fundamentally alters the campus environment to the detriment of everyone in the community" such that free speech and academic freedom are necessary preconditions to a university's success.).

The Department must provide a sufficient explanation.

B. The proposed change to the definition of sexual harassment in § 106.30 will violate First Amendment rights and chill the free exchange of ideas.

The NPRM pays lip service to free speech in its preamble. *See* 87 Fed. Reg. at 41415 ("Title IX protects individuals from sex discrimination and does not regulate the content of speech as such. OCR has expressed this position repeatedly in discussing Title IX in prior guidance. See 2001 Revised Sexual Harassment Guidance at 22; 2003 First Amendment Dear Colleague Letter; 2014 Q&A on Sexual Violence at 43-44. The Department emphasizes that in cases of alleged sex-based harassment, the protections of the First Amendment must be considered if, for example, issues of speech or expression.").

The Department has failed to heed the warnings of the past and account for the reasons why the current regulations were put into place. In the preamble to the 2020 regulations, the Department stated:

> The "Sexual Harassment" subsection of the "Section 106.30 Definitions" section of this preamble discusses in greater detail how the *Davis* definition of sexual harassment as "severe, pervasive, and objectively offensive" comports with First Amendment protections, and the way in which a broader definition, such as severe, persistent, or pervasive (as used in the 1997 Guidance and 2001 Guidance), has led to infringement of rights of free speech and academic freedom of students and faculty.

85 Fed. Reg. at 30036 n.88; *see also id.* at 30130 ("Failure to recognize and respect principles of free speech and academic freedom has led to overly broad anti-harassment policies that have resulted in chilling and infringement of constitutional protections."). The current definition contained in § 106.30 captures categories of misconduct likely to impede educational access while avoiding a chill on free speech and academic freedom. The failure to recognize and respect free speech principles and academic freedom has led to overly broad anti-harassment policies in the past that have resulted in chilling and infringement of constitutional protections. Several provisions in the Proposed Rule tread the same, anti-speech path.

1. The Proposed Rule would modify 34 C.F.R. § 106.44 to require schools to respond to sex discrimination, regardless of whether schools know about it, and impose monitoring duties on Title IX coordinators, which would chill speech.

The current regulations require that a recipient must possess "actual knowledge" in order to be held liable under Title IX. *See* 34 CFR § 106.44(a) ("A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."); see also 85 Fed. Reg. at 30038 ("These final regulations adopt the actual knowledge condition from the *Gebser/Davis* framework so that these final regulations clearly prohibit a recipient's own intentional discrimination, but adapt the *Gebser/Davis* condition of actual knowledge to include notice to more recipient employees than what is required under the Gebser/Davis framework, in a way that takes into account the different needs and expectations of students in elementary and secondary schools, and in postsecondary institutions, with respect to sexual harassment and sexual harassment allegations."); *id.* at 30035 ("The withdrawn 2011 Dear Colleague Letter continued to recommend that schools act upon constructive notice (rather than actual knowledge) and to hold schools accountable under a strict liability standard rather than deliberate indifference.").

The NPRM proposes modifying 34 C.F.R. 106.44(a) and (b) to say:

> (a) A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.
> (b) A recipient must …. Require its Title IX Coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX.

87 Fed. Reg. at 41572.

This new duty will lead to Title IX coordinators zealously policing protected speech as a prophylactic measure to avoid Title IX violations. Unsurprisingly, this will have a detrimental effect on campus culture and campus life.

2. Schools are expected to counter "derogatory" speech.

Under the Proposed Rule, schools must *counter* "derogatory opinions," making a non-response to any such opinions a potential Title IX violation. The NPRM says:

> For instance, although the First Amendment may prohibit a recipient from restricting the rights of students to express opinions about one sex that may be considered derogatory, the recipient can affirm its own commitment to nondiscrimination based on sex and take steps to ensure that competing views are heard. The age of the students involved and the location or forum in which such opinions are expressed may affect the actions a recipient can take consistent with the First Amendment.

87 Fed. Reg. at 41515. Institutions of higher education cannot suppress student thought on controversial issues simply because some students find it "offensive." Under the proposed rule (particularly in light of the lower threshold for hostile environment claims), cancel culture will become the norm on K-12 and college campuses, as students, teachers, and professors are threatened or punished for engaging in protected First Amendment speech on sex or LGBT issues. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("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."). And, even without official action to enforce these new rules, the threat of Title IX investigations will intimidate students and faculty into keeping quiet on controversial issues. Schools are likely to ostracize students who express disfavored political, moral, and social opinions, including on gender identity. But, as the Supreme Court has said:

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Id. at 641. This principle has even more teeth at institutions of higher learning. *See Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.") (cleaned up).

The Department should withdraw this proposed change to protect free speech.

3. The NPRM Removes the current prohibition in § 106.44(a) on using speech suppression to prevail in OCR investigations.

The current regulations provide that: "The Department may not deem a recipient to have satisfied the recipient's duty to not be deliberately indifferent under this part based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment." 34 CFR § 106.44(a). This means that institutions—public and private—cannot use Title IX as an excuse for suppressing protected student or faculty speech. The Proposed Rule removed this provision. See 87 Fed. Reg. at 41432, 41572-41575. The Department has not explained why it removed this provision and must do so. The Department should withdraw this proposal to prevent schools from using their obligations under federal civil rights law to shut down protected speech.

4. The Proposed Rule's gender identity provisions turn protected speech into harassment.

As discussed above, the proposed rule defines sex-based harassment to include offensive conduct on the basis of "gender identity." The proposed Rule effectively requires schools to micromanage and control the speech of all students, teachers, and staff. This now includes things like (1) compelling the use of each person's preferred

pronouns that may contradict the person's sex; and (2) characterizing as punishable harassment any objection to allowing male participation on girls sports teams.

The Proposed Rule vaguely defines both the hostile environment standard and the obligation of the school to provide "supportive measures." Under this paradigm, an accusation by a student or teacher of "sex-based harassment" could arise from any other student or teacher refusing to "validate" or "affirm" the person's "gender identity." This could happen when a student refuses to use another student's neo-pronoun or if a lesbian turns down a date with a man, who has "identified" as a woman and tells the man the objective fact that she doesn't date men.

This clearly violates students' and teachers' First Amendment rights to express their views on scientific, moral, and religious issues. *See Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2464 (2018) ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and … a law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence) (internal quotations omitted); *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) ("Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination.") (internal quotations omitted)).

Even worse, it compels students and faculty to deny objective truth.[6]

5. The Proposes Rule removes the provision in 34 C.F.R. § 106.71(b)(1) that makes clear that exercise of rights protected under the First Amendment does not constitute retaliation

34 C.F.R. § 106.71 prohibits recipients or individuals from retaliating against individuals who participate in the Title IX process:

> No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report

[6] Legend has it that when Galileo was put on trial for his heretic belief that the Earth revolved the Sun and eventually forced to recant, he muttered under his breath "*Eppur si muove*" or "it still moves."

> or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

34 C.F.R. § 106.71(a). The regulations also, however, make clear that "the exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section." 34 C.F.R. § 106.71(b)(1).

The Proposed Rule eliminates § 106.71(b)(1). The NPRM reasons that "106.71(b)(1) is redundant and its removal would be appropriate" because "[a]s explained in the discussion of the definition of prohibited "sex-based harassment" (proposed § 106.2), the Department has long made clear that it enforces Title IX consistent with the requirements of the First Amendment." This discussion and rationale are wholly inadequate. Removal of § 106.71(b)(1) will chill free speech and infringe on First Amendment rights.

The NPRM fails to take into account the real-life examples of Title IX's retaliation provisions being abused to chill free speech. For example, the saga of Northwestern Professor Laura Kipnis is instructive:

> In 2015, she published a polemic in *The Chronicle of Higher Education* titled "Sexual Paranoia Strikes Academe." Kipnis argued that students' sense of vulnerability on campus was expanding to an unwarranted degree, partly owing to new enforcement policies around Title IX, which prohibits sex discrimination at educational institutions that receive federal funds. The new Title IX policies on sexual misconduct which were then sweeping campuses perpetuated "myths and fantasies about power," Kipnis wrote, which enlarged the invasive power of institutions while undermining the goal of educating students in critical thinking and resilience. "If you wanted to produce a pacified, cowering citizenry, this would be the method," she concluded. Kipnis wrote of a philosophy

> professor, Peter Ludlow, whom Northwestern disciplined for sexual harassment; Kipnis questioned the logic of the accusations against him. One of Ludlow's accusers, a graduate student (unnamed in Kipnis's essay), then joined a fellow graduate student in the philosophy department in filing Title IX complaints against Kipnis, under Northwestern's sexual-misconduct policy. Through her essay and a subsequent tweet about the essay, Kipnis was alleged to have violated the part of the sexual-misconduct policy prohibiting "retaliation"; additionally, she was alleged to have created a "hostile environment" and a "chilling effect" on complaints. Northwestern launched a formal Title IX investigation of Kipnis.
>
> Most people under Title IX investigation don't speak publicly about it, even to defend themselves. But Kipnis responded by publishing a follow-up essay in the Chronicle, called "My Title IX Inquisition," decrying the investigation as a misuse of Title IX that allowed "intellectual disagreement to be redefined as retaliation." On the same day, Northwestern cleared Kipnis of wrongdoing, finding that "viewpoint expression" is not retaliation, and that a "reasonable person" in the complainant's position "would not suffer a hostile environment on account of" the essay and the tweet.[7]

The Department demonstrates absolutely no awareness of harmful instances such as this—and its effects on free speech and weaponization of the Title IX process. The Department fails to provide a reasoned explanation for eliminating § 106.71(b)(1).

6. The Proposed Rule plainly ignores the mountain of evidence demonstrating that it will chill free speech on campus.

The Proposed Rule is arbitrary and capacious because it wrongly believes its new definition of sexual harassment will not chill free speech. The Department claims that "Title IX protects individuals from sex discrimination and does not regulate the content of speech as such. OCR has expressed this position repeatedly in discussing Title IX in prior guidance. *See* 2001 Revised Sexual Harassment Guidance at 22; 2003 First Amendment Dear Colleague Letter; 2014 Q&A on Sexual Violence at 43-44." 87 Fed. Reg. at 41415. But this proclamation is contradicted by a mountain of public evidence and the Department's past statements.

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[7] Jeanie Suk Gersen, Laura Kipnis's Endless Trial by Title IX, THE NEW YORKER (Sept. 20, 2017); see also Laura Kipnis, *My Title IX Inquisition*, THE CHRONICLE OF HIGHER EDUCATION, May 29, 2015, http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf.

Free speech was routinely suppressed or punished from 2011 to 2017 under Title IX. Through sub-regulatory guidance and administrative enforcement OCR created an expansive definition of sexual harassment that included "verbal conduct" (i.e., speech) such as "making sexual comments, jokes or gestures," "spreading sexual rumors," and "creating e-mails or Web sites of a sexual nature."[8] The environment became so precarious that Harvard Law School professor Jeannie Suk Gersen wrote in 2014 that law school faculty were increasingly reluctant to teach rape law for fear of offending or upsetting their students.[9] When the University of Montana sensibly incorporated the *Davis* standard into its sexual harassment policy, OCR objected.[10] OCR insisted in 2013 that the university establish policies to "encourage students to report sexual harassment early, before such conduct becomes severe or pervasive, so that it can take steps to prevent the harassment from creating a hostile environment."[11] The broad definition of sexual harassment was a so-called "national blueprint" for schools[12] and led OCR to regulate conduct that was not covered under Title IX.[13] Two scholars wrote that OCR's guidance required schools to regulate student conduct "that is not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination."[14]

The Department itself recognized this in 2020. *See, e.g.*, 85 Fed Reg. at 20036 ("The 'Sexual Harassment' subsection of the 'Section 106.30 Definitions' section of this preamble discusses in greater detail how the *Davis* definition of sexual harassment as 'severe, pervasive, and objectively offensive' comports with First Amendment protections, and the way in which a broader definition, such as severe, persistent, or pervasive (as used in the 1997 Guidance and 2001 Guidance), has led

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[8] *Id.*

[9] THE NEW YORKER, Dec. 15, 2014, http://www.newyorker.com/news/news-desk/trouble-teaching-rape-law.; *see also* Jacob Gersen and Jeannie Suk, The Sex Bureaucracy, The Chronicle of Higher Educ. (Jan. 6, 2017) (https:// www.chronicle.com/article/The-College-Sex-Bureaucracy/238805) (OCR's "broad definition" of sexual harassment has "grown to include most voluntary and willing sexual contact").

[10] U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to University of Montana, May 8, 2013, https://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf.

[11] BROOKINGS INSTITUTION, Jan. 24, 2019, https://www.brookings.edu/blog/brown-center-chalkboard/2019/01/24/the-department-of-educations-proposed-sexual-harassment-rules-looking-beyond-the-rhetoric/.

[12] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, Departments of Education and Justice: National "Blueprint" for Unconstitutional Speech Codes, https://www.thefire.org/cases/departments-of-education-and-justice-national-requirement-for-unconstitutional-speech-codes/.

[13] *See, e.g.*, Jacob Gersen and Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 902–03 (2016) (Asserting that the Obama OCR's guidance required schools to regulate student conduct "that [was] not creating a hostile environment and therefore is not sexual harassment and therefore not sex discrimination" and concluding that OCR's guidance overstep[ped] OCR's jurisdictional authority).

[14] *E.g.*, Jacob Gersen and Jeannie Suk, The Sex Bureaucracy, 104 CALIF. L. REV. 881, 902–03 (2016).

to infringement of rights of free speech and academic freedom of students and faculty.").

The Department's failure to recognize these incontrovertible facts renders its explanation insufficient, arbitrary, and capricious.

III. THE PROPOSED RULE REMOVES KEY DUE PROCESS PROTECTIONS FROM THE CURRENT REGULATIONS.

Due process is a fundamental constitutional principle in American jurisprudence. Due process is a legal principle which has been shaped and developed through the process of applying and interpreting a written constitution. "Fair process" or "procedural justice" increases outcome legitimacy. Indeed, "[r]esearch demonstrates that people's views about their outcomes are shaped not solely by how fair or favorable an outcome appears to be but also by the fairness of the process through which the decision was reached. A fair process provided by a third party leads to higher perceptions of legitimacy; in turn, legitimacy leads to increased compliance with the law."[15]

As a result, due process protections are a critical part of a Title IX. Fair grievance procedures benefit both complainants and respondents, as well as recipients. Both parties benefit from equal opportunities to participate by setting forth their own views of the allegations. Everyone benefits from processes geared toward reaching factually accurate outcomes. The grievance process prescribed in the current regulations provides a fair process rooted in due process protections that improves the accuracy and legitimacy of the outcome for the benefit of both parties.

[15] Rebecca Holland-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 FORDHAM L. REV. 2081, 2084 (2017) (internal citations omitted).

Any Title IX grievance procedure mandated by the Department must comport with due process guarantees[16] as well as fundamental fairness.[17]

A. The Proposed Rule removes or modifies important due process safeguards in the Title IX grievance process.

1. The Proposed Rule violates due process because it removes the provisions in 34 CFR § 106.45 requiring evidence to be provided to both parties.

The Department should withdraw its proposal to modify the provisions of 34 CFR § 106.45 relating to the opportunities of parties to inspect and review evidence during the grievance process. The current regulations require the recipient to:

> Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

34 CFR § 106.45.

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[16] *See Goss v. Lopez*, 419 U.S. 565, 583–84 (1975) ("On the other hand, requiring effective notice and informal hearing permitting the student to give his [or her] version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced."); Nicola A. Boothe-Perry, *Enforcement of Law Schools' Non-Academic Honor Codes: A Necessary Step Towards Professionalism?*, 89 NEB. L. REV. 634, 662–63 (2012) ("Thus, while well-settled that there is no specific procedure required for due process in school disciplinary proceedings, the cases establish the bare minimum requirements of: (1) adequate notice of the charges; (2) reasonable opportunity to prepare for and meet them; (3) an orderly hearing adapted to the nature of the case; and (4) a fair and impartial decision .... Where disciplinary measures are imposed pursuant to non-academic reasons (e.g., fraudulent conduct), as opposed to purely academic reasons, the courts are inclined to reverse decisions made by the institutions without these minimal procedural safeguards.") (internal citations omitted).

[17] *E.g.*, Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK UNIV. L. REV. 395, 406–07 (2005) ("Courts around the nation have taken a relatively consistent stance on what type of process private colleges and universities owe to their students .... Courts expect that schools will adhere to basic concepts of fairness in dealing with students in disciplinary matters. Schools must employ the procedures set out in their own policies, and those policies must not be offensive to fundamental notions of fairness.").

The Department proposes allowing parties to be given, instead, an "oral description" of the evidence: "(4) Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond." 87 Fed. Reg. at 41481. To maintain a transparent process, however, the parties need a complete understanding of the evidence obtained by the recipient and how a determination regarding responsibility is made. A written description places parties—particularly respondents—at a severe disadvantage, forcing them to trust that a school has provided a complete and accurate description of every piece of relevant evidence. We know from experience that the single-investigator model has a tremendous potential for abuse. *See* Part III(B), *infra*.

Additionally, this puts educational institutions in the position to pre-judge important issues such as relevance. It would, thus, permit these institutions to make a determination regarding relevance and then withhold evidence on that basis.

The Department should withdraw the proposal.

2. The Department should require schools to maintain a consistent evidentiary standard in 34 CFR 106.45.

The current regulations provide:

> Schools must use either "the preponderance of the evidence standard or the clear and convincing evidence standard, [and] apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment."

34 CFR § 106.45. The Proposed Rule tweaks the current evidentiary rule in 34 C.F.R. § 106.45: "Schools must "[u]se the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred." 87 Fed. Reg. at 41576.

First, this creates an internal contradiction. One reason the NPRM 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." 87 Fed. Reg. at 41486. But the Proposed Rule permits using a lower standard for sex discrimination than for other complaints, including racial discrimination complaints.

So by the Rule's own logic, schools may discriminate on the basis of race by imposing a lower standard for racial than for sex discrimination. That makes no sense.

And, the Department fails to offer a justification for mandating that sex discrimination complaints be addressed under no higher standard than other complaints but—at the same time—refusing to mandate that they also be addressed under no lower a standard.

The Department should maintain the current evidentiary standard requirements set forth in 34 CFR 106.45. If it, however, does wish to change the current standard, it should not deviate further from the Proposed Rule. It's important that (1) recipients not use an evidentiary standard below the preponderance of the evidence; (2) a recipient's grievance process state up front which of the two permissible standards of evidence the recipient has selected and (3) apply that selected standard to all formal complaints of sexual harassment, including those against employees.

3. The Proposed Rule modifies 34 CFR § 106.45 to bring back the biased and unfair single-investigator model

The current regulations flatly prohibit the single investigator model. *See* 34 CFR § 106.45 ("The role of Title IX Coordinator and the role of the Title IX investigator must be distinct from the role of Title IX adjudicator."). This is because fundamental fairness to both parties requires that the intake of a report and formal complaint, the investigation (including party and witness interviews and collection of documentary and other evidence), drafting of an investigative report, and ultimate decision about responsibility should not be left in the hands of a single person (or team of persons each of whom performed all those roles). Rather, after the recipient has conducted its impartial investigation, a separate decision-maker must reach the determination regarding responsibility; that determination can be made by one or more decision-makers (such as a panel), but no decision-maker can be the same person who served as the Title IX Coordinator or investigator.

The Proposed Rule eliminates this prohibition and expressly permits the decision-maker to be the same person as the Title IX coordinator. Integrating the investigative and decision-making functions will (1) substantially impair the overall fairness of the grievance process; (2) decrease the reliability of fact-finding and the accuracy of outcomes; (3) lower party and public confidence in outcomes; and (4) decrease the accuracy of the determination regarding responsibility in Title IX cases because individuals who perform both roles may have confirmation bias and other prejudices that taint the proceedings, whereas separating those functions helps prevent bias and prejudice from impacting the outcome.

Prior to the current regulations, Both OCR and the White House pressured schools to employ the single investigator model.[18] Schools housed these investigators/adjudicators in their Title IX offices, which had strong incentives to ensure the school stayed compliant with the DCLs to avoid losing federal funding. Many Title IX offices assumed every role in the process, acting as prosecutor, judge, jury, and appeals board

The biases of individuals in the single-investigator role had disastrous consequences. *See, e.g.*, Laura Kipnis, UNWANTED ADVANCES 33 (2017) ("The reality is that a set of incomprehensible directives, issued by a branch of the federal government, are being wielded in wildly idiosyncratic ways, according to the whims and biases of individual Title IX officers operating with no public scrutiny or accountability. Some of them are also all too willing to tread on academic and creative freedom as they see fit"). Even proponents of a strong role for Title IX coordinators acknowledged that corruption existed in the process.[19]

Indeed, courts have called the fairness of this model into question over the last few years. *See, e.g.*, *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1072–73 (Cal. App. 2018) (all decision makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator."); *Doe v. Miami Univ.*, 882 F.3d 579, 601, 605 (6th Cir. 2018) (court found "legitimate concerns" raised by the investigator's "alleged dominance on the three-person [decision-making] panel" because "she was the only one of the three with conflicting roles."); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016) (referring to the "obvious" "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review"); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1068 (Cal. App. 2019) ("As we have explained, in USC's system, no in-person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a

[18] *See Doe v. Univ. of Scis.*, 961 F.3d 203, 213 (3d Cir. 2020) (describing the pressure universities faced as a result of the Dear Colleague Letter). In the "single investigator" model, there is no hearing. One person conducts interviews with each party and witness, and then makes the determination whether the accused is responsible. No one knows what the investigator hears or sees in the interviews except the people in the room at the time. This makes the investigator all-powerful. Neither accuser nor accused can guess what additional evidence to offer, or what different interpretations of the evidence to propose because they are completely in the dark about what the investigator is learning and are helpless to fend off the investigator's structural and personal biases as they get cooked into the evidence-gathering.

[19] *See, e.g.*, Association of Title IX Administrators (ATIXA), *ATIXA Position Statement: Why Colleges Are in the Business of Addressing Sexual Violence* 3–4 (Feb. 17, 2017) (acknowledging that due process has been denied in some recipients' Title IX proceedings but insisting that "Title IX isn't the reason why due process is being compromised .... Due process is at risk because of the small pockets of administrative corruption ... and because of the inadequate level of training currently afforded to administrators. *College administrators need to know more about sufficient due process protections and how to provide these protections in practice*.") (emphasis added).

written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross-examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross-examination: adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness' credibility.").

The Proposed Rule pays lip service to 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. It somehow concludes, however, that unifying the investigatory and adjudicatory roles does not raise a substantial risk of bias because "the recipient is not in the role of prosecutor seeking to prove a violation of its policy," but rather "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." 87 Fed. Reg. at 41467.

Perhaps most shockingly, the Department wrongly claims that a separate adjudicator would not help the reliability of the grievance process. 87 Fed. Reg. at 41466–41467. It cites no evidence in support of this claim. *Id.* This rationale is inadequate and fails to account for the real-world evidence that led to the 2020 Regulations.

A separate, neutral adjudicator is also necessary because of the Title IX incentive structure. The incentive structure pushes recipients toward findings of fault. That is, if there is discrimination that a recipient fails to redress, they could lose federal funding, so they are incentivized to stamp out as many Title IX violations as possible. On the other hand, however, if there is non-discriminatory conduct that schools redress, it often costs the recipient nothing. It's common sense, moreover, that an investigator may come to hold views that favor one party or another during an investigation. A neutral decisionmaker is one of the best ways to ensure a fair process.

The Department's proposed change would return to the flawed and highly unfair system that led to the enactment of the 2020 Regulations.

4. The Proposed Rule violates Due Process by removing written notice provisions in 34 C.F.R. 106.45(b)(2)(i)(B).

The current regulations require the recipient to provide written notice of a formal complaint to a respondent. In that written notice, a respondent must be

provided with (1) presumption of innocence statement; (2) right to advisor of choice; (3) penalty for false statements:

> The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section. The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

34 CFR 106.45(b)(2)(i)(B). The Proposed Rule removes those three requirements from the written notice:

> (c) Notice of allegations. Upon initiation of the recipient's grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known. (1) The notice must include: (i) The recipient's grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k); (ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident, the conduct alleged to constitute sex discrimination under Title IX, and the date and location of the alleged incident, to the extent that information is available to the recipient; and (iii) A statement that retaliation is prohibited.

87 Fed. Reg. at 41575. The Department has failed to provide any justification for why it removed the requirements that recipients inform accused students about the presumption of innocence, the right to counsel, or the penalties for false statements.

5. The Proposed Rule removes the due process protection of mandating live hearings for postsecondary settings.

The Title IX regulations currently require a live hearing at the postsecondary level. 34 CFR § 106.45(b)(6)(i) ("For postsecondary institutions, the recipient's grievance process must provide for a live hearing."). The Proposed Rule removes that requirement. 87 Fed. Reg. at 41462, 41497, 41498. "A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing."

Relatedly, under the current regulations the parties must be allowed at live hearings to ask questions directly through their advisors:

> At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

34 C.F.R. § 106.45(b)(6)(i).

At the postsecondary level, live hearings are key to seeking truth and determining responsibility. Because most parties and witnesses are adults there, grievance procedures' live cross-examination at a hearing is both appropriate and worthwhile. The current regulations require institutions to provide a live hearing, and to allow the parties' advisors to cross-examine the other party and witnesses.

The current regulations balance the importance of cross-examination with any potential harm from personal confrontation between the complainant and the respondent by requiring questions to be asked by an advisor aligned with the party. Further, they allow either party to request that the recipient facilitate the parties being located in separate rooms during cross-examination while observing the questioning live via technological means. The current regulations thereby provide the benefits of cross-examination while avoiding any unnecessary trauma that could arise from personal confrontation between the complainant and the respondent.[20]

The Proposed Rule obviously doesn't require a live hearing. But it also now appears to only require schools to let parties submit written questions to each other on the limited topic of "credibility":

> This assessment of credibility includes either (i) Allowing the decisionmaker to ask the parties and witnesses, during individual

[20] *Cf. Baum*, 903 F.3d at 583 ("Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student's agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination— its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.").

> meetings with the parties or at a live hearing, relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties …

87 Fed. Reg. at 41577–41578. The wording of this provision is vague, but it appears that recipients can exclude questions between parties as long as credibility isn't in dispute. **We request further clarification as to when a recipient may exclude questions between the parties.** If the Department does not provide clarification, the Proposed Rule is arbitrary and capricious.

Finally, at the postsecondary level, the Proposed Rule imagines that college students will mostly "self-advocate" in harassment proceedings. Although students would be entitled to an advisor, postsecondary institutions would not have to permit parents to be involved in the process. The Department has failed to give any meaningful reason for excluding parents from these proceedings. Students in higher education would undoubtedly benefit from a parent's counsel and the Proposed Rule fails to provide a single reason for excluding parents from the process.

6. The Proposed Rule's "Supportive Measures" provision is internally inconsistent.

The proposed rule allows "supportive measures" that temporarily burden a respondent only during the pendency of the proceedings. 87 Fed. Reg. at 41421. This provision is internally contradictory because, elsewhere in the NPRM, it emphasizes the need for equitable treatment in the Title IX process between complainants and respondents. *Id.* at 41453. Here, however, both are not subject to the same rules and the Department has not acknowledged or explained that departure. This is also irrational because there's no basis for distinguishing between complainants and respondents on the basis of their conduct. Since respondents are afforded the presumption of innocence by the NPRM, *id.* at 41488, 41508, this makes no sense.

This provision is also flawed because there are no limits to how burdensome the supportive measures may be. In theory, a respondent could be suspended from all classes and dismissed from campus on the basis of an unproven allegation. A school wouldn't even need to find that the complainant is likely to prevail on his or her claim of discrimination to impose that *de facto* sanction.

B. The totality of the Proposed Rule returns to the problematic paradigm from the 2011–17 era and fails to adequately consider the mountain of evidence that strong due process protections are necessary for Title IX grievances procedures.

The current regulations in 34 CFR § 106.45 (and elsewhere) set forth clear legal obligations that require schools to promptly respond to allegations of sexual harassment, follow a fair grievance process to resolve those allegations, and provide remedies to victims. It guarantees victims and accused students strong, clear procedural rights in a predictable, transparent process designed to reach reliable outcomes.[21] When taken as a whole, the current regulations were enacted following regulatory and constitutional mess from 2011 to 2017. The proposed rule would re-institute many of those flawed policies.

OCR's 2011 *Dear Colleague Letter: Sexual Violence* ("2011 DCL") wreaked havoc on campuses across the country (The 2011 DCL was expanded upon by a 2014 *Questions and Answers on Title IX and Sexual Violence*). It was a Kafkaesque disciplinary disaster that resulted in hundreds of successful lawsuits against schools and widespread criticism from across the ideological spectrum. The 2011 DCL compelled schools to adopt the lowest standard of proof for proving sexual harassment and sexual assault claims—preponderance of the evidence—and pressured schools to find accused students responsible for sexual misconduct even where there was significant doubt about culpability.[22]

A laundry list of due process violations—reminiscent of Star Chamber—stacked the deck against accused students: schools failed to give students the complaint against them, or notice of the factual basis of charges, the evidence gathered, or the identities of witnesses; schools fail to provide hearings or to allow

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[21] *See, e.g.*, U.S. Dep't of Educ. YouTube Channel, *OCR Webinar on Due Process Protections under the New Title IX Regulations* (July 21, 2020), https://youtu.be/48UwobtiKDI; U.S. Dep't of Educ. YouTube Channel, *OCR Title IX Webinar: Bias and Conflicts of Interest* (Jan 15, 2021), https://www.youtube.com/watch?v=vHppcOdrzCg.

[22] OCR found numerous institutions in violation of Title IX for failing to adopt the preponderance of the evidence standard in its investigations of sexual harassment, even though the notion that the preponderance of the evidence standard is the only standard that might be applied under Title IX was set forth in the 2011 Dear Colleague Letter and not in the Title IX statute, current regulations, or other guidance. *E.g.*, U.S. Dep't. of Education, Office for Civil Rights, Letter of Findings to Harvard Law School 7, Dec. 10, 2014, https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf ("[I]n order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence."); *see also* Blair A. Baker, *When Campus Sexual Misconduct Policies Violate Due Process Rights*, 26 CORNELL J. L. & PUB. POL'Y 533, 542 (2016) (The 2011 DCL "forced universities to change their former policies drastically, with regards to their specific procedures as well as the standard of proof, out of fear that the Department of Education will pursue their school for a violation of Title IX.").

the accused student's lawyer to attend or speak at hearings; schools barred the accused from putting questions to the accuser or witnesses, even through intermediaries; schools denied parties the right to see the investigative report or get copies for their lawyers for preparing an appeal; schools allowed appeals only on very narrow grounds such as new evidence or procedural error, providing no meaningful check on the initial decisionmaker. A study by the Foundation for Individual Rights in Education found that 73% of the top universities in America did not guarantee the presumption of innocence in campus proceedings.[23]

By 2014, OCR had stopped using the terms complainant/alleged victim and alleged perpetrator and replaced them with victim/survivor and perpetrator. OCR then began keeping a public list of the schools at which it was investigating possible Title IX violations, putting schools under a cloud of suspicion.

This resulted in a Title IX system that quite literally resembled Kafka's *The Trial*.[24] Here are just a few examples of the infamous system created during the 2011–17 paradigm:

- An athlete of color at Colorado State University-Pueblo was accused of sexually assaulting a female trainer, but not by her. Despite the trainer saying that she had not been raped, University officials pointed out that according to Title IX, they got to decide the accused student's fate and the student was found guilty and expelled.[25]

- At USC, a student-athlete was kicked out of school for abusing his girlfriend—despite the fact his girlfriend never reported any abuse and vehemently denied any abuse ever took place—after a neighbor saw the couple playfully roughhousing in the front yard.[26]

- A Howard University law professor was punished, following a 16-month investigation, because an exam question he wrote involving a bikini wax was deemed to have created an unsafe environment after a student "allegedly

[23] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, Dec. 18, 2018, https://www.thefire.org/report-as-changes-to-title-ix-enforcement-loom-americas-top-universities-overwhelmingly-fail-to-guarantee-fair-hearings-for-students/.

[24] *See, e.g.*, COMMENTARY MAGAZINE, June 2017, https://www.commentarymagazine.com/articles/kc-johnson/kafka-u/.

[25] REASON, Apr. 19, 2016, https://reason.com/2016/04/19/female-student-said-im-fine-and-i-wasnt/.

[26] REASON, Aug. 2, 2017, https://reason.com/2017/08/02/student-athletes-torn-apart-by-title-ix/.

believed the question's premise somehow required her to reveal to the class whether she'd had a Brazilian wax."[27]

- A judge rebuked Brandeis University for denying fundamental due process rights to a student who was found guilty of sexual misconduct for a variety of non-violent offenses: most notably, because he had awakened his then-boyfriend with nonconsensual kisses.[28]

- Northwestern University Professor Laura Kipnis (herself a liberal feminist) faced a Title IX complaint and investigation simply for writing an essay about sex on campus and criticizing sexual harassment policies (the complaint alleged she created a "chilling environment" for reporting sexual harassment or assaults).[29]

- Carleton College suspended a student for drunken sex and then expelled the student as soon as he appealed the suspension, with the Dean writing to him that "the fact you continue to assert that it was okay to engage in sexual activity with a person in [Jane Doe's] condition is deeply troubling."[30]

- A University of Tennessee student was investigated for sexual harassment because he wrote his instructor's name wrong.[31]

- Resident Advisors at University of Massachusetts-Amherst told students that making jokes about Harambe, the dead gorilla and internet meme, could constitute a violation of Title IX.[32]

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[27] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, July 6, 2017, https://www.thefire.org/a-sticky-situation-at-howard-university-brazilian-wax-test-question-nets-professor-a-504-day-title-ix-investigation-sanctions/.

[28] REASON, Apr. 1, 2016, https://reason.com/2016/04/01/judge-sides-with-gay-brandeis-student-gu/; https://www.washingtonexaminer.com/federal-judge-rebukes-lack-of-due-process-in-campus-sex-assault-procedures.

[29] THE CHRONICLE OF HIGHER EDUCATION, May 29, 2015, http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf.

[30] REASON, Aug. 1, 2019, https://reason.com/2019/08/01/carleton-college-title-ix-expelled-football-student-lawsuit/.

[31] REASON, Oct. 12, 2016, https://reason.com/2016/10/12/ut-student-now-being-investigated-for-se/.

[32] REASON, Sept. 6, 2016, https://reason.com/2016/09/06/umass-amherst-harambe-jokes-are-racist-m/.

One of the more tragic ironies is that the 2011 DCL resulted in a disproportionate number of expulsions and scholarship losses for Black male students.[33]

The criticisms of the 2011–17 system spanned the ideological spectrum. Here are just a few examples:

- Four feminist law professors at Harvard wrote that the Biden/Lhamon Title IX system "put pressure on [schools] to stack the system so as to favor alleged victims over those they accuse and that "procedures for enforcing [definitions of sexual harassment] are frequently so unfair as to be truly shocking."[34]
- More than two dozen other Harvard Law School professors wrote a letter in 2014 objecting to the school's Title IX process as unfair.[35]
- A group of 16 law professors from the University of Pennsylvania argued "we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness."[36]
- Janet Halley, a self-described feminist and professor at Harvard Law School told Congress that "the rate of complaints and sanctions against male (including transitioning to male) students of color is unreasonably high."[37]

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[33] REALCLEAREDUCATION, Jan. 21, 2019, https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html.

[34] Elizabeth Bartholet et al., *Fairness For All Students Under Title IX*, Aug. 21, 2017, https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y.

[35] BOSTON GLOBE, Oct. 14, 2014, https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html ("Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process").

[36] Open Letter from Members of the Penn Law School Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities*, WALL ST. J., Feb. 18, 2015, http://online.wsj.com/public/resources/documents/ 2015_0218_upenn.pdf (statement of 16 members of the University of Pennsylvania Law School faculty).

[37] THE COLLEGE FIX, Aug. 4, 2015, https://www.thecollegefix.com/shut-out-of-sexual-assault-hearing-critics-of-pro-accuser-legislation-flood-senate-committee-with-testimony/ ; Additionally, Harvard Law Professor Jeannie Suk Gersen wrote in The New Yorker in 2015 that the administrators and faculty members she'd spoken with who "routinely work on sexual-misconduct cases" said that "most of the complaints they see are against minorities." The New Yorker, Dec. 11, 2015, https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

- The past President of the American Civil Liberties Union remarked in 2015 that "OCR's distorted concept of sexual harassment actually does more harm than good to gender justice, not to mention to free speech."[38]
- The American College of Trial Lawyers issued a report concluding that OCR had imperiled due process and free speech.[39]

The due-process deficiencies in the 2011 DCL and 2014 Q&A led to over 600 lawsuits by accused students against their academic institutions.[40] These lawsuits, more often than not,[41] resulted in victories for accused students across the country in state and federal court, including key wins at the appellate level. *See, e.g.*, *Doe v. Oberlin Coll.*, 963 F.3d 580, 581 (6th Cir. 2020); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 205 (3d Cir. 2020); *Doe v. Purdue Univ.*, 928 F.3d 652, 656 (7th Cir. 2019); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 60 (1st Cir. 2019); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Univ. of Cincinnati*, 872 F.3d 393 (6th Cir. 2017); *Doe v. Claremont McKenna Coll.*, 25 Cal. App. 5th 1055, 1070 (2018); *Doe v. Regents of Univ. of Cal.*, 28 Cal. App. 5th 44, 61 (2018).

The Department has proposed returning—in large part—to the problematic Title IX grievance system from the 2011–17 era. It has utterly failed to reconcile these past failures of OCR policy with its Proposed Rule.

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[38] Shorenstein Center, *Nadine Strossen: "Free Expression: An Endangered Species on Campus?" Transcript*, https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript/.

[39] American College of Trial Lawyers, *Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence, White Paper on Campus Sexual Assault Investigations*, 2017, https://www.actl.com/docs/defaultsource/defaultdocumentlibrary/positionstatementsandwhitepapers/task_force_allegations_of_sexual_violence_white_paper_final.pdf.

[40] *See Milestone: 600+ Title IX/Due Process Lawsuits in Behalf of Accused Students*, TITLE IX FOR ALL, Apr. 1, 2020, https://www.titleixforall.com/milestone-600-title-ix-due-process-lawsuits-in-behalf-of-accused-students; *see also* Diane Heckman, *The Assembly Line of Title IX Mishandling Cases Concerning Sexual Violence on College Campuses*, 336 WEST'S EDUC. L. REP. 619, 631 (2016) (stating that since 2014 "there has been an influx of lawsuits contending post-secondary schools have violated Title IX due to their failure to properly handle sexual assault claims. What is unusual is that both sexes are bringing such Title IX mishandling cases due to lack of or failure to follow proper process and due process from each party's perspective. A staggering number of cases involve incidents of alcohol or drug usage or intoxication triggering the issue of the negating a voluntary consent between the participants.") (internal citations omitted).

[41] *See* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49 (2019).

> (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(g).

Two federal district courts have now determined that an entity's tax-exempt status under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), constitutes federal financial assistance. *See E.H. v. Valley Christian Acad.*, 2022 U.S. Dist. LEXIS 132893, at *17 (C.D. Cal. July 25, 2022); *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass'n*, 2022 U.S. Dist. LEXIS 130429, at *15 (D. Md. July 21, 2022). Both decisions held that 501(c)(3) status made private high schools indirect recipients of federal financial assistance, therefore, subjected them to Title IX.

Prior to these decisions, 501(c)(3) had never been considered federal financial assistance. Income tax exemptions are "conspicuously absent from [the] laundry list" of examples in 34 C.F.R. § 106.2(g). *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n*, 134 F. Supp. 2d 965, 971 (N.D. Ill. 2001); see also *Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 332 n.2 (E.D.N.Y. 2012) (citing, *e.g.*, *Stewart v. New York Univ.*, 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976)).

The Department should clarify in 34 C.F.R. § 106.2(g) that 501(c)(3) status does not constitute federal financial assistance. Extending Title IX to schools because of 501(c)(3) status would be a drastic extension of Title IX. It would force every private school enjoying tax-exempt status to comply with Title IX.

VI. THE DEPARTMENT MUST ASSESS THE IMPACT OF THE PROPOSED REGULATIONS ON FAMILIES AND PARENTAL RIGHTS PURSUANT TO 5 U.S.C § 601.

Section 654 of the Treasury and General Government Appropriations Act, 1999, Pub. L. 105-277, codified at 5 U.S.C § 601, provides:

> Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether … the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children.

5 U.S.C § 601 (statutory notes). As discussed in Part I(D), the Proposed Rule infringes on parental rights because it treats failure to "affirm[] gender identity" the same as traditional forms of discrimination (*e.g.*, excluding girls from the debate team), a school wouldn't need to obtain parental consent before pushing "gender affirmation" of whatever self-declared identity a child announces in school; the school would never

have to disclose that affirmation program to the child's parents, and must—at any rate—pursue it even over parents' objections. The statute clearly provides that the Department must evaluate its proposed actions with respect to whether the "action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children." *Id.*

The Department must conduct the impact analysis as required by Pub. L. 105-277, codified at 5 U.S.C § 601, or the Proposed Rule is arbitrary, capricious, and not in accordance with law.

Sincerely,

AUSTIN KNUDSEN
ATTORNEY GENERAL OF MONTANA

STEVE MARSHALL
ATTORNEY GENERAL OF ALABAMA

DEREK SCHMIDT
ATTORNEY GENERAL OF KANSAS

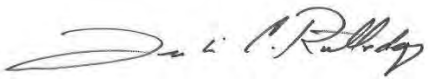

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Exhibit 29

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,

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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] , 576 U.S. 644, 657 (2015).

[2] , , , 6 F.4th 1160, 1178 (10th Cir. 2021) , 142 S. Ct. 1106 (2022) (Mem.).

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

[4] , 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 , 138 S. Ct. 2448, 2471–73 (2018) (discussing the essential First Amendment protections for issues of public concern).

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

[7] , 992 F.3d 492, 511 (6th Cir. 2021); , 548 F. Supp. 3d 814, 824 (S.D. Ind. 2021); , No. 5:22-cv-0415-HLT-GEB (D. Kan. May 9, 2022); , No. 210584 (Va. Aug. 30, 2021); Emily Matesic, , 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, , Wis. Pub. Radio (June 3, 2022), https://www.wpr.org/kiel-school-board-closes-title-ix-investigation-over-wrong-pronouns-prompted-threats-violence.

[8] , Complaint filed in , 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 , Case No. 5:22-cv-0415-HLT-GEB, (D. Kan. Mar. 7, 2022), https://adfmedialegalfiles.blob.core.windows.net/files/RicardComplaint.pdf.

[9] Complaint filed in , 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 , Case No. CL22-1304, at ¶ 81.

[11] , 992 F.3d at 511–12.

[12] at 501.

[13] 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 , 135 S. Ct. at 2227–30.

16 . at 2228.

17 , No. 210584, slip op. at *9–10 (Va. Aug. 30, 2021).

18 , 936 F.3d 740, 755 (8th Cir. 2019).

19 ., 515 U.S. 557, 578–79 (1995).

20 , 448 P.3d 890, 914–15 (Ariz. 2019).

21 , 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 pervasive, that, based on the totality of the circumstances and evaluated subjectively objectively, denies 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] ., 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 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] , 605 F.3d 703, 708 (9th Cir. 2010) (quotation omitted).

[25] , 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] , 526 U.S. at 651.

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

[28] at 659.

order.[29] Direct restrictions on speech have a punitive effect even if the recipient institution's 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 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 , No. 3:22-CV-00183-DCN, 2022 WL 2355532, at *13.

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31 NPRM at 677.

32 , 505 U.S. 123, 130 (1992).

33 NPRM at 676.

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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 health and safety of a student or clarify that the 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] at 679.

[36] Christiana Kiefer, , 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 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).

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 . . . ."[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, , 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] 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. , 508 U.S. 384 (1993); , 533 U.S. 98 (2001).

[63] NPRM at 666 (emphasis added).

[64] 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 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] at 43.

Exhibit 30

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 ill Harm arental Rights and Endanger hildren

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 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 parental rights and the well-being of children. By redefining "sex" to encompass

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"gender identity," the Department of Education wrongly seeks to compel schools to treat students as whatever sex they like — without parents' knowledge or consent.

I. Redefining "sex discrimination" to include gender-identity discrimination undermines parental rights and exposes children to the risk of long-term harms.

What role do parents play in deciding the medical and psychological care of their children? Do school officials have the right to supersede the authority and stated intent of parents when it comes to some of the most important decisions regarding their children?

Most Americans, and especially most parents, would agree that outside of extreme circumstances, parents should be the ones making crucial decisions about their children's health and well-being.

Across the country, school districts are beginning to introduce policies that require staff to ask students to provide their preferred name and pronouns. The rationale underlying these questions is that students will express their "gender identity" through the use of these names and pronouns. Staff are then required to use any name and pronoun the student provides, even if the names and pronouns are different from the registration or enrollment documents provided by the student's parents. And staff are also required to keep the use of these preferred names and pronouns confidential from the student's parents or guardians — hiding their use when communicating with parents or guardians, for example, on documents sent home — unless the student specifically authorizes staff to disclose their use.

The implications of such policies are clear: School districts are enabling students to lead double lives — using one name and set of pronouns at school and another at home, without their parents' knowledge and consent. The lack of parental knowledge is no accident. The purpose of these policies is to cut parents out of decisions about their children until school officials have decided that they will approach their child's desire to live as the opposite sex the way that school officials want them to approach it.

Keeping such sensitive information secret from parents is a grave imposition on their fundamental rights. If schools keep secrets from parents, how can parents direct the upbringing of their children? In almost all cases, parents know their children better than any school official could. If schools give parents unreliable information about their children's mental health at school, how can parents make decisions regarding their children's education and healthcare in a manner that is best for their individual child and consistent with their family's values or religious beliefs? Because these policies turn school officials into gatekeepers — controlling

parents' access to information about their own children — they are unconstitutional.

As a result, ADF is already challenging these policies in court. The Harrisonburg City Public School Board in Virginia has one such policy. Upon a child's request, Harrisonburg's policy requires staff to immediately begin using opposite-sex pronouns and forbids staff from sharing information with parents about their child's request, instead instructing staff to mislead and deceive parents. This policy (and others like it) usurps parents' right to direct the upbringing of their children. It also forces school staff to violate their religious beliefs by affirming the board's view on gender identity — not to mention by lying to parents.

Such policies will only proliferate if the Department adds proposed section 106.10 (defining sex discrimination to include gender identity) and the new proposed definition of "sex-based harassment" under section 106.2 to the Title IX regulations. Indeed, the notice of proposed rulemaking cites with approval two specific policies — one from the California Department of Education, and another from Washoe County School District in Nevada — that instill these requirements around the use of names and pronouns.[1] According to the rule, the "requirement to permit students to participate [in education] consistent with their gender identity may require updating of policies."[2]

Those two approved policies, from California's Department of Education and Nevada's Washoe County School District, say that schools need to share *nothing* with parents when a child expresses gender dysphoria.

Washoe's policy says that transgender students have "the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share their private information." Staff *must not* "disclose information that may reveal a student's transgender or gender non-conforming status to others, including parents/guardians or other staff members," unless the student specifically authorizes it. Similarly, California insists that with "rare exceptions, schools are required to respect the limitations that a student places on the disclosure of their transgender status, including *not* sharing that information with the student's parents." Instead, once students assert an alternative gender identity, the school must refer to them by preferred pronouns, let them use the bathrooms or locker room of their choice, and practice so-called "social transition" or "social affirmation" (a potentially life-changing psychotherapeutic intervention at the center of a roiling international debate) — all while intentionally deceiving

[1] Notice of proposed rulemaking document – p627; 87 Fed. Reg. at 41,529.
[2] 87 Fed. Reg. at 41,391.

parents. They're kept in the dark and cut out of crucial decisions about their own children.[3]

Given the clear threat to parental rights that these policies represent, as well as the potential harms faced by students who have no parental oversight on such changes, ADF strongly opposes the Department's proposed redefinition of sex to include gender identity. The Department should not adopt these proposed regulations.

A. The Department must expressly consider the impact on parental rights.

The proposed rule must directly consider the impact on parental rights, in each of its applications and across all of its changes to Title IX.

Parents take care of us before we can take care of ourselves. They bring us into the world. They teach us to walk, to talk, to love. They prepare us to enter society and live as upstanding citizens.

Of all the people who share in shaping a child's moral character and the adults they become — from teachers and coaches to spiritual mentors, extended family, and others — parents have far and away the deepest and most enduring influence. The men and women we are often reflect the men and women our parents were.

Everyone should care about how children are raised. They become our nation's leaders, after all. Everyone should also be able to agree that, in nearly every case, parents are best positioned to protect their children's health and welfare.

Children are first and foremost the responsibility of their parents. The unique and intimate relationship between a parent and a child creates a duty and a corresponding natural right. Parents' right to direct the upbringing and education of their children is "pre-political." What does that mean? Parental rights are natural rights that exist before the state. They cannot be given or taken away by a government. In the words of the U.S. Supreme Court, children are not "mere creature[s] of the state."[4]

Parental rights include, but are not limited to, making decisions regarding children's education and healthcare in a manner consistent with their family's

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[3] Max Eden, Title IX's anti-parent secret agenda (June 24, 2022), https://www.washingtonexaminer.com/restoring-america/community-family/title-ixs-anti-parent-secret-agenda.

[4] *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

values and religious beliefs. Parents must do so to promote their children's general health and well-being.

Although the law recognizes the rights of parents, parental rights are under increasing attack from public-school indoctrination and state governments. Sometimes, tragically, parents fail at providing their children's most basic needs. When that happens, the government plays an important role. But the government should never replace parents. Great teachers recognize this. Therefore, they seek to support the role of parents including, and especially, in the classroom.

Students deserve to learn in a classroom where they, their parents, and their views are treated with respect. Imposing a particular (and hotly debated) political viewpoint on students on questions about gender and sexual orientation stigmatizes those who hold disfavored views. According to Mary Hasson of the Ethics and Public Policy Center, "An education environment that, implicitly or explicitly, labels or treats students as 'bigoted' because of their beliefs denies that child the right to a supportive educational environment, effectively denying them meaningful access to the right to an education."[5]

Alliance Defending Freedom litigates precedent-setting cases to protect parents and help to shape and defend public policy that enshrines parents' rights as fundamental.

B. Efforts to hide the use of students' "preferred" names and pronouns from their parents or guardians represent a clear threat to parental rights.

Redefining the word "sex" in Title IX in the new Biden administration rule will pressure schools to mislead emotionally distressed children into thinking they can change their sex. Schools could face investigation if they do not address students who are confused about their sex with pronouns and names that correspond to the opposite sex or to the concept of being "non-binary."

The proposed rule could even mandate "gender support plans," which challenge the truth that we are born male and female and erroneously suggest that a doctor "assigns" a child's sex after the child is born. Schools often develop these plans without informing parents or asking for their consent. Some schools even lie to parents about the existence of these plans. The implementation of such plans in schools from coast-to-coast is directly undermining the vital role that parents play in guiding children's education and health care decisions.

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[5] Emilie Kao Jared Eckert, *Promise to America's Children Warns of Destructive Equality Act LGBT Agenda*, Daily Signal (Feb. 18, 2021), https://www.heritage.org/gender/commentary/promise-americas-children-warns-destructive-equality-act-lgbt-agenda.

Children who experience feelings of confusion or discomfort with their bodies need to be protected from the irreversible damage that results from social and medical interventions on their young minds and bodies. They need compassion and understanding. They need wise counsel and the truth.

They need their parents. Parents love and know their children best, and it is their fundamental right to help their children make decisions about their physical and mental health.

The truth is that there are only two "sexes." Gender dysphoria (the distress someone experiences when they have a disconnect between their bodily sex and internal sense of gender) is a serious condition that should be treated with humane and compassionate responses. Adults, youth, and children who suffer from gender dysphoria deserve to be treated with the utmost respect and great compassion, but no child is born in the wrong body. Schools should not encourage students to treat their bodies, including their biological sex, as a mistake.

All children need protection, and redefining "sex" under Title IX (or any other statute) will endanger them. In most cases, children need the protection *of* their parents — not protection *from* their parents. This is particularly the case with children suffering from distress caused by feelings of discomfort with their sex. Kids struggling with their gender identity should be free to voice their distress, but parents (not schools) must be allowed to choose the best mental health treatment for their individual child's needs. Schools cannot presume that all parents are unfit to make such choices.

C. The proposed rule unconstitutionally seeks to violate parental rights.

Policies like the proposed rule that ignore biological reality — ignore sex — pose serious risks to student health and safety and undermine the fundamental right of parents to direct the upbringing and education of their children. And the U.S. Supreme Court has long held that the Constitution safeguards that right.

In particular, erroneously redefining "sex" to include gender identity will hasten the spread of secretive "gender support plans," which, at their core, undermine parental rights. Under the Department's incorrect view of Title IX, schools may be required to violate parental rights simply because parents do not conform to politically correct ideologies. No government authority should override the authority of parents to protect the well-being of their children by enacting such policies.

Where school policy allows students to begin a secret life at school, inconsistent with their sex, without the knowledge and consent of their parents, the policy violates the constitutional rights of the parents.

Parents have a fundamental human right to direct the upbringing of their children. One of the most fundamental and longest recognized "liberty interests" protected by the Fourteenth Amendment to the U.S. Constitution is the right of parents to "direct the upbringing and education of children under their control."[6]

Case law establishes three important principles with respect to parents' rights.

First, parents are the primary decision-makers with respect to their minor children — not the children's school.[7]

Second, courts recognize that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions,"[8] and that parents, not government officials, "hav[e] the most effective motives and inclinations and [are] in the best position and under the strongest obligations" to decide what is best for their children.[9]

Third, parents' constitutional rights reach their peak on "matters of the greatest importance."[10] Medical and health-related decisions, for example, are generally reserved for parents: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."[11]

School policies that undermine this fundamental right of parents have been met with legal challenges across the country.[12] Some public schools encourage

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[6] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.).
[7] *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected . . . broad parental authority over minor children.").
[8] *Parham,* 442 U.S. at 603–04.
[9] *Jackson v. Benson*, 218 Wis. 2d 835, 879 (1998).
[10] *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005); *see Wisconsin v. Yoder*, 406 U.S. 205, 233–34 (1972).
[11] *Parham*, 442 U.S. at 603
[12] For information about some of these legal challenges with which ADF is involved, see generally Compl., *Doe v. Madison Metro. Sch. Dist.*, No. 20-CV-454 (Wis. Cir. Ct. filed Feb. 18, 2020), *available at* https://bit.ly/3RBohv4; Compl., *B.F. v. Kettle Moraine Sch. Dist.,* No. 21-CV-1650 (Wis. Cir. Ct. filed Nov. 17, 2021), https://bit.ly/3T_lqOb; Compl., *D.F. v. Harrisonburg City Pub. Sch. Bd.*, No. CL22-1304 (Va. Cir. Ct. filed June 1, 2022), https://bit.ly/3L2boHO. For information about similar legal challenges filed around the country, see Donna St. George, The Washington Post, *Gender transitions at school spur debate over when, or if, parents are told*, (July 18, 2022), https://wapo.st/3qnO7GS, which notes lawsuits in Massachusetts, Florida, Wisconsin, Kansas, Virginia and Maryland.

students to identify as the opposite sex at school and hide it from parents. And some government officials pressure parents to "transition" their children under threat of abuse charges. ADF defends parents' right to make medical decisions for their children.

As these lawsuits make clear, it is not just keeping the use of preferred names and pronouns a secret that is problematic; even where the parents are aware of their child's wishes to use different names and pronouns, the policy requires the school to use the different name and pronoun over the parents' direction.[13] Parents' directions may be considered as part of medical and/or religious considerations. et, even in these circumstances, staff are required to use the preferred pronouns requested by students, which unlawfully interferes with the parents' free-exercise rights and their fundamental right to make decisions concerning the upbringing and care of their child. Again, the proposed redefinitions would align with the efforts of these unlawful policies.

Title IX does not require this, and the Constitution does not allow schools or the Department to attempt to do so. As one Kansas court held, "it is illegitimate to conceal information from parents for the purpose of frustrating their ability to exercise [their] fundamental right" to direct the education and upbringing of their child.[14] In that case, Pamela Ricard, a math teacher at Fort Riley Middle School sought to halt enforcement of a school district policy that required her to violate her religious beliefs by lying to students and parents. Troublingly, teachers were forced to use a student's "preferred name" to address the student in class while using the student's legal name when speaking to parents. Ricard sued school district officials after they reprimanded and suspended her for addressing a student by the student's legal and enrolled last name. The federal court ruled that she is free to speak without violating her conscience by communicating with parents in a manner consistent with how she is required to address the students at school. Additionally, the court acknowledged that Ms. Ricard can continue addressing students by their preferred names while avoiding pronouns for students who have requested pronouns inconsistent with their biological sex. The court also found that Ricard is likely to prevail on her First Amendment free exercise of religion claim.[15]

Particularly relevant here, the court rejected the school district's claimed interest in compelling Ms. Ricard to withhold information from parents: "It is difficult to envision why a school would even claim — much less how a school could

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[13] *See* Compl., *supra*, *B.F. v. Kettle Moraine Sch. District*, No. 21-CV-1650, ¶ 35; *see also Meriwether v. Hartop*, 992 F.2d 492, 507 (6th Cir. 2021) (reversing order dismissing professor's free-speech challenge to policy requiring use of preferred pronouns in classroom).

[14] *Ricard v. USD Geary County Schools School Board Members*, No. 5:22-cv-04015-HLT-GEB, 2022 WL 1471372, at *8 n.12 (D. Kan. May 9, 2022).

[15] ADF, Court: Kansas teacher free to speak consistent with her religious beliefs, https://bit.ly/3TW59cG.

establish — a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns."[16]

But this is not the only case involving the violation of parental rights under similar attempts to redefine sex discrimination, as the Department proposes to nationalize in the proposed rule. Officials at Kettle Moraine School District in Wisconsin sought to defy the wishes of parents regarding their children who struggle with gender dysphoria. One of the Wisconsin couples in this case was striving to work through gender dysphoria with their 12-year-old daughter, who was pushed by a counseling program to say she wanted to be a boy. Her parents, who best understood her needs and long-term health, wanted to give her more opportunities to work through her very real struggles before making any permanent changes, including changes to her name or pronoun usage.

Unfortunately, the school that their daughter attended disregarded her parents' directions. School officials told the parents they would refer to their daughter by whatever name or pronoun she chose, without first informing them or getting their consent. Treated as an afterthought — really, treated more like an obstacle — the parents were ultimately forced to withdraw their daughter from the school to protect her and preserve their God-given, constitutionally protected parental role.

The school district policy takes life-altering decisions out of parents' hands and gives them to school bureaucrats, who have no expertise whatsoever in these matters. The school district and officials are substituting their own controversial ideology for basic biological reality — a harm that goes far beyond simple pronoun usage. Schools cannot even give students aspirin or basic medication without parental consent. et, in the case of significant and potentially life-altering decisions about gender identity, officials are overruling the expressed desire of parents regarding the health of their child.[17]

School districts should not override the prerogative of parents. Doing so only hurts children. The proposed rule thus should change course and avert mandating these policies nationwide.

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[16] *Ricard*, 2022 WL 1471372, at *8.

[17] ADF, Parents Forced to Sue School District to Protect Right to Care for Their Children, https://bit.ly/3c_Ign_.

D. Policies that immediately accept students' requests to use "preferred" names and pronouns at school fail to consider the harms of an "affirmative" approach.

Inherent in these policies is an underlying assumption that any discomfort or incongruence that a child experiences with their natal sex must be met with an "affirmative" response. This approach recommends that any expression of a new gender identity should be immediately accepted as decisive, and thoroughly affirmed by means of consistent use of clothing, names, or pronouns, for example. But this approach is not supported by the available clinical data, nor does it take account of the long-term (and indeed potentially lifelong) harms that it implicates.

In an expert affidavit provided to the court in *Doe v. Madison Metropolitan School District*, Dr. Stephen B. Levine, Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine, identified many of the concerning implications of pursuing an "affirmative" approach, particularly in the school context without parental involvement.[18]

In that affidavit, Dr. Levine outlined that among psychiatrists and psychotherapists who practice in the area, there are widely varying views concerning both the causes of and appropriate therapeutic response to gender dysphoria in children, and that existing studies do not provide a basis for a scientific conclusion as to which therapeutic response results in the best long-term outcomes for affected individuals.[19] Nonetheless, these school policies unquestioningly adopt an "affirmative" response to students manifesting gender dysphoria or similar discomfort with their natal sex.

Furthermore, Dr. Levine explained that a majority of children (in several studies, a very large majority) who are diagnosed with gender dysphoria "desist" — that is, their gender dysphoria did not persist — by puberty or adulthood.[20] At the same time, studies also suggest that the active affirmation of transgender identity in young children will substantially reduce the number of children "desisting."[21]

Dr. Levine went on to explain how a so-called "social transition" as part of an "affirmative" response (*i.e.*, the use of different names, pronouns, or clothes, for example) is itself an important intervention with profound implications for the long-term mental and physical health of the child.[22]

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[18] *See* Expert Aff. of Dr. Stephen B. Levine, *Doe v. Madison Metro. Sch. Dist.*, No. 20-CV-454 (Wis. Cir. Ct. signed Feb. 10, 2020), https://bit.ly/3TSOerz.
[19] *Id.* ¶¶ 22–44.
[20] *Id.* ¶¶ 60–62.
[21] *Id.* ¶¶ 63–64.
[22] *Id.* ¶¶ 65–69.

Dr. Levine outlined how putting a child or adolescent on a pathway towards life presenting as the opposite sex puts that individual at risk of a wide range of long-term or even lifelong harms, including sterilization (whether chemical or surgical) and associated regret and sense of loss; physical health risks associated with exposure to elevated levels of cross-sex hormones; surgical complications and lifelong after-care; alienation of family relationships; inability to form healthy romantic relationships and attract a desirable mate; and elevated mental health risks.[23]

Dr. Levine also explained how parental involvement is necessary for accurate and thorough health assessment of a child, and further for the effective psychotherapeutic treatment and support of the child.[24]

Indeed, Dr. Levine's more recent expert report submitted in *B.P.J. v. West Virginia Board of Education* (concerning a West Virginia law limiting women's sports to females) indicated that the concerns surrounding the adoption of an "affirmative" approach have only heightened in light of new scientific studies and international developments.[25]

Dr. Levine's latest report noted that the knowledge base concerning the "affirmative" treatment of gender dysphoria has very low scientific quality with many long-term implications remaining unknown.[26] Furthermore, Dr. Levine explained that internationally, there has been a marked trend away from "affirmative" care and toward better psychological care.[27]

et these important considerations receive no attention by the Department in its promulgation of the proposed regulations. Instead, the proposed rule threatens to standardize the psychotherapeutic intervention known as "social transition" and then to make physical "transition" interventions standard medical care for gender-dysphoric minors. Puberty blockers and cross-sex hormones could be offered to children as young as 9 years old. After receiving these, minors could then undergo irreversible "top" or "bottom" surgery.

The Department should instead consider that children who struggle with discomfort with their sex should not be medicalized or subject to life-altering procedures. They should be given counseling, and this counseling should take the form of watchful waiting or other assistance furthering desistance. This type of talk-therapy counseling should not be wrongly labeled "conversion therapy," and

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[23] *Id.* ¶¶ 98–120.
[24] *Id.* ¶¶ 70–84.
[25] Decl. Expert Rep. of Dr. Stephen B. Levine, *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316 (S.D. W. Va. Feb. 23, 2022), ECF 286-1, https://bit.ly/3L19WFw.
[26] *Id.* ¶¶ 140–59.
[27] *Id.* ¶¶ 76 82.

counselors and parents should be free to continue to obtain it as the proper course of treatment. Moreover, because this is the proper course, the Department should be at pains to make sure that Title IX does not coerce any contrary standard of care. It should not be used to promote other medical procedures, especially on children, or to promote "social transition," which often sets students on an irreversible course towards unnecessary, dangerous, and experimental medical interventions, increasing the odds of the persistence of gender-identity issues.

In short, neither the Department nor schools are being supportive, affirming, or inclusive when they seek to change the course of psychosocial development and allow students to purport to select their own gender or sex. Instead, they are putting children on the course of needing lifelong medical care and are putting children at risk of many serious complications, including sterility, sexual dysfunction, infections, and other serious problems. These problems are only compounded when Title IX encourages or requires schools to encourage students to identify with another sex without parental involvement or knowledge.

E. The proposed rule wrongly overrides parental rights on curricula and facilities.

The same considerations extend to matters of parental control over curricular and facilities decisions. Many public schools are indoctrinating students in harmful views of human sexuality and race, injecting ideas from critical race and critical gender theories into classrooms. ADF helps parents and teachers challenge this indoctrination of students.

Because the proposed Title IX rule frames gender ideology as an anti-discrimination issue, it is possible that schools will not seek parental permission for children to participate in lessons on choosing and purportedly changing one's sex. Indeed, schools will very likely use Title IX's antidiscrimination mandate to justify denying parental opt-outs from these controversial lessons.

The proposed rule likely also grants children an absolute right to use school facilities and participate in activities "consistent with their gender identity," regardless of whether their parents agree or are even aware of that identity. Schools will feel free to allow students to select the sex-separated restrooms, overnight field trip accommodations, camp cabins, locker rooms, and other intimate facilities of their choice and based on their gender identity, not their sex — without parental knowledge or prior approval.

The proposed rule's efforts to redefine the scope of Title IX to address off-campus activity, including on an expansive harassment theory, also sets schools on a collision course with family relationships. Under the proposed rule, schools may

feel emboldened to pursue parents under the auspices of Title IX enforcement for at-home conduct out-of-step with the Administration's harmful gender ideology.[28]

The proposed rule should add regulatory text expressly disclaiming these consequences. It should directly consider these issues, explain whether the rule requires these consequences, and quantify their costs and benefits. Any failure to address parental rights would be arbitrary decision making.

II. The Department should consider alternatives that do not harm parental rights and the interests of children.

A. The Department should expressly consider alternative Title IX policies that provide accountability, choice, and transparency, especially when it comes to parental rights.

Parents need laws that provide government accountability, choice, and transparency.[29] As this comment has shown, the proposed rule fails to advance these foundational values.

The Department thus should withdraw the proposed rule and consider alternative policies that meet these three important policy goals for parental rights. This alternative policy should include the following elements, which should be included in Title IX rulemaking. These rights come from the U.S. Constitution, federal law, and state law, and any Title IX rulemaking should respect these rights to avoid conflicts with state law.

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- Every mother or father may hold the government accountable for infringing on their rights to care for their child.
- Every mother or father should be able to direct the upbringing, education, and care of their children. Any infringement on these fundamental rights by a federal, state, or local government policy must meet the strictest legal standard.

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- Every mother or father has the responsibility and right to choose the education and medical treatment that they deem best for their child.

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[28] Kaylee McGhee White, *Biden's new Title IX rules deputize teachers to override parents on gender identity*, New ork Post (Aug. 15, 2022), https://bit.ly/3RMCDbs.
[29] ADF, Promise to America's Parents, https://bit.ly/3xc6a6t.

Exhibit 31

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF PRESTON CADE BRUMLEY, SUPERINTENDENT OF THE LOUISIANA DEPARTMENT OF EDUCATION

Under 28 U.S.C. § 1746, I, Preston Cade Brumley hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Louisiana State Superintendent of Education and serve as the administrative head of the Louisiana Department of Education (the "Louisiana Department"). *See* La. Rev. Stat. § 17:24(A).

2. The Louisiana Department of Education, among other things, implements the State's policies and establishes the academic standards for elementary and secondary public schools in Louisiana. The Louisiana Department of Education also "administer[s] and distribute[s] all federal funds" the State receives for elementary and secondary education. La. Rev. Stat. 17:24(C).

3. Public elementary and secondary education in Louisiana is generally funded through federal grants, state funding appropriated by the Legislature, and local sales and property taxes. Federal

funding accounts for approximately 13% of Louisiana school funding. State and local funding accounts for approximately 44% and 43% of Louisiana school funding respectively.

4. Federal funding for elementary and secondary education in Louisiana is primarily provided through entitlement and competitive grants, with certain grants being awarded to and administered by the State and a few grants being awarded directly to local school boards to administer. In Louisiana, most grants are awarded to the Louisiana Department of Education and then allocated to the local school boards and charter schools.

5. Along with other sources of federal funding, Louisiana receives funds under Sections 611 and 619 of the Individuals with Disabilities Education Act, Titles 1–4 and 5 of the Elementary and Secondary Education Act, the McKinney-Vento Education for Homeless Children and Youth Program, and the 21st Century Community Learning Centers Program as well as other needed programs that benefit the children who attend Louisiana public schools.

6. In fiscal year 2022-2023, the Louisiana Department of Education received $725,432,889 of federal funds for education programs and activities throughout Louisiana (which does not include federal funds the State received for its colleges and universities). In fiscal year 2023-2024, the Louisiana Department of Education received $771,558,381 of federal funds for education programs and activities in Louisiana (which does not include federal funds the State received for its colleges and universities). The amount of federal funds to be awarded in fiscal year 2024-2025 has not yet been finally determined but is likely to be comparable.

7. As a condition of receiving federal funds, I as the State Superintendent must sign an assurance that the Louisiana Department of Education will comply with Title IX and Title IX regulations, and the Department must conduct compliance activities required by agencies providing funding to ensure compliance with Title IX regulations.

8. In addition to administering and distributing federal funds, the Louisiana Department of Education retains a portion of funds to offset its administrative costs.

THE RULE'S IMPACT

9. Recently, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). The Rule has an effective date of August 1, 2024, *see id.* at 33,549; however, the Rule has already caused and will continue to cause the Louisiana Department irreparable harm.

10. The Louisiana Department of Education does not wish to comply with the Rule, which it believes is unlawful and contrary to the best interests of students and teachers in the State. The Louisiana Department of Education and Local Education Authorities, however, will be forced to comply or else risk losing administrative and program funding that is critical to the State's education system and to the education of Louisiana children many of whom are the most vulnerable due to poverty and/or special characteristics.

11. The Louisiana Department of Education has been forced to expend time and resources to begin reviewing the Rule and to notify local school boards about the Rule. *See* Ex. A (State Superintendent's Letter to Local School Boards).

12. If the Rule's effective date is not postponed and the Rule is not stayed, the Louisiana Department of Education will need to incur more substantial costs to further understand the Rule and terms of compliance. It is anticipated that local education authorities will request guidance from the Louisiana Department of Education before undertaking compliance activities that may be necessitated by the Rule which will require conducting a more extensive review of the Rule by outside special counsel with intensive experience in Title IX and related issues as well as the newly imposed requirements of the Rule. This more extensive review will need to be completed by June 1st, so the

Louisiana Department of Education has time to update its policies, educate and train staff relative to the standards of Title IX compliance activities under the new Rule as required by agencies providing funding (See LA. Admin. Code , Title28, Part 1, Subpart 1, Chapter 9, Sec. 903) and communicate with local school boards before the August 1, 2024 effective date.

13. All the resources that have been and will need to be expended to review and understand the Rule detract from the Louisiana Department of Education's efforts to improve the State's education system and schools that have a high percentage of students in poverty and/or with special characteristics and needs.

14. The Rule also harms the State, because it increases regulatory burdens and obligations and multiplies litigation and liability risks. *See, e.g.*, 89 Fed. Reg. 33,541, 33,866–67, 33,851, 33,858, 33,881. Time and money that would have otherwise been spent to advance education opportunities and improve education outcomes for Louisiana students will be diverted to compliance costs, such as expanded recordkeeping requirements.

15. In addition, the Rule places the Louisiana Department and schools in an untenable position, because it will be impossible to comply with the Rule and with Louisiana's Fairness in Women's Sports Act (not to mention other laws that may soon be enacted, *see* H.B. 610, 2024 Leg. Reg. Sess. (La. 2024); H.B. 121, 2024 Leg. Reg. Sess. (La. 2024).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of May, 2024 in Baton Rouge, Louisiana.

Preston Cade Brumley

PRESTON CADE BRUMLEY
SUPERINTENDENT
LOUISIANA DEPARTMENT OF EDUCATION

Exhibit A

DR. CADE BRUMLEY
STATE SUPERINTENDENT

CLAIBORNE BUILDING
1201 N 3RD ST.
BATON ROUGE, LA 70802

LOUISIANA DEPARTMENT OF EDUCATION

DATE: April 22, 2024

TO: School System Leaders & Schools Boards

FROM: Dr. Cade Brumley, State Superintendent of Education

SUBJECT: Response to New Federal Title IX Rules

On Friday, April 19, 2024, the U.S Department of Education (ED) released new Title IX rules[1], effective August 1, 2024, that expands the interpretation of discrimination on the basis of sex to include gender identity[2] and other categories.

For example, under the new Title IX rules, schools would be required to allow biological males who identify as females to receive access to women and girls' locker rooms and school restrooms or face sanctions for a rule violation on the basis of sex discrimination. In another example, the new rule could force educators to reference students by names and pronouns not consistent with their biological sex and also erode parent notification of such student desires. It could also force schools to establish extensive bureaucracies to police free speech on campus.

Furthermore, these new Title IX rules could be in direct contradiction with Louisiana's Fairness in Women's Sports Act, a law that affirms school-sanctioned athletic participation must be divided by biological sex unless the configuration is co-ed in nature. While ED claims these new rules do not speak to sports, the new rules explicitly mentions athletics over 30 times. Clearly, sports in Louisiana could be impacted by the new rules and, if implemented, create a conflict with Louisiana law.

These new rules have been in development for nearly two years, and I have previously submitted comments in staunch opposition as it alters the long-standing definition that has created fairness and equal access to opportunity for women and men. At this time, my opposition to these new Title IX rules remains unchanged. The Title IX rule changes recklessly endanger students and seek to dismantle equal opportunities for females.

Presently, my office is working with the Office of the Governor and our Attorney General to review the 1500-pages of new rules[3] and determine their overall impact. It is inevitable that there will be a legal challenge to the new rules, contesting the unprecedented unilateral expansion of the long-standing prohibition against discrimination based on "sex" to include "sex stereotypes, sex related characteristics (including intersex traits) pregnancy or related conditions, sexual orientation and gender identity." This expanded definition is unsupported by the text of Title IX, its implementing regulations, and the law's extensive congressional history and record of debate and deliberation. This rule runs contradictory to the entire foundation of Title IX.

The Louisiana Department of Education recommends that school systems maintain communication with their legal counsel on this matter. Further, it remains my position that schools should not alter policies or procedures at this time.

CC: Governor Jeff Landry
Attorney General Liz Murrill
Members of the The Louisiana State Board of Elementary and Secondary Education (BESE)
Louisiana High School Athletic Association (LHSAA)

[1] https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf
[2] https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/
[3] https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf

Exhibit 32

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF DEBBIE CRITCHFIELD

Under 28 U.S.C. § 1746, I, Debbie Critchfield, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. My name is Debbie Critchfield. I am the Superintendent of Public Instruction for the State of Idaho. I serve as the chief executive officer of the Idaho Department of Education (the "Department") and am a member of the Idaho State Board of Education.

2. The Department is responsible for carrying out the policies, procedures, and duties authorized by law or established by the State Board of Education for all public elementary and secondary school matters. The Department also manages and distributes federal and state funds to public local education agencies.

3. Public education in Idaho is generally funded through federal grants, state funding appropriated by the Legislature, and local sales and property taxes. Federal funding accounts for approximately 18% of Idaho school funding distributed by the Department for 2022-2023.

4. Federal funding is primarily provided through entitlement and competitive grants, with certain grants being awarded to and administered by the State and certain grants being awarded directly to local education agencies to administer.

5. Last fiscal year, the Department distributed $505,500,000.00 in federal funding for its education programs and activities. This fiscal year, the State appropriations for public schools include $557,500,000.00 in federal funding for its education programs and activities.

6. In addition to administering and distributing federal funds, the Department retains a portion of funds to offset its administrative costs. The Department thus directly benefits from federal funds and will be harmed if those funds are terminated.

7. As the Idaho Superintendent for Public Instruction, I must sign an assurance that the Department will comply with Title IX and Title IX regulations as a condition of receiving federal funds.

The Rule's Impact

8. Recently, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). The Rule has an effective date of August 1, 2024, *see id.* at 33,549.

9. As a preliminary matter, the Rule has already caused the Department harm. The Department has needed to expend time and resources to study the Rule and determine how to best advise local education agencies about the Rule.

10. If the Rule's effective date is not postponed and the Rule is not stayed, the Department will incur more costs to further understand the Rule and provide guidance to local education agencies that rely on the Department for direction. This more extensive review will need to be completed

immediately so the Department has time to develop relevant model policies and communicate with local education agencies before the end of the school year.

11. I anticipate local education agencies need more than two months to implement significant changes in policies by the August 1, 2024, effective date. Successful implementation will require engaging the community in the policy process, training employees, and educating students and patrons.

12. Further, 61% of Idaho's local education agencies are considered "rural" as defined by Idaho Code section 33-319. As such, the vast majority of Idaho's local education agencies employ Title IX Coordinators whose job descriptions include multiple roles beyond that of Title IX compliance. I expect some local education agencies will need to hire an additional employee or employees to achieve compliance with the Rule.

13. If the Department is not able to meet this unworkable deadline, Idaho risks losing its administrative funding and funding that is critical to the State's education system and to the education of Idaho children.

14. All the resources that will be expended to review and understand the Rule detract from the Department's efforts to improve the State's education system and schools.

15. The Rule also harms the State, because it increases regulatory burdens and obligations and multiplies litigation and liability risks. *See, e.g.*, 89 Fed. Reg. 33,881, 33,492, 33,850, 33,877. Time and money that would have otherwise been spent to advance education opportunities and improve education outcomes for Idaho students will be diverted to compliance costs, such as expanded recordkeeping requirements.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this tenth day of May, 2024 in Boise, Idaho.

Debbie Critchfield

Exhibit 33

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

The State of LOUISIANA, By and through its Attorney General, Elizabeth B. Murrill; et al., PLAINTIFFS, v. U.S. DEPARTMENT OF EDUCATION; et al., DEFENDANTS.	Civil Action No. 3:24-cv-00563 Chief Judge Terry A Doughty Magistrate Judge Kayla D. McClusky

DECLARATION OF MATT FREEMAN

Under 28 U.S.C. § 1746, I, Matt Freeman, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

BACKGROUND

1. I am the Executive Director for the Idaho State Board of Education (ISBOE). Under Article IX, Section 2 of the Idaho Constitution, the ISBOE is charged with the "general supervision of the state educational institutions and public school system of the state of Idaho." Under Idaho Code § 33-101, this includes the general supervision, governance and control of all state educational institutions, to wit: University of Idaho, Idaho State University, Boise State University, Lewis-Clark State College … and for the general supervision, governance and control of the public school systems, including public community colleges.

2. I am the Executive Director of the ISBOE and am charged with, among other things, ensuring the effective articulation and coordination of institution and agency concerns, and serve as

an advisor to the ISBOE and the heads of the institutions on all appropriate matters. In my role as the Executive Director for the ISBOE, I am familiar with ISBOE's governing policy on Title IX.

3. The ISBOE, among other things, prescribes governing policies for the state institutions of higher education in Idaho. To this end, the ISBOE has implemented a policy directing the public institutions of higher education to comply with the Title IX regulations, and requiring the public institutions of higher education to draft, implement and publish policies complying with Title IX and the Title IX Regulations. This policy may be found here: https://boardofed.idaho.gov/wp-content/uploads/2016/12/IT-Title-IX-1220-1.pdf. Although the ISBOE is responsible for ensuring that its governing policies are followed, it does not participate in the details of internal management of its institutions and agencies. That responsibility is delegated to the respective institution presidents.

4. Each of Idaho's public institutions of higher education receive federal funds, including federal grants and student financial aid. As an example, just one of Idaho's public institutions of higher education, the University of Idaho, in FY22 had over $56 million in federal research expenditures.

5. The State of Idaho's public institutions of higher education would be harmed if they were no longer able to access federal funds or if any of their grants or their ability to access and administer student financial aid were terminated.

The Rule's Impact

6. Recently, the U.S. Department of Education published a final rule titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). The Rule has an effective date of August 1, 2024, *see id.* at 33,549.

7. The Rule directly conflicts with Idaho statutes that are applicable to its public institutions of higher education, including Idaho Code § 67-5909B, which becomes effective July 1,

2024 and which states that a government employee shall not be subjected to adverse employment action for declining to address a person using a name other than the person's legal name or a derivative thereof , or by a preferred personal title or pronoun that is inconsistent with the person's sex; and Idaho's Fairness in Women's Sports Act, Chapter 62, Title 33, Idaho Code (which is currently the subject of federal litigation). Institutions of higher education in Idaho will be placed in an untenable position—violate Idaho law by complying with the Rule or else risk losing its federal funding that is critical to the State's education system and to the education the students of Idaho institutions of higher education. ISBOE Policy I.A.4. provides that "[a]ll Board Governing Policies and Procedures and the internal policies and procedures of its institutions and agencies will comply with and be in conformance to applicable law" (https://boardofed.idaho.gov/board-policies-rules/board-policies/general-governing-policies-procedures-section-i/a-policy-making-authority/).

8. The Rule likely has already caused employees in Idaho's institutions of higher education to expend time and resources to begin reviewing the Rule, attend trainings on how to comply with the Rule, and begin to formulate a compliance plan.

9. If the Rule's effective date is not postponed and the Rule is not stayed, the ISBOE and Idaho's institutions of higher education will need to incur more costs to further understand the Rule. This more extensive review will need to be completed soon, so the ISBOE and Idaho's public institutions of higher education have time to update their policies, publish their new policies, and train their employees before the August 1, 2024 effective date.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of May, 2024 in Boise, Idaho.

Matt Freeman

Exhibit 34

BIENVILLE PARISH SCHOOL BOARD
1956 First Street / P.O. Box 418
Arcadia, Louisiana 71001

RESOLUTION

BE IT FOREVER KNOWN, that by official action taken at its special meeting on May 7, 2024, the Bienville Parish School Board (sometimes referred to as the "Board") adopted the following resolution:

WHEREAS, the United States Department of Education has issued a final rule, titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" ("Final Rule"),[1] which it will publish in the federal register;

WHEREAS, the Final Rule dramatically changes Title IX regulations and acknowledges it will increase complaint investigations;

WHEREAS, the Final Rule will disadvantage the Board by increasing its obligations, compliance costs, and liability risks;

WHEREAS, the Board believes the Final Rule is contrary to existing state law, as well as laws currently being considered by the Louisiana Legislature; and

WHEREAS, the State of Louisiana and school districts within the State intend to challenge the legality of the Final Rule and the Board's participation in such lawsuit will result in no direct legal fees or costs to the Board, as the Attorney General is already representing the State.

NOW, THEREFORE, BE IT RESOLVED, that by the vote reflected herein below, the Bienville Parish School Board does hereby elect to join the State of Louisiana in litigation against the United States Department of Education and other federal defendants to challenge the Final Rule.

ON THE MOTION OF Donald Calloway and seconded by Colton Guin, the following votes were cast:

YEAS:	Sharolyn Boston, Oswald Townsend, Derrika Bailey, Darren Iverson, Martha Grigg, Colton Guin, Donald Calloway
NAYS:	NONE
ABSENT:	NONE

IN WITNESS WHEREOF I have hereunto set my hand officially on this 7th day of May, 2024.

DARREN IVERSON, PRESIDENT

BYRON LYONS, SUPERINTENDENT

1. "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" ("Final Rule"), US Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf

Exhibit 35

Winn Parish School Board
May 6, 2024
Resolution

BE IT FOREVER KNOWN, that by official action taken at its meeting of May 6, 2024, the Winn Parish School Board (sometimes referred to as the "Board") adopted the following resolution:

WHEREAS, the United States Department of Education has issued a final rule, titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" ("Final Rule"), which it will publish in the federal register;

WHEREAS, the Final Rule dramatically changes Title IX regulations and acknowledges it will increase complaint investigations;

WHEREAS, the Final Rule will disadvantage the Board by increasing its obligations, compliance costs, and liability risks;

WHEREAS, the Board believes the Final Rule is contrary to federal law and will be detrimental to students, parents, and employees;

WHEREAS, the Board believes the Final Rule, is directly contrary to existing state law, as well as laws currently being considered by the Louisiana Legislature; and

WHEREAS, the State of Louisiana and school districts within the State have challenged the legality of the Final Rule in that matter styled, "State of Louisiana, et al v. U.S. Department of Education, et al" bearing Case No. 3:24-CV-00563 on the records of the United States District Court for the Western District of Louisiana;

NOW, THEREFORE, BE IT RESOLVED, that by the vote reflected hereinbelow, the Winn Parish School Board does hereby express its Support of the State and the various districts who have joined the State as parties in the forgoing litigation against the United States Department of Education and other federal defendants to challenge the Final Rule.

ON THE MOTION OF Steve Vines and seconded by Lance Underwood the following votes were cast:

YEAS:
Harry Scott, Steve Vines, Lacey McManus, Lance Underwood, Joe Lynn Browning
Amber Cox, Dan Taylor, Joe Llaine Long, Mike Biffle, Michelle Carpenter, Patrick Howell

NEAS: NONE

ABSENT: NONE

The motion was approved.

Secretary-Treasurer
Winn Parish School Board

President
Winn Parish School Board

Exhibit 36

PUBLIC SUBMISSION

Comment on FR Doc # 2022-13734

Posted by the **Department of Education** on Nov 6, 2022

View More Comments 238.98K (/document/ED-2021-OCR-0166-0001/comment)

View Related Comments 238.98K (/docket/ED-2021-OCR-0166/comments)

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Comment

To the Office for Civil Rights:

We submit this comment on behalf of Genspect, (www.genspect.org) to communicate our issues with the United States Department of Education's proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972 (the "proposed amendments"). We are specifically concerned about the proposed amendment's treatment of the concept of "gender identity" in this document.

Genspect is an alliance of professionals, parent groups, trans people and detrans people. We seek to provide a rational approach to gender despite the heightened discourse in this arena. We have serious concerns about the currently popular "gender-affirmative" approach to gender and we seek higher quality care for young people. We are independent and have no religious or political affiliations.

We are concerned that the proposed amendments do not define the concept "gender identity" and therefore this is open to misinterpretation. Secondly, we believe that the proposed system that will enable children to "self-identify" and mandates that schools "socially transition" children without clinical supervision and/or parental consent is deeply inappropriate and will lead to further problems such as triangulation, and the concretisation of an identity which is still undergoing formation. Thirdly, we think the emphasis on the "affirmative care" model of psychotherapy is reckless as this is a new approach that has no high quality evidence-base and the treatments involved are experimental. Fourthly, we would like to draw attention to the importance of including the family when making decisions involving children and to ignore parental input is authoritarian. Finally, the lack of attention given to the possibility of desistance and detransition in these amendments is exclusionary and needs to be rectified.

We would like to take this opportunity to draw attention to the latest developments in Europe where the most progressive countries with regards to gender, Sweden, Finland, France and the United Kingdom have all taken the decision to move away from the gender-affirmative approach and instead to value conventional talk therapy as a means to help gender-distressed children.

Genspect

Brief Guidance for Schools

CELEBRATING DIVERSITY

Today's school communities include gender non-conforming students and students with different sexual orientations. This gives schools a wonderful opportunity to celebrate diversity and uniqueness, to empower young people to transcend stereotypes, and to encourage everyone to be themselves.

SEXUAL ORIENTATION AND GENDER IDENTITY

Sexual orientation refers to whether a person is romantically or sexually attracted to people of the same or the opposite biological sex. Sexual orientation describes how you feel about other people; for example whether you are heterosexual, gay, lesbian or bisexual – or even asexual.

Gender identity and gender expression refer to whether people feel that their birth sex aligns with stereotypically masculine or feminine traits and behaviors, and how they wish to express themselves and be seen in society. Gender identity describes how you feel about yourself – for example, whether you identify as transgender or non-binary.

Not everyone feels they have a gender identity, but we all seem to have a sexual orientation. Most of us discover this during adolescence, and it usually endures for the rest of our lives. I It is important to note that some people have described how they utilized their gender identity as a form of sexual repression, due to unacknowledged feelings of internalized homophobia.

SEX AND GENDER

Sex relates to biology and the two sexes: male and female. We all have chromosomes (XY for males and XX for females*) within almost every cell of our bodies and our brains, determining our physical development along male or female pathways.

Sex differences are important, and are acknowledged within society, whether in single-sex toilets, changing-rooms and accommodation, or most sports. Within schools, sex is also significant in biology lessons and within curricular materials on sex education.

Gender relates to culturally influenced, masculine and feminine societal expectations of behavior, aptitudes and appearance based upon sex.

It is gender, not sex, which influences school policies regarding uniforms, hair-length, jewelry and make-up. Gender can also influence assumptions we make about what recreational activities boys or girls will prefer, and what academic strengths boys and girls will have.

*Although all people are born either male or female, some people have different chromosome combinations which, on very rare occasions, can make it more challenging to ascertain which sex they are at birth. People who are born with these differences are described under the umbrella term of Differences of Sexual Development (DSDs), previously known as "intersex". There are over 40 unique and rare medical conditions that can impact sex development in males and females. Find out more.

TRANSGENDER IDENTIFICATION AND GENDER DYSPHORIA

Many people who feel that their gender does not align with their sex identify as transgender or non-binary. Some people who identify as transgender or non-binary experience "gender dysphoria," a severe type of distress or impairment in functioning due to a feeling of misalignment between gender and sex.

There is no equivalent condition to gender dysphoria experienced in terms of sexual orientation. For example, there is no equivalent condition experience by people who are lesbian, gay or bisexual.

Historical evidence shows that when gender dysphoria presents in childhood, most cases resolve naturally, with 61%-98% of children reidentifying with their biological sex during puberty. No studies to date have evaluated the natural course and rate of gender dysphoria resolution among the new cohort of adolescents presenting with adolescent-onset gender dysphoria.

In recent years, the number of young people being referred to specialist clinics for gender dysphoria has increased dramatically. Many with gender dysphoria also have Autism Spectrum Disorder (ASD) or ADHD diagnoses. Other mental health diagnoses and childhood trauma also occur at higher rates among those with gender dysphoria. This is a significantly under-researched and fast-growing phenomenon; this is why we encourage a cautious and compassionate approach.

We believe that this new phenomenon of large numbers of young people questioning their gender is best described as "Rapid Onset Gender Dysphoria". This description, coined in 2018 by American public health researcher Lisa Littman, provides what we believe is the best account of the new cohort of gender-questioning adolescents. While it is not a diagnosis, this description factors in the strong role of social influence among these children, as well as the significant levels of comorbidities (co-occurring conditions and diagnoses).

While the term is not universally accepted, the research upon which it is based has stood the test of substantial academic scrutiny.

AFFIRMATION AND SOCIAL TRANSITION

Many transgender organizations advise schools to "affirm" students' gender identities by using the names and pronouns students request, and letting students use the bathroom that matches their gender identity. This is known as social transition.

While well-intentioned, affirming a student's gender identity or publicly celebrating a transgender student's courage are not neutral actions: they can unintentionally influence students' identity formation. Identity formation is an important psychosocial stage of development for young people between 12 and 25 years old.

The role of the school is to foster a tolerant and caring approach to all students and to ensure that there is no bullying or hostility towards any student. It is not the role of the school to influence identity formation. Social transition is a powerful psychotherapeutic intervention and so it should not be carried out without clinical supervision.

AFFIRMATION AND THERAPY

We have serious concerns about affirmation-only therapy, which we believe forecloses other options for the therapeutic client. While it is important to affirm the depth of the young person's feelings, affirmation can stray into confirmation unless the therapist retains the ability to explore the whole picture. Affirmative-only therapists use a model which prevents them from taking a depth-perspective of the young person's feelings. This risks glossing over other factors which may be causing them to question their gender identity. We strongly believe that therapists' hands should not be tied in this way.

MEDICAL TRANSITION

Children and young people with gender dysphoria who socially transition are more likely to continue to feel unhappiness with their birth sex, and go on to medical interventions including puberty blockers, cross-sex hormones and surgery. As social transition is a therapeutic intervention that increases the likelihood of medical transition, schools must liaise with parents to ensure this is an appropriate step to take.

Over 95% of young people with gender issues who take medication to delay the progression of puberty of their birth sex go on to take cross-sex hormones. Recent reviews of the latest research on medical interventions for gender-dysphoric youth in the UK (see also here and here), Finland and Sweden found that the evidence of the benefits of these treatments did not outweigh their risks.

The gender identity affirmative approach is a new approach to gender, and is not supported by any long-term evidence. Some people are very positive towards this approach; some are very negative. A recent legal case in the UK analyzed 3000 pages of evidence and found that puberty blockers should not be prescribed without considerable caution.

The sharp rises in the number of people detransitioning has not yet been analyzed. A recent study shows that the causes of gender distress may only become clear with the benefit of hindsight: factors such as trauma and unmetabolized grief may have profound effects on young minds.

Research has found that many patients with childhood-onset gender distress who are not treated with affirmative social transition or medical interventions grow up to be lesbian, gay or bisexual.

SUICIDE

Every suicide is a terrible tragedy.

Young people suffering from gender dysphoria are an extremely vulnerable group deserving of support. Although high suicide rates among people who identify as transgender are frequently mentioned, the data show that suicidality rate among young people referred for gender issues is about the same as those referred for other mental health difficulties. In other words, suicide statistics are misused.

There is currently no evidence showing that social or medical transition reduces the risk of suicide among young people with gender dysphoria.

Young people are particularly susceptible to suicide contagion; the adults around them should therefore avoid any speculation about direct links to a single cause or "trigger" for a suicide. Speaking responsibly about suicide is an acquired skill. Teachers worried about this can complete suicide skills programs to ensure that they are well-equipped to deal appropriately with this complex matter.

- Toilets, changing rooms and sports activities can be very challenging. Menstruation anxiety causes serious shame for females, and so females often seek the privacy of the single-sex toilet. However, single-sex toilets cause serious anxiety for gender dysphoric youths. We recommend that schools should provide a single occupancy space for children with gender dysphoria. This is not necessarily easy, but some creative options can be explored to meet this issue.
- Uniforms can also cause distress, as students may request permission to wear opposite sex uniforms. We recommend that schools offer a flexible approach to uniforms.
- Activities which require students to sleep away from home can be fraught. It is recommended that residential dormitories remain single-sex; however, all students must be freely given a realistic option as to whether they wish to partake in these activities.
- Social transition is a powerful therapeutic intervention that should not be undertaken without clinical supervision. School authorities need to maintain professional records according to the legal requirements. This helps to avoid confusion in correspondence and communications. Names might be changed – students have used alternative names for generations – but this does not mean that educators are forced to accept these name changes. This is a matter between the educators, the parents, the relevant mental health professionals, and the student.
- Schools should liaise with parents before any social transition takes place, as this is an intervention with far-reaching consequences.
- Pronouns have recently become a controversial issue. Schools have never before changed pronouns for students and the long-term impact of this policy remains unknown. Young people who are exploring their gender identity might be exploring their sexual orientation and their overall identity simultaneously. This is a period of flux and uncertainty for the young person, and it is seldom helpful for adults to concretize every idea and belief of the child.
- Educators should affirm students' emotions and beliefs, and it is certainly important to affirm and to support students to express themselves in an open-minded setting. However, affirming is not the same thing as confirming.
- Students' defenses can manifest through a fixation on language. This may require a robust but understanding and flexible approach from the educator.
- The language and terminology involved in gender-related issues is constantly changing, and this may lead educators to the mistaken belief that they do not understand the issues at hand. It is helpful to take some time to learn the language, terminology and acronyms, so these do not become superficial obstacles to the provision of appropriate support.
- A cautious, least-invasive-first approach is mirrored in general clinical best practice, and it is recommended that educators take a similarly cautious approach.
- Educators should be aware that gender dysphoria is highly likely to occur with comorbidities, such as ASD, ADHD, anxiety and other conditions.
- Schools should provide suicide skills training so that educators do not inadvertently increase the risk of suicide.
- As teenagers experiencing gender dysphoria mature and progress through adolescence and into adulthood, the majority of them might be able to one day accept and happily live with their biological sex, adult body and sexual orientation. This is why we advocate for a cautious, non-interventionist approach for children.

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Written by Stella O'Malley, Psychotherapist and Executive Director of Genspect

Exhibit 37

September 11, 2022

Department of Education
Office for Civil Rights
400 Maryland Ave SW
Washington, DC 20202

Re: *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance;*
RIN: 1870-AA16; Docket ID No. ED-2021-OCR-0166

To the Office for Civil Rights:

We submit this comment on behalf of GETA, the Gender Exploratory Therapy Association (https://genderexploratory.com) to express our concerns about the United States Department of Education's proposed amendments to the regulations implementing Title IX of the Education Amendments of 1972 (the "proposed amendments"). In particular, we are concerned about the proposed amendments' treatment of the concept of "gender identity" in the regulation, and the implementation of that concept in the K-12 setting.

GETA members are practitioners and trainees in the psychotherapy professions who believe that people who are exploring their gender identity or struggling with their biological sex should have access to therapists who will provide thoughtful care without pushing an ideological or political agenda. Skilled, ethical exploratory therapy is appropriate for those with gender dysphoria, their families, and detransitioners. We reject treatments that set out to change sexual orientation or gender identity; practices that use coercive techniques have no place in health care. As GETA members, we respect client autonomy and do not impose our own beliefs, values, opinions, ideology, religion, or goals onto our clients. Although we applaud and support the DOE's efforts to ensure that gender-nonconforming students are treated with respect and dignity in schools, the proposed amendments require schools to engage in powerful psychotherapeutic interventions with gender-nonconforming children for which school personnel are not trained. As therapists, we believe that psychological approaches should be the first-line treatment for all cases of gender dysphoria, and that immediate social transition by school personnel is contrary to an effective therapeutic approach intended to explore the various possible causes of a young person's psychological distress. A holistic therapeutic approach avoids the risks of woefully premature social and medical transition and supports children's autonomy by facilitating deeper self-understanding. If implemented, the proposed amendments will curtail such an approach and, as a consequence, will harm children.

We describe five principal concerns in this comment:

(1) The proposed amendments' failure to define the concept "gender identity."

(2) The proposed amendments' creation of a system that allows the child to "self-identify" as the opposite sex, and mandates that the school "socially transition" the child without any input from mental health professionals or the child's parents. Mandatory social transition by schools is a powerful psychotherapeutic intervention by teachers and school administrators who are not trained in this area.

(3) The tendency of social affirmation within school settings to support the "affirmative care" model of psychotherapy and thereby lead to experimental medical interventions that have potentially harmful and lifelong side effects.

(4) The harmful impact on many families caused by the proposed amendments.

(5) The harm caused by this system to the mental health of other students, especially female students.

1. The Proposed Amendments Fail to Define "Gender Identity"

The principal shortcoming of the DOE's proposed amendments is that they fail to define "gender identity." There are many definitions of "gender identity" currently available in legal sources, psychological literature, cultural criticism, and popular culture. The proposed amendments simultaneously fail to define "gender identity" and at the same time create serious penalties for school officials, teachers, and other students who fail to treat a student according to that identity, thus leaving the proposed amendments hopelessly ambiguous and ripe for misuse. In this section we describe four common meanings of the term "gender identity." This list is not exhaustive, but it demonstrates that leaving that term undefined in the proposed amendments will give rise to substantial confusion and disagreement over the regulations' scope and purpose.

First, "gender identity" – and especially "gender identity" that is not aligned with one's biological sex – is often associated with the psychological condition of "gender dysphoria." "Gender dysphoria" is defined in the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5") as a "marked incongruence between one's experienced/expressed gender and [one's biological sex], lasting at least 6 months."[1] Although the proposed amendments do not use the term "gender dysphoria," we infer that the inclusion of the term "gender identity" in the proposed amendments is intended to protect those children whose perceived "gender identity" is different from their biological sex, and hence would include children with gender dysphoria.

If this is the intended meaning of "gender identity," then the proposed amendments are setting out policies concerning how school officials, teachers, and other students should respond to a child who has a very serious mental health disorder. We identify the potentially harmful

[1] American Psychiatric Association, "Gender Dysphoria," Diagnostic and Statistical Manual of Mental Disorders, at 452 (5th ed., 2013).

also maintains that "Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity."[9] Although some state laws add the caveat that school officials need not recognize a students' self-proclaimed "gender identity" if it appears that the student is asserting a sex-incongruent gender identity for an "improper purpose,"[10] the *2016 Dear Colleague Letter* provides no similar limitation. The proposed amendments to the regulations implementing Title IX also provide no limitation.

Fourth, if one moves beyond definitions of "gender identity" provided in legal and policy documents, the term becomes even more difficult to define. In addition to the now well-known concept of a "nonbinary" gender identity, other gender identities have proliferated in popular culture, including agender, bigender, demigender, pangender, omnigender, polygender, and gender-fluid. As the term "gender-fluid" suggests, these "identities" are not necessarily fixed. As explained by one popular magazine, "[g]ender-fluid typically refers to someone who prefers to express either or both maleness or femaleness, and that can vary, perhaps from day to day."[11] Given the incredible proliferation of "gender identities" in popular culture today, the proposed amendment's failure to define "gender identity" places K-12 schools in the impossible position of formally recognizing, and making significant policy accommodations for, self-proclaimed identities that are neither stable nor, in some cases, comprehensible by others.

In short, the proposed amendments fail to define the key concept of "gender identity." At a minimum, this failure leaves teachers and other school personnel in the unenviable position of trying to implement a punitive regulation that provides civil rights protections and remedies for a characteristic that has multiple, fluctuating definitions in law and society.

2. Mandatory Social Transition by Schools is a Powerful Psychotherapeutic Intervention by Untrained Teachers and School Administrators

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Protections) ("schools are expected to treat students consistent with the student's stated gender identity"); *N.Y. Guidance to Schools*, *supra*, at 5 ("It is recommended that schools accept a student's assertion of his/her/their own gender identity."); *Chicago Guidelines*, *supra,* at 4 ("At all times, the Support Coordinator and the Student Administrative Support Team shall respect the self-determination of the student.").

[9] *2016 Dear Colleague Letter*, *supra*, at 2.

[10] *See, e.g., Conn. Civil Rights Protections, supra,* at 4; *Guidance for Massachusetts Public Schools, supra.*

[11] Perri O. Blumberg and Emily Becker, *Here's Your Comprehensive Gender Identity List, as Defined by Psychologists and Sex Experts,* Women's Health (July 6, 2022), https://www.womenshealthmag.com/relationships/a36395721/gender-identity-list/. *See also* Julie L. Nagoshi, et al., *Deconstructing the Complex Perceptions of Gender Roles, Gender Identity, and Sexual Orientation Among Transgender Individuals*, 22(4) Feminism & Psychology 405, 408 (2012) (discussing theories of "gender identity" that insist on the "the fluidity of gender identity").

Although the proposed amendments do not define "gender identity," as explained in the previous section there are several indications that the amendments effectively require K-12 schools to implement a self-identification ("self-ID") system – that is, a system that determines a child's "gender identity" based solely on the child's assertions. In a self-ID system, society is required to treat a person according to the gender identity that person declares, regardless of outward expression and regardless of reasonable concerns that the child asserting a transgender identity may be doing so because of other mental health issues or for improper purposes. In a self-ID system, no mental health professional is required to verify the authenticity of the child's assertion. And, significantly, no meeting is held with the child's parents. In addition, once the child has declared a new gender identity, the proposed regulation effectively mandates that the K-12 school recognizes that identity and treat it as a legally protected characteristic, thereby implementing what is called "social transition" by using new pronouns, a new name, and allowing the child to use single-sex facilities for the opposite sex.

As mental health professionals who have worked with thousands of gender-nonconforming children, we believe that a system of self-ID combined with mandatory social transition can be very harmful to a child's psychological well-being and development. For example, for a student who may be struggling with gender dysphoria, social transition may be more harmful than helpful. Gender dysphoria can have many causes, including a traumatic experience such as sexual abuse or rape.[12] Social transition may afford a child an immediate sense of relief, but the trauma remains unidentified and unaddressed. Instead of immediate social transition, the first step in working with a child who claims a new gender identity should be a meeting with a psychotherapist who is trained to diagnose or treat mental health disorders. Teachers and school counselors can certainly be part of a team of supportive professionals who, along with the child's parents, provide gender dysphoric children with support and therapeutic options. But teachers and school administrators are not mental health professionals and may not fully understand that:

- Gender and sexuality are complex, develop unpredictably over time, and are influenced by many factors (biological, psychological, social, etc.).
- Personal identity is not static. Identity exploration is a normal part of adolescent and young adult development.
- It is extremely difficult to determine if a gender identity experienced during childhood and adolescence will remain fixed into adulthood. Because identity remains in flux during adolescence, teachers and administrators should be very circumspect about implementing social interventions with far-reaching effects.
- Young people may not have the capacity to fully comprehend the impact of gender transition.
- Same-sex attracted youth are often gender nonconforming and may experience distress as they come to terms with their sexual orientation. Gay, lesbian, and bisexual youth may need help and support to accept themselves as they are.

[12] United Kingdom, *The Cass Review, Independent Review of Gender Identity Services for Children and Young People: Interim Report*, at 5-7 (February 2022) (hereinafter *The Cass Review*), Ex. A.

In sum, by requiring schools to socially transition children solely on the basis of the child's self-declared "gender identity," the proposed amendments require school personnel to embark on a powerful psychotherapeutic intervention for which they are not trained.

3. Social Affirmation in School Settings Harms Children by Interfering with Exploratory Psychotherapy and Putting them on a Pathway to Experimental Medical Interventions

First, when children who suffer from gender dysphoria come to believe that adopting an alternate gender identity will relieve their distress, and when teachers and administrators immediately endorse that belief, it prevents the exploration of other unrecognized factors that may be fueling the children's suffering. Given that gender dysphoric children so often present with other serious mental health and neurological issues,[13] instant social affirmation by school personnel often distracts attention away from those other issues and severely undermines the goals of exploratory therapy. This harms children. When a young person is socially affirmed as a first resort, rather than being helped to explore their gender identity through exploratory psychotherapy, it forecloses a pathway toward self-acceptance – that is, it may prevent them from coming to terms with their sexed body and/or with their developing sexual orientation.[14] This harms children.

Those advocating the importance of social transition and the "affirmation" approach often maintain it is necessary to prevent suicide among transgender youth and that the suicide rate among transgender youth is 41% (much higher than non-transgender youth). Suicide is obviously a serious concern for any child in mental or psychological distress. However, the studies often relied on by advocates of the gender affirmation model to justify automatic social transition and medicalization of minors have been discredited due to the selection bias in the methods used.[15] Moreover, intense focus on gender dysphoria as a singular cause of suicidal ideation or attempt is not only misleading given that so many gender dysphoric individuals present with other mental health problems that are also strongly associated with suicidal tendencies, it is also dangerous

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[13] *See* Gary Butler, et al., *Assessment and Support of Children and Adolescents with GenderDysphoria*, 103(7) Archives of Disease in Childhood 631 (2018), Ex. B; John F. Strang, et al., *Increased Gender Variance in Autism Spectrum Disorders and Attention Deficit Hyperactivity Disorder*, 43(8) Archives of Sexual Behavior 1525 (2014), Ex. C.

[14] One study found that 63.7% of boys with early onset gender dysphoria, who received 'watchful waiting' treatment and no pre-pubertal social transition, grew up to be gay or bisexual. Devita Singh, et al., *A Follow-Up Study of Boys with Gender Identity Disorder*, 12 Frontiers in Psychiatry 1, 14 (2021), Ex. D.

[15] The frequently repeated claim that 41% of 6,450 transgender respondents said they had attempted suicide at some point in their lives is taken from the National Transgender Discrimination Survey. Jack L. Turban, et al., *Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults,* 77(1) JAMA Psychiatry 68-76 (2020), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2749479. However, a 2021 paper notes that the participants were recruited through transgender advocacy organizations and subjects were asked to "pledge" to promote the survey among friends and family. This recruiting method yielded a large but highly skewed sample. Roberto D'Angelo, et al., *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria*, 50 Archives of Sex Behavior 7-16 (2021), Ex. E.

given the "Werther effect." This is the well-known phenomenon that certain kinds of reporting on suicide tends to generate imitation suicide attempts.[16] Finally, even when social affirmation is deemed the appropriate approach for a particular young person, the individual's holistic mental health and well-being must also be taken into account, including the possibility that he or she has physical/mental disabilities or conditions that need to be addressed *in addition to gender dysphoria*.

Second, by socially affirming a child's gender transition, school personnel often harm rather than help the children involved by pushing them down a pathway to medical transition. A recent study demonstrates that early social transition (i.e., changing the names and pronouns of young people, and then treating them as the opposite sex) tends to concretize an opposite sex or nonbinary identity in the person's mind,[17] leading them to believe that medical transition is necessary to alleviate their distress. When a young person embarks on medical transition, interventions may include puberty blockers, cross-sex hormones, or surgical procedures aimed at making the child's body look more like that of a person of the opposite sex or, in some cases, to appear "nonbinary." Insufficient quality evidence exists to understand all of the short-term and long-term consequences of these medical interventions to physical and mental health. There is no high-quality evidence demonstrating that such medical interventions are beneficial or effective in resolving gender dysphoria and improving mental health.[18] Long-term studies of the serious physical side effects of such medical interventions do not exist, but there is growing evidence that the commonly-prescribed medical interventions, especially the administration of puberty blockers, can leave children permanently infertile and unable to achieve orgasm.[19]

For these reasons, several European countries have recently pulled back from medical transitioning of minors. Earlier this year, Sweden's National Board of Health and Welfare released new guidelines for treating young people with gender dysphoria, holding that "the risks of puberty suppressing treatment with GnRH-analogues and gender-affirming hormonal treatment currently outweigh the possible benefits." The Board urged that "the treatments should

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[16] Francisco J. Acosta, et al., *Suicide Coverage in the Digital Press Media: Adherence to World Health Organization Guidelines and Effectiveness of Different Interventions Aimed at Media Professionals*, 35(13) Health Communication (2020).

[17] Kristina R Olson, et al., *Gender Identity 5 Years After Social Transition*, 150(2) Pediatrics (Aug. 2022), Ex. F.

[18] *Cass Review*, *supra*, at 63.

[19] *See, e.g.,* Shira Baram, et al., *Fertility Preservation for Transgender Adolescents and Young Adults: A Systematic Review*, 25(5) Human Reproduction Update 694 (2019) Ex. G. During a recent conference at Duke University, noted vaginoplasty surgeon Marci Bowers (a transwoman herself) reported that: "Every single child or adolescent who was truly blocked at Tanner Stage 2 [when puberty begins] has never experienced orgasm. I mean, it's really about zero." Https://gript.ie/adolescents-who-change-sex-will-never-be-able-to-achieve-sexual-satisfaction-leading-surgeon.

be offered only in exceptional cases."[20] Likewise, Finland's Council for Choices in Health Care came to almost the exact same conclusion a year earlier, noting (in translation): "The first-line intervention for gender variance during childhood and adolescent years is psychosocial support and, as necessary, gender-explorative therapy and treatment for comorbid psychiatric disorders." Finland's Council also found that "[i]n light of available evidence, gender reassignment of minors is an experimental practice"; such an intervention "must be done with a great deal of caution, and no irreversible treatment should be initiated."[21]

In the United Kingdom, following release of Dr. Hilary Cass's interim report evaluating the Tavistock's Gender Identity Development Service (GIDS), as well as her subsequent interim letter, the National Health Service recently announced that it would be closing GIDS in Spring 2023, transferring gender services to regional centers operating on a multidisciplinary model. The interim report noted, in particular, that "[t]here is lack of agreement, and in many instances a lack of open discussion, about the extent to which gender incongruence in childhood and adolescence can be an inherent and immutable phenomenon for which transition is the best option for the individual, or a more fluid and temporal response to a range of developmental, social, and psychological factors."[22] Dr. Cass stressed that "[i]t is essential that [gender dysphoric children and young people] can access the same level of psychological and social support as any other child or young person in distress."[23]

In August 2022, the UK law firm of Pogust Goodhead announced that it will be filing a class action lawsuit for damages against GIDS on behalf of children (and their families) whose new gender identity was quickly affirmed without exploratory therapy and who were then rushed onto puberty blockers and cross-sex hormones.[24] The law firm of Girard Sharp is currently soliciting clients to explore bringing a similar class action suit here in the United States.[25]

Third, social transition by school personnel may harm children by exacerbating the phenomenon of peer-group transition. The proposed regulations fail to acknowledge a difference between the cohort of youth experiencing actual gender dysphoria, and the cohort of youth adopting a gender identity without experiencing gender dysphoria. Recent evidence suggests that there is a peer conformist aspect of young people identifying as transgender or nonbinary and desiring social

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[20] National Board of Health and Welfare, Sweden, *Care of Children and Adolescents with Gender Dysphoria: Summary*, 3 (2022), Ex. H.

[21] PALKO / COHERE Finland, *Medical Treatment Methods for Dysphoria Related to Gender Variance in Minors* (2020), Ex. I.

[22] *The Cass Review*, *supra*, at 16.

[23] *Id.* at 20.

[24] Samuel Lovett, *Tavistock Gender Clinic Facing Legal Action over 'Failure of Care' Claims*, The Independent, Aug. 11, 2022, https://www.independent.co.uk/news/health/tavistock-gender-clinic-lawyers-latest-b2143006.html.

[25] *See* https://www.girardsharp.com/work-investigations-puberty-blockers.

and medical transition.[26] School policies that require *all* students to be affirmed, without question and without reference to any therapeutic diagnosis, result in some students undergoing a serious psychological intervention (social transition) without benefit of mental health treatment for their gender dysphoria, and others undergoing the same social transition without a therapeutic basis for doing so. Both cohorts are then susceptible to progressing from social transition to medical transition.

While high quality studies do not yet exist demonstrating the precise rates, sizeable numbers of youth who socially or medically transition in adolescence later come to regret such transition when they reach young adulthood.[27] School policies that affirm anyone who questions their gender identity, or who adopts an alternate gender identity, without individualized psychotherapy, will increase that number. More and more young people will come to regret their transition and suffer because they were affirmed without appropriate therapeutic exploration of the reasons or alternatives to transition.

In sum, the proposed amendments require schools to socially transition children, thus interfering with vital exploratory psychotherapy and pushing children into experimental and in many cases harmful medical interventions.

4. Families of Gender-Nonconforming Children are Harmed by Undisclosed Social Transition of Children

If implemented, the proposed amendments will also harm many families of gender-nonconforming children. As explained in Section 2 above, the proposed amendments almost certainly codify a system of self-ID and mandatory social affirmation. The proposed amendments say nothing about consultation with a child's parents before a school socially transitions a child. Indeed, many school systems in states that recognize gender identity in law now have explicit policies that bar teachers and other school personnel from notifying the child's parents about these very consequential changes without first obtaining the child's permission. For example, guidance provided to teachers in the Chicago Public School system makes clear that school personnel are required to socially transition children who assert transgender identities

[26] Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria,* 13(8) PLoS One (2018), Ex. J. Supporters of the self-ID and mandatory affirmation model attempted to have the *PLoS One* journal editors retract Dr. Littman's article, and activists have claimed that Dr. Littman's study has been discredited. This is incorrect. The *PLoS One* editors asked Dr. Littman to make minor changes to clarify the study design, methods, and limitations, which she did. *See* https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0214157.

[27] Numerous websites devoted to detransition stories can be found online. *See*, *e.g.*, https://www.detransvoices.org, https://post-trans.com, and https://www.transgendertrend.com/detransition. On March 12, 2022, Genspect.org hosted the first annual Detrans Awareness Day conference devoted to the stories of those who regretted their gender transition and returned to living as their biological sex. The full video of that conference can be viewed at https://www.youtube.com/watch?v=AnvZvqwIR7o. The r/detrans Reddit (with 38K+ members) also contains many such first-person accounts: https://www.reddit.com/r/detrans/.

without consulting the child's parents. "Parent(s)/guardian(s) [sic] consent is not required to address a student by their affirmed name and pronouns."[28] These guidelines also require "school staff" to hide the fact that a child has socially transitioned at school from parents unless the child gives permission. "It is not required for parents to participate" in the "Student Administrative Support Team" meetings concerning their child's "gender transition."[29] School staff are told that they "shall comply" with the Support Team's "recommendations in communicating with parents."[30] The U.S. Department of Education and Justice's *2016 Dear Colleague Letter* also indicates that parental consent is unnecessary: "The Departments interpret Title IX to require that when a student or the student's parent or guardian, *as appropriate*, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity."[31] Lawsuits have been filed by parents who are justifiably angry that a school would socially transition their children without consulting them.

The legality of these practices under U.S. constitutional and statutory law is now being tested in the courts.[32] Our focus is on the consequences of covert social transition for the mental health of children and their parents. Based on our work with thousands of families, we are of the opinion that social transition of K-12 children without the consent of and discussion with the child's parents is an enormous overreach by schools that has destabilized many families and disrupted otherwise healthy parent-child relationships that are the foundation for the child's mental health.

We are aware that, in some situations, family relationships are not healthy and child abuse is a very real concern. We are also aware that some parents are intolerant of gender-nonconforming behavior and expression by their children. The concern is that if a child who claims an opposite-sex gender identity is "outed" to the parents, the parents will reject the child or the child's proclaimed identity, just as happened to many gay adults in their childhoods. In our experience, however, today the norm is not parental rejection of a gender-nonconforming child. Most parents are very supportive of their gender-nonconforming children. But parental support does not require unquestioning affirmation of their child's newly-disclosed gender identity. In the vast majority of cases, parents have a much deeper understanding of the child's life experiences and other mental health challenges, including recent traumas and other neurological conditions (e.g., Autism, ADHD, Anxiety Disorder). The parents may very well, and accurately, believe that their

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[28] *Chicago Guidelines*, *supra*, at 5.

[29] *Id.* at 3.

[30] *Id.* at 5. *See also, N.Y. Guidance to School Districts*, *supra*, at 7 ("School personnel should speak with the student first before discussing a student's gender nonconformity or transgender status with the student's parent or guardian. For the same reasons, school personnel should discuss with the student how the school should refer to the student, e.g., appropriate pronoun use, in written communication to the student's parent or guardian.").

[31] *2016 Dear Colleague Letter*, *supra*, at 2.

[32] *See, e.g.,* Compl. John Doe et al. v. Madison Metropolitan School District, 20-CV-454 (Cir. Ct. Dane Cty., Wisc., Feb. 18, 2020); D.F. v. The School Bd. of the City of Harrisonburg, VA, CL22-1304 (Cir. Ct. Rockingham Cty., VA, Jun. 1, 2022).

For the reasons stated above, we urge the U.S. Department of Education to abandon the sections of the proposed amendments that address "gender identity." The proposed amendments will be harmful to students, both those questioning their gender identities and those who are not. Students questioning their gender identities, or who are diagnosed with gender dysphoria, can be protected from abusive treatment and aided in their struggles without facing the risks posed by a policy that requires schools to affirm and validate students' gender identities based solely on the individual student's self-declarations.

The Gender Exploratory Therapy Association

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Robert Withers, Jungian Analyst
David Clarke Pruden, MS
Thomas Preston, PhD, ABPP
Sarah Edmonds, PhD
Lynne Glover
Louise Clara
Lisa Duval
Mari Dickerson, LCSW
David M. Haralson, PhD, LMFT
Dina Critel-Rathje, MS, LIMHP
Michelle Peixinho, LCSW
Brooke Laufer, PsyD.
Tammy Carvalho MS Professional Counseling
Jerry T. Lawler, PhD, Clinical Psychologist
Jill Edelstein, MSW, LCSW
Mary M Kennedy, PsyD
Tania Marshall, M.Sc. (App. Psych), B.A. (Psych)
Susan Evans SRN, RMN Psychoanalytic Psychotherapist
Sophie Frost-MA Psychoanalytic Psychotherapy
Andrew B. Clark, MD

Anya S Dashevsky, Psy.D.
Dr Harriette Parnes
Cindy Eades, MAC, LPC
Kristen Farrell-Turner, PhD
F.R. Robinson, LPC, MA in Professional Counseling
Michelle Mackness, MC
Bret Alderman, PhD in Depth Psychology
Susanne Navas, MA & MEd Clinical Mental Health Counseling (May 2023)
Heather Gilley, Grad Student for School Counseling
Kathryn Hingle, BS
Judith Heppner, MSW, RSW
Jan Horner MS, LPC
Marcus Evans
Aaron Kimberly, BScN, RN

Exhibit 38

ETHICS AND PUBLIC POLICY CENTER

September 12, 2022

Via Federal eRulemaking Portal

Miguel A. Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: EPPC Scholars Comment Opposing "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," RIN 1870-AA16, Docket ID ED-2021-OCR-0166

Dear Secretary Cardona:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong opposition to the Department of Education's ("ED" or "the Department") proposed rule "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" ("Proposed Rule").[1] Rachel N. Morrison is an EPPC Fellow, member of the HHS Accountability Project, and former attorney at the Equal Employment Opportunity Commission. Mary Hasson is the Kate O'Beirne Senior Fellow at EPPC, an attorney, and co-founder of EPPC's Person and Identity Project, an initiative that equips parents and faith-based institutions to counter gender ideology and promote the truth of the human person.

The Proposed Rule radically rewrites Title IX of the Education Amendments of 1972, landmark federal civil rights law that prohibits sex discrimination in education. As proposed, the rule is arbitrary and capricious, exceeds statutory authority, and is unlawful and unconstitutional. The rationale for the proposed changes is unsupported by substantial evidence. The Proposed Rule contradicts long-standing scientific understandings of the human person and places ideology ahead of sound policy. It turns the clock back on girls' and women's rights, tramples parental rights, harms children's interests, and ignores religious freedom and free speech of students, employees, and religious educational institutions. We urge the Department to withdraw and abandon the Proposed Rule.

1. ED has failed to provide substantial evidence that a revision of the current Title IX regulations is warranted.

EO 12866, section 1(b) establishes the principles of regulation, including that "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem." To justify replacing current regulations, including the 2020 Rule, ED must provide specific evidence as to how those regulations are causing harms or burdens. ED has failed to meet that standard.

[1] 87 Fed. Reg. 41390.

test scores are falling, but schools are doubling down on ideological content and goals. Gender identity policies have no place in schools; Title IX cannot protect both sex-based rights and "gender identity" claims at the same time.

B. School to clinic pipeline.

Backed by government support for "gender-affirming care," schools in some cities are enmeshed with the business side of adolescent gender clinics.[88] Clinicians provide trainings for teachers on "transgender" youth, "gender affirmation," social transition, and medical/surgical transition. Teachers and school staff, in turn, follow the advice of gender clinicians, validate children's "gender identities" (no matter how young or troubled), facilitate their "gender transitions" (often behind parents' backs) and refer them (and sometimes their parents) to gender clinics for medical interventions.

The "gender-affirming" climate in schools, fueled by policies that teach and privilege "gender identity" explorations, has been described by some parents as a school-to-gender-clinic-pipeline. This is another reason why we oppose the injection of "gender identity" into the school environment. Gender-affirming medical and surgical interventions cause serious harm to the developing bodies and vulnerable psyches of children.

Across the globe, gender specialists and whistleblowers have raised alarm over the scant evidence supporting gender-affirming protocols and the mounting evidence that gender affirmation causes harm to minors. In the wake of extensive evidence reviews, several leading European gender clinics recently ended or curtailed gender-affirming interventions for minors. Extensive psychotherapy, open to exploring alternative diagnoses and non-invasive ways of managing gender dysphoria, is emerging as the first-line response to adolescent identity distress.

The number of children and adolescents diagnosed with gender dysphoria or identifying as "transgender" has risen dramatically over the past decade, becoming "an international phenomenon, observed all across North America, Europe, Scandinavia, and elsewhere."[89] The typical patient profile also has changed markedly: until recently, patients seeking treatment for gender dysphoria were usually either adult males or very young children, mostly boys. Today, the typical patient is an adolescent, usually female.[90]

Alongside the explosive growth in gender-dysphoric or transgender-identified children and adolescents, the worlds of psychology and medicine have witnessed a sea change in the dominant clinical approach towards these issues—changes which raise serious ethical questions.[91] For years, gender dysphoria in children was addressed through "watchful waiting" or with psychotherapy for the child and family. In most (up to 88%) of these situations, the child's gender dysphoria (identity distress) would resolve by puberty.[92] In contrast, nearly all minors who begin gender-affirming social and medical

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[88] The gender clinics at Lurie Children's Hospital (IL) and Seattle Children's Hospital (WA), for example, have collaborative relationships with local public school districts.

[89] Kenneth J. Zucker., *Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues*, 48 Archives of Sexual Behavior 1983, n.3 (2019), https://link.springer.com/article/10.1007%2Fs10508-019-01518-8.

[90] *Id.*

[91] Lucy Griffin et al., *Sex, Gender and Gender Identity: A Re-Evaluation of the Evidence*, 45 BJPsych Bulletin 291 (2021), https://pubmed.ncbi.nlm.nih.gov/32690121/.

[92] Devita Singh et al., *A Follow-Up Study of Boys with Gender Identity Disorder*, 12 Frontiers in Psychiatry 632784 (2021), https://www.frontiersin.org/articles/10.3389/fpsyt.2021.632784/full.

transitions today persist in transgender identification.[93] Based on the belief that "gender variations are not disorders, gender may be fluid and not binary," the gender-affirming approach insists that children and adolescents who identify as transgender should be permitted "to live in the gender that feels most real or comfortable to that child and to express that gender with freedom from restriction, aspersion, or rejection."[94]

According to gender therapist Laura Edwards-Leeper, gender affirmation means "the gender identity and related experienced asserted by a child, an adolescent, and/or family members" should be accepted as "true" and "the clinician's role in providing affirming care to that family is to empathetically support such assertions."[95] Consequently, the gender-affirming model rejects "therapeutic approaches that encourage individuals to accept their given body and assigned gender," and contends that alternative approaches "may inadvertently cause psychological harm."[96]

Despite the "absence of empirical data" to support them, the gender affirming model and gender affirming medical and surgical interventions have been heavily promoted by transgender activists, allied clinicians, and several establishment medical organizations.[97] Even so, the rapid swing from the "watchful waiting" therapeutic paradigm to a "gender affirmative" protocol that validates all asserted "gender identities" and puts adolescents on a path towards "gender-affirming" medical interventions is unprecedented. So too is the number of transgender- identified adolescents seeking irreversible "transgender" body modifications—drastic measures that some come to regret.[98]

Clinical concerns over the outcomes of gender affirmation have escalated.[99] Gender affirmation has a domino effect, beginning with psycho-social transition.[100] Although it is not physically invasive, once begun, psycho-social transition is psychologically difficult to walk back. Children who socially transition are more likely to persist in a transgender-identification than children who do not socially transition. This raises serious ethical questions.[101] The Dutch gender-affirming protocol never supported

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[93] See, for example, this study from the Tavistock and Portman NHS Gender Identity Development Service (UK), which found 98% of adolescents who underwent puberty suppression continued on to cross- sex hormones. Polly Carmichael, et al., *Short-Term Outcomes of Pubertal Suppression in a Selected Cohort of 12 To 15 Year Old Young People with Persistent Gender Dysphoria in the UK*, 16 *PloS one* e0243894 (2021), https://doi.org/10.1371/journal.pone.0243894.

[94] Laura Edwards-Leeper et al., *Affirmative Practice with Transgender and Gender Nonconforming Youth: Expanding the Model*, 3 Psychology of Sexual Orientation & Gender Diversity 165 (2016), https://www.apa.org/pubs/journals/features/sgd-sgd0000167.pdf.

[95] *Id.* at 165.

[96] *Id.* at 166 (citing Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth, Substance Abuse and Mental Health Services Administration (2015), https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf).

[97] *Id.*

[98] Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners*, 50 Arch Sex Behav 3353 (2021), https://pubmed.ncbi.nlm.nih.gov/34665380/.

[99] For example, see the following recent publications: William Malone et al., *Puberty Blockers for Gender Dysphoria: The Science Is Far From Settled*, 5 The Lancet Child & Adolescent Health e33 (2021), https://doi.org/10.1016/S2352- 4642(21)00235-2; Kirsty Entwistle, *Debate: Reality Check—Detransitioner's Testimonies Require Us to Rethink Gender Dysphoria*, Child & Adolescent Mental Health (2020), https://doi.org/10.1111/camh.12380; Paul W. Hruz, *Deficiencies in Scientific Evidence for Medical Management of Gender Dysphoria*, 87 The Linacre Quarterly 34 (2020), https://doi.org/10.1177/ 0024363919873762.

[100] When a minor's desired identity is affirmed, the minor initiates external "social" changes to express the desired identity (name, pronouns, hair, clothing, etc.).

[101] Kenneth J. Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, 19 Int'l

social transition for pre-pubertal children, over concerns that it would tip the scales towards persistence in transgender identification.[102] Social transition sets the child on a path toward medical transition before the child is mature enough to appreciate the long-term physical and psychological consequences.

For pre-pubertal children, social transition also creates an impetus for the next step in gender affirming care: puberty blockers. A pre-pubertal child who presents as a member of the opposite sex views puberty with extreme anxiety, as the growth of secondary sex characteristics will reveal the child's true sexual identity. Puberty blockers interrupt the child's natural development and preserve the child's secret, if only for a time.

Puberty is a whole-body developmental process. Preventing its normal course, for an indeterminate time, has unknown long-term consequences beyond the "pause" in development of secondary sex characteristics: The child's social and cognitive maturation (including advances in executive functioning and other brain functions) is suspended along with other developmentally appropriate growth, including bone growth. Stopping the puberty blockers will allow the development of secondary sex characteristics to resume, but the time lost from the unnatural delay in biological maturation cannot be recaptured. No longer described as "fully reversible," puberty blockers have negative effects on bone density, social and emotional maturation, and other aspects of development. Further, puberty blockers generally fail to lessen the child's gender dysphoria and results are mixed in terms of effects on mental health.[103] Long-term effects remain unknown.[104]

Multiple studies show that the vast majority of children who begin puberty blockers go on to receive cross-sex hormones, the next step in gender-affirming care, with life-altering consequences.[105]Blocking a child's natural puberty (preventing maturation of genitals and reproductive organs) and then introducing cross-sex hormones renders the child permanently sterile.[106] Gender clinicians now admit that puberty blocking may impair the child's later sexual functioning as an adult as well.[107] These losses cannot be fully comprehended by a child, precluding the possibility of informed consent.

Cross-sex hormones carry numerous health risks and cause many irreversible changes in adolescents' bodies, including genital or vaginal atrophy, hair loss (or gain), voice changes, and impaired

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J. of Transgenderism 231 (2018). Michael Biggs, *Revisiting the Effect of GnRH Analogue Treatment on Bone Mineral Density in Young Adolescents with Gender Dysphoria*, 34 J. of Pediatric Endocrinology & Metabolism 937 (2021), https://doi.org/10.1515/jpem-2021-0180.

[102] Annelou L. C. de Vries, & Peggy T. Cohen-Kettenis, *Clinical Management of Gender Dysphoria in Children and Adolescents: The Dutch Approach*, 59 J. of Homosexuality 301 (2012), https://doi.org/10.1080/00918369.2012.653300.

[103] Annelou L. C. de Vries et al., *Puberty Suppression in Adolescents with Gender Identity Disorder: A Prospective Follow-Up Study*, 8 J. Sex Med. 2276 (2011), https://www.jsm.jsexmed.org/article/S1743-6095(15)33617-1/pdf.

[104] There are no long-term, rigorous studies on the safety and outcomes of using puberty blockers to disrupt natural puberty in healthy but dysphoric children for an extended time.

[105] Polly Carmichael, et al., *Short-Term Outcomes of Pubertal Suppression in a Selected Cohort of 12 To 15 Year Old Young People with Persistent Gender Dysphoria in the UK*, 16 *PloS one* e0243894 (2021), https://doi.org/10.1371/journal.pone.0243894.

[106] Stephen B. Levine, *Ethical Concerns About Emerging Treatment Paradigms for Gender Dysphoria*, 44 J. Sex Marital Ther. 29 (2018), https://pubmed.ncbi.nlm.nih.gov/28332936/.

[107] Abigail Shrier, *Top Trans Doctors Blow the Whistle on "Sloppy Care,"* Common Sense (Oct. 4, 2021), https://bariweiss.substack.com/p/top-trans-doctors-blow-the-whistle.

fertility. They also increase cardiovascular risks and cause liver and metabolic changes.[108] The flood of opposite sex hormones has variable emotional and psychological effects as well. Females who take testosterone experience an increase in gender dysphoria, particularly regarding their breasts, creating heightened demand for double mastectomies on teens as young as 13.[109] The gender affirming model recommends performing mastectomies on the healthy breasts of adolescent girls in order to address emotional discontent. This is an unethical practice described by psychotherapist Alison Clayton as nothing less than "dangerous medicine."[110]

The gender-affirming approach continues to push ethical boundaries. The World Professional Association for Transgender Health (WPATH) recently released its proposed "Standards of Care Version 8," which lower the recommended ages for adolescents to receive cross-sex hormones to age 14, double mastectomy ("chest masculinization") to age 15, male breast augmentation and facial surgery to age 16, and removal of testes, vagina, or uterus to age 17, with flexibility to provide these gender affirming interventions at even younger ages.[111] This is unethical human experimentation—on *children*. A Swedish teen who underwent medical transition and then de-transitioned after suffering substantial bodily harm describes the "gender affirming" medical protocol this way: "They're experimenting on young people ... we're guinea pigs."[112]

Schools that promote "gender identity" exploration and "gender transitions" are the gateway to medical and surgical "transgender" interventions. Protecting "gender identity" under Title IX, as the Proposed Rule intends, will put countless numbers of children on the transgender assembly line—and lead to irreversible harm.

C. ED must conduct a Family Policymaking Assessment.

The Treasury and General Government Appropriations Act of 1999 requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being.[113] As explained above, this rule would negatively affect family well-being, requiring ED to provide an assessment of the Proposed Rule'.

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[108] *Gender-Affirming Hormone in Children and Adolescents*, BMJ EBM Spotlight Blog (Feb. 25, 2019), https://blogs.bmj.com/bmjebmspotlight/2019/02/25/gender-affirming-hormone-in-children-and-adolescents-evidence-review/.

[109] Johanna Olson-Kennedy et. al. *Chest Reconstruction and Chest Dysphoria in Transmasculine Minors and Young Adults: Comparisons of Nonsurgical and Postsurgical Cohorts*. *JAMA Pediatr*. 2018 May 1;172(5):431-436. doi: 10.1001/jamapediatrics .2017.5440. PMID: 29507933; PMCID: PMC5875384.

[110] Alison Clayton, *The Gender Affirmative Treatment Model for Youth with Gender Dysphoria: A Medical Advance or Dangerous Medicine*?. *Arch Sex Behav* (2021), https://doi.org/10.1007/s10508-021-02232-0.

[111] WPATH Standards of Care, Version 8, Draft for Public Comment, December 2021, "Adolescent" Chapter, p. 3.

[112] Mission: Investigate. Trans Children ("Trans Train 4") (Nov. 26, 2021), https://www.svtplay.se/video/33358590/uppdrag-granskning/mission-investigate-trans-children-avsnitt-1.

[113] Pub. L. 105-277 ("(c) FAMILY POLICYMAKING ASSESSMENT.—Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether—(1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment; (2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children; (3) the action helps the family perform its functions, or substitutes governmental activity for the function; (4) the action increases or decreases disposable income or poverty of families and children; (5) the proposed benefits of the action justify the financial impact on the family; (6) the action may be carried out by State or local government or by the family; and (7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.").

Exhibit 39

Public Submission of the

Defense of Freedom Institute for Policy Studies on the

U.S. Department of Education's Notice of Proposed Rulemaking

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Agency/Docket Number: ED-2021-OCR-0166
RIN: 1870-AA16
Document Number: 2022-13734

discrimination based on gender identity and sexual orientation will have broad impacts on family well-being, the Department must assess its proposed rule in light of the seven factors listed in the law in order to avoid acting in an arbitrary and capricious manner. Any failure to do so would be arbitrary and capricious and a violation of the APA.

The slippery slope of gender identity affirmations by teachers and recipient employees

Despite the lack of statutory authority under Title IX, the NPRM would require teacher, Title IX Coordinator, or recipient employee communications with students regarding gender-affirming care. The NPRM goes to extraordinary lengths to insert a student's "inner sense of gender" into Title IX's protections and the Department's (and recipients') peculiar set of interests and newfound enforcement authorities. As discussed *supra*, elementary and secondary school employees would be obligated to monitor for and report any possible violation, objectively *and* subjectively considered, of a student's Title IX rights—now to include gender identity (and sexual orientation, sex stereotypes, and sex characteristics). The Department's proposed grant of parental authority, quite possibly to a recipient employee, such as a teacher, acting *in loco parentis* on behalf of a student, discussed *supra*, presents further concern regarding recipient advocacy of gender-affirming care for a student whose "inner sense of gender" seemed to the recipient employee (acting *in loco parentis*) to warrant the care. Recipient employees, including the Title IX Coordinator, may genuinely come to believe—having considered a young student's apparent "inner sense of gender"—that psychological or even physiological treatment is warranted. The NPRM includes no prohibition on such considerations by recipient employees, even as it assumes many parental roles regarding the student's developmental attributes.

Admiral Rachel Levine,[392] the biologically male Assistant Secretary of Health at the U.S. Department of Health and Human Services ("HHS") who identifies as a woman, maintains an official biography that emphasizes a focus "on the intersection between mental and physical health, treating children, adolescents, and young adults."[393] Admiral Levine has long expressly advocated the provision of puberty blockers, cross-sex hormones, mastectomies, and castrations for sex reassignment "transitions" for youth.[394] Of particular note, during the Admiral's confirmation hearings, Levine refused to answer whether "minors are capable of making such a life-changing decision as changing one's sex" and whether the government should be permitted to "override the

[392] *See* https://www.hhs.gov/about/leadership/rachel-levine.html.
[393] *Id*.
[394] *See* Rachel Levine, Address at Franklin & Marshall College, "It's a Transgeneration: Issues in Transgender Medicine" (Jan. 19, 2017), *available at* https://www.fandm.edu/common-hour/common-hour-archive/2017/01/30/it-s-a-transgeneration-issues-in-transgender-medicine.

parent's consent [in order] to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia."[395]

HHS recently issued guidance, "Gender-Affirming Care and Young People," that states that "[g]ender-affirming care is a supportive form of healthcare" and "may include medical, surgical, mental health, and non-medical services for trans gender and nonbinary people."[396] It advocates that "*early gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent* to focus on social transitions and can increase their confidence . . ."[397] HHS includes elementary and secondary school students as part of the intended audience for this guidance.

In the absence of contrary directives in the NPRM, the public is right to assume that the Department follows the directives of President Biden's public health experts at HHS, led by Admiral Levine, who believe and have publicly stated that children and adolescents should receive "gender-affirming care" at the earliest possible point in life.[398] The Department has arbitrarily and capriciously failed to explain in the NPRM whether the NPRM requires or authorizes school district employees and other recipients to override parental refusal to provide "gender-affirming care" for their children.

Other administration officials have parroted Admiral Levine's approach. On March 31, 2022 (the "Transgender Day of Visibility"), U.S. Secretary of State Antony Blinken equated the denial of gender-affirming care with "violence."[399] With slightly less subtlety, on the same date, HHS declared that "[t]ransgender and gender nonbinary adolescents are at increased risk for mental health issues, substance abuse, and suicide."[400] On April 7, 2022, White House Press Secretary Jen Psaki called gender-affirming care "medically necessary, lifesaving healthcare for [kids]."[401] Secretary Cardona, in announcing the NPRM, blamed the absence of additional Title IX protections based on gender identity (and sexual orientation, sex stereotypes, sex characteristics,

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[395] Madeleine Kearns, *The Absurd Criticism of Rand Paul's Rachel Levine Questioning*, NAT'L REV., Feb. 26, 2021, https://www.nationalreview.com/2021/02/the-absurd-criticism-of-rand-pauls-rachel-levine-questioning/?gclid=CjwKCAjwx7GYBhB7EiwA0d8oewgUsxWiD8lk5iSpuLpRFefGRxksoc3QtYyuI7ZOhdWjMlxY3Xn-ZRoC-wsQAvD_BwE.

[396] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.

[397] *Id.*

[398] *Id*.

[399] *See* https://www.state.gov/on-transgender-day-of-visibility-2/.

[400] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.

[401] *See* https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/07/press-briefing-by-press-secretary-jen-psaki-april-7-2022/.

and pregnancy or related conditions) on "higher rates of anxiety, depression, and suicide" among "LGBTQ youth."[402]

The Biden administration's enthusiasm for gender reassignment surgery is at odds with the findings of the Obama administration's Centers for Medicare and Medicaid Services, which, in 2016, determined that the surgery would not be covered[403] by plans because of insufficient evidence ("evidence gaps") that it benefits patients.[404] In contrast, the Biden administration has a clear, indignant message: adopt our rules and provide gender-affirming care or students will die.

The long-term effects of "gender-affirming care" advocated by HHS have been insufficiently evaluated

Beyond the administration's inexcusable hyperbole, reliable evidence actually indicates a higher rate of suicide among young people in jurisdictions that have increased access to "gender-affirming" care. A recent comprehensive study of the impact of such care found that "young people may also experience significant and irreversible harms from such medical interventions" and concluded that "[r]ather than facilitating access by minors to these medical interventions without parental consent, states should be pursuing policies that strengthen parental involvement in these important decisions with life-long implications for their children."[405]

Relevant "medical treatments" such as puberty blockers and cross-sex hormones among adolescents "did not exist in the United States prior to 2007 and [were] extremely rare before 2010."[406] Provision of these treatments in the U.S. is quite recent, and "[t]he effects of puberty blockers and cross-sex hormones as medical intervention for adolescents . . . has never been subjected to a large-scale randomized controlled trial (RCT), like the kind that it typically required for approval of new medications."[407]

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[402] *See* https://www.ed.gov/news/speeches/secretary-cardonas-remarks-us-department-educations-release-proposed-amendments-title-ix.
[403] *See* https://www.cms.gov/medicare-coverage-database/view/ncacal-decision-memo.aspx?proposed=N&NCAId=282&bc=ACAAAAAAQAAA&.
[404] Ryan T. Anderson, *Sex Change: Physically Impossible, Psychosocially Unhelpful, and Philosophically Misguided*, PUB. DISCOURSE, Mar. 5, 2018, https://www.thepublicdiscourse.com/2018/03/21151/.
[405] Jay Greene, Ph.D., *Puberty Blockers, Cross-Sex Hormones, and Youth Suicide*, HERITAGE FOUNDATION, Jun. 13, 2022, https://www.heritage.org/gender/report/puberty-blockers-cross-sex-hormones-and-youth-suicide.
[406] *Id*.
[407] *Id*.

Another recent analysis of a post-surgical transgender population study (published in the AMERICAN JOURNAL OF PSYCHIATRY in October 2019)[408] found that "transitioning" procedures failed to improve mental health struggles or to bring the other promised mental health benefits for patients suffering from gender dysphoria.[409] The study also found "no [mood or anxiety disorder] benefits to hormonal transition."[410]

Nonetheless, the Biden administration's medical, education, and political leadership insist these experimental treatments are requisite to saving lives, contrary to the public good with which they have been temporarily entrusted. The politicization of a person's inner sense of gender may, indeed, have tremendous medical costs resulting from the continued promotion of "gender-affirming" care. As the Biden administration promotes what can only be described as experimental gender-affirming care, in July 2022 England's National Institutes of Health ("NIH") announced closure of its child gender identity clinic following an independent review determined that its care was "leaving young people 'at considerable risk' of poor mental health and distress."[411]

The Cass Review,[412] led by former President of the Royal College of Paediatrics and Child Health, Dr. Hilary Cass,[413] noted that further examination of other mental health and cognitive issues in children should occur prior to treatment and that ". . . brain maturation may be temporarily or permanently disrupted by puberty blockers, which could have significant impact on the ability to make complex risk-laden decisions, as well as possible longer-term neuropsychological consequences." The report noted the "lack of [medical] consensus and open discussion about the nature of gender dysphoria and therefore about the appropriate clinical response," the need to "know more about the population being referred and outcomes," and that routine and consistent data collection had not occurred, undermining the ability to track outcomes.[414]

One reporter recently noted:

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[408] *See* https://ajp.psychiatryonline.org/doi/full/10.1176/appi.ajp.2019.19010080.
[409] Ryan T. Anderson, "*Transitioning" Procedures Don't Help Mental Health, Largest Dataset Shows*, DAILY SIGNAL, Aug. 3, 2020, https://www.dailysignal.com/2020/08/03/transitioning-procedures-dont-help-mental-health-largest-dataset-shows/?_gl=1*1wt7dl8*_ga*MTY2OTI1NDM0NC4xNjYxODA4MjQw*_ga_W14BT6YQ87*MTY2MTgyMjEwOC4yLjAuMTY2MTgyMjEwOC42MC4wLjA.
[410] *Id*.
[411] Jasmine Andersson & Andre Rhoden-Paul, *NHS to Close Tavistock Child Gender Identity Clinic*, BBC NEWS, Jul. 28, 2022, https://www.bbc.com/news/uk-62335665.
[412] *See* https://cass.independent-review.uk/publications/interim-report/.
[413] *See* https://cass.independent-review.uk/about-the-review/the-chair/.
[414] *Id*.

> As the Biden administration continues to try to use its regulatory powers to force a "gender-affirming" approach to children who question their sex, in other countries the rubber-stamping of a gender-dysphoric child's belief and the prescribing of puberty-blocking drugs are under serious reconsideration. *The U.K., Sweden, Finland, and France—not exactly Bible Belt countries—are all pulling back from the rush to transition children*.[415]

Iran: a world leader in gender reassignment surgeries

In fact, gender reassignment surgeries have historically been performed far more often in countries where homosexuality is illegal and may be punished with death.

Iran, for example, is an international hub for gender reassignment surgeries.[416] Iran's late spiritual and political leader, Ayatollah Khomeini, issued a religious decree calling for gender reassignment surgeries "after being moved by a meeting with a woman who said she was trapped in a man's body."[417] According to a 2021 Country Report produced by the U.S. State Department, "NGOs reported that [government] authorities pressured LGBTQI+ persons to undergo gender reassignment surgery" and that these medical "procedures disregarded psychological and physical health . . ."[418] The State Department reported that "the number of private and semigovernmental psychological and psychiatric clinics allegedly engaging in 'corrective treatment' or reparative therapies of LGBTQI+ persons continue[s] to grow."[419]

Homosexuality in Iran is a crime punishable by death, and gender reassignment surgeries are thus the preferred option—making Iran, where transsexuality was legalized in 1987, the second-leading provider in the world of such surgeries.[420] Differing from the gender reassignment procedures advocated by Admiral Levine (discussed *supra*), Iran also uses electric shock in addition to hormone treatments and "strong psychoactive medications," according to a United Nations report

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[415] Wesley J. Smith, *U.K. Transgender Clinic to Close after Damning Report: "Not Safe" for Children*, NAT'L REV., Jul. 28, 2022, https://www.nationalreview.com/corner/u-k-transgender-clinic-to-close-after-damning-report-not-safe-for-children/ (emphasis added).

[416] *Why Iran Is a Hub for Sex-reassignment Surgery: It Is Not Because the Regime Is Liberal*, ECONOMIST, Apr. 4, 2019, https://www.economist.com/middle-east-and-africa/2019/04/04/why-iran-is-a-hub-for-sex-reassignment-surgery.

[417] Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC NEWS, Nov. 5, 2014, https://www.bbc.com/news/magazine-29832690.

[418] *See* https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/iran.

[419] *See id.*

[420] JERUSALEM POST Staff, *Homosexuals in Iran Are Having Sex Reassignment Surgery to Avoid Execution*, JERUSALEM POST, Mar. 6, 2020, https://www.jpost.com/middle-east/iran-news/homosexuals-in-iran-having-sex-reassignment-surgery-to-avoid-execution-619968.

on human rights violations in Iran.[421] According to reports from prominent Iranian-born LGTB activist Shadi Amin, "[t]he government believes that if you are a gay man your soul is that of a woman and you should change your body."[422]

In the People's Republic of China ("PRC"), gender-affirming treatments are also on the rise where, according to a report by the CCP-owned CHINA DAILY, gender reassignment doctors are "[h]elping women find their inner man" through surgeries,[423] and where, according to Amnesty International, gender incongruence is still treated as a mental health disorder under Chinese law.[424] The PRC permits corrective surgeries in order to treat what Chinese law considers a mental health disorder.

The Department must withdraw the NPRM in its entirety

The NPRM ignores the proper safety, privacy, and dignity of female students. It does so despite Title IX's clear purpose of guaranteeing equal educational opportunities for female students and in defiance of the Department's own long-term guidance regarding the meaning of "sex" for Title IX purposes. With its promise of future rulemaking on the matter of sex-segregated sports, the Department claims to set aside for the moment an issue of considerable ongoing national debate; however, the regulatory text does not reflect the Department's contention that the NPRM is not intended to impact women's and girls' athletics. The NPRM's expansion of Title IX to gender identity includes no limiting language to preserve sex-segregated athletics; the proposed rule states quite clearly that failure of a recipient to respond to the demands imposed by a student's gender identity ("inner sense of self") will automatically constitute more than *de minimis* harm—thereby indicating a violation of Title IX. The NPRM does not shield sex-segregated sports from this element of the rule.

The NPRM violates the PPRA and FERPA through the monitoring and reporting requirements imposed on recipient employees by the NPRM. Those statutory requirements are simply ignored by the Department as it pursues its unprecedented reach into the sexual behavior or attitudes of students, religious practices, affiliations, or beliefs of the student or student's parent, mental or psychological problems of the student or the student's family, and the political affiliations or

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[421] Benjamin Weinthal, *Iran's Use of "Electric Shocks" on Gay Children Is Torture, Says UN Report*, JERUSALEM POST, Feb. 12, 2021), https://www.jpost.com/middle-east/iran-news/irans-use-of-electric-shocks-on-gay-children-is-torture-says-un-report-658727.
[422] Mark Hodge, *Sexual "Cleansing" Iran Is Forcing Thousands of Gay People to Have Gender Reassignment Surgery Against Their Will or Face Execution*, SUN UK, Feb. 19, 2020, https://www.thesun.co.uk/news/10998169/iran-gay-people-gender-reassignment-surgery/.
[423] Xu Junqian, *Helping Women Find Their Inner Man*, CHINA DAILY, Mar. 24, 2017, https://www.chinadaily.com.cn/china/2017-03/24/content_28660710.htm.
[424] *See* https://www.amnestyusa.org/wp-content/uploads/2019/05/Barriers-to-gender-affirming-treatments-for-transgender-people-in-China.pdf.

Exhibit 40

No. 1 -6

In the Supreme Court of the United States

JOEL DOE ET AL.,
Petitioners,
v.
BO ERTOWN AREA SCHOOL DISTRICT ET AL.,
Respondents,
and
PENNS LVANIA OUTH CONGRESS FOUNDATION,
Respondent-Intervenor.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* DRS. MIRIAM GROSSMAN, PAUL RU , MIC AEL LAIDLA , UENTIN VAN METER, ANDRE VAN MOL IN SUPPORT OF PETITIONER

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Counsel for *Amici Curiae*

ideological purposes untethered from scientific empirical data, as described *infra* and *supra*.

II. *Gender Dysphoria* Is a Psychological Disorder Distinguished by Confused and Distressed Thinking About the Reality of One's Sex.

A gender dysphoric youth – such as the ones in this case using locker rooms of their self-reported gender, as opposed to their sex[5] – experiences a sense of incongruity between the gender expectations linked to her or his biological sex and her or his biological sex itself. Tomer Shechner, *Gender Identity Disorder: A Literature Review from a Developmental Perspective*, 47 Isr. J. of Psychiatry Related Sci. 132-38 (2010). As noted by one of the most judicially relied upon authorities regarding the science of mental states, gender dysphoric boys subjectively feel as if they are girls, and gender dysphoric girls subjectively feel as if they are boys – according to their sense of what that feeling of being a member of the opposite sex must be like. *See* American Psychological Association, *Diagnostic Statistical Manual of Mental Disorders* [hereinafter, "DSM-5"] 452 (5th ed. 2013).

et subjective feelings, strong as they may be, cannot constitute (or transform) objective reality. Cretella, *supra*, at 51 ("[T]his 'alternate perspective' of an 'innate gender fluidity' arising from prenatally 'feminized' or 'masculinized' brains trapped in the wrong body is an ideological belief that has no basis in rigorous science."); J. Michael Bailey and Kiira Triea, *What Many Transsexual Activists Don't Want You to*

[5] App. 7a-8a, 11a,24a, 44a, 72a-73a.

Know and Why You Should Know It Anyway, 50 Perspectives in Biology Med. 521-34 (2007) (finding little scientific basis for the belief that male-to-female transsexuals are women trapped in men's bodies). A gender dysphoric girl is not a boy trapped in a girl's body, and a gender dysphoric boy is not a girl trapped in a boy's body.[6] The students treated in the Third Circuit's opinion retain their sex no matter their beliefs.

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[6] Studies of brain structure and function have not demonstrated any conclusive, biological basis for transgendered identity. *See* Giuseppina Rametti *et al.*, *White Matter Microstructure in Female to Male Transsexuals Before Cross-sex Hormonal Treatment. A Diffusion Tensor Imaging Study*, 45 J. of Psychiatric Res. 199-204 (2011) (offering no evidence to support the hypothesis that transgenderism is caused by differences in the structure of the brain); Giuseppina Rametti *et al.*, *The Microstructure of White Matter in Male to Female Transsexuals Before Cross-sex Hormonal Treatment. A DTI Study*, 45 J. of Psychiatric Res. 949-54 (2011) (same); Emiliano *Santarnecchi et al.*, *Intrinsic Cerebral Connectivity Analysis in an Untreated Female-to-Male Transsexual Subject: A First Attempt Using Resting-State fMRI*, 96 Neuroendoctrinology 188-93 (2012) (in a study of brain activity, finding that a transsexual's brain profile was more closely related to his biological sex than his desired one); Hans Berglund *et al.*, *Male-to-Female Transsexuals Show Sex-Atypical Hypothalamus Activation When Smelling Odorous Steroids*, 18 Cerebral Cortex 1900-08 (2008) (in a study of brain activity, finding no support for the hypothesis that transgenderism is caused by some innate, biological condition of the brain). Some researchers believe that transgenderism can be attributed to other biological causes, such as hormone exposure in utero. *See*, *e.g.*, Nancy Segal, *Two Monozygotic Twin Pairs Discordant for Female-to-Male Transsexualism*, 35 Archives of Sexual Behav. 347-58 (2006) (examining two sets of twins and hypothesizing, without evidence, that uneven prenatal androgen exposures led one twin in each set to be transsexual). Presently, no scientific evidence supports that conclusion.

III. There is No Scientific or Medical Support for Treating Gender Dysphoric Children in Accordance with Their *Gender Identity* Rather than Their Sex.

In standard medical and psychological practice, a youth who has a persistent, mistaken belief that is inconsistent with reality is not encouraged in his or her belief. *See* Cretella, *supra*, at 51 (listing other similar such conditions); Anne Lawrence, *Clinical and Theoretical Parallels Between Desire for Limb Amputation and Gender Identity Disorder*, 35 Archives of Sexual Behavior 263-78 (2006) (finding similarities between body integrity identity disorder and gender dysphoria). For instance, an anorexic child is not encouraged to lose weight. He or she is not treated with liposuction; instead, he or she is encouraged to align his or her belief with reality – i.e., to see himself or herself as he or she really is. Indeed, this approach is not just a good guide to sound medical practice. It is common sense.

Until quite recently these considerations predominated in how gender dysphoric children were treated. Dr. Kenneth ucker, long acknowledged as one of the foremost authorities on gender dysphoria in children, spent years helping his patients align their subjective gender identity with their objective biological sex. He used psychosocial treatments (talk therapy, family counseling, etc.) to treat gender dysphoria and had much success.[7] *See* Cretella, *supra*,

[7] In a follow-up study by Dr. ucker and colleagues of children treated by them over the course of thirty years at the Center for Mental Health and Addiction in Toronto, they found that gender dysphoria persisted in only three of the twenty-five

at 51 (describing ucker's work); Kenneth J. ucker *et al.*, *A Developmental, Biopsychosocial Model for the Treatment of Children with Gender Identity Disorder*, 59 J. of Homosexuality 369-97 (2012).

Dr. ucker's eminently sound practice is anchored by recognition of the ineradicable reality that each child is immutably either male or female. It is also influenced by the universally recognized fact that gender dysphoria in children is almost always transient: the vast majority of gender dysphoric youth naturally reconcile their gender identity with their biological sex. All competent authorities agree that between 80 and 95 percent of children who say that they are transgender naturally come to accept their sex and enjoy emotional health by late adolescence. *See*, *e.g.*, Peggy Cohen-Kettenis *et al.*, *The Treatment of Adolescent Transsexuals: Changing Insights*, 5 J. of Sexual Medicine 1892, 1893 (2008). The American College of Pediatricians, for example, recently concluded that as many as 98 percent of gender-confused boys, and 88 percent of gender-confused girls, naturally resolve.[8] *See also* DSM-5, *supra*, 455.

Traditional psychosocial treatments for gender dysphoria, such as those employed by Dr. ucker, are therefore prudent; they work with and not against the

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girls they had treated. Kelley D. Drummond *et al.*, *A Follow-up Study of Girls with Gender Identity Disorder*, 44 Developmental Psychology 34-45 (2008).

[8] American College of Pediatricians, Gender Ideology Harms Children, Aug. 17, 2016.

Available at:
https://www.acpeds.org/thecollege-speaks/positionstatements/gender-ideology-harms-children.

facts of science and the predictable rhythms of children's psycho-sexual development. They give gender dysphoric children the opportunity to reconcile their subjective gender identity with their objective biological sex without any irreversible effects or the use of harmful medical treatments.

Although some researchers report that they have identified certain factors which are associated with the persistence of gender dysphoria into adulthood,[9] there is no evidence that any clinician can identify the perhaps one-in-twenty children for whom gender dysphoria will last with any certainty. Because such a large majority of these children will naturally resolve their confusion, proper medical practice calls for a cautious, wait-and-see, approach for all gender dysphoric children. This approach can be and often is rightly supplemented by family or individual psychotherapy to identify and treat the underlying problems which present as the belief that one belongs to the opposite sex.

Policies and protocols that treat children who experience gender-atypical thoughts or behavior as if they belong to the opposite sex – exactly the policy adopted and endorsed by the Third Circuit, on the contrary, interfere with the natural progress of psycho-sexual development. Such treatments encourage a gender dysphoric youth, like the some in this case, to adhere to his or her false belief that he or

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[9] *See*, *e.g.*, Thomas D. Steensma *et al.*, *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-up Study*, 52 J. of the Am. Acad. of Child Adolescent Psychiatry 582-90 (2013).

she is the opposite sex.[10] These treatments would help the child to maintain his or her delusion but with less distress by, among other aspects, requiring others in the child's life to go along with the charade. This is essentially what the Third Circuit is requiring here. But this misses a crucial point and scientific truth. Importantly, there are no long-term, longitudinal, control studies that support the use of gender-affirming policies and treatments for gender dysphoria. Cretella, *supra*, at 52. This is particularly concerning as the treatment course moves from social and verbal affirmation to intrusive medical interventions. *See* Paul W. Hruz, Lawrence S. Mayer

Paul R. McHugh, *Growing Pains: Problems with Puberty Suppression in Treating Gender Dysphoria*, The New Atlantis, Spring 2017, at 6 (discussing the plasticity of youth gender identity and postulating that "[i]f the increasing use of gender-affirming care does cause children to persist with their identification as the opposite sex, then many children who would otherwise not need ongoing medical treatment would be exposed to hormonal and surgical interventions.").

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[10] Nonetheless, gender affirmance is on the rise – particularly among children. Chris Smyth, *Better Help Urged for Children With Signs of Gender Dysphoria,* The Times (London), October 25, 2013.

Available at:
http://www.thetimes.co.uk/tto/health/news/article3903783.ece (stating that the United Kingdom saw a fifty percent increase in the number of children referred to gender dysphoria clinics from 2011 to 2012). There are now forty gender clinics across the United States that provide and promote gender-affirming treatments. Cretella, *supra*, at 52.

The Third Circuit's mandated gender-affirming therapy, which it found to be a compelling governmental interest,[11] is therefore based on a novel – and largely dangerous – experiment with no objective scientific basis to support such conclusions. Considering all the existing scientific evidence – some more of which we shall explore – it amounts to bad medicine based upon ideology rather than sound scientific evidence.

IV. Gender-Affirming Policies Generally arm, Rather than elp, Gender Dysphoric Children.

The Third Circuit would require those under its jurisdiction to affirm (at least implicitly, by action or inaction) that that a youth with gender dysphoria be treated without question or aid. A youth's false belief would thus be perpetuated through name and pronoun changes, the "successful" impersonation of the opposite sex, and "acceptance" (forced, from some) by others that she is really a male or he is really a female. This could be viewed by some as a necessary but basically harmless expedient, a bit of play-acting to help those like some in this case to feel better about themselves during a difficult time in their lives.

There is substantial evidence, however, that this approach is harmful – even when it is viewed on its own terms as a way to help the afflicted youth get through a tough time. The American College of Pediatricians recently declared:

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[11] App. 256a, 270a-271a.

> There is an obvious self-fulfilling nature to encouraging young [gender dysphoric] children to impersonate the opposite sex and then institute pubertal suppression. If a boy who questions whether or not he is a boy (who is meant to grow into a man) is treated as a girl, then has his natural pubertal progression to manhood suppressed, have we not set in motion an inevitable outcome? All of his same sex peers develop into young men, his opposite sex friends develop into young women, but he remains a pre-pubertal boy. He will be left psycho-socially isolated and alone.

American College of Pediatricians, *supra*; *c.f.* Hruz, Growing Pains, *supra*, at 23 (noting that when puberty-suppressing hormones are withdrawn in girls who have been treated for a condition that causes the early onset of puberty, menstruation began at "essentially the average age as the general population"—age 13—but noting that beginning to suppress puberty at age 12 for gender-dysphoric children may create physical or psychological challenges to "simply resum[ing] normal puberty down the road"). Indeed, the *American Psychological Association Handbook on Sexuality and Psychology* cautions against a rush to affirm and transition that "runs the risk of neglecting individual problems the child might be experiencing and may involve an early gender role transition that might be challenging to reverse if cross-gender feelings do not persist." W. Bockting, "Ch. 24: Transgender Identity Development," in D. Tolman L. Diamond eds.,

American Psychological Association Handbook on Sexuality and Psychology, (vol. 1) (2014) at 744, 750.

It is well-recognized, too, that repetition has some effect on the structure and function of a person's brain. This phenomenon, known as *neuroplasticity*, means that a child who is encouraged to impersonate the opposite sex may be less likely to reverse course later in life.[12] For instance, if a boy repeatedly behaves as a girl, his brain is likely to develop in such a way that eventual alignment with his biological sex is less likely to occur. Cretella, *supra*, at 53. By rule of logic then, some number of gender dysphoric children who would naturally come to peacefully accept their sex at conception are prevented from doing so by gender-affirming policies like those mandated under the Third Circuit's jurisdiction.

Policies that compel social affirmation of gender dysphoric children do not exist in an ideological vacuum. Because they are not supported by medical or scientific evidence, one should not be surprised to discover that policies such as that endorsed by the Third Circuit are nested within a larger ideology about how to "help" children who believe that they are trapped in the wrong bodies. Although these gender-affirming policies do not themselves require medical

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[12] One study showed that the white matter microstructure of specific brain areas in female-to-male transsexuals was more similar to that of heterosexual males than to that of heterosexual females. *See* Giuseppina Rametti *et al.*, *White Matter Microstructure in Female to Male Transsexuals Before Cross-sex Hormonal Treatment. A Diffusion Tensor Imaging Study*, 45 J. of Psychiatric Res. 199-204 (2011). The results of that study may be explained by neuroplasticity.

procedures, puberty suppression, hormone therapy, and surgical interventions are a common complement. The more that gender affirmance is promoted to children, the more that children can be expected to accept, and even to pursue, drastic medical courses.

The gender dysphoric youth surrounded by adults and peers who go along with his or her delusion is likely to perceive his natural biological development as a source of distress. Puberty suppressing hormones are often used, beginning at age eleven, to prevent the appearance of natural but (in this given case) unwanted characteristics of any maturing member of the youth's sex. Henriette A. Delemarre-van de Waal and Peggy T. Cohen-Kettenis, *Clinical Management of Gender Identity Disorder in Adolescents: A Protocol on Psychological and Pediatric Endocrinology Aspects*, 155 Eur. J. of Endocrinology S131, S132 (2006). Then, starting at age sixteen, cross-sex hormones are administered in order to induce something like the process of puberty that would normally occur for the opposite sex. *Id.* at S133.

Dr. Michelle Cretella, immediate past President of the American College of Pediatricians, has written that these medical treatments are "neither fully reversible nor harmless." Cretella, *supra*, at 53; *see also* Hruz, *supra* at 21-26 (analyzing claims of reversibility). Puberty suppression hormones prevent the development of secondary sex characteristics, arrest bone growth, prevent full organization and maturation of the brain, and inhibit fertility. Cretella, *supra*, at 53. Cross-gender hormones increase a child's risk for coronary disease and sterility. *Id.* at 50, 53. Oral estrogen, which is administered to gender

dysphoric boys, may cause thrombosis, cardiovascular disease, weight gain, hypertriglyceridemia, elevated blood pressure, decreased glucose tolerance, gallbladder disease, prolactinoma, and breast cancer. *Id*. at 53 (citing Eva Moore *et al*., *Endocrine Treatment of Transsexual People: A Review of Treatment Regimens, Outcomes, and Adverse Effects*, 88 J. of Clin. Endocrinology Metabolism 3467-73 (2003)).

Similarly, testosterone administered to gender dysphoric girls may negatively affect their cholesterol; increase their homocysteine levels (a risk factor for heart disease); cause hepatotoxicity and polycythemia (an excess of red blood cells); increase their risk of sleep apnea; cause insulin resistance; and have unknown effects on breast, endometrial and ovarian tissues. *Id*. (citing Moore, *supra*, at 3467-73). Finally, girls may legally obtain a mastectomy at sixteen, which carries with it its own unique set of future problems, especially because it is irreversible. *Id*. (citing Lauren Schmidt, *Psychological Outcomes and Reproductive Issues Among Gender Dysphoric Individuals*, 44 Endocrinology Metabolism Clinics of N. Am. 773-85 (2015). The Hayes Directory reviewed all relevant literature on these treatments in 2014 and gave them its lowest possible rating: the research findings were "too sparse" and "too limited" to suggest conclusions. Hayes, Inc., "Hormone Therapy for the Treatment of Gender Dysphoria," *Hayes Medical Technology Directory* (2014). And there has been no FDA approval for this use of sex hormones and blocking agents.

One policy statement has endorsed a counter-approach. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents* Pediatrics. 2018

Oct; 142(4).[13] This although "almost all clinics and professional organizations in the world use the watchful waiting approach," Dr. James Cantor persuasively critiques any counter-approach in his comprehensive analysis and dissection of Dr. Rafferty's policy statement. James Cantor, "American Academy of Pediatrics Policy and Trans-kids: Fact-checking," Sexology Today, Oct. 17, 2010.[14] In fact, he goes on to say that: "Not only did [Dr. Rafferty's article] fail to provide extraordinary evidence, it failed to provide the evidence at all" for requiring the affirmative therapy approach to the exclusion of all others. *Id*.

Recently a lead author of a Finnish study admonished: "In such situations [of adolescent gender incongruence] appropriate treatment for psychiatric comorbidity may be warranted before conclusions regarding gender identity can be drawn." Kaltiala-R. Heino, *et al*., *Gender dysphoria in adolescence: current perspectives*, 9 Adolescent Health, Medicine and Therpeutics 2018: 31-41. Again, The American Psychological Association *Handbook on Sexuality and Psychology* cautions against a rush to affirm and transition that "runs the risk of neglecting individual problems the child might be experiencing and may involve an early gender role transition that might be challenging to reverse if cross-gender feelings do not

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[13] Available at:
http://pediatrics.aappublications.org/content/pediatrics/142/4/e20182162.full.pdf

[14] Available at:
http://www.sexologytoday.org/2018/10/american-academy-of-pediatricspolicy.html

persist." Bockting, *supra* at 750. Indeed, children are not legally capable of assessing the severity of these risks or weighing the perceived benefits of gender affirmance (if any) against their many harms. A.C. Amanda C. Pustilnika Leslie Meltzer Henry, *Adolescent Medical Decision Making and the Law of the Horse*. 15 J. Health Care L. Pol'y 1 (2012). Neurologically, the adolescent brain is immature and lacks an adult capacity for risk assessment prior to the early to mid-20s. Cretella, *supra*, at 53. et, gender-affirming policies urge gender dysphoric children to forgo their fertility and jeopardize their physical health in order to avoid the distress of natural physical development.

Parents or guardians would of course have to consent to these interventions on behalf of their minor children. Even assuming that these adults have the true best interests of their children at heart, how many of them are going to be well-informed of the truth about gender dysphoria, especially where their children have already been treated (at school, and anywhere else that the Third Circuit's mandate runs) as members of the sex to which these interventions promise greater access?

Finally, gender-affirming policies aggressively promote the false notion that youths such as those treated by the endorsed policy below are trapped in the wrong body. Consequently, many gender dysphoric youths will seek (once they reach the age of maturity) the closest thing to their desired body which modern medicine can offer. Simply put: policies such as those at issue in this case will cause some young

adults who would have realigned with their sex to instead attempt to change it through surgery.

Sadly, there is no sound evidence that dramatic surgery produces lasting benefits.[15] Upon reviewing the evidence regarding sex reassignment surgery, the Hayes Directory stated that "only weak conclusions" were possible, due to "serious limitations" in the research to date. Hayes, Inc., "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," Hayes Medical Technology Directory (2014); *see also* Cecilia Dhejne et al., *Long-Term Follow-up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLoS ONE, Feb. 22, 2011 (suggesting sex reassignment surgery may not rectify the comparatively poor health outcomes associated with transgender populations); Annette Kuhn *et al.*, *Quality of Life Years After Sex Reassignment Surgery for Transsexualism*, 92 Fertility Sterility 1685-89 (2009) (finding considerably lower general life satisfaction in post-surgical transsexuals as compared with females who had at least one pelvic surgery in the past).

It would appear that the most radical of treatments to the human body with exceedingly powerful hormones and permanently disfiguring and risky surgeries are done because of the child/adolescent's self-identification — effectively a

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[15] One study (Annelou L.C. de Vries *et al.*, " oung Adult Psychological Outcomes After Puberty Suppression and Gender Reassignment," 134 Pediatrics 696-704 (2014)) reported some short-term benefits. But the authors made no effort to assess long-term effects, and their study was, in any event, not properly controlled.

self-diagnosis – a policy implicitly if not explicitly mandated by the Third Circuit's decision. There is considerable evidence that "sex-change" surgery poses very serious health risks. *See* David Batty, *Mistaken Identity*, The Guardian, July 30, 2014 (in an assessment of more than 100 follow-up studies on post-operative transsexuals, concluding that none of the studies proved that sex reassignment is beneficial for patients or thoroughly investigated "[t]he potential complications of hormones and genital surgery, which include deep vein thrombosis and incontinence").[16] One "risk" is for sure: anyone who goes through with "sex-change" surgery will never be able to engage in a reproductive sexual act. *See* Hruz, *supra* at 25 ("medical technology does not make it possible for a patient to actually grow the sex organs of the opposite sex . . . [i]nfertility is therefore one of the major side effects of the course of treatment").

CONCLUSION

The Third Circuit has mandated an experimental "one-size-fits-all" policy of gender affirmance. Underlying that directive is the assumption that treating gender dysphoric children in accordance with their self-proclaimed gender identity rather than their biological sex is beneficial to them. But there is no scientific evidence to support that rosy presupposition; on the contrary, the evidence shows that affirming any child's mistaken belief that he or she is a prisoner of the wrong body is ultimately harmful to that child.

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[16] Available at: http://www.theguardian.com/society/2004/jul/31/health.socialcare

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA et al., *Plaintiffs*, v. U.S. DEPARTMENT OF EDUCATION et al., *Defendants*.	No. 24-cv-563
RAPIDES PARISH SCHOOL BOARD, *Plaintiff*, v. U.S. DEPARTMENT OF EDUCATION et al., *Defendants*.	No. 24-cv-567

DEFENDANTS' CONSOLIDATED OPPOSITION TO LOUISIANA'S AND RAPIDES PARISH SCHOOL BOARD'S MOTIONS FOR A PRELIMINARY INJUNCTION AND § 705 STAY

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INTRODUCTION

Title IX prohibits recipients of federal funds from discriminating on the basis of sex in their education programs or activities. 20 U.S.C. § 1681(a). The Department of Education is charged with issuing rules to effectuate this prohibition. *See id.* § 1682. Pursuant to that authority, the Department recently issued a rule titled Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) [hereinafter Final Rule or Rule]. Among other things, the Final Rule clarifies that "discrimination on the basis of sex" includes "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity," and that the definition of hostile environment sex-based harassment includes "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." *Id.* at 33,884.

Plaintiffs, a group of states and local school boards, now move to preliminarily enjoin or stay the effective date of the Final Rule. *See* Louisiana's Mot. Postponement or Stay under 5 U.S.C. § 705 or a Prelim. Inj., ECF No. 24; Rapides Parish Sch. Bd.'s Mot. Delay Effective Date & for Prelim. Inj., ECF No. 11. The Court should deny their Motions because they have not made a clear showing of the relevant factors.

First, Plaintiffs have failed to demonstrate a likelihood of success on the merits. The Department's interpretation of discrimination "on the basis of sex" straightforwardly applies the Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* concluded that Title VII's prohibition against sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity "because it is impossible to discriminate against a person

for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 660. That same reasoning applies to the nearly identical prohibition of sex discrimination in Title IX. Even if one assumes that sex is binary, neither *Bostock* nor the Final Rule relies on defining "sex" to mean "gender identity" or "sexual orientation."

Further, Plaintiffs fail to demonstrate that the Final Rule is arbitrary or capricious based on the distinctions that it recognizes between contexts in which Congress has specified exceptions to Title IX's prohibition on sex discrimination and other contexts (e.g., restrooms) in which it has not. The Department's recognition that separate or different treatment based on sex is permissible under Title IX in some circumstances, through the provision to be codified at 34 C.F.R. § 106.31(a)(2), does not somehow render the rest of the Rule unreasonable. To the contrary, the Rule's adherence to the lines drawn by Congress—which specified only a handful of contexts where separation or different treatment based on sex is permitted even when it may subject a person to harm—was proper and lawful.

Plaintiffs are also incorrect that the Rule establishes an unworkable harassment standard. The Department used a similar standard in its enforcement of Title IX for decades prior to regulatory changes made in 2020 and continues to use a similar standard in its enforcement of both Title VI (prohibiting discrimination on the basis of race, color, national origin including shared ancestry and ethnic characteristics) and Section 504 of the Rehabilitation Act (prohibiting discrimination based on disability). *See* Final Rule, 89 Fed. Reg. at 33,642. And courts and the Equal Employment Opportunity Commission (EEOC) have used a similar standard to identify harassment under Title VII's analogous provisions for decades. Plaintiffs nowhere address this context. Nor do Plaintiffs demonstrate that the challenged harassment standard threatens freedom of speech or free exercise of religion.

Plaintiffs are unlikely to succeed on their other claims as well. Plaintiffs fail to show that the Final Rule requires an interpretation of Title IX that would violate the Spending Clause or that the Rule implicates the major questions doctrine. And they do not demonstrate that any provision of the Rule is arbitrary or capricious, including based on the assertion that the Department failed to adequately address concerns about parental rights or reliance interests.

Plaintiffs have not clearly shown the other requirements for a stay or preliminary injunction either. Plaintiffs' alleged harms are speculative at best, or otherwise not legally cognizable. Plaintiffs thus cannot establish irreparable injury justifying preliminary relief. Moreover, the public interest and balance of equities weigh against granting Plaintiffs' motion, as enjoining the Rule would substantially harm the federal government's interests in preventing discrimination in federally funded education programs and activities.

Accordingly, the Court should deny the motions for a preliminary injunction or § 705 stay.

BACKGROUND

I. Title IX, Implementing Regulations, and Guidance

Title IX's anti-discrimination provision 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 education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). There are only a small number of "specific, narrow exceptions to that broad prohibition." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *see* 20 U.S.C. § 1681(a)(1)–(9) (listing educational institutions, organizations, or programs that are exempt or partly exempt from Title IX's prohibition on sex discrimination); *id.* § 1686 (permitting maintenance of sex-separate living facilities).

Title IX directs the Department to "issu[e] rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing

the financial assistance in connection with which the action is taken." *Id.* § 1682. Title IX also sets forth an administrative enforcement scheme, which allows the Department to obtain voluntary compliance from or, failing that, terminate the federal funds of a recipient that fails to comply with the statute or the Department's implementing regulations. *Id*.

Over the years, the Department has promulgated regulations effectuating Title IX, including in 2020, when it specified how recipients of federal funds must respond to allegations of sexual harassment in their education programs or activities. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) [hereinafter 2020 Amendments].

One month after publication of the 2020 Amendments, the Supreme Court held that the prohibition on discrimination "because of . . . sex" in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1), necessarily encompasses discrimination because of sexual orientation and gender identity. *See Bostock*, 590 U.S. at 660. Following *Bostock*, President Biden directed the Department of Education to review the 2020 Amendments and existing agency guidance "for consistency with governing law." Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order No. 14,021, § 2, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

In June 2021, the Department's Office for Civil Rights ("OCR") held a nationwide virtual public hearing on Title IX. Final Rule, 89 Fed. Reg. at 33,480. OCR also received more than 30,000 written comments in connection with the hearing, in addition to over 280 live comments. *Id.* at 33,835, 33,860. In addition, OCR held listening sessions with a wide variety of stakeholders. *Id.* at 33,480. During these engagements seeking public input, stakeholders described the harms students suffer when they are restricted from participating in school consistent with their gender

identity and expressed concern that the definition of sexual harassment in the 2020 amendments allowed schools to ignore conduct that could deny educational opportunities based on sex. *Id.* at 33,478–80; *see also*, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,396 (proposed July 12, 2022) [hereinafter NPRM]. In July 2022, the Department issued an NPRM. *See* 87 Fed. Reg. 41,390. Following extensive review of the more than 240,000 public comments, the Department published the Final Rule, which goes into effect on August 1, 2024. *See* 89 Fed. Reg. at 33,476–77.

As relevant to this case, the Final Rule clarifies (1) the scope of sex discrimination under Title IX, *id.* at 33,476; (2) the limits of permissible different or separate treatment on the basis of sex under Title IX, *id.* at 33,477; and (3) the definition of sex-based harassment under Title IX, *id.* at 33,476.

II. Procedural History

The *Louisiana* Plaintiffs filed their Complaint on April 29, 2024, ECF No. 1, which they amended on May 3, 2024, ECF No. 11. They filed their Motion for a Postponement or Stay under § 705 or a Preliminary Injunction on May 15, 2024.

Rapides Parish School Board (RPSB) filed its Complaint on April 30, 2024. ECF No. 1. It filed its Motion to Delay Effective Date and for Preliminary Injunction on May 14, 2024.

The Court consolidated the cases on May 15, 2024. Order, ECF No. 25.

LEGAL STANDARD

"A preliminary injunction is an extraordinary and drastic remedy" that should "never be awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citation omitted); *see Cherokee Pump & Equip., Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994). A plaintiff may obtain this "extraordinary remedy" only "upon a clear showing" that it is "entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The party seeking a preliminary

injunction bears the burden to show "a substantial likelihood of success on the merits," "a substantial threat of irreparable injury," "that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted," and "that the grant of an injunction will not disserve the public interest." *Jordan v. Fisher*, 823 F.3d 805, 809 (5th Cir. 2016) (citation omitted). When the federal government is the defendant, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The movant bears the same burden when seeking a stay under § 705. *See All. for Hippocratic Med. v. FDA*, 78 F.4th 210, 242 (5th Cir. 2023).

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed on the Merits.

A. The Final Rule's Clarification that Title IX Prohibits Discrimination on the Basis of Gender Identity Is Compelled by the Statutory Text.

Once again, 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 education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Final Rule clarifies that "[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." 89 Fed. Reg. at 33,886 (to be codified at 34 C.F.R. § 106.10). As the Department explained, "discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or 'biological distinctions between male and female.'" *Id.* at 33,802 (quoting *Bostock*, 590 U.S. at 655).

Plaintiffs argue that the Department's interpretation of Title IX is inconsistent with the statutory text and contrary to law. *See* Louisiana's Mem. in Supp. of Mot. for Postponement or Stay under 5 U.S.C. § 705 or a Prelim. Inj. 12–16, ECF No. 24 [hereinafter Louisiana's Mem.];

RPSB's Mem. in Supp. of Mot. to Delay Effective Date & for Prelim. Inj. 9–16, ECF No. 11-1 [hereinafter RPSB's Mem.]. In fact, the Department faithfully interpreted the statutory text in light of *Bostock*, which interpreted Title VII's provision making it unlawful, in relevant part, "for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex," 590 U.S. at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Supreme Court explained that Title VII's "because of" language "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 656–57 (citation omitted). "[S]ex is necessarily a but-for cause" of discrimination on the basis of sexual orientation or gender identity "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 660, 661 (emphasis omitted). If, for example, an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," but "retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* at 660. "[T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision." *Id.* That is so even if "sex" in Title VII "refer[s] only to biological distinctions between male and female." *Id.* at 655.

Bostock's reasoning applies with equal force to Title IX's prohibition on discrimination "on the basis of sex," 20 U.S.C. § 1681(a), which employs a causation standard indistinguishable from Title VII's "because of . . . sex" language, 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has long used the phrase "on the basis of" interchangeably with Title VII's "because of" language when discussing Title VII's causation standard, including in *Bostock* itself. *See* 590 U.S. at 650 ("[I]n Title VII, Congress outlawed discrimination in the workplace on the basis of . . . sex."); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) (explaining statutory phrase, "based

on" has the same meaning as the phrase "because of" (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007))). Courts—including the Fifth Circuit—consistently rely on interpretations of Title VII's prohibition against discrimination "because of . . . sex" to interpret Title IX's textually similar provision. *See, e.g.*, *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986)); *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 248 (5th Cir. 1997); *Lakoski v. James*, 66 F.3d 751, 756 (5th Cir. 1995). Indeed, the Fifth Circuit has emphasized "Title IX's similarity to Title VII," explaining that "the prohibitions of discrimination on the basis of sex [in] Title IX and Title VII are the same." *Lakoski*, 66 F.3d at 756 & n.3; *see also Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1119 (5th Cir. 2021) (explaining that "the causation standard for Title IX [retaliation] claims" under 20 U.S.C. 1681(a) "should be the same as the causation standard for Title VII claims"); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 337 (5th Cir. 2019) (Ho, J., concurring) ("[F]ederal statutes governing educational institutions employ language indistinguishable from Title VII[.]"). And as to the specific question at hand, several courts have already held that there is no difference between the two statutes that would permit a different result. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023). Title IX no more permits a school to bar a student from band practice on the basis of the student being transgender than Title VII permits an employer to fire an employee because the employee is transgender.

Plaintiffs rely on two Sixth Circuit opinions to argue that *Bostock*'s reasoning does not apply to Title IX. *See* Pls.' Mot. 15–16. But neither of these cases identifies a persuasive ground to conclude that *Bostock*'s analysis of Title VII's prohibition of discrimination "because of" sex is

inapplicable to Title IX's nearly indistinguishable prohibition.

Meriwether v. Hartop was a fact-specific free-speech case, which held that a university lacked a sufficient interest in disciplining a professor for certain classroom statements regarding transgender students. 992 F.3d 492 (6th Cir. 2021). The court explained that the university's Title IX interests were "not implicated" because there was "no indication at this stage of the litigation" that the professor's speech inhibited students' "education or ability to succeed in the classroom." *Id*. at 511. The court also noted that "Title VII differs from Title IX in important respects," pointing to Title IX's provisions allowing for consideration of sex in athletic scholarships and maintenance of separate living facilities for different sexes. *See id.* at 510 & n.4. *Meriwether*, however, nowhere suggests that discrimination "because of . . . sex" in Title VII imposes a different causal standard or means something different than discrimination "on the basis of sex" in Title IX.

Pelcha v. MW Bancorp, Inc., an Age Discrimination in Employment Act (ADEA) case, is similarly inapposite, and did not even touch on the question of whether a prohibition on discrimination "because of" sex is materially distinguishable from Title IX's prohibition on discrimination "on the basis of" sex. 988 F.3d 318 (6th Cir. 2021). The court merely declined to rely on *Bostock* in light of binding Supreme Court precedent interpreting the ADEA's causality requirement. *See Pelcha*, 988 F.3d at 323–24 (citing *Gross*, 557 U.S. 167). In any event, the court recognized that the ADEA's prohibition on terminating employees "because of such individual's age," 29 U.S.C. § 623(a)(1), imposed no more than "but for" causation, *Pelcha*, 988 F.3d at 324, which is the same causal standard the Court applied in *Bostock* to hold that discrimination "because of sex" necessarily includes discrimination "for being homosexual or transgender," *Bostock*, 590 U.S. at 656–57, 660.

Plaintiffs lean heavily on their view that sex is binary and "biological," Louisiana' Mem.

12–15; RPSB's Mem. 9–13, but fail to acknowledge that *Bostock* "proceed[ed] on the assumption that 'sex' . . . referr[ed] only to biological distinctions between male and female." 590 U.S. at 655. Regardless of how one defines the word, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 660. The Final Rule operates equally well under the same assumption. *See* Final Rule, 89 Fed. Reg. at 33,802, 33,804–05, 33,807. As *Bostock* underscores, discriminating against someone based on their gender identity necessarily constitutes discrimination "on the basis of" the sex that they were assigned at birth. *See Bostock*, 590 U.S. at 660–61 (explaining "transgender status [is] inextricably bound up with sex").

Relying on this same misapprehension of *Bostock*, the *Louisiana* Plaintiffs assert that *Bostock* permits discrimination against bisexual and nonbinary students. *See* Louisiana's Mem. 15. But *Bostock*'s reasoning clearly forecloses discrimination against bisexual and nonbinary students as well. It is impossible to define bisexuality without reference to sex—bisexuality necessarily entails consideration of "the sex of the person to whom they should be attracted." *See* Final Rule, 89 Fed. Reg. at 33807. And it is impossible to discriminate against someone for being nonbinary without considering their nonconformity to sex stereotypes associated with their sex assigned at birth. *See id.* To the extent that Plaintiffs mean to suggest that discrimination against bisexual or nonbinary students is acceptable because it can be accomplished by discriminating equally against men and women, *Bostock* directly rejected this argument, holding that it is no "defense for an employer to say it discriminates against both men and women because of sex." 590 U.S. at 659. As the Supreme Court explained, "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an

individual in part because of sex. Instead of avoiding Title VII exposure, this employer doubles it." *Id*.

As set forth above, the Department properly applied *Bostock*'s straightforward textual analysis in interpreting the plain language of Title IX's anti-discrimination provision. Plaintiffs thus are unlikely to succeed on the merits of their claims that the interpretation of sex discrimination to be codified at 34 C.F.R. § 106.10 is inconsistent with Title IX or exceeded the Department's authority.

B. The Final Rule's Limitations on Sex Separation and Differentiation Properly Account for Congressional Direction on Title IX's Coverage and Application to Different Contexts.

The Final Rule's adherence to the limited scope of Title IX's exceptions to the statute's general prohibition on sex discrimination follows naturally from Title IX's text and is not arbitrary or capricious. Plaintiffs take issue with the Final Rule's provision that, with limited exceptions, a recipient may not carry out otherwise permissible different or separate treatment on the basis of sex in a manner that prevents a person from participating in an education program or activity consistent with the person's gender identity. *See* Final Rule, 89 Fed. Reg. at 33,887 (to be codified at 34 C.F.R. § 106.31(a)(2)). Plaintiffs assert that this provision is contrary to statute and unreasonable. Louisiana's Mem. 22–25; RPSB's Mem. 10–15, 21, 22–23. These arguments fail.

1. Section 106.31(a)(2) Is Consistent with the Statutory Text and Longstanding Regulations.

The Department's regulations have long specified that separate or different treatment on the basis of sex is generally prohibited under Title IX because such treatment is presumptively discriminatory. Final Rule, 89 Fed. Reg. at 33,814 (citing NPRM, 87 Fed. Reg. at 41,534; 34 C.F.R. § 106.31(b)(4), (7)). The regulations have also long recognized limited contexts in which sex separation or differentiation is allowed. *Id.* The provision to be codified at 34 C.F.R.

§ 106.31(a)(2) explains how recipients may carry out such separate or different treatment without running afoul of the statute's nondiscrimination mandate. In short, the Rule provides, consistent with Supreme Court precedent, that save for limited instances allowed by statute, Title IX prohibits "distinctions or differences in treatment [on the basis of sex] that injure protected individuals." *Id.* at 33,814 (brackets in original) (quoting *Bostock*, 590 U.S. at 681); *see Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024) ("The words 'discriminate against,' we have explained, refer to 'differences in treatment that injure' employees." (quoting *Bostock*, 590 U.S. at 681)).

As compelled by that natural reading of the statutory text, which prohibits "discrimination," 20 U.S.C. § 1681(a), the Department explained that, except in limited contexts explained below, a recipient must not provide sex-separate facilities or activities in a manner that subjects any person to legally cognizable injury (i.e., more than de minimis harm). Final Rule, 89 Fed. Reg. at 33,814. The Department has long recognized that sex "separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination" because such sex-separate facilities generally impose no more than de minimis harm on students. *Id.* at 33,818; *see generally* 34 C.F.R. § 106.33. But consistent with federal court decisions and guidelines published by respected medical organizations, the Department explained that sex separation that prevents a person from participating in a program or activity consistent with their gender identity *does* cause more than de minimis harm—a conclusion that Plaintiffs do not dispute. *See* 89 Fed. Reg. at 33,816 (citing *Grimm*, 972 F.3d at 617–18; *Whitaker*, 858 F.3d at 1045-46); *id.* at 33,819 n.90 (citing guidelines published by medical organizations). Because preventing a student from using sex-separate restrooms or participating in single-sex classes consistent with their gender identity causes more than de minimis harm on the

basis of sex, *id.* at 33,814, it is prohibited by Title IX.[1]

At the same time, the Department recognized that Congress specified a few limited contexts in which more than de minimis harm is permitted by the statute—contexts in which Congress has defined exemptions from Title IX's general prohibition on sex discrimination, thus permitting sex separation without regard to harm. *Id.* at 33,819; *see, e.g.*, 20 U.S.C. § 1681(a)(6) (membership practices of certain social fraternities or sororities); *id.* § 1681(a)(4) (institutions focused on military training); *id.* § 1686 (educational institution's maintenance of "separate living facilities for the different sexes").

Plaintiffs are incorrect that the Final Rule's attention to the distinction between regulations that mirror an express statutory exception (as listed at § 106.31(a)(2)) and those that address sex separation in other contexts not specifically exempted by Congress is somehow contradictory. *See, e.g.*, RPSB's Mem. 10, 12. To the contrary, as explained by the Department, this distinction follows directly from the statute itself. *See* Final Rule, 89 Fed. Reg. at 33,814, 33,819. The Final Rule "clearly effectuates this basic congressional decision." *Califano v. Aznavorian*, 439 U.S. 170, 178 (1978). Although Congress did not except "toilet, shower, and locker room facilities" from the general prohibition on sex discrimination, RPSB's Mem. 14 (quoting 34 C.F.R. § 106.33), the Department reasonably determined that sex separation in such contexts can be consistent with Title

[1] Contrary to RPSB's contention, RPSB Mem. 22, the standard set forth in § 106.31(a)(2) is not based on a premise that "schools discriminate based on 'sex stereotypes' when requiring students to access sex-specific facilities and programs based on their sex." RPSB appears to be misconstruing the Department's response to a comment suggesting that the Department needed to narrowly define "sex" to "avoid overbroad application of a prohibition on discrimination based on sex stereotypes." Final Rule, 89 Fed. Reg. at 33,811. In addressing that concern, the Department explained that "not all conduct one *might label* 'sex stereotyping' necessarily violates Title IX," and that, pursuant to § 106.31(a)(2), "otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than de minimis harm on affected students." *Id.* (emphasis added).

IX, but only to the extent that any sex-based harm imposed is de minimis (i.e., not discriminatory). 89 Fed. Reg. at 33,816; *see id.* at 33,821 (explaining that the statutory living facilities "carve-out" in 20 U.S.C. § 1686 is inapplicable to "other aspects of a recipient's education program or activity for which Title IX permits different treatment or separation on the basis of sex, such as bathrooms, locker rooms, or shower facilities," and noting that the latter are "regulations that the Department adopted under different statutory authority [20 U.S.C. §§ 1681–1682], and which have long been addressed separately from 'living facilities'").

Thus, contrary to RPSB's argument, RPSB's Mem. 10–12, 14–15, the de minimis harm provision at § 106.31(a)(2) follows directly from the text and structure of Title IX. It explains how Title IX's prohibition of discrimination—which is premised on a concept of harm—places limitations on the sex-based separate or different treatment permitted in certain contexts by Department regulations. That is, in these contexts, separate or different treatment on the basis of sex is permitted to the extent it does not cause more than de minimis harm. This does not mean that "facilities and classes . . . must be separated by *gender identity*," as RSPB suggests. RPSB's Mem. 12. Rather, in contexts that Congress did not exempt from Title IX's general prohibition on sex discrimination, a person cannot be prevented from using a sex-separate facility consistent with the person's gender identity because doing so would cause more than de minimis harm. 89 Fed. Reg. at 33,816–18. RPSB argues at length that differentiation based on sex (i.e. sex-separated facilities) is discriminatory only when it "treats a person *worse* because of sex." RPSB's Mem. 11 (quoting *Muldrow*, 144 S. Ct. at 974); *see generally id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686–87 (1973); *Jackson*, 544 U.S. at 174). But, indeed, this is the very point captured by the de minimis harm standard set forth in § 106.31(a)(2), which, consistent with Supreme Court precedent, recognizes that Title IX does not prohibit all sex-based distinctions, and only prohibits

different or separate sex-based treatment that causes harm. *See* 89 Fed. Reg. at 33,814–20; *Muldrow*, 144 S. Ct. at 974.

2. Section 106.31(a)(2) Is Consistent with the Rest of the Final Rule and the Department's Other Regulations.

The *Louisiana* Plaintiffs' contention that § 106.31(a)(2) is somehow "internally inconsistent," Louisiana's Mem. 23–24, is also wrong. Rewriting the language of the Rule, the *Louisiana* Plaintiffs claim that if the Rule is correct that preventing a person from using a sex-separate facility consistent with the person's gender identity causes more than de minimis harm, "the Department loses any basis to conclude that sex-specific bathrooms are presumptively nondiscriminatory." *Id.* at 24. But there is no inconsistency in recognizing both that Title IX permits sex separation in the restroom context because it is "not presumptively unlawful sex discrimination," Final Rule, 89 Fed. Reg. at 33,818, and also prohibits a recipient from carrying out such separation in a manner that imposes more than de minimis harm, such as by denying a transgender student access consistent with that student's gender identity. *Id.* at 33,814–16. That is, there is no inconsistency between the Rule's recognition that in certain contexts, sex separation is generally not harmful, *id.* at 33,819, and its observation that in other contexts "there are injuries, including stigmatic injuries, associated with treating individuals differently on the basis of sex," *id.* at 33,815.

Nor does the Department's decision to address athletics through a separate rulemaking and to specify that the de minimis harm rule in § 106.31(a)(2) does not apply to sex-separated athletic teams that a recipient offers under § 106.41(b), *see id.* at 33,816, lend support to Plaintiffs' contention that the Rule is unreasonable. Plaintiffs' challenges to § 106.31(a)(2) at points appear to assume that this provision has implications for sex-separate athletic teams. *See* Louisiana's Mem. 23; RPSB's Mem. 2, 5–6, 8, 15, 21, 23. To the contrary, § 106.31(a)(2) expressly does *not*

apply to the criteria recipients use to determine students' eligibility to participate on male and female athletic teams. Final Rule, 89 Fed. Reg. at 33,816–17 ("Consistent with the longstanding athletics regulations, § 106.31(a)(2) does not apply to permissible sex separation of athletic teams."). Indeed, the Department revised the proposed regulation to identify the specific contexts in which § 106.31(a)(2) does not apply, including with respect to § 106.41(b). *Id*. In April 2023, the Department issued a separate notice of proposed rulemaking regarding the athletics regulations, which will be finalized in a separate rulemaking. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams, 88 Fed. Reg. 22,860 (proposed Apr. 13, 2023). As the Department has explained, "[u]ntil that rule is finalized and issued, the current regulations on athletics continue to apply." Final Rule, 89 Fed. Reg. at 33,817. In other words, the Rule makes explicit that it in no way alters the status quo regarding eligibility for sex-separate athletic teams.

Moreover, the Department's decision to address athletics through a separate rulemaking is consistent with the fact that Congress recognized by statute that athletics is a special context. *Id.*; *see* Education Amendments of 1974, section 844. And the Department's athletics regulations have always tracked Congress's determination that the unique circumstances of athletics merit a different approach, "governed by an overarching nondiscrimination mandate and obligation to provide equal athletic opportunities for students regardless of sex." Final Rule, 89 Fed. Reg. at 33,816 (citing 34 C.F.R. § 106.41(a), (c)).[2] This approach allows individual students to be excluded from a particular male or female team based on their sex, even when doing so imposes

[2] Because the Department's treatment of athletics is based on congressional direction in the Education Amendments of 1974, the *Louisiana* Plaintiffs' argument that the Department's allowance of sex separation in athletics inconsistently relies on regulatory authority alone, Louisiana's Mem. 24, is plainly incorrect. Regardless, as the Department explained, athletics have always been treated as a special context and are to be addressed in a separate rulemaking.

more than de minimis harm. *Id.* at 33,817. Contrary to Plaintiffs' suggestions, Louisiana's Mem. 23; RPSB's Mem. 10–11, the Rule thoroughly and logically explains why the de minimis harm standard in § 106.31(a)(2) does not apply to the athletics regulations, and why this is consistent with the Department's longstanding approach to athletics. Final Rule, 89 Fed. Reg. at 33,816–19.

Further, Plaintiffs have not shown that, in promulgating § 106.31(a)(2), the Department "failed to adequately consider important aspects of the problem," Louisiana's Mem. 22; *see also* RPSB's Mem. 21, 22–23. The Department thoroughly considered and addressed commenters' concerns, including reported concerns regarding safety, privacy, and compliance. The Department "strongly agrees that recipients have a legitimate interest in protecting all students' safety and privacy," and explained that, under § 106.31(a)(2), "a recipient can make and enforce rules that protect all students' safety and privacy without also excluding transgender students from accessing sex-separate facilities and activities consistent with their gender identity." Final Rule, 89 Fed. Reg. at 33,820; *see also id.* ("nothing in Title IX or the final regulations prevents a recipient from offering single occupancy facilities, among other accommodations, to any students who seek additional privacy for any reason"). The Department reasonably concluded, however, that there is no "evidence that transgender students pose a safety risk to cisgender students, or that the mere presence of a transgender person in a single-sex space compromises anyone's legitimate privacy interest." *Id.* Nor have Plaintiffs identified any evidence contradicting that conclusion, Louisiana's unsupported and baseless reference to "sexual predators" notwithstanding. Louisiana's Mem. 22. As the Final Rule notes, federal courts have rejected "unsubstantiated and generalized concerns that transgender persons' access to sex-separate spaces infringes on other students' privacy or safety." Final Rule, 89 Fed. Reg. at 33,820 (citing cases).

The Department also addressed concerns regarding compliance, including "questions about

how a recipient should determine a person's gender identity for purposes of § 106.31(a)(2)." Final Rule, 89 Fed. Reg. at 33,819 (noting that "many recipients rely on a student's consistent assertion to determine their gender identity, or on written confirmation of the student's gender identity by the student or student's parent, counselor, coach, or teacher"). Contrary to Louisiana's characterization, Louisiana's Mem. 10, the Rule does not bar recipients from having "documentation requirements" to confirm gender identity; rather, the Rule acknowledges that "many recipients rely on . . . written confirmation . . . by the student or student's parent, counselor, coach, or teacher." Final Rule, 89 Fed. Reg. at 33,819. The Rule merely explains that recipients may not "require[e] a student to submit to invasive medical inquiries or *burdensome* documentation requirements" because doing so "imposes more than de minimis harm." *Id.* Plaintiffs do not meaningfully dispute that conclusion, and the Rule's recognition that some compliance mechanisms are unduly invasive or burdensome does not render the Rule arbitrary and capricious.

To the extent that Plaintiffs argue that the Rule fails to adequately address how § 106.31(a)(2) applies to nonbinary individuals, Louisiana's Mem. 24–25; RPSB's Mem. 11, they are incorrect. The Department explained that "that "[f]or nonbinary students, a recipient may, for example, coordinate with the student, and the student's parent or guardian as appropriate, to determine how to best provide the student with safe and nondiscriminatory access to facilities, as required by Title IX." Final Rule, 89 Fed. Reg. at 33,818. Plaintiffs identify no way in which this explanation is unreasonable.[3]

[3] The *Louisiana* Plaintiffs assert that the Rule is arbitrary and capricious in not requiring recipients to maintain any gender-neutral facilities, because that is the only option that would allow nonbinary students to access bathrooms consistent with their gender identity. Louisiana Mem. 24. But contrary to the *Louisiana* Plaintiffs' assertion, the Rule does not mean that "recipients must

Finally, Plaintiffs do not demonstrate that the Department failed to adequately address reliance interests and alternative policies, or that it engaged in an unreasonable cost-benefit analysis with respect to § 106.31(a)(2). RPSB argues that the Rule fails to take into account "reliance interests" because schools built communal restrooms and locker rooms, rather than single-occupant facilities, "based on [the Department's] prior positions." RPSB's Mem. 22–23. Louisiana, similarly, argues that the Department failed "to acknowledge the Rule will require recipients to incur significant costs" associated with construction or modification of bathroom and locker room facilities. Louisiana's Mem. 25. But no provision in the Rule requires recipients to modify their restroom or locker room facilities. *See, e.g.*, Final Rule, 89 Fed. Reg. at 33,876 ("Compliance with final § 106.31(a)(2) may require updating of policies or training materials, but will not require significant expenditures, such as construction of new facilities or creation of new programs."). As Louisiana admits, Louisiana's Mem. 24, the Rule states explicitly that recipients are not required to "provide gender-neutral or single-occupancy facilities." Final Rule, 89 Fed. Reg. at 33,820. In considering potential costs to recipients of compliance with the Final Rule, it was not unreasonable for the Department to assume that most recipients would not choose to incur construction costs, where they are not required to do so by the Rule.

To the extent Louisiana alleges that the Department did not accurately assess other costs—such as time necessary to review the Rule, revise policies, and train employees—it fails to explain how such alleged errors render § 106.31(a)(2) or any other specific provision of the Rule arbitrary and capricious. Indeed, any claim relating to the Department's cost-benefit analysis is not subject to review. The Department did not undertake a cost-benefit analysis to comply with Title IX, but

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provide gender-neutral bathrooms and may be required to provide a different restroom for every claimed gender identity or designate all bathrooms as being for all genders." *Id.* at 24–25.

rather only to comply with Executive Orders 12866 and 13563. 89 Fed. Reg. at 33,843, 33,859. Alleged violations of these "Executive Orders cannot give rise to a cause of action" under the Administrative Procedure Act (APA). *Fla. Bankers Ass'n v. U.S. Dep't of Treas.*, 19 F. Supp. 3d 111, 118 n.1 (D.D.C. 2014), *vacated on other grounds*, 799 F.3d 1065 (D.C. Cir. 2015); *see Air Transp. Ass'n v. FAA*, 169 F.3d 1, 8–9 (D.C. Cir. 1999). Nor is this a case where the Department "decide[d] to rely on a cost-benefit analysis as part of its rulemaking," thus creating the possibility that "a serious flaw undermining that analysis can render the rule unreasonable." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012). Even if the Department's cost-benefit analysis were reviewable, it would readily withstand scrutiny. Courts "review an agency's cost-benefit analysis deferentially," *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 254 (D.C. Cir. 2013), and Plaintiffs do not demonstrate any serious flaw in that analysis, which was based on reasoned consideration of the issues Plaintiffs reference. *See, e.g.*, 89 Fed. Reg. at 33,851–52, 33,866–68.

RPSB faults the Department for "fail[ing] to consider alternative policies," RPSB's Mem. 23 (citing *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020)), but does not explain how the purported alternatives it imagines were "within the ambit of the existing policy," *Regents*, 140 S. Ct. at 1913. Indeed, one of these supposed "alternatives"—"rules to protect privacy and girls' equal access to athletic programs and physical education," RPSB's Mem. 23, would clearly fall outside the scope of the regulations addressed by the Rule, which explicitly does not take up athletics. *See* Final Rule, 89 Fed. Reg. at 33,816–19.

In sum, the Final Rule's application of the de minimis harm standard in § 106.31(a)(2) is supported and logical, and, in promulgating this provision, the Department neither failed to consider an important aspect of the problem nor ignored relevant evidence. *See FCC v. Prometheus*

Radio Project, 592 U.S. 414, 423 (2021) (noting that judicial review under arbitrary-and-capricious standard is "deferential" and "simply ensures that the agency has acted within a zone of reasonableness").

C. The Final Rule's Definition of Hostile Environment Sex-Based Harassment Is a Lawful Exercise of the Department's Statutory Authority and Consistent with the Requirements of the First Amendment.

Plaintiffs are also unlikely to succeed on their claim that the Rule's harassment definition is unlawful. The Final Rule defines hostile environment sex-based harassment, in relevant part, as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." Final Rule, 89 Fed. Reg. at 33,884. The definition in the Final Rule is consistent with "relevant judicial precedent, and . . . with congressional intent and the Department's longstanding interpretation of Title IX and resulting enforcement practice prior to the 2020 amendments." *Id.* at 33,490. In addition, this language "closely tracks longstanding case law defining sexual harassment," *id.* at 33,494 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)), and aligns with the definition used by the EEOC. 89 Fed. Reg. at 33,516. The *Louisiana* Plaintiffs argue that the definition is inconsistent with the standard set forth in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999), Louisiana's Mem. 16. And all Plaintiffs argue that the Rule violates the First Amendment by compelling or failing to protect speech. Louisiana's Mem. 16-17; RPSB's Mem. 19-20. These arguments are incorrect.

First, the *Louisiana* Plaintiffs' reliance on *Davis* is misplaced. *Davis* addressed a standard that a plaintiff must meet to bring a private action for damages, 526 U.S. at 650; it did not limit the Department's administrative enforcement authority. The Supreme Court's articulation of the scope of the private cause of action in Title IX focused on the fact that this cause of action is

implied, rather than an express creation of Congress. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Explaining that "[t]he requirement that recipients receive adequate notice of Title IX's proscriptions . . . bears on the proper definition of 'discrimination' in the context of a private damages action," *Davis* thus held that "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. at 650.

The *Louisiana* Plaintiffs do not explain why the *Davis* standard must apply in the distinct administrative enforcement context. Title IX permits the Department to enforce its nondiscrimination mandate through "'any . . . means authorized by law,' including ultimately the termination of federal funding." *Gebser*, 524 U.S. at 280–81, 287 (quoting 20 U.S.C. § 1682). The Department's administrative enforcement proceedings differ in many ways from private lawsuits for monetary damages, and *Davis*'s analysis of when to allow recovery of damages on theories of *respondeat superior* and constructive notice is thus inapposite. Indeed, after observing that Congress "entrusted" Federal agencies to "promulgate rules, regulations, and orders to enforce the objectives" of Title IX, 526 U.S. at 638, *Davis* repeatedly and approvingly cited the Department's then-recently published guidance regarding sexual harassment, *see id.* at 647–48, 651 (citing 1997 Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13, 1997)). That guidance specifically stated that schools could be found to violate Title IX if the relevant harassment "was sufficiently severe, persistent, or pervasive to create a hostile environment." 1997 Sexual Harassment Guidance, 62 Fed. Reg. at 12,040.

The *Louisiana* Plaintiffs also incorrectly argue that the Department exceeded the scope of

its statutory authority by clarifying that a recipient's obligations to address sex-based harassment apply even when some conduct contributing to a hostile environment in the recipient's program or activity occurred off campus or outside the United States. Louisiana's Mem. 16; *see* Final Rule, 89 Fed. Reg. at 33,886. As the Rule states clearly, Title IX applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. Final Rule, 89 Fed. Reg. at 33,576 (citing § 106.11). Conduct occurring outside of a recipient's education program or activity, or abroad, is implicated only insofar as it "contributes to a hostile environment in the United States," *id.*, and in the recipient's program or activity, *id.* at 33,528. If such conduct occurs, for instance, in a study-abroad program, "that conduct may be relevant and considered by the recipient so that it can address the sex discrimination occurring within its program in the United States." *Id*. at 33,576.

Second, Plaintiffs fail to show that the Final Rule's definition of hostile environment sex-based harassment runs afoul of the First Amendment. *See* Louisiana's Mem. 16–18; RPSB's Mem. 19–21. Plaintiffs assert a pre-enforcement facial challenge to the Rule, but do not "even try to show that [the Rule] is 'unconstitutional in all of its application.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Although in the First Amendment context "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021), courts "have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation," *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003) (internal citations omitted). *See NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 450 (5th Cir. 2022)

(citing *Hicks*, 539 U.S. at 119). Plaintiffs cannot satisfy this standard. Nothing in the Rule raises overbreadth concerns. The definition "covers only sex-based conduct that is unwelcome, both subjectively and objectively offensive, and so severe or pervasive that it limits" a person's ability to participate in the recipient's education program or activity. Final Rule, 89 Fed. Reg. at 33,503. The Supreme Court has upheld Title VII's anti-harassment provisions that apply a similar standard "without acknowledging any First Amendment concern." *Id.* at 33,505 (citing *Harris*, 510 U.S. at 23).

Indeed, Plaintiffs cite no case in which a court has held unconstitutional a definition of harassment analogous to the hostile environment sex-based harassment definition to be codified at 34 C.F.R. § 106.2. Further narrowing the Rule's scope, the harassment definition "only prohibit[s] conduct that meets all the elements" set forth in the definition and is evaluated based on the "the totality of the circumstances . . . to ensure that no element or relevant factual consideration is ignored." Final Rule, 89 Fed. Reg. at 33,506. When evaluated against the "plainly legitimate sweep" of preventing sex-based harassment, the Rule in no way sweeps in such a substantial proportion of protected speech to justify "the strong medicine' of overbreadth invalidation," *Hicks*, 539 U.S. at 119–20.

The cases that Plaintiffs rely on to argue that "such policies present First Amendment problems" are inapposite. Louisiana's Mem. 17; RPSB's Mem. 20. *Speech First, Inc. v. Cartwright* involved a policy that, among other things, prohibited "a wide range of 'verbal, physical, electronic, and other' expression concerning any of (depending on how you count) some 25 or so characteristics," and "reache[d] not only a student's own speech, but also her conduct 'encouraging,' 'condoning,' or 'failing to intervene' to stop another student's speech." 32 F.4th 1110, 1125 (11th Cir. 2022). In contrast to the Final Rule, "[t]he policy, in short, [was] staggeringly

broad," *id.*, and it was not "tailored to harms that have long been covered by hostile environment laws." Final Rule, 89 Fed. Reg. at 33,505 (discussing *Speech First*, 32 F.4th 1110). Neither does Meriwether support Plaintiffs' claims; that court did not hold that the university's particular hostile environment definition ran afoul of the First Amendment. *See* 992 F.3d at 498. Rather, the policy flatly ordered faculty—on threat of discipline—to "refer to students by their "preferred pronoun[s]." *Id.*

Plaintiffs cite a number of cases addressing the interplay between the First Amendment and public accommodations law. *See* RPSB Mem. 20. But different First Amendment doctrines apply in the context of education. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 419-20 (2006) (although public employees may speak on matters "of public concern," employers may also limit speech where "necessary . . . to operate efficiently and effectively"); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) ("the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."). The question of whether a government may require expressive conduct or speech from adults, in the general population, running or engaging with a business open to the public is inapposite to the question here. The Department explained its decision not to reopen the comment period on the Final Rule to address one of these cases—*303 Creative v. Elenis*, 600 U.S. 570 (2023)—"because the decision did not address the education context and would not change the final regulations, which already specify that nothing in these regulations requires a recipient to restrict rights protected under the First Amendment." 89 Fed. Reg. at 33,803. Plaintiffs' cited cases do not control whether the Department's definition of hostile environment sex-based harassment is lawful in the distinct context of the Department's administrative enforcement of its nondiscrimination mandate

under Title IX. For the reasons discussed above, the definition is lawful, and by its own terms, the Rule does not infringe on anyone's protected speech in violation of the First Amendment.

The Department's decision not to independently define "gender identity, sex stereotypes, and sex characteristics" does not, as RPSB asserts, somehow render the harassment definition vague and overbroad. *Contra* RPSB's Mem. 20. First, the Department has in fact offered its understanding of these terms, which are consistent with courts' and lawmakers' usage. *See* Final Rule, 89 Fed. Reg. at 33,809 (gender identity); *id.* at 33,810 (sex characteristics); *id.* at 33,811 (sex stereotypes). The Department's explanations are thus no less precise than these terms' accepted usage in those other contexts. And crucially, RPSB does not explain how these definitions, any more than the case law that they track, would cause a recipient to "refrain from protected speech," RPSB's Mem. 20.

Third, Plaintiffs allege—without support—that the Rule somehow "calls for schools to punish speech expressing views. . . that the [Biden] administration dislikes," RPSB's Mem. 20, or that the Rule "prohibits students from expressing their views, including their religious views, on numerous topics." Louisiana's Mem. 17. By its plain terms, the Final Rule does no such thing. "Nothing in the Final [Rule] limits any rights that would otherwise be protected by the First Amendment," Final Rule, 89 Fed. Reg. at 33,505, and "nothing in the regulations requires or authorizes a recipient to violate anyone's First Amendment rights." *Id*. at 33,516. In the event discipline is meted out, that too must be consistent with Due Process principles and the First Amendment. *Id*. at 33,500-01. And the Department clearly stated that, contrary to Plaintiffs' suggestions, "a stray remark, such as a misuse of language, would not constitute harassment under [the applicable] standard." *Id.* at 33,516. At bottom, Plaintiffs' First Amendment arguments boil down to "speculat[ion] about the most extreme hypothetical applications" of the Rule, *NetChoice*,

49 F.4th at 451–52, but "[s]uch whataboutisms further exemplify why it's inappropriate to hold the [Rule] facially unconstitutional in a pre-enforcement posture." *Id.*

Accordingly, Plaintiffs cannot show that the Rule's definition of sex-based harassment is unlawful, and their claim is unlikely to succeed.

D. The Final Rule's Explanation of the Scope of Title IX's Unambiguous Prohibition on Sex Discrimination Poses No Spending Clause Issue.

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." U.S. Const., art. I, § 8, cl. 1. Congress has broad power to set conditions on such funds so long as those conditions (1) are "unambiguous[]," (2) are not unduly coercive, (3) relate "to the federal interest" in the project, and (4) are consistent with "other constitutional provisions." *See South Dakota v. Dole*, 483 U.S. 203, 207–08, 211 (1987). Plaintiffs argue that if the Rule properly effectuates Title IX, the Rule's alleged infirmities would render it invalid under the Spending Clause because all four of the above conditions would be violated. *See* Louisiana's Mem. 19–21; RPSB's Mem. 16–18. They are wrong.

The focus of a Spending Clause inquiry is typically on a statute, not an implementing regulation, because the Spending Clause limits Congress's authority to condition federal funds. *See Kentucky v. Yellen*, 54 F.4th 325, 353 (6th Cir. 2022). Plaintiffs rightfully do not suggest (or contend) that Title IX violates the Spending Clause; that statute has long been held to be consistent with the Spending Clause. *See Davis*, 526 U.S. at 640 (noting that the Supreme Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause"). Rather, Plaintiffs focus on the Rule, claiming that its alleged faults render Title IX ambiguous, coercive, unrelated to a federal interest, and inconsistent with other constitutional provisions. But in focusing on the Rule, Plaintiffs merely restate their other merits arguments. For the same reason that those arguments are unlikely to succeed, so too is Plaintiffs' Spending Clause

claim unlikely to succeed.

1. There is no issue with ambiguity, *contra* Louisiana's Mem. 20, because the relevant provision in the Final Rule merely delineates the scope of Title IX's unambiguous prohibition on sex discrimination, based on the statutory language's plain meaning. *See* 89 Fed. Reg. at 33,802, *cf. Bostock*, 590 U.S. at 688 (Alito, J., dissenting) (noting that the Court found similar language in Title VII "unambiguous"). "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds," *NFIB v. Sebelius*, 567 U.S. 519, 579 (2012), so long as it does so "unambiguously," *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The requirement of unambiguity requires that Congress "make the existence of the condition itself" "explicitly obvious," not that Congress list all ways in which a recipient could fail to comply. *Benning v. Georgia*, 391 F.3d 1299, 1307 (11th Cir. 2004) (citation omitted).

Here, this condition is met because Title IX unambiguously prohibits sex-based discrimination. *See, e.g.*, 20 U.S.C. § 1681(a) ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). Louisiana claims not to have anticipated that Title IX addresses, for example, discrimination concerning gender identity, Louisiana's Mem. 20, but "the fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates the breadth of a legislative command." *Bostock*, 590 U.S. at 674 (cleaned up).[4]

[4] RPSB notes that *Bostock* was addressing Title VII, which was not enacted under the Spending Clause, RPSB's Mem. 18, but that in no way diminishes the force of the Supreme Court's conclusion in *Bostock* that the meaning of discrimination on the basis of sex was clear. *Cf. Bostock*, 590 U.S. at 688 (Alito, J., dissenting) ("According to the Court, the text is unambiguous."). Indeed,

2. Title IX as effectuated by the Rule is not unduly coercive either. *Contra* Louisiana's Mem. 20–21; RPSB's Mem. 17. A statute may be unconstitutionally coercive if it "pass[es] the point at which 'pressure turns into compulsion.'" *NFIB*, 567 U.S. at 580 (quoting *South Dakota*, 483 U.S. at 211). And, when "mounting a facial challenge" under the Spending Clause (as with other facial challenges), the plaintiff "has a very heavy burden to carry, and must show that the [statute] cannot operate constitutionally under any circumstance." *West Virginia v. HHS*, 289 F.3d 281, 292 (4th Cir. 2002).

Plaintiffs have not met this heavy burden. They cite no authority suggesting that Title IX and its implementing regulations are unduly coercive. As an initial matter, Plaintiffs ignore the administrative enforcement process that must occur before any funding is withheld. *See* 20 U.S.C. § 1682 (requiring, *inter alia*, that the Department notify Congress and wait at least 30 days before any termination of funding could take effect); 34 C.F.R. §§ 100.7–100.11 (incorporated by 34 C.F.R. § 106.81). And Plaintiffs' fears of funding loss are pure speculation. The *Louisiana* Plaintiffs offer no explanation as to why they believe their funding to be imperiled. Louisiana's Mem. 21. RPSB points to alleged pressure "to adopt the Rule's new gender-identity mandate." RPSB's Mem. 17. But under *Bostock*, Title IX's prohibition on sex-based discrimination necessarily includes discrimination because of gender identity, *Bostock*, 590 U.S. at 660, and thus that "mandate" stems directly from Title IX. Particularly in the context of this facial challenge, Plaintiffs cannot show that they have been unduly coerced. *See Equity in Athletics, Inc. v. ED*, 675 F. Supp. 2d 660, 674 (W.D. Va. 2009) (holding that Title IX and certain implementing regulations

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the sole case RPSB cites for the proposition that *Bostock* does not apply to Title IX for this reason is *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990), which addresses only the unrelated topic of the standard for waivers *of a state's sovereign immunity*—it does not discuss the standard for conditions on federal spending, nor does it address the application of *Bostock*.

did not violate the Spending Clause because of the enforcement process and that there are penalties "less drastic than the withholding of federal funding").

Moreover, the bar to establish economic coercion is high—"[i]n the typical case [courts] look to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments." *NFIB*, 567 U.S. at 579 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)). The *Louisiana* Plaintiffs refer to a "significant percentage" of education funding that could be lost without evidence or explanation of what portion of the overall budgets that would constitute. *See* Louisiana's Mem. 21. And RPSB states without citation that it believes "10% of its budget" is at issue, again without evidence or explanation—in particular how much of this funding is determined by Louisiana (and not the federal government). *See* RPSB's Mem. 17. At any rate, even if RPSB's speculation were to manifest and a hypothetical enforcement process resulted in total funding withdrawal, RPSB does not explain how a 10 percent loss to a school board budget is substantially different from a 5 percent loss of state highway funding, which the Supreme Court held to be "relatively mild encouragement to the States" in *South Dakota*, 483 U.S. at 211.

3. The *Louisiana* Plaintiffs' remaining Spending Clause theories—that the Rule is contrary to federal interests and is otherwise unconstitutional, Louisiana's Mem. 20–21—restate their other merits arguments. For the same reasons that the Rule is consistent with Title IX and the First Amendment, there also is no Spending Clause violation on these bases.

RPSB claims that the Rule violates the Spending Clause because it "preempts state law." RPSB's Mem. 17–18. Crucially, however, RPSB has not identified a state law that plausibly conflicts with Title IX or the Rule. At most, RPSB vaguely references state laws "that prohibit schools from opening girls' athletic teams to biological males." RPSB's Mem. 17. But the Rule expressly states that it does not govern eligibility criteria for male and female athletic teams (which

is a separate topic that remains subject to a pending rulemaking), stating that "[u]ntil that [athletics] rule is finalized and issued, the current regulations on athletics continue to apply." Final Rule, 89 Fed. Reg. at 33,817. In any event, it is not uncommon for a state's choice of accepting Spending Clause funds to include the choice of what laws to enact. *See New York v. United States*, 505 U.S. 144, 167 (1992) (concluding in addressing the Spending Clause that "[w]here the recipient of federal funds is a State . . . the conditions attached to the funds by Congress may influence a State's legislative choices."). That influence can be considered a type of preemption and is unproblematic. *See, e.g.*, *Planned Parenthood of Hous. & Sw. Tex. v. Sanchez*, 403 F.3d 324, 337 (5th Cir. 2005) (observing, in the context of a conflict preemption analysis between a state law and federal funding conditions, that "State participation in federal funding programs is voluntary, but once a state has accepted federal funds, it is bound by the strings that accompany them").

Accordingly, the Final Rule does not raise any Spending Clause concerns, and Plaintiffs' claim is unlikely to succeed on the merits.

E. The Rule Does Not Violate the Major Questions or Nondelegation Doctrine.

Contrary to Plaintiffs' assertions, this case does not implicate the major questions doctrine. *See* Louisiana's Mem. 18–19; RPSB's Mem. 18–19. That doctrine is reserved for only "extraordinary" cases, "in which the history and breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022). This is not such a case. The Department does not contend that Congress gave it the authority to decide as a matter of policy whether Title IX prohibits discrimination based on gender identity. Instead, like the Supreme Court's decision in *Bostock*, the relevant portions of the rule reflect "policy decisions" made by "Congress . . . itself" in the unambiguous text of the statute. *Id.* at 723. Accordingly, just as the Supreme Court did not invoke the major-questions doctrine

when it endorsed the EEOC's interpretation of Title VII in *Bostock*, there is no basis for invoking it here.

This Rule does not create a delegation problem either. *Contra* Louisiana's Mem. 21. Congress may lawfully delegate decision-making authority if it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citation omitted). That section's instruction to "effectuate the provisions of" § 1681 "by issuing rules, regulations, or orders of general applicability" is a commonly phrased delegation with a straightforward "intelligible principle"—effectuating Title IX's antidiscrimination provision—for the Department to follow.[5] For decades, the Department has promulgated regulations pursuant to § 1682, and no court has suggested that Congress violated the separation of powers by delegating such rulemaking authority to the Department.

F. The Final Rule Adequately Addressed Commenters' Concerns about Parental Rights.

Plaintiffs do not demonstrate that the Department failed to adequately address concerns about parental rights. *See* Louisiana's Mem. 23; RPSB's Mem. 22. The Department thoroughly considered parental rights and drafted the Final Rule with the utmost respect for the fundamental role of parents in bringing up their children, and without disturbing any existing parental rights. *See, e.g.*, Final Rule, 89 Fed. Reg. at 33,821 (explaining that "nothing in Title IX or the final regulations may be read in derogation of any legal right of a parent . . . to act on behalf of a minor child"); *see also id.* at 33,835–36, 33,531. Responding to the specific concern highlighted by the *Louisiana* Plaintiffs—regarding school policies on notifying parents of a student's requests to be

[5] Likewise, RPSB is also incorrect to argue that the Rule lacks congressional authorization. *See* RPSB's Mem. 16.

treated consistent with a specific gender identity, Louisiana's Mem. 22—the Rule explains that "nothing in these final regulations prevents a recipient from disclosing information about a minor child to their parent who has the legal right to receive disclosures on behalf of their child." Final Rule, 89 Fed. Reg. at 33,822. The Rule's several pages of discussion of concerns related to parental rights belie Plaintiffs' accusations that the Department "entirely failed to consider" this issue, Louisiana's Mem. 22, or "merely paid lip service to parental rights," RPSB's Mem. 23.

G. The Department Adequately Considered Recipients' Reliance Interests.

RPSB also erroneously argues that the Rule is arbitrary and capricious because the Department failed to consider the schools' reasonable reliance interest. *See* RPSB's Mem. 22–23. Despite claiming that the Department "glossed over the changes to longstanding policies, practices, and facilities that schools would need to undertake to comply with the Rule while respecting the privacy and safety of all students," *id.* at 22, RPSB provides no support for this assertion—nor could it. To the extent that RPSB argues that the Rule undermines its reliance interest in building "expensive facilities based on ED's prior positions—for example, building communal restrooms and locker rooms rather than single-occupant facilities," RPSB's Mem. 22–23, it is plainly wrong. No provision in the Rule requires recipients to modify their restroom or locker room facilities. Nor does RPSB explain why compliance with the Rule would require it to incur such construction costs, which the Rule expressly disclaims. *See* Final Rule, 89 Fed. Reg. at 33,876 ("Compliance with final § 106.31(a)(2) may require updating of policies or training materials, but will not require significant expenditures, such as construction of new facilities or creation of new programs."). At bottom, the Department adequately considered the recipients' relevant reliance interest on past policies and practices and ultimately concluded that "the final regulations will not impose substantial new burdens that are not justified by the significant benefits the Department expects from implementation of the final regulations." *Id.* at 33,849; *see also*

Prometheus Radio Project, 592 U.S. at 423 (noting that judicial review under arbitrary-and-capricious standard is "deferential" and "simply ensures that the agency has acted within a zone of reasonableness").

II. Plaintiffs Have Not Established Irreparable Harm.

Plaintiffs also fail to establish the imminent irreparable harm needed to justify a preliminary injunction. "A plaintiff seeking a preliminary injunction must 'demonstrate that irreparable injury is likely in the absence of an injunction.'" *Anibowei v. Morgan*, 70 F.4th 898, 902 (5th Cir. 2023) (quoting *Nat. Res. Def. Council, Inc*., 555 U.S. at 22). "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Supreme Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Nat. Res. Def. Council, Inc*., 555 U.S. at 22. Moreover, "the irreparable harm element must be satisfied by independent proof, or no injunction may issue." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989).

Both the *Louisiana* Plaintiffs and RPSB claim that they will suffer irreparable harm in the form of unrecoverable compliance costs in the lead up to the Final Rule's August 1, 2024 effective date. In order for compliance costs to qualify as irreparable harm, they "must be based on more than 'speculat[ion]' or 'unfounded fears.'" *Rest. L. Ctr. v. U.S. Dep't of Lab*., 66 F.4th 593, 597 (5th Cir. 2023) (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022)). Here, Plaintiffs' evidence in support of the alleged compliance costs fails to meet that standard.

As for RPSB, in support of its claim of compliance costs, it provides a single declaration that merely identifies the type of routine and standard costs that would be associated with any new federal regulation. *See, e.g*., Ex. A ¶ 5 ("[T]he school board would have to train its staff on the agency's new rule and resulting changes to school board policies and practices."). *Louisiana* Plaintiffs also provide declarations that identify similarly routine and standard compliance costs.

See, e.g., Ex. 14 ¶ 20(a)-(d) (identifying "[c]osts and time" needed "to review and understand the Rule," "revise school district policies," "revise employee training," and "train employees"). Thus, at most, the evidence provided by both Plaintiffs states the obvious: a new regulation will likely require regulated parties to undertake *some* activities to assure compliance. Such assertions do not justify the extraordinary relief in the form of a preliminary injunction, or else nearly all regulations would produce irreparable harm. *Cf. Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) (compliance with the regulation would lead to permanent closure of power plants).

The *Louisiana* Plaintiffs also argue that the Rule conflicts with Plaintiff States' laws, and relatedly that the Rule will cause irreparable harm to Plaintiff States and Plaintiff School Boards by "pressur[ing]" them into changing their conflicting laws and policies. Louisiana's Mem. 27. But regardless of whether the *Louisiana* Plaintiffs' laws or policies conflict with the Final Rule, a "corollary [of the Supremacy Clause] is that the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). Accordingly, it is the federal government, not the *Louisiana* Plaintiffs, that faces significant irreparable harm, if it is prevented from administrating the Rule. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (reasoning that if the Government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury").

Lastly, the *Louisiana* Plaintiffs argue that they will suffer irreparable harm in the form of "private litigation, not to mention decreased enrollment of students and loss of teachers." Louisiana's Mem. 27–28. The *Louisiana* Plaintiffs' only evidence for these alleged fears is a handful of unsupported and speculative statements by their declarants. *See, e.g.*, Ex. 18 ¶ 23 ("Around 35 teachers have indicated that they would consider resigning."); *id.* ("This policy will

also likely lead to private litigation."). The *Louisiana* Plaintiffs have thus failed to provide support that these fears are concrete and imminent, rather than speculative and hypothetical. These fears are at most a "possibility," which is insufficient to establish irreparable harm. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

III. The Equities and Public Interest Weigh Against Preliminary Relief.

The balance of equities and the public interest "merge when the Government is the opposing party." *Id*. Here, these combined factors strongly counsel against issuing the requested preliminary relief. The Final Rule implements the Department's authority to enforce the statutory objectives of Title IX. *See* 20 U.S.C. § 1682. "There is inherent harm to an agency in preventing it from enforcing regulations that Congress found it in the public interest to direct that agency to develop." *Cornish v. Dudas*, 540 F. Supp. 2d 61, 65 (D.D.C. 2008). The public interest favors allowing the Department to fulfill these responsibilities.

Moreover, granting preliminary relief would significantly harm the Government's interests in preventing discrimination in educational programs and activities. Sex discrimination in educational environments has devastating consequences, including the effects of harassment based on sexual orientation and gender identity. *See*, *e.g.*, Final Rule, 89 Fed. Reg. at 33,478–80 (summarizing personal stories submitted by commenters). The Final Rule therefore effectuates Title IX's important goals of "avoid[ing] the use of federal resources to support discriminatory practices [and] provid[ing] individual citizens effective protection against those practices." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). Needless to say, preventing sex discrimination is in the public interest. *See EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 798 (5th Cir. 2016).

Conversely, Plaintiffs have failed to show they face significant imminent and irreparable harm. At most, both Plaintiffs identify standard compliance costs. RPSB also argues that the

balance of equities tips in favor of a preliminary injunction because the Final Rule threatens to strip it of federal funding. RPSB's Mem. 23–25. But RPSB fails to identify how any such loss of funding is "imminent." *Chacon v. Granata*, 515 F.2d 922, 925 (5th Cir. 1975). Indeed, even if an administrative enforcement action were to occur once the Rule goes into effect, recipients could at that time raise challenges to any administrative enforcement proceedings, which would necessarily precede any termination of funds. 20 U.S.C. § 1682. Moreover, any adverse administrative determination would be subject to judicial review. *Id.* § 1683. But regardless, compelling non-monetary government interests measure up against even serious economic harm. *See, e.g.*, *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 470 (5th Cir. 2021) (allowing the state government's restrictions with respect to the operations of bars in response COVID-19 despite financial harms to the bars).

In sum, the balance of the equities and the public interest both weigh in favor of denying the requests for a preliminary injunction, and the Court may deny the motion on this basis alone. *See Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 460 (5th Cir. 2016).

IV. Any Relief Afforded by the Court Should Be Limited in Accordance with the APA and Equitable Principles.

While Defendants dispute that any relief is necessary for the reasons explained above, any relief afforded must be appropriately limited to the parties and consistent with the APA and equitable principles.

The Court should not issue preliminary relief that extends beyond Plaintiffs or beyond portions of the Rule as to which the Court has found that Plaintiffs have established a likelihood of success. The better view is that the APA does not itself authorize any specific remedies, including vacatur—remedies are addressed in § 703 of the APA, which says nothing about "set aside" but refers to the existing forms of relief. *Cf. United States v. Texas*, 599 U.S. 670, 693–99

(2023) (Gorsuch, J., concurring in the judgment).

But in any event, relief—including any "set aside"—should be limited by traditional equitable principles, including that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see also, e.g.*, *Cargill v. Garland*, 57 F.4th 447, 472 (5th Cir.) (en banc) (plurality opinion) (concluding without contradiction from any other member of the Court that the district court could consider on remand "a more limited remedy" than universal vacatur, and instructing the district court to "determine what remedy . . . is appropriate to effectuate" the judgment), *cert. granted*, 144 S. Ct. 374 (2023); *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (declining to enter vacatur in favor of remand). That means the Court should not issue preliminary relief that extends beyond Plaintiffs or that reaches provisions of the Rule beyond those as to which the Court has found that plaintiffs have established a likelihood of success. "At a minimum, a district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government." *Arizona v. Biden*, 40 F.4th 375, 395–96 (6th Cir. 2022) (Sutton, C.J., concurring).

And while Plaintiffs appear to refer to a § 705 stay as an interim measure, Proposed Order, a sweeping § 705 stay would raise all the same problems as nationwide injunctions. *See DHS v. New York*, 140 S. Ct. 599, 599–601 (2020) (Gorsuch, J., concurring in the grant of stay). Moreover, Section 705 (like other APA provisions) "was primarily intended to reflect existing law," not "to fashion new rules of intervention for District Courts." *Sampson v. Murray*, 415 U.S. 61, 68 n.15 (1974). Plaintiffs do not identify, and the Government has not found, any pre-APA practice of district courts granting universal stays of agency regulations. Consistent with that backdrop, Congress contemplated that any relief under Section 705 "would normally, if not always, be

limited to the parties," Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 277 (1946). And even if Section 705 did authorize universal preliminary relief, such an "extraordinary remedy" would at minimum "demand truly extraordinary circumstances to justify it." *Texas*, 599 U.S. at 702 (Gorsuch, J., concurring in the judgment). Especially where, as here, parallel challenges are pending in courts around the country, universal relief threatens to "stymie the orderly review of important questions," "render meaningless rules about joinder and class actions," and "sweep up nonparties who may not wish to receive the benefit of the court's decision." *Id.* at 703. There is no sound basis for imposing those costs where, as here, party-specific relief could fully remedy any cognizable injury Plaintiffs may face.[6]

In this case, under traditional equitable principles, the Court should decline to vacate the challenged portions of the Final Rule because declaratory judgment as to the parties or a more limited injunction as to the parties would suffice. *See Nuziard v. Minority Bus. Dev. Agency*, 2024 WL 965299, at *40–44 (N.D. Tex. Mar. 5, 2024) (rejecting universal vacatur for equitable reasons where injunction would suffice).

Finally, the Final Rule is severable. *See* 89 Fed. Reg. at 33,848 ("[R]emov[ing] any 'doubt that it would have adopted the remaining provisions of the Final Rule' without any of the other provisions, should any of them be deemed unlawful."). Plaintiffs have challenged only certain portions of the Rule as discussed above; and if the Court grants preliminary relief as to any of those portions, the remainder of the Rule should be permitted to go into effect, as intended, on

[6] The *Louisiana* Plaintiffs gesture to concerns about lawsuits brought by third parties, Louisiana's Mem. 30, but these concerns are entirely speculative. Making the concern further speculative, the *Louisiana* Plaintiffs offer no reason to think such hypothetical suits would relate to the Rule as opposed to another source of law. *See supra* Part 1.C Sexual Harassment (correcting a misapprehension regarding the distinction between the Department's regulatory authority and the standard for a judicially-implied private right of action).

August 1, 2024. As the Supreme Court explained, courts should "enjoin only the unconstitutional applications of a statute while leaving other applications in force, . . . or . . . sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motions for a § 705 stay or preliminary injunction.

Dated: June 4, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 3:24-CV-00563**
VERSUS	**JUDGE TERRY A. DOUGHTY**
U S DEPT OF EDUCATION ET AL	**MAG. JUDGE KAYLA D. MCCLUSKY**

MEMORANDUM RULING

I. INTRODUCTION

On April 29, 2024, the United States Department of Education issued the Final Rule, which redefined sexual discrimination in Title IX. Plaintiffs immediately filed suit in this Court followed by a request for this Court to issue a Preliminary Injunction and/or Temporary Restraining Order against the Final Rule.

It is a tenant of this free country that harassment against any person, whether it be based on their gender identity or sexual orientation, is unacceptable. Harassment against children in school for these very reasons is even more inappropriate. The Final Rule redefines "sex discrimination" to include gender identity, sexual orientation, sex stereotypes, and sex characteristics; preempts state law to the contrary; requires students to be allowed to access bathrooms and locker rooms based on their gender identity; prohibits schools from requiring medical or other documentation to validate the student's gender identity; requires schools to use whatever pronouns the student requires; and imposes additional requirements that will result in substantial costs to the school.

Contained within the 423-page Final Rule are substantive and procedural regulations that amend previous Title IX regulations.[1] Such changes will significantly affect every public school and college in the United States. The primary changes include:

1) Adding 34 CFR 106.10 to read:

> 106.10 Scope
> Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation or gender identity.[2]

2) Revising 34 C.F.R. 106.6 to declare that the Final Rule preempts state law.[3]

3) Revising 34 C.F.R. 106.8 to require recipients to designate, hire, and pay for a Title IX Coordinator to ensure compliance with Title IX. This revision further requires recipients to train employees and hire investigators and facilitators. The revision additionally sets forth required grievance procedures.[4]

4) Revises 34 C.F.R. 106.6(b) to prohibit any recipient from adopting or implementing any practice or procedure concerning a student's current, potential, or past parental, family, or marital status where such practice or procedure treats students differently on the basis of sex.[5]

5) Amends 34 C.F.R. 106.44 to require recipients "with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity" to mandatorily report the conduct to the Title IX Coordinator or to give the person alleging discrimination the Title IX Coordinator's contact information.[6]

6) Amends 34 C.F.R. 106.45 to impose grievance procedures for complaints of sex discrimination. This includes requiring the recipient to perform and/or conduct an investigation into alleged sex discrimination complaints, interview witnesses, and obtain evidence.[7]

7) Prohibits recipients from requiring medical or any other documentation to validate the student's gender identity.[8]

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[1] 20 U.S.C. § 1681-1688.
[2] 89 Fed. Reg. at 33886.
[3] Section (b) states that despite any state law to the contrary, the recipients are still required to comply with Title IX and its regulations. 89 Fed. Reg. at 33885. Recipients are schools that receive Title IX funding.
[4] 89 Fed. Reg. at 33885-86.
[5] 89 Fed. Reg. at 33887.
[6] 89 Fed. Reg. at 33888.
[7] 89 Fed. Reg. at 33891-92.
[8] 89 Fed. Reg. at 33819.

8) Requires a recipient to allow students to access bathrooms and locker rooms based upon their gender identity.[9]

9) Requires that any student's claimed gender identity be treated as if it was his or her sex and requires recipients to compel staff and students to use whatever pronouns the student requests.[10]

10) Creates a new standard for "hostile environment harassment" that could include views critical of gender identity occurring outside the recipient's educational programs or even outside the United States.[11]

11) The effective date for the Final Rule to take effect is August 1, 2024.[12]

Louisiana Plaintiffs[13] and the School Board of Rapides Parish ("Rapides") (collectively "Plaintiffs") filed Motions for Preliminary Injunction and Motions for Stay [Doc. Nos. 17 and 27] Defendants filed a Response [Doc. No. 38].[14] Plaintiffs filed Replies [Doc. Nos. 46 and 52]. The States of California, Colorado, District of Columbia, Delaware, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington filed an amici curiae brief in Opposition to the Motions for Preliminary Injunction [Doc. No. 50].

For the reasons set forth herein, this Court finds the Plaintiffs are likely to succeed on the merits that the Defendants' Final Rule is (1) contrary to law under the Administrative Procedures

[9] 89 Fed. Reg. at 33818.
[10] 89 Fed. Reg. at 33516
[11] 89 Fed. Reg. at 33516 and 33530.
[12] 89 Fed. Reg. at 33474.
[13] Louisiana Plaintiffs consists of: State of Louisiana, by and through its Attorney General, Elizabeth B. Murrill; LA Dept. of Education, State of Mississippi, by and through its Attorney General, Lynn Fitch; State of Montana, by and through its Attorney General, Austin Knudsen; State of Idaho, by and through its Attorney General, Raul Labrador; School Board of Webster Parish; School Board of Red River Parish; School Board of Bossier Parish; School Board of Sabine Parish; School Board of Grant Parish; School Board of West Carroll Parish; School Board of Caddo Parish; School Board of Natchitoches Parish; School Board of Caldwell Parish; School Board of Allen Parish; School Board of LaSalle Parish; School Board of Jefferson Davis Parish; School Board of Ouachita Parish; School Board of Franklin Parish; School Board of Acadia Parish; School Board of DeSoto Parish; and School Board of St. Tammany Parish.
[14] Defendants consists of: U.S. Department of Education; Miguel Cardona, in his official capacity as Secretary of Education; Office for Civil Rights, U S Dept. of Education; Catherine Lhamon, in her official capacity as the Assistant Secretary for Civil Rights; U S Dept of Justice, and Merrick B. Garland, in his official capacity as the Attorney General of the United States.

Act ("APA"), (2) violates the Free Speech Clause of the First Amendment, (3) violates the Free Exercise Clause of the First Amendment, (4) violates the Spending Clause, and (5) is arbitrary and capricious in accordance with Title 5 U.S.C. § 706 (2)(A) of the APA.

Therefore, the Motions for Preliminary Injunction [Doc. Nos. 17 and 27] are **GRANTED**. The Motions to Stay [Doc. Nos. 17 and 27] are **DENIED** as moot.

II. BACKGROUND

a. History of Title IX

On June 23, 1972, Congress enacted Title IX of the Education Amendments,[15] which forbid educational programs or activities receiving federal financial assistance from discriminating on the basis of sex. Title IX was a direct response to the discrimination of women in educational programs and activities. As of 1970, only eight percent (8%) of American women had a college degree, and only fifty-nine (59%) percent had graduated from high school.[16] Title 20 U.S.C. § 1681(a) provides:

> No person… shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The text of Title IX confirms that Title IX was intended to prevent biological women from being discriminated against in education in favor of biological men. Title IX lists several exemptions which use the language "one sex" or "both sexes" showing that the statute was referring to biological men and biological women, not gender identity, sexual orientation, sex stereotypes, or sex characteristics. Title 20 U.S.C. § 1681 contains the following exemptions (collectively referred to as "Exemptions"):

[15] 20 U.S.C. § 1681, et seq.
[16] Equal Access to Education: Forty Years of Title IX, U.S. Dep't. Just. 2 (June 23, 2012), https://perma.cc/3 GFD-74YX ("DOJ Equal Access").

1) public institutions that traditionally and continually had a policy of admitting only "students of one sex"[17];
2) educational institutions which had started to transition from being an institution which admits only students of "one sex" to students of "both sexes"[18];
3) social fraternities or sororities and voluntary youth organizations, specifically exempting the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and other youth service organizations which had traditionally been limited to persons of one sex[19];
4) Boys State Conference, Boys Nation Conference, Girls State Conference, Girls Nation conference, or any program or activity specifically for, or promoting said organizations[20];
5) father-son or mother-daughter activities at an educational institution[21];
6) scholarship or other financial assistance awarded by an institution of higher education as a result of an award in a beauty pageant where participation is limited to individuals of "one sex only[.]"[22]

Additionally, 20 U.S.C. § 1686 of Title IX states that nothing contained in Title IX shall be construed to prohibit any educational facility from "maintaining separate living facilities for the different sexes."[23]

In 1974, Congress enacted legislation instructing regulations to be promulgated "which shall include with respect to intercollegiate athletic activities reasonable provisions concerning the nature of particular sports."[24] Those regulations allowed a school "to provide separate teams for 'men and women' where the provisions of only one team would 'not accommodate the interests and ability of both sexes.'"[25]

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[17] 20 U.S.C. § 1681(a)(5).
[18] Id (a)(A)(2).
[19] Id (a)(6)(A)and (B).
[20] Id (a)(7).
[21] Id (a)(8).
[22] Id (a)(9).
[23] 20 U.S.C. § 1681(c) defines an education institution as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department."
[24] Pub. L. 93-380 § 844, 88 Stat. 484, 612 (1974).
[25] 34 C.F.R. 106.41(c)(1).

The United States Department of Justice ("DOJ") promulgated the DOJ Equal Access bulletin (see FN 16) in which the DOJ referred to the discriminated sex as "women." In discussing the impact Title IX had in its forty years, the DOJ stated:

> Since 1972, women have made great strides in their educational attainment, benefitting from the protections enacted through Title IX. In 2009, approximately 87 percent of women had at least a high school education and approximately 28 percent had at least a college degree, up from 59 percent with a high school education and 8 percent with a college degree in 1970. Additionally, enrollment in higher education has increased at a greater rate for females than for males; since 1968, the percentage of women between the ages of 25 and 34 with at least a college degree has more than tripled. Women now have higher graduation rates and lower high school dropout rates, take more Advanced Placement exams, and earn more advanced degrees than their male counterparts. They also tend to score higher in reading assessment tests than male students.[26]

The DOJ Equal Access bulletin also noted how Title IX expanded women's access to high school athletic programs, noting that from 1972 to 2011 female participation rose from approximately 250,000 in 1972 to 3,250,000 in 2011.[27] In discussing the success of Title IX for women in athletics more thoroughly, Deborah Brake wrote in the University of Michigan Journal of Law Reform that:

> Title IX has paved the way for significant increases in athletic participation for girls and women at all levels of education. Since the enactment of Title IX, female participation in competitive sports has soared to unprecedented heights. Fewer than 300,000 female students participated in interscholastic athletics in 1976. By 1998-99, that number exceeded 2.6 million, with significant increases in each intervening year. To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven to one in three.[28]

[26] DOJ Equal Access pp. 2-3.
[27] Id. pp. 4-5.
[28] Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J. L. Reform 13 (2000)

It is clear in the text of Title IX itself, and in the decades-long impact of Title IX, that its enactment was created to apply to two sexes. There is nothing in the text or history of Title IX indicating that the law was meant to apply to anyone other than biological men and/or women. The logic of Title IX was sound, the execution was flawless, and the application has had stellar results for years. Therefore, the Court must ask itself, what is the driving force behind a change to such a successful and inclusive rule, and if the driving force has legitimate reasons for the change, why is the enforcement of the changes being done in such a hurried and sloppy manner?

b. The Final Rule

The Final Rule is what is at issue here, but in order for the Court to thoroughly examine that rule, it must start at the beginning, which goes back to January 2021, i.e., the beginning of President Joe Biden's ("President Biden") term in office.

On the same day of his inauguration,[29] President Biden executed Executive Order 13988, entitled "Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation."[30] This Executive Order declared that discrimination "because of sex" includes discrimination on the basis of gender identity and sexual orientation under Title IX and other federal laws.

The Executive Order directed the head of each agency, as soon as practicable, to review all existing orders, regulations, guidance documents, policies, programs, or other agency actions that were promulgated or administered by the agency under Title VII or any other statute or regulation that prohibits sex discrimination. The head of each agency was also ordered to consider whether to revise, suspend, or rescind agency actions and to consider whether there were additional actions

[29] January 20, 2021.
[30] 86 Fed. Reg 7023 (January 20, 2021).

the agency should take in implementing the Executive Order. Additionally, the head of each agency was ordered to devise a plan within 100 days to implement those actions.

On June 22, 2021, the DOE, Office for Civil Rights ("OCR") published an "Interpretation"[31] of 20 U.S.C. § 1681(a) (which prohibits discrimination on the basis of sex) to include discrimination based on sexual orientation and gender identity. The DOE stated it would fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education and activities that receive federal financial assistance from the DOE. The Interpretation took effect the same day it was published.

On June 23, 2021, the DOE issued a "Dear Educator" letter[32] to directly notify the institutions and persons subject to Title IX of the DOE's interpretation. This "Dear Educator" letter also informed institutions and persons subject to Title IX that the DOE would begin immediately enforcing enforcement of discrimination based on gender identity or sexual orientation.

As a result of the Interpretation and "Dear Educator" letter, Tennessee and nineteen other states filed suit against the DOE, the Equal Employment Opportunity Commission, and the DOJ seeking a preliminary injunction to prohibit the DOE's interpretation from taking effect. On July 15, 2022, in *Tennessee v. United States Department of Education*,[33] the district court granted the Plaintiff's Motion for Preliminary Injunction, prohibiting the DOE's Interpretation from taking effect.

After the "Dear Educator" rule was enjoined, the DOE engaged in formal agency rulemaking to amend the Title IX regulations. On April 13, 2023, the DOE published a Notice of

[31] 86 Fed. Reg. 32637.
[32] 615 F.Supp. 3d at 817-18
[33] 615 F. Supp. 3d 807 (E.D. Tenn. 2022),

Proposed Rulemaking with regard to Title IX regulations in the Federal Register.[34] Comments were to be received by May 15, 2023.

Thereafter, on April 29, 2024, the DOE published the Final Rule[35] which contained the amendments at issue here. The Final Rule has an effective date of August 1, 2024.

III. STANDING

A court is required to evaluate its jurisdiction, which requires a determination of whether the Plaintiffs have standing. The United States Constitution, via Article III, limits federal courts' jurisdiction to "cases" and "controversies." *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) (citing U.S. Const. art. III, § 2). The "law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 435 (2017) (citation omitted).

Thus, "the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (citation and internal quotation marks omitted). The Article III standing requirements apply to claims for injunctive and declaratory relief. *See Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018), *as revised* (Aug. 9, 2018); *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997). In the context of a preliminary injunction, "the 'merits' required for the plaintiff to demonstrate a likelihood of success include not only substantive theories but also the establishment of jurisdiction." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015).

[34] 88 Fed. Reg. 22860
[35] 89 Fed. Reg. 33474

Article III standing is comprised of three essential elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016) (citation omitted). "The plaintiff must have (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id.* (internal citations omitted). Furthermore, "[a] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester, N.Y.*, 581 U.S. at 439 (citations omitted). However, the presence of one party with standing "is sufficient to satisfy Article III's case-or-controversy requirement." *Texas v. U.S.*, 809 F.3d 134, 151 (5th Cir. 2015) (citing *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006)). Further, a plaintiff's standing is evaluated at the time of filing of the initial complaint in which they joined. *Lynch v. Leis*, 382 F.3d 642, 647 (6th Cir. 2004); *Davis v. F.E.C.*, 554 F.3d 724, 734 (2008); *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013).

In order to establish standing, the plaintiff must demonstrate that they have encountered or suffered an injury attributable to the defendant's challenged conduct and that such injury is likely to be resolved through a favorable decision. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992). Further, during the preliminary injunction stage, the movant is only required to demonstrate a likelihood of proving standing. *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020). For the reasons stated herein, the Court finds that the Plaintiffs have demonstrated a likelihood of satisfying Article III's standing requirements.

(1) Injury-in-fact

Plaintiffs seeking to establish injury-in-fact must show that they suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not

conjectural or hypothetical." *Spokeo*, 578 U.S. at 339 (citations and internal quotation marks omitted). For an injury to be "particularized," it must "affect the plaintiff in a personal and individual way." *Id.* (citations and internal quotation marks omitted).

In *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014), the Supreme Court held that, for purposes of an Article III injury-in-fact, an allegation of future injury may suffice if there is "a 'substantial risk' that the harm will occur." (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, (2013)). In *SBA List*, a petitioner challenged a statute that prohibited making certain false statements during the course of a political campaign. *Id.* at 151–52. In deciding whether the pre-enforcement challenge was justiciable—and in particular, whether it alleged a sufficiently imminent injury for purposes of Article III—the Court noted that pre-enforcement review is warranted under circumstances that render the threatened enforcement "sufficiently imminent." *Id.* at 159. Specifically, the Court noted that past enforcement is "good evidence that the threat of enforcement is not 'chimerical.'" *Id.* at 164 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Similarly, in *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979), the Supreme Court held that a complaint alleges an Article III injury-in-fact where fear of future injury is not "imaginary or wholly speculative."

Plaintiffs consist of four states[36] and a total of eighteen Louisiana Parish School Boards ("School Board Plaintiffs").[37] Plaintiffs argue they are injured because the Final Rule (1) conflicts with State laws that are designed to safeguard female sports, safety, privacy and parental rights, (2) results in non-recoverable costs of complying with the Final Rule, (3) requires Plaintiffs to secure funding, and (4) interferes with the State Plaintiffs' sovereign authority to enforce its laws,

[36] Louisiana, Mississippi, Montana and Idaho (Plaintiff States").
[37] School Board Plaintiffs consist of Webster Parish, Red River Parish, Bossier Parish, Sabine Parish, Grant Parish, West Carroll Parish, Caddo Parish, Natchitoches Parish, Caldwell Parish, Allen Parish, LaSalle Parish, Jefferson Davis Parish, Ouachita Parish, Franklin Parish, Acadia Parish, DeSoto Parish, St. Tammany Parish and Rapides Parish.

which in turn interferes with the Plaintiff States' police power over public health policy. Plaintiffs further argue they are facing "substantial pressure" from the DOE to change their state laws. Similarly, School Board Plaintiffs assert that they are being pressured to revise their current policies and practices or risk losing significant federal funding. School Board Plaintiffs further argue they will suffer harm by increased recordkeeping, additional obligations, potential complaints, administrative investigation, private litigation, increased liability exposure, and/or decreased enrollment of students.

School Board Plaintiffs prepared ten Declarations discussing the injuries school boards would suffer if the Final Rule were to go into effect.[38] School Board Plaintiffs received millions of dollars of federal funds for the 2022-23 school year ranging from a low of $2,907,104 to a high of $75,635,132. Each School Board Plaintiff indicated that the Final Rule increased its federal obligations, compliance costs, and litigation risks. Most School Board Plaintiffs also had construction costs to construct gender-neutral bathrooms and locker rooms.[39] The School Board Plaintiffs additionally estimated decreased school enrollment, loss of teachers, and increased litigation. The School Board Plaintiffs further expressed concerns about whether the Final Rule would apply to sports, which would incur substantial additional costs.

Louisiana State Superintendent of Education Preston Brumley estimated that federal funds accounted for approximately 13% of Louisiana State school funding ($725,432,889) last year.[40] Further, Plaintiff States argue that the Final Rule conflicts with their duly enacted laws (and soon-to-be enacted laws) designed to safeguard female sports, safety, privacy, and parental rights. See, e.g., La. Rev. Stat. §§ 4:442, 4:444; Miss. Code Ann. §§ 37-97-1, 37-97-3, Mont. Ann. §§ 1-1-201,

[38] Allen, Caldwell, Franklin, Grant, Jefferson, LaSalle, Ouachita, Sabine, St. Tammany and West Carroll Parish School Boards [Doc. No. 18-16 -25].
[39] The DOE made no attempt to estimate construction costs in the Final Rule. 89 Fed. Reg. 33849-878.
[40] [Doc. Nos. 18-33, 34].

20-7-1306, 40-6-704, Idaho Code §§ 73-114(2), 33-6201–6203, 33-6701–6707; S.B. 2753, 2024 Leg. Reg. Sess. (Miss. 2024); see also H.B. 610, 2024 Leg. Reg. Sess. (La. 2024); H.B. 121, 2024 Leg. Reg. Sess. (La. 2024); 89 Fed. Reg. at 33,885.[41]

Defendants contest Plaintiffs have sustained irreparable harm needed to justify a preliminary injunction, but Defendants do not contest injury-in-fact.

By alleging injuries due to compliance costs, conflicts with state laws, additional recordkeeping, construction costs, and violation of First Amendment Rights, Plaintiffs have shown they have suffered invasion of a legally protected interest that is concrete and particularized and actual and imminent. The inquiries are actual and imminent because the Final Rule is set to go into effect in August.

Accordingly, the Plaintiffs have alleged a likelihood of establishing an injury-in-fact sufficient to satisfy Article III.

(2) Traceability

To establish traceability or "causation" in this context, a plaintiff must demonstrate a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Therefore, courts examining this element of standing must assess the remoteness, if any, between the plaintiff's injury and the defendant's actions. As explained in *Ass'n of Am. Physicians & Surgeons v. Schiff*, the plaintiff must establish that it is "'substantially probable that the challenged acts of the defendant, not of some absent third party' caused or will cause the injury alleged." 518 F. Supp. 3d 505, 513 (D.D.C. 2021), *aff'd sub nom. Ass'n of Am. Physicians & Surgeons, Inc. v. Schiff*, 23 F.4th 1028 (D.C. Cir. 2022) ("*AAPS II*") (quoting *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996)).

[41] [Doc. No. 24, p. 36]

Defendants do not contest traceability.

In *Duke Power Co. v. Carolina Envt. Study Grp*., the United States Supreme Court found that a plaintiff's injury was fairly traceable to a statute under a theory of "but-for" causation. 438 U.S. 59 (1978). The plaintiffs, who were comprised in part of individuals living near the proposed sites for nuclear plants, challenged a statute that limited the aggregate liability for a single nuclear accident under the theory that, but for the passing of the statute, the nuclear plants would not have been constructed. *Id*. at 64-65. The Supreme Court agreed with the district court's finding that there was a "substantial likelihood" that the nuclear plants would have been neither completed nor operated absent the passage of the nuclear-friendly statute. *Id*. at 75.

Similarly, Plaintiffs easily meet the traceability standard. All of the alleged injuries have a direct relation between the Final Rule and injuries alleged. The Final Rule here is the but-for cause of any of Plaintiff's alleged injuries. Therefore, it is unquestionable that the actions of Defendants in implementing the Final Rule are the cause of the Plaintiffs' alleged injuries, and Plaintiffs have established traceability for standing purposes.

(3) Redressability

The redressability element of the standing analysis requires that the alleged injury is "likely to be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61. "To determine whether an injury is redressable, a court will consider the relationship between 'the judicial relief requested' and the 'injury' suffered." *California v. Texas*, 141 U.S. 2104, 2115, 210 L. Ed. 2d 230 (2021) (quoting *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)). Additionally, courts typically find that where an injury is traceable to a defendant's conduct, it is usually redressable as well. *See, e.g.*, *Scenic Am., Inc. v. United States Dep't of Transportation*, 836 F.3d 42, 54 (D.C. Cir. 2016) ("[C]ausation and

redressability are closely related, and can be viewed as two facets of a single requirement."); *Toll Bros. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) ("Redressability . . . is closely related to traceability, and the two prongs often overlap."); *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 852 (W.D. Tex. 2019).

Plaintiffs argue that they are likely to prove that a favorable decision would redress their injuries because they provided ample evidence that their injuries are imminent and ongoing. In response, Defendants contend that any threat of future injury is merely speculative.

The Court finds that Plaintiffs are likely to prove that their injuries would be redressed by a preliminary injunction. The Defendants have attempted to enact these rules for three- and one-half years. The Plaintiffs would be required to immediately hire additional employees and a Title IX Coordinator, train employees, and/or begin additional construction in order to comply with the Final Rule before it goes into effect. Thus, Plaintiffs are likely to prove that the injuries are imminent and would be redressed by a Preliminary Injunction.

Accordingly, Plaintiffs have satisfied all the requirements for Article III standing.

IV. PRELIMINARY INJUNCTION

The Plaintiffs move the Court to issue a preliminary injunction to stop the implementation of the Defendants' Final Rule. A preliminary injunction is an extraordinary and drastic remedy that should never be awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). A movant must make a clear showing that it is entitled to relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Specifically, to obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm; (3) the threat of

irreparable harm outweighs any harm that would result if the injunction were granted; and (4) an injunction is in the public interest.[42]

Here, Defendants contend that a preliminary injunction is not warranted because Plaintiffs have not established irreparable harm; that the Final Rule is a "clarification" and not a change in the law; the Defendants have the authority to enforce the Final Rule; and the Final Rule does not violate the Spending Clause, First Amendment, or the major question doctrine.

Plaintiffs argue that a preliminary injunction is necessary here to cure the unlawfulness of the Final Rule. Specifically, Plaintiffs assert that the Final Rule "ignores the text, structure, and context of Title IX to advance Defendants' political and ideological agenda. Defendants have no authority [] to rewrite Title IX and decide major questions as the Final Rule does. The Final Rule also violates the Spending Clause, is an unconstitutional exercise of legislative power, and fails arbitrary-and-capricious review several times over. And to top it off, the Final Rule causes Plaintiffs immediate irreparable harm and will cause additional irreparable harm, including unrecoverable compliance costs."[43]

After considering the extensive and expedited briefing herein, the Court finds that Plaintiffs satisfied all elements required for the issuance of a preliminary injunction, and it **GRANTS** Plaintiffs' Motions for the following reasons.

a. Likelihood of Success on the Merits

To show a likelihood of success on the merits, the Plaintiffs must "present a prima facie case, but need not show it is certain to win." *Janvey v. Alguire*, 647 F.3d 585, 595-96 (5th Cir. 2011). As stated previously, Plaintiffs make four arguments for why they are likely to succeed on the merits. These arguments are that (1) the Final Rule is contrary to law and exceeds statutory

[42] *Louisiana v. Becerra*, 20 F.4th 260, 262 (5th Cir. 2021).
[43] [Doc. No. 24, p. 12]

authority; (2) the Final Rule's conditions violate the spending clause; (3) the Final Rule is an unconstitutional exercise of legislative power; and (4) the Final Rule is arbitrary and capricious.

1. The Final Rule is Contrary to Law and Exceeds Statutory Authority

Plaintiffs argue that because the Final Rule is contrary to Title IX's text and structure and Defendants have no statutory authority to subvert Title IX or to decide major questions, then they are likely to succeed in showing that the Final Rule is not in accordance with the law and exceeds statutory authority under Title 5 U.S.C. § 706(2)(A), (C).[44] 5 U.S.C. § 706(2)(A), (C) reads as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be--
> **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

The Court will analyze this argument in parts, beginning with the Final Rule's contrariness to the text of Title IX.

a. Contrariness to Title IX

As stated earlier, Title IX provides, in relevant part, that "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 education program or activity receiving Federal financial assistance[.]"

[44] 5 U.S.C. § 706(2)(A), the Administrative Procedures Act

Plaintiffs argue that the plain text of the statute reads that there is a prohibition on discrimination based on someone's biological text and that the Final Rule's requirement that recipients consider gender identity and treat people consistent with their self-professed gender identity is at odds with Title IX.

Defendants rely on *Bostock v. Clayton County, Georgia*, 590 U.S. 644 (2020) to support their interpretation of "sex discrimination" under Title IX. In *Bostock*, the Supreme Court found that an employer violates Title VII[45] by firing an individual for being homosexual or transgender because sex plays a necessary and undistinguished role in that employment decision. *Id.* at 662. Defendants applied this holding to find that "sex discrimination" under Title IX included not only biological men and women but also discrimination based on sex stereotypes, sex characteristics, sexual orientation, and gender identity.

However, applying *Bostock* to Title IX is not that straightforward. First, the DOE maintains it has the power to issue the Final Rule because *Bostock* only "clarifies" the laws and does not change it.[46] However, the Supreme Court specifically did not determine whether *Bostock* applied to other federal laws.[47] *Id*. at 681. Second, there exists a split among the courts as to the application of *Bostock* to Title IX, with some courts finding that *Bostock* applies to Title IX[48] and others finding

[45] Title VII makes it unlawful to discriminate against an individual "because of" the individual's sex.
[46] 89 Fed. Reg. 33474
[47] The Supreme Court stated, "The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination…. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today." 590 U.S. at 681.
[48] *Grimm v. Gloucester County School Board*, 972 F.3d 586, 617 (4th Cir. 2020) (*Bostock* applied to Title IX claims); *Doe by and through Doe v. Boyertown Area School District*, 897 F.3d 518, 536 (3rd Cir. 2018) (prior to *Bostock*, but refused to enjoin school allowing transgender students to use bathroom, and locker rooms consistent with their gender identity in a Title IX claim); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1118 (9th Cir. 2023) (found *Bostock* applied to Title IX claims); AC by MCV Metropolitan School District of Martinsville, 75 F.4th 760, 770 (7th Cir. 2023) (*Bostock* applies to Title IX); *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (a faithful application of *Bostock* causes us to conclude that the district court's understanding of *Bostock* was far too narrow)

that it does not.[49] Because a circuit split exists and there is no binding federal jurisprudence on this issue, the Court must make its own interpretation as to the applicability of *Bostock* to Title IX. For the reasons set forth below, the Court finds that *Bostock* does not apply to Title IX.

First, when interpreting a statutory term, the Court must interpret the words in a manner consistent with the ordinary meaning at the time Congress enacted the statute. *Wisconsin Central Ltd. v. U.S.*, 585 U.S. 274, 277 (2018); *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary meaning. *Id.* at 284. To interpret the meaning of a word, Courts look at the meaning of the word at the time Congress enacted it. *Id.* Courts routinely consult dictionaries as a principal source of ordinary meaning at the time of enactment. *Cascabel Cattle Company, LLC v. United States*, 955 F.3d 445, 451 (5th Cir. 2020).

In applying these statutory principles to Title IX, the Court finds that the term "sex discrimination" only included discrimination against biological males and females at the time of enactment. Plaintiffs provided this Court with three different dictionary definitions of "sex" before, at, and after Title IX's enactment in 1972.[50] All these dictionaries define "sex" as "male or female." Defendants have not provided a single dictionary definition that defined "sex" as including gender identity or sexual orientation either before or at the time of Title IX's enactment. Additionally,

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[49] *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. en banc. 2022); ("sex" in Title IX, at the time of enactment, meant biological sex); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). (The rule in *Bostock* extends no further than Title VII). *Neese v. Becerra*, 640 F.Supp. 3d 668, 666-667 (N.D. Tex. 2022) (*Bostock* does not extend to Section 1557 of the Affordable Care Act or Title IX.) *Tennessee v. United States Dept. of Educ.*, 615 F.Supp. 3d 807, 839 (E.D. Tenn. 2022). (DOE guidance creates rights for students and obligation for regular entities not to discriminate based upon sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX or its implementing regulations); *Meriweather v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (it does not follow that principles announced in Title VII context automatically apply in the Title IX context.); and *Texas v. United States*, 201 F.Supp. 3d 810, (N.D. Texas 2016) (before *Bostock*, but held the DOE's "Dear Colleague Letter" sent to schools to allow students to use the bathroom, locker rooms and showers at the student's choosing, contradicted the meaning of Title IX).

[50] Sex, Webster's Third New International Dictionary 2081 (1966); Sex, Webster's New World Dictionary (1972); Sex, American Heritage Dictionary 1187 (1969).

while Defendants argue that the Supreme Court's prior use of the word "gender" shows gender identity was included within the meaning of "sex" at the time of enactment, dictionary definitions during and after enactment show the word "gender" was used as a synonym for "sex."[51] The word "gender", as used in prior Supreme Court opinions, meant biological men and/or women, not gender identity.[52]

Further, Congress has recognized the probative value of the 1975 Title IX regulations (which added Title IX's application to women's sports), in light of Title IX's unique post-enactment history. *Grove City Coll. V. Bell*, 465 U.S. 555, 567 (1984). These 1975 regulations clearly dealt with protecting biological women in sports and show that sex discrimination means discrimination of someone based upon his or her biological sex.[53]

Together, the ordinary meaning of "sex discrimination" at the time of enactment and the 1975 regulations of Title IX indicate that "sex discrimination" included only biological males or females. The Court finds no support in either the ordinary meaning or the 1975 regulations that *Bostock*'s interpretation of "sex" should apply to Title IX. The Court further finds that Defendants use of *Bostock*'s interpretation of "sex" to Title IX would essentially reverse the entire premise of Title IX, as it would literally allow biological males to circumvent the purpose of allowing biological females to participate in sports that they were unable to participate in prior to 1975. The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme. *City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021). Here, the Final Rule would render meaningless all of the Exemptions set forth in Title IX, such as traditionally one-sex colleges, social fraternities and sororities, voluntary youth organizations, one-sex youth

[51] Sex, Webster's Third New International Dictionary 944 (1966).
[52] *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (Superseded by Statute); and *Frontiero v. Richardson*, 93 S.Ct. 1764, 1770 (1973).
[53] 40 Fed. Reg. 24132, 24134, and 24,135.

service organizations, beauty pageants, and the exemption that allows educational facilities to maintain separate living facilities. Allowing this would allow decades of triumphs for women and men alike to go down the drain, and this Court finds that Defendants' argument is meritless.

Finally, this Court finds that the application of *Bostock* and the Final Rule's definition of "sex discrimination" contradict the purpose of Title IX. A statute is to be read "as a whole" because the statutory language, plain or not, depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991); *Southwest Airlines Co. v. Saxton*, 596 U.S. 450, 455 (2022). Here, the language, exemptions, legislative history, and prior regulations of Title IX demonstrates that Title IX was intended to prevent biological women from discrimination.[54] *Bostock* dealt with Title VII, which prohibits an employer from hiring or discharging an individual because of the individual's race, color, religion, sex, or national origin. Title IX exempts certain conduct as being discrimination by the above discussed exemptions. *Bostock* does not apply because the purpose of Title VII to prohibit discrimination in hiring is different than Title IX's purpose to protect biological women from discrimination in education.

Thus, Title IX was written and intended to protect biological women from discrimination. Such purpose makes it difficult to sincerely argue that, at the time of enactment, "discrimination on the basis of sex" included gender identity, sex stereotypes, sexual orientation, or sex characteristics. Enacting the changes in the Final Rule would subvert the original purpose of Title IX: protecting biological females from discrimination.

The above statutory analysis demonstrates that, at the time of enactment, "sex discrimination" clearly included only discrimination against biological males and females. Defendants thus seemingly use *Bostock* in an attempt to circumvent Congress and make major

[54] Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24, 1281 (June 4, 1975).

changes to the text, structure, and purpose of Title IX. Such changes are undoubtedly contrary to Title IX and contrary to the Law.

b. The Final Rule's "Harassment Standard" is contrary to Title IX and Violates the First Amendment

Plaintiffs further argue that the Final Rule is contrary to law because the "Harassment Standard" would require recipients of federal funding under Title IX to violate First Amendment rights. Under the statute, harassment becomes discrimination "'under' the recipient's programs" when it "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" and when "the recipient exercises substantial control over both the harasser and the context." *Davis*, 526 U.S. at 633, 645 (emphasis added); *see Meriwether*, 992 F.3d at 511.

Plaintiffs argue the Final Rule's new broad "severe or pervasive" standard, which considers speech or other expressive conduct that "limits" a person's ability to participate in a program to be discriminatory harassment, cannot be squared with Title IX. 89 Fed. Reg. at 33,884. Plaintiffs further urge that the Final Rule's requirement that a recipient consider conduct that occurred outside of its program or outside of the United States in determining whether a hostile environment has been created in its education program and activity be consistent with Title IX's harassment standard. Id. at 33,530.

Plaintiffs further urge that this standard chills and punishes protected speech under the First Amendment because it would compel staff and students to use whatever pronouns a person demands, even when those are contrary to grammar rules, reality, or political ideologies, and it further prohibits staff and students from expressing their own views on certain topics. Essentially, the harassment standard allows for one political ideology to dominate the educational landscape while either silencing the other or calling the other "harassment" under these standards.

Thus, Plaintiffs argue that the Final Rule conflicts with the "fixed star in our constitutional constellation" that the government cannot "prescribe what shall be orthodox" or "force citizens to confess by word or act their faith therein," *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), and "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In Opposition, Defendants argue that the harassment standard was used by the DOE in a similar standard in its enforcement of Title IX and uses a similar standard in Title VI and Section 504 of the Rehabilitation Act. Further, Defendants claim that courts and the Equal Employment Opportunity Commission have used a similar standard to identify harassment under Title VII's analogous provisions for decades.

As Defendants did earlier with their attempt to use the same standards in *Bostock* to the facts here, this attempt is equally as unconvincing. The Court is not considering the merits of this case in this ruling, but it cannot overlook that the implications here are different than implication in something like a Title VII case. While Title VII is vastly important, and the Court sees the merits in harassment standards set forth in those provisions, the Court cannot simply apply the same standard to federally funded educational institutions. The "harassment standard" created by the Final Rule is obviously contrary to Title IX, and Plaintiffs have made compelling arguments for how it can violate the free speech right of the First Amendment.

c. Defendants' Authority to Rewrite Title IX and Decide Major Questions

Plaintiffs lastly argue that the Final Rule is contrary to law and exceeds statutory authority because Defendants lack any authority to rewrite Title IX and thus decide major questions under the major questions doctrine. The "major questions doctrine" provides that an agency is not

authorized to make decisions of vast economic and political significance without specific congressional authorization.

To be a "major question," the power exercised must be of a vast economic and political significance. *Utility,* 573 U.S. 302, 324. Here, the Court finds that the Final Rule is an issue of vast economic significant. The DOE modified the Title IX regulations to require every public elementary school, middle school, high school, and college in the United States that receives federal financial assistance. The Final Rule also gives the student the right to sue the school, other students, the school board, teachers, and administrators if discriminated against based upon gender identity, among other requirements. Recipients of Title IX will be required to make millions of dollars in improvements to their facilities to comply with the Final Rule.[55] Should Plaintiff School Boards fail to comply with the Final Rule, millions of dollars of funding are at stake.[56] The power exercised is thus of vast economic significance.

The issue is also one of vast political significance. The validity of the Final Rule will ultimately determine whether biological males that identify as female are allowed in female bathrooms and locker rooms and vice versa. The Court finds that this effect is one of vast political significance because it will affect every public elementary school, middle school, high school, and college in the United States that receive federal funding. The Final Rule prohibits requiring medical or other documentation to determine whether the biological male claiming to identify as female is sincere.[57] The Final Rule also places no limit on how many times a person can change

[55] [Doc. No. 18-16] ("significant costs") [Doc. No. 18-17] ($1.2 million) [Doc. No. 18-18] ("astronomical" costs); [Doc. No. 18-19] ($2.1 million); [Doc. No. 18-20, p. 8 ("significant" costs); [Doc. No. 18-21, p. 8] ("substantial expense"); [Doc. No. 18-22] (20.3 to 20.7 million dollars); [Doc. No. 18-23 at 8] (hundreds of millions of dollars") [Doc. No. 18-25, p. 7] (expensive construction costs), and [Doc. No. 18-26] (new bathrooms at 5 schools cost of $11 million dollars and up to $211.2 million if the program were expanded to each school in the district).
[56] Rapides itself receives about $30 million dollars, or about 10% of its budget as federal funding.
[57] 89 Fed. Reg. 33819

gender identity. And what about students that identify as non-binary?[58] Title IX is silent on this issue, which is of vast political significance because it is a polarizing political issue that an agency has no authority to make. The Court thus finds the enactment of the Final Rule is also an issue of vast political significance.

Additionally, the Court shares a concern with Plaintiffs that the Final Rule may also biological males who identify as females to compete on female sports teams. The DOE disputes that the Final Rule will apply to women's sports because the Javits Amendment and the relevant regulations historically interpreted Title IX's non-discrimination mandate to tolerate sex separation in activities.[59] Additionally, the DOE proposed rules that govern athletics under Title IX.[60] However, the Final Rule applies to sex discrimination in any educational "program" or "activity" receiving Federal financial assistance.[61] The terms "program" or "activity" are not defined but could feasibly include sports teams for recipient schools. Certainly, the DOE has proposed rules and amendments, but those rules and amendments may never be enacted or may be substantially amended. If those rules and amendments are not enacted, the Final Rule will arguably apply to athletic teams. There thus exists a credible concern that the Final Rule may allow biological males who identify as females to compete on female sports teams. However, because the effect of the Final Rule on sports is not certain, the Court is not considering that aspect of the Final Rule when analyzing the major questions doctrine.

Because the Final Rule is a matter of both vast economic and political significance, the Court finds the enactment of this rule involves a major question pursuant to the major questions

[58] Person whose gender identity does not fit into the categories of male or female.
[59] 89 Fed. Reg. 33816-17.
[60] 88 Fed. Reg 22860 (April 13, 2023).
[61] 34 C.F.R. 106.1

doctrine. Therefore, Congress must have given "clear statutory authorization"[62] to the applicable agency. The Court finds that Congress did not give clear statutory authorization to this agency.

Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress provides. We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance. *National Federation of Independent Business v. Department of Labor*, 142 S.Ct. 661, 665 (2022). Further, an agency's decreed result must be within the scope of its lawful authority. *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

Statements by individual legislators should not be given controlling effect but are an authoritative guide to the statute's construction. *Grove City College v. Bell*, 104 S.Ct. 1211, 1218 (1984). Statutory permission for an agency or official to "modify" does not authorize basic and fundamental changes in the scheme designed by Congress, and instead that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Biden v. Nebraska*, 143 S.Ct. 2355, 2368 (2023). Finally, agencies are not free to adopt unreasonable interpretations of statutory provisions and then edit the other statutory provisions to mitigate the unreasonableness. *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014).

Here, Defendants maintain they have this authority pursuant to 20 U.S.C. 1682.[63] That statute (in pertinent part) reads:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty is authorized and directed to effectuate the provisions of Section 1681 of this title with respect to such program or activity by issuing rules, regulations or orders of general applicability which shall be consistent with the achievement of the objectives of the

[62] *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587 (2022); *Biden v. Nebraska*, 143 S.Ct. 2355, 2374-75 (2023).
[63] 89 Fed. Reg. 33803

> statute authorizing the financial assistance in connection with which the action is taken.[64]

The Court finds that Congress did not give the Defendants "clear statutory authorization" to enact the Final Rule. Congress only gave Defendants the authority to issue rules, regulations, or orders to "effectuate the provisions of Section 1681" that "shall be consistent with the achievement of the objectives of the Statute." However, as discussed above, Defendants are attempting to circumvent Congress by using *Bostock* to make major changes in Title IX law. Such changes are inconsistent with the text, structure, and purpose of Title IX.

Accordingly, this Court finds that Defendants do not have the authority to enact regulations which change the meaning of "sex discrimination" to include gender identity, sexual orientation, sex stereotypes or sex characteristics.

2. The Final Rule's Conditions Violate the Spending Clause

Plaintiffs next argue that the Final Rule violates the Spending Clause because the Final Rule's conditions do not satisfy the elements imposed by Congress in the Spending Clause. The Spending Clause of the U.S. Constitution grants Congress the power to impose taxes and borrow money to "pay the Debts and provide for the … general welfare of the United States." U.S. Constitution, Art. I, Section 8, c1. 1. Legislation enacted pursuant to the Spending Clause is much in the nature of a contract. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). In return for federal funds, the State agrees to comply with federally imposed conditions. *Id.* However, the State must accept the terms of the contract voluntarily and knowingly. *Id*. If Congress intends to impose a condition, it must do so unambiguously. *Id*. By insisting Congress speak with a clear voice, the States can exercise their choice knowingly, cognizant with the consequences of their participation. *Id*.

[64] 20 U.S.C. 1682.

Although the federal government cannot control state conduct directly, Congress often uses its power to tax and spend as a work-around by offering federal funds in exchange for states establishing preferred programs or enacting favored laws. *West Virginia by and through Morrisey v. U.S. Dept. of the Treasury*, 59 F. 4th 1124, 1131 (11th Cir. 2023). In a pre-enforcement constitutional challenge, the injury-in-fact requirement can be satisfied by establishing a "realistic danger of sustaining direct injury" from the statute's operation or enforcement. *Id*. at 1137.

Further, conditioned funding grants enacted pursuant to the Spending Clause must satisfy five elements: (1) the expenditure must advance the general welfare; (2) any attached condition must be unambiguous; (3) conditions must relate to the federal interest in particular natural projects or programs; (4) conditions cannot violate another constitutional provision. In some circumstances, conditions cannot be so coercive that pressure turns into compulsion. If the first four elements are not satisfied, it is unconstitutional. *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987). Title IX is enacted pursuant to Congress' authority under the Spending Clause. *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 640 (1999).

Here, Plaintiffs argue the Final Rule violates the Spending Clause because it is ambiguous, contrary to the federal interest, would require participants to engage in unconstitutional activities, and is so coercive that it is compulsive. Plaintiffs contend that the term "sex discrimination" could not have provided the Plaintiffs with notice that the term "sex" included gender identity, sex characteristics, sexual orientation, or sex stereotypes. Defendants argue that *Bostock* should have provided notice to the Plaintiffs that "sex discrimination" also included gender identity, sex characteristics, sexual orientation, or sex stereotypes.

First, because Title IX was enacted pursuant to Congress' authority under the Spending Clause, the regulatory scheme must provide funding recipients with notice that they may be liable

for their failure to abide by the terms. *Davis Next Friend LaShonda D. v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 640, 643 (1999). As previously discussed, when Title IX was enacted in 1972, "sex discrimination" only referred to biological women and men. It did not include gender identity, sex characteristics, sexual orientation, or sex stereotypes. Also, as discussed, Title VII, which was at issue in *Bostock*, is much different than Title IX. Even though the Defendants had failed attempts to change the definition of "sex discrimination", proper notice was not given by Defendants to Plaintiffs.

Second, the regulatory scheme must also comply with the elements for conditioned funding grants. The Court ultimately finds that the Final Rule is ambiguous and thus violates the Spending Clause. The new regulation implemented by the Final Rule clearly changes the prior regulations. The Final Rule interprets the original wording of "sex discrimination" in 20 U.S.C. § 1981 to include sexual orientation, sex characteristics, sex stereotypes, and gender identity. The Final Rule also requires participants with knowledge of conduct that may reasonably constitute sex discrimination to report it to the Title IX Coordinator. The Final Rule interprets the statute to create new requirements for a "hostile work environment."

The Final Rule does not discuss the effect changing the interpretation will have on middle school, high school, and college sports. Consequently, a recipient could not have interpreted sexual discrimination to include gender identity prior to the Defendants' intended changes. The Final Rule is not a clarification of existing laws – it is a new law enacted by an administrative agency, not Congress. This Court thus finds the Final Rule ambiguous. Because the Court finds the Final Rule is ambiguous, the Court finds that it does not satisfy the elements of the Spending Clause, and thus, it violates the Spending Clause.

This Court finds the Final Rule violates the Spending Clause because it contains ambiguous conditions and because the Final Rule violates other constitutional provisions – free speech and free exercise. Because this Court has found the Final Rule violates the Spending Clause, there is no need to discuss the Plaintiffs' argument that the Final Rule violates the non-delegation doctrine.

3. Whether the Final Rule is an Unconstitutional Exercise of Legal Power

Plaintiffs also argue that because there was no true intelligible principle guiding the DOE's discretion, then the Final rule is an impermissible exercise of legal power. In support of this argument, Plaintiffs claim that if Congress delegated the authority to issue the Final Rule, which the Court found it did not, then the delegation would violate Article I and separation-of-powers principles. Because the Court finds that Congress did not impose this authority, an analysis on this argument is unnecessary.

4. Whether the Final Rule is Arbitrary and Capricious under the APA

Plaintiffs maintain the Final Rule is arbitrary and capricious in accordance with APA Title 5 U.S.C. § 706(2)(A). Courts presume that when an agency-administrated statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity. The question for a reviewing court is whether, in resolving the ambiguity, the agency acted reasonably and thus "stayed within the bounds of its statutory authority." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Even under *Chevron's* deferential framework, agencies must operate "within the bounds of reasonable interpretation." *Arlington v. FCC*, 133 U.S. 1863, 1868 (2015). Reasonable statutory interpretation must account for both "the special content in which the language is used" and "the broader content of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Thus, an agency interpretation that is inconsistent with the design and structure of the statute as a

whole does not merit deference. *University of Tex. Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2529 (2015).

Federal administrative agencies are required to engage in "reasoned decision making." *Allentown Mack Sales & Service, Inc., v. NLRB,* 522 U.S. 359, 374 (1998). Not only must an agency's decreed result be within the scope of its lawful authority but also the process by which it reaches that result must be logical and rational. *Michigan v. E.P.A.,* 576 U.S. 743, 750 (2015). Agency action is lawful only if it rests on a consideration of the relevant factors. *Id.* An agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. *Utility,* 573 U.S. 302, 328. Agencies are not free to adopt unreasonable interpretations of statutory provisions and then edit other interpretations of statutory provisions to mitigate the unreasonableness. *Id*.

Plaintiffs contends the Defendants were not authorized to enact the Final Rule, the process was not rational and lawful, and the Final Rule is inconsistent with Title IX.

To decide whether agency action is arbitrary and capricious, courts begin by asking whether "an agency articulated a rational connection between the facts found and the decision made." *Louisiana v. United States Department of Energy*, 90 F.4th 461, 469 (5th Cir. 2024) (citing *ExxonMobil Pipeline Co. v. DOT*, 867 F.3d 564, 571 (5th Cir. 2017)). We then ask if the agency's reasoning "fails to account for relevant factors or evinces a clear error of judgment." *Id.* An agency must display awareness that it is changing position. *Id.* When an agency changes position, such changes require a careful comparison of the agency's statements to ensure that the agency has recognized the change, reasoned through it without factual or legal error, and balanced all relevant interests affected by the change. *Id.* In sum, an administrative agency's actions are arbitrary and capricious if the agency has: (1) relied on factors which Congress had not intended for it to

consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) is so implausible that it could not be ascribed to a difference in view of the product of agency expertise. *Id*.

This Court has found that the Defendants did not have congressional authority to enact the Final Rule and that the Final Rule violates Free Speech rights, Free Exercise rights, and the Spending Clause. This Court further finds that the Final Rule is arbitrary and capricious because the DOE (1) failed to address relevant factors and (2) and failed to consider important aspects of the problem. The Court shall address each in turn.

1. DOE's Failure to Address Relevant Factors

The Court finds that the DOE failed to consider several relevant factors when drafting the Final Rule. These multiple failures indicate that the Final Rule is arbitrary and capricious.

First, Defendants failed to include any requirements for changing one's gender identity and did not include any guidance for addressing "non-binary" students or students with other gender identities.[65] A "gender fluid"[66] person could possibly change gender identities every day or several times per day. The Final Rule prohibits recipients from enacting common-sense rules to make sure the person who changed gender identities is sincere. Allowing a student to announce what gender they are, without requiring any supporting documentation, is arbitrary and capricious.

Second, Defendants failed to consider that biological females and biological males that identify as females have different body parts. Nearly every civilization recognizes a norm against exposing one's unclothed body to the opposite sex. *Doe v. Luzerne Cnty*., 660 F.3d 169, 176 (3rd

[65] Any gender that falls outside of the binary system of male/female or man/woman. *Adams*, supra note 31.
[66] A "gender fluid" person is a person who does not identify with a single fixed gender and expresses a fluid or unfixed gender identity. One's expression of identity is likely to shift and change depending on context. Cydney Adams, The Gender Identity Terms You Need To Know, CBS INTERACTIVE, INC., March 24, 2017.

Cir. 2011). Yet, Defendants did not consider these cultural norms or the reasons such norms are so prevalent when adopting the Final Rule.

Third, the Defendants failed to consider the effect of the additional costs on the recipient schools and only gave those schools three months to comply. However, compliance requires recipient schools to hire a Title IX Coordinator, redesign locker rooms and bathrooms, provide training to all staff and students,[67] and likely pay much higher liability insurance premiums. The increased liability exposure for placing biological males who identify as females, and vice versa, into women's locker rooms and bathrooms will likely greatly increase insurance premiums, if covered at all. The Final Rule did not even consider or discuss these additional construction and insurance costs.

Fourth, Defendants failed to consider the Final Rule's effect on the Exemptions[68] that allow males and females to be separated. The only reference to the application of the new definitions discussed in 34 C.F.R. 106.31(2) is ambiguous. It states:

> (2) In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimus harm except as permitted by 20 U.S.C. § 1681(a)(1) through (9) and the corresponding regulations.

The Court questions how this regulation affects Title IX's Exemptions for fraternities and sororities, voluntary youth organizations, public colleges that have traditionally only admitted students of one sex, beauty pageants, and other exemptions. The language refers to the Exemptions that allow separation on the basis of sex but then states any sex separation cannot be done if it subjects a person to "more than de minimis harm." It makes the Exemptions meaningless. It

[67] See FN 50
[68] See Section II.

arguably changes the law in the Title IX Exemptions where the Exemptions cannot be relied on to allow sex separation. It is ambiguous and therefore arbitrary and capricious.

Finally, despite receiving more than 240,000 comments, including numerous comments opposing the proposed rule,[69] Defendants only made minor changes to the proposed rules. Many of the comments pointed out the problems the Final Rule had, including, but not limited to, no authority, ambiguity, violation of the Spending Clause, violation of First Amendment Free Speech and Free Exercise rights, and lack of religious exemptions. Despite the comments, the Final Rule did not change anything regarding those issues.

2. DOE's Failure to Consider Important Aspects of the Problem

The Court finds that the DOE failed to consider several important aspects of the problems with the Final Rule.

Title IX was enacted for the protection of the discrimination of biological females. However, the Final Rule may likely cause biological females more discrimination than they had before Title IX was enacted. Importantly, Defendants did not consider the effect the Final Rule would have on biological females by requiring them to share their bathrooms and locker rooms with biological males. The Final Rule only focuses on the "effect on the student who changes their gender identity" and fails to address the effect on the other students ("cisgender students"). These cisgender females must use the bathroom, undress, and shower in the presence of persons who may identify as females but still have male biological parts. Many of these students are minors. The DOE made no attempt to determine the effect on students having students who are biologically

[69] 89 Fed. Reg. 33477.

the opposite sex in their locker rooms and bathrooms. Instead, the DOE declared in the Final Rule, with no explanation, that transgender students do not pose a safety risk for cisgender students.[70]

Further, by allowing biological men who identify as a female into locker rooms, showers, and bathrooms, biological females risk invasion of privacy, embarrassment, and sexual assault. Further, by not requiring medical or other documentation to verify that biological men actually identify as females, the only Final Rule requirement is for a person to simply declare they have changed gender identities. This protocol likewise places biological females at risk. After that declaration is made, these schools are prohibited from questioning the sincerity of the new gender identity. The school cannot require any documentation to prove the sincerity of the gender change, i.e., doctor diagnosis. The school also must use the pronouns required by the student that changes gender. Allowing a biological male student to change to a female by simply declaring it, requiring no documentation of the change, and allowing the student to shower with cisgender females in the girls' locker room goes beyond the scope of arbitrary and capricious.

It is unambiguous that when Title IX was enacted, under the Supreme Court canons of construction, "sex discrimination" referred to biological females and males. "Sex discrimination" did not refer to gender identity, sex stereotypes, sex characteristics, or sexual orientation. Yet, this fact was ignored and not considered by Defendants.

This Court finds the Final Rule is arbitrary and capricious pursuant to Title 5 U.S.C. § 706(2)(A).

In sum, Plaintiffs have demonstrated that they are likely to succeed on the merits for their claims that the (1) the Final Rule is contrary to law and exceeds statutory authority; (2) the Final

[70] 89 Fed. Reg. 33820

Rule's conditions violate the spending clause; (3) the Final Rule is an unconstitutional exercise of legislative power; and (4) the Final Rule is arbitrary and capricious.

Accordingly, the first element for a preliminary injunction is satisfied.

b. Irreparable Harm

The second requirement for a Preliminary Injunction is a showing of "a substantial threat of irreparable injury" if the injunction is not issued. *Texas*, 809 F.3d at 150. For injury to be "irreparable," plaintiffs need only show it cannot be undone through monetary remedies. *Burgess v. Fed. Deposit Inc., Corp.*, 871 F.3d 297, 304 (5th Cir. 2017). Deprivation of a procedural right to protect a party's concrete interests is irreparable injury. *Texas*, 933 F.3d at 447. Additionally, violation of a First Amendment constitutional right, even for a short period of time, is always irreparable injury. *Elrod v. Burns*, 427 U.S. at 347, 373 (1976). Finally, costs for expanded recordkeeping requirements, expanded training requirements, and other compliance costs and imminent threats of costs that cannot be recovered also constitute irreparable harm. *Career Colleges and Schools of Texas v. United States Dept. of Educ.,* 98 F.4th 220, 235-38 (5th Cir. 2024).

Defendants argue Plaintiffs have not shown irreparable harm because there is only a possibility of irreparable harm and because the compliance costs are necessary and do not justify a preliminary injunction.

The Court finds that Plaintiffs demonstrated a "significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc., v. Jackson*, 804 F.2d 1390, 1394 (5th Cir. 1986). To demonstrate irreparable harm at the preliminary injunction stage, Plaintiffs must adduce evidence showing that the irreparable injury is likely to occur during the pendency of the litigation. *Justin Indus. Inc.*, v. *Choctaw Secs., L.P.*, 920 F.2d 262, 268 n. 7 (5th Cir. 1990). Plaintiffs satisfied this requirement

and showed that irreparable injury is likely to occur during the pendency of the litigation. This Court finds that the alleged past actions of Defendants show a substantial risk of harm that is not imaginary or speculative. *SBA List*, 573 U. S. at 164. Based upon the Affidavits and Declarations of Plaintiffs, the compliance costs, the short time Plaintiffs have to comply, and the substantial likelihood of the violations of First Amendment rights and violations of the Spending Clause, Plaintiffs have shown irreparable harm. Despite the Defendants' assertion that the compliance costs are minimal, the Defendants have provided no evidence to dispute both construction and compliance costs. The State Plaintiffs have also shown irreparable harm in violation of First Amendment rights, preemption of state laws, loss of Title IX federal funds, pressure to change their laws, and invasion of state sovereignty.

c. Equitable Factors and Public Interest

Plaintiffs must also demonstrate that the threatened harm outweighs any harm that may result to the Federal Defendants and that the injunction will not undermine the public interest. *Valley v. Rapides Par. Sch. Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997). These two factors overlap considerably. *Texas*, 809 F.3d at 187. In weighing equities, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The public interest factor requires the court to consider what public interests may be served by granting or denying a preliminary injunction. *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 997–98 (8th Cir. 2011).

The balance of equities and public interest strongly favors Plaintiffs. A preliminary injunction would simply keep the status quo. There are strong arguments by Plaintiffs that Free

Speech and Free Exercise rights are being violated. Keeping the status quo is necessary in light of a serious question of whether Defendants had Congressional authority to enact the Final Rule.

Defendants maintain equitable considerations favor Defendants because granting a preliminary injunction would significantly harm the government's intentions in preventing discrimination in educational programs and activities. However, the Defendants are responsible for a significant change in the status quo and for the short three-month deadline they gave the Plaintiffs to comply. Equity is not in Defendants' favor.

Because Plaintiffs met all the elements necessary to show entitlement to a preliminary injunction, this Court shall issue said injunction against the Defendants herein. There are presently at least six other cases considering this issue in other courts.[71] It would be appropriate for this Court to allow those proceedings to be decided in their respective courts. Therefore, this Preliminary Injunction will be limited to the States of Louisiana, Mississippi, Montana, and Idaho.

V. CONCLUSION

This case demonstrates the abuse of power by executive federal agencies in the rulemaking process. The separation of powers and system of checks and balances exist in this country for a reason.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Montesquieu, The Spirit of the Laws (1748).

[71] State where proceeding filed is listed first. (1) Kentucky, Tennessee, Indiana, Ohio, West Virginia, and Virginia; (2) Texas; (3) Alabama, Florida, Georgia, South Carolina; (4) Kansas, Alaska, Utah, and Wyoming; (5) Oklahoma; and (6) Missouri, Arkansas, Iowa, Nebraska, North Dakota, and South Dakota.

Since 2020, the United States Supreme Court has vacated executive agency rules numerous times.[72] Both the Legislative Branch and Judicial Branches have the power to stop the abuse of power. The Judicial Branch can vacate rules that are beyond the executive agencies' authority,[73] but only after a suit is filed.

The abuse of power by administrative agencies is a threat to democracy.

Accordingly, and for the reasons set forth herein,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Preliminary Injunctions [Doc. Nos. 17 and 27] filed by Louisiana Plaintiffs and by Rapides is **GRANTED.**

IT IS FURTHER ORDERED that the UNITED STATES DEPARTMENT OF EDUCATION, THE OFFICE OF CIVIL RIGHTS, THE UNITED STATES DEPARTMENT OF JUSTICE, MIGUEL CARDONA, SECRETARY OF THE U.S. DEPARTMENT OF EDUCATION, CATHERINE LHAMON, ASSISTANT SECRETARY OF THE OFFICE OF CIVIL RIGHTS, MERRICK D. GARLAND, ATTORNEY GENERAL OF THE STATES, along with their secretaries, directors, administrators, and employees, **ARE HEREBY ENJOINED AND RESTRAINED from implementing, enacting, enforcing and taking action in any manner to enforce the FINAL RULE**, NONDISCRIMINATION ON THE BASES OF SEX IN EDUCATION PROGRAM ACTIVITIES RECEIVING FINANCIAL ASSISTANCE, 89 Fed. Reg. 33474 (April 29, 2024), which is scheduled to go into effect on August 1, 2024.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the FINAL RULE entitled NONDISCRIMINATION ON THE BASIS OF SEX, IN EDUCATION PROGRAM

[72] *Ala. Ass'n. of Realtors v. Dep't. of Health & Human Services*, 141 S.Ct 2485 (2021); *National Federation of Independent Businesses v. OSHA*, 142 S.Ct. 661(2022); *West Virginia v. EPA*, 142 S.Ct. 2587 (2022); and *Biden v. Nebraska*, 143 S.Ct. 2355 (2023).

[73] The Supreme Court implemented the major questions doctrine to prohibit executive agencies from making rules that are of vast economic and political significance.

ACTIVITIES RECEIVING FINANCIAL ASSISTANCE, 89 Fed. Reg. 33474 (April 27, 2024) is **HEREBY ENJOINED AND RESTRAINED** from going into effect on August 1, 2024, pending further orders of the Court.

This Injunction is limited to the States of Louisiana, Mississippi, Montana, and Idaho.

IT IS FURTHER ORDERED that no security is required to be posted by Louisiana Plaintiffs or Rapides under Federal Rule of Civil Procedure 65.

IT IS FURTHER ORDERED that this Preliminary Injunction Order shall remain in effect pending the final resolution of this case, or until further orders from this Court, the United States Court of Appeal, for the Fifth Circuit, or the Supreme Court of the United States.

IT IS FURTHER ORDERED that no evidentiary hearing is required at this time.

MONROE, LOUISIANA, this 13th day of June 2024.

TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF EDUCATION *et al.*, *Defendants*.	No. 24-cv-563
RAPIDES PARISH SCHOOL BOARD, *Plaintiff*, v. U.S. DEPARTMENT OF EDUCATION *et al.*, *Defendants*.	No. 24-cv-567

DEFENDANTS' MOTION FOR A PARTIAL STAY PENDING APPEAL

Defendants respectfully move this Court for a partial stay of this Court's June 13, 2024, Memorandum Ruling, ECF No. 53, pending appeal to the United States Court of Appeals for the Fifth Circuit. The basis for Defendants' motion is set forth in the attached Memorandum. A proposed order is also attached. Undersigned counsel for Defendants has conferred with counsel for Plaintiffs, who indicated that Plaintiffs in each case oppose Defendants' motion.

Dated: June 24, 2024

Respectfully submitted,

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/s/ *Pardis Gheibi*

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CERTIFICATE OF CONFERENCE

I certify that on June 21, 2024, I conferred via e-mail with counsel for Plaintiffs in the above-captioned cases about this motion. By email on June 21, 2024, Louisiana Solicitor General J. Benjamin Aguiñaga and Natalie Thompson, Senior Counsel, Alliance Defending Freedom, informed me via email that Plaintiffs in each case oppose the relief sought. Specifically, Mr. Aguiñaga stated, "Plaintiffs in No. 24-cv-563 oppose the motion you describe." Ms. Thompson stated "Rapides Parish School Board is also opposed."

/s/ *Pardis Gheibi*

CERTIFICATE OF SERVICE

I certify that on June 24, 2024, the above document was filed with the CM/ECF filing system.

/s/ *Pardis Gheibi*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF EDUCATION *et al.*, *Defendants*.	No. 24-cv-563
RAPIDES PARISH SCHOOL BOARD, *Plaintiff*, v. U.S. DEPARTMENT OF EDUCATION *et al.*, *Defendants*.	No. 24-cv-567

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR A PARTIAL STAY PENDING APPEAL

Defendants respectfully request that this Court issue a partial stay, pending appeal, of this Court's June 13, 2024, Memorandum Ruling, ECF No. 53 ("Mem. Ruling"), which enjoined the Department of Education from enforcing its April 29, 2024, Final Rule in the plaintiff States. Plaintiffs' request for preliminary relief challenged only a handful of provisions of the Final Rule, all relating to the Rule's application of Title IX's prohibition against sex discrimination to transgender individuals. Even then, the allegations of harm underpinning Plaintiffs' claims concerned only the application of two discrete provisions—34 C.F.R. § 106.31(a)(2) and the

definition of "hostile environment harassment" within 34 C.F.R. § 106.2—that govern particular factual contexts in which recipients may differentiate students based on sex, such as by providing sex-separated bathrooms and using sex-specific pronouns. Importantly, no Plaintiff establishes any harm stemming from the Rule's basic nondiscrimination requirement in 34 C.F.R. § 106.10, which precludes recipients from denying students educational opportunities "simply for being . . . transgender." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 651 (2020). As such, Defendants request that this Court stay the injunction insofar as it extends beyond the following provisions of the 2024 Rule: 34 C.F.R. § 106.31(a)(2), and the hostile environment harassment definition in 34 C.F.R. § 106.2 as applied to discrimination on the basis of gender identity.

LEGAL STANDARD

Courts consider four factors in assessing the propriety of granting a motion for stay pending appeal: (1) the movant's likelihood of prevailing on the merits of the appeal, (2) whether the movant will suffer irreparable damage absent a stay, (3) the harm that other parties will suffer if a stay is granted, and (4) the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). When the Government is a party, its interests and the public interest overlap in the balancing of harms. *See Nken v. Holder*, 556 U.S. 418, 420 (2009).

ARGUMENT

I. The Injunction Is Overbroad.

The injunction in this case is overbroad, at minimum, because it reaches provisions of the Rule that were not challenged by Plaintiffs and that did not form the basis for any alleged irreparable injury underlying their request for preliminary relief. On appeal, Defendants will show that the Court's injunction cannot be squared with Title IX's plain text and Supreme Court

precedent. Defendants recognize that this Court has rejected their arguments. Accordingly, Defendants refrain from reiterating each of their arguments in detail here, and instead incorporate their previously filed opposition to the preliminary injunction motion by reference. *See* Defs.' Consol. Opp'n to Pls.' Mot. for Prelim. Inj. & § 705 Stay, ECF No. 38. But even apart from Defendants' argument on the merits of their defense to all parts of the Rule, they have a strong likelihood of succeeding in establishing at a minimum that the injunction the Court entered was overbroad, based on well-established remedial principles and the Rule's express severability provisions. In this stay motion, Defendants seek only narrower relief, asking that this Court stay the injunction to the extent it sweeps broader than necessary to "redress the plaintiff[s'] particular injur[ies]" asserted here, *Gill v. Whitford*, 585 U.S. 48, 73 (2018)—that is, to the extent it extends beyond the following provisions of the 2024 Rule: (i) 34 C.F.R. § 106.31(a)(2), and (ii) the hostile environment harassment definition in 34 C.F.R. § 106.2, as applied to discrimination on the basis of gender identity.

A. The Injunction Is Overbroad Because It Reaches Provisions of the Rule Not Challenged by Plaintiffs.

As Plaintiffs' filings make clear, their claims—and the purported harms underlying those claims—are grounded in objections to the Rule's treatment of gender identity. Compl. ¶ 3, *Louisiana v. U.S. Dep't of Educ.*, 3:24-cv-00563 (April 29, 2024), ECF No. 1 (characterizing as the Rule's "central feature" the Department's "move to transform Title IX's prohibition on discrimination based on 'sex' to include discrimination based on 'gender identity'"); Compl. ¶ 64 *Rapides Parish Sch. Bd. v. U.S. Dep't of Edu.*, 1:24-cv-00567 (April 30, 2024), ECF No. 1 (challenging the Rule's "gender-identity mandates"). In particular, Plaintiffs take issue with applications of three specific provisions of the Rule: the scope of prohibited discrimination in § 106.10; the de minimis harm standard in § 106.31(a)(2); and the definition of hostile

environment harassment in § 106.2. *See* Mem. in Supp. of Mot. for Postponement or Stay Under 5 U.S.C. § 705 or a Prelim. Inj. 8-10, ECF No. 24 ("States Mot."); SBRP Mem. in Supp. of Mot. To Delay Effective Date & for Prelim. Inj. 4-7, ECF No. 11-1 ("SBRP Mot."). The Court likewise focused on the effect of these provisions in enjoining the Rule. Mem. Ruling 17-36.

However, the Rule promulgates many amendments to Title IX's existing regulations beyond those challenged by Plaintiffs, most of which have nothing to do with gender identity. These include, for example, provisions regarding the role of Title IX coordinators, 89 Fed. Reg. at 33,885 (34 C.F.R. § 106.8(a)); recipients' notice and record-keeping obligations, *id.* at 33,885-86 (34 C.F.R. § 106.8(c), (f)); access to lactation spaces, *id.* at 33,888 (34 C.F.R. § 106.40(b)(3)(v)); a recipient's response to sex discrimination, *id.* at 33,888-91 (34 C.F.R. § 106.44); and grievance procedures for claims of sex discrimination, *id.* at 33,891-95 (34 C.F.R. §§ 106.45, 106.46). Plaintiffs did not challenge any of these provisions in their request for preliminary injunctive relief, and did not identify any harm, irreparable or otherwise, that they stand to suffer as a result of these aspects of the Rule. Thus, the Court's injunction was overbroad in sofar as it reached these other portions of the Rule.

B. Even as to the Challenged Provisions, the Injunction Is Overbroad.

The Court's injunction also is overbroad even as to the handful of provisions Plaintiffs challenged. Most notably, the injunction is overbroad in extending to § 106.10. Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a), and § 106.10 sets out the scope of that general prohibition, explaining that "[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," 89 Fed. Reg. at 33,886. Plaintiffs allege no harm from the Rule's recognition that prohibited discrimination includes discrimination on the bases of such factors as

pregnancy or sexual orientation; indeed, Plaintiffs nowhere suggest that they intend to engage in discrimination against students for being pregnant or gay at all. Plaintiffs thus offer no reason to enjoin these aspects of § 106.10.

Even as to § 106.10's inclusion of gender identity, Plaintiffs do not suggest that an injunction is necessary because they intend to treat transgender students worse for being transgender. They do not, for instance, claim that they will be irreparably harmed if they cannot bar transgender students from participating in the science fair or a theatrical production simply for being transgender, forms of sex discrimination that the Department's Title IX regulations would not expressly bar if § 106.10's definition were to be enjoined. Rather, Plaintiffs object to the Rule's provisions regarding gender identity as applied to sex-separate facilities like bathrooms and the use of pronouns when addressing transgender students. *See* States Mot. 1-2; SBRP Mot. 3-7. But § 106.10 is not the cause of Plaintiffs' claimed harms in those respects, which flow from the provisions of § 106.31(a)(2) regarding permissible sex-separation and § 106.2's definition of hostile environment harassment.

Section 106.10, like *Bostock*, simply recognizes that discrimination on the basis of gender identity is necessarily a form of prohibited sex discrimination, without "purport[ing] to address bathrooms, locker rooms," 590 U.S. at 681, or other contexts in which sex-based different treatment or separation may be permitted under Title IX. Accordingly, Plaintiffs offer no rationale that could support enjoining § 106.10, which the Department also specifically explained should operate independently if other provisions of the Rule were invalidated. *See* 89 Fed. Reg. at 33,848 (identifying § 106.10 in its severability discussion as an example of a provision "intended to operate independently" of other provisions in the Rule, and in particular noting that it is "distinct"

from the Rule's definition of "sex-based harassment . . . and the prevention of participation consistent with gender identity, which are addressed in §§ 106.2 and 106.31(a)").

The injunction is also overbroad insofar as it bars all applications of § 106.2's definition of hostile environment harassment. Plaintiffs object to the application of the harassment standard as applied to gender identity discrimination. States Mot. 1-2; SBRP Mot. 6-7; *see also* Mem. Ruling 22. But § 106.2's hostile environment harassment standard applies beyond that limited context. Indeed, it protects all students from "[u]nwelcome sex-based conduct." 89 Fed. Reg. at 33,884. Plaintiffs did not identify any way in which they face irreparable harm from § 106.2's applications outside the context of discrimination on the basis of gender identity. There is no basis for enjoining those applications, which are not an asserted cause of Plaintiffs' claimed injuries.

II. The Balance of Harms and the Public Interest Favor a Partial Stay.

The remaining stay factors tilt decisively toward the Department. Every time the federal government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citation omitted). The harm is particularly pronounced here because the Rule effectuates Title IX's twin goals of "avoid[ing] the use of federal resources to support discriminatory practices [and] provid[ing] individual citizens effective protection against those practices." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979). No one disputes that preventing discrimination serves a compelling public interest. *See EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 798 (5th Cir. 2016). Moreover, the overbroad injunction could prematurely impair the rights of individuals with respect to the Rule's provisions that are entirely unrelated to Plaintiffs' claims by precluding the Department from taking steps to ensure that, *inter alia*, breastfeeding and pumping students have access to lactation spaces or that students are not being

punished for being pregnant, gay, or transgender. By contrast, Plaintiffs suffer no harm from the Department's limited stay request. As discussed above, Plaintiffs plainly suffer no harm from the many provisions of the Rule that they did not challenge. As to the limited provisions Plaintiffs have challenged, they identify no harm from the application of those provisions in the mine-run of circumstances. Accordingly, the harms that formed the basis for the Court's issuance of preliminary relief are not implicated here, and, in any event, do not outweigh the harm to the Department from an overbroad injunction.

CONCLUSION

The Court should stay its preliminary injunction to the extent it extends beyond the following provisions of the 2024 Rule: (i) 34 C.F.R. § 106.31(a)(2), and (ii) the "hostile environment harassment" definition in 34 C.F.R. § 106.2, as applied to discrimination on the basis of gender identity.

Under Rule 8 of the Federal Rules of Appellate Procedure, a party seeking to stay an injunction pending appeal ordinarily must first seek such relief in the district court. Accordingly, Defendants respectfully request that the Court rule on this motion by 12:00 noon on July 1, 2024, after which Defendants plan to seek relief in the Court of Appeals should the Court fail to grant this motion.

Dated: June 24, 2024

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA *et al.*, *Plaintiffs*, v. U.S. DEPARTMENT OF EDUCATION *et al.*, *Defendants*.	No. 24-cv-563
RAPIDES PARISH SCHOOL BOARD, *Plaintiff*, v. U.S. DEPARTMENT OF EDUCATION *et al.*, *Defendants*.	No. 24-cv-567

[PROPOSED] ORDER

Upon consideration of Defendants' Motion for a Partial Stay Pending Appeal, IT IS HEREBY ORDERED that the Motion is GRANTED. The preliminary injunction entered in the Court's June 13, 2024, Memorandum Ruling (ECF No. 53) and Judgment (ECF No. 54) is hereby stayed pending Defendants' appeal thereof to the United States Court of Appeals for the Fifth Circuit, except as to the following provisions of the 2024 Rule: (i) 34 C.F.R. § 106.31(a)(2), and (ii) the "hostile environment harassment" definition in 34 C.F.R. § 106.2, as applied to discrimination on the basis of gender identity.

DATE: _____

_____
HON. TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

MINUTE ENTRY
TERRY A. DOUGHTY
U.S. DISTRICT JUDGE
June 26, 2024

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 3:24-CV-00563 LEAD**
VERSUS	**JUDGE TERRY A. DOUGHTY**
U S DEPT OF EDUCATION ET AL	**MAG. JUDGE KAYLA D. MCCLUSKY**

On June 24, 2024, Defendants filed a Motion to Stay Order on Motion for Preliminary Injunction [Doc. No. 59].

Plaintiffs shall have until Monday, July 1, 2024, at 5:00 p.m. C.D.T. to file a Response. Defendants may file a Reply by Wednesday, July 3, 2024, at 5:00 p.m. C.D.T.

TAD

TAD

No. 24-30399

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF EDUCATION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A PARTIAL STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required under Fifth Circuit Rule 28.2.1 as appellants are all governmental parties.

s/Jack Starcher
Jack Starcher

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INTRODUCTION AND SUMMARY

Title IX prohibits sex discrimination in federally funded education programs and activities. As the Supreme Court has made clear, "Congress gave the statute a broad reach" to cover a "wide range of intentional unequal treatment." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005). Congress also tasked the Department of Education with issuing rules to effectuate the statute's broad prohibition on sex discrimination.

Pursuant to that delegated authority, the Department promulgated a rule in April 2024 making a variety of amendments to Title IX's regulations. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024). Those amendments do many things, ranging from revising record-keeping requirements to guaranteeing access to lactation spaces to breastfeeding students. Plaintiffs do not challenge the vast majority of those changes.

Instead, plaintiffs' request for a preliminary injunction challenged provisions relating to the Rule's application of Title IX's prohibition against sex discrimination to transgender individuals. Even then, the allegations of harm underpinning plaintiffs' claims concern only the application of two discrete provisions—34 C.F.R. § 106.31(a)(2) and the definition of "hostile environment harassment" within 34 C.F.R. § 106.2—to particular contexts, primarily focusing on ways in which recipients may differentiate students based on sex, such as by providing sex-separate bathrooms and using gendered pronouns. Importantly, no plaintiff establishes any harm stemming

from the Rule's basic antidiscrimination requirement in 34 C.F.R. § 106.10, which precludes recipients from denying students educational opportunities "simply for being … transgender." *Bostock v. Clayton County*, 590 U.S. 644, 651-52 (2020).

The district court nonetheless preliminarily enjoined enforcement of the entire Rule within the plaintiff States, without even considering the Department's express determination that provisions of the Rule could operate independently and the severability provisions within the Rule itself. The court's sweeping injunction—extending far beyond the challenged provisions that cause plaintiffs' putative harms—contravenes bedrock principles requiring that equitable relief be "tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018). The court plainly erred in enjoining the provisions of the Rule that plaintiffs do not argue are unlawful. The court also erred in enjoining the challenged provisions in a manner reaching far beyond any correlation with plaintiffs' claims of harm.

On appeal, the Department will show that the court's injunction cannot be squared with Title IX's plain text and Supreme Court precedent. In this interim posture, however, the Department seeks only narrower relief to vindicate core, equitable limitations on the scope of injunctive relief, asking that this Court stay the injunction to the extent it sweeps broader than necessary to "redress the plaintiff[s'] particular injur[ies]" asserted here, *Gill*, 585 U.S. at 73—that is, to the extent it extends beyond the following 2024 Rule's provisions: (i) 34 C.F.R. § 106.31(a)(2), and (ii) 34

C.F.R. § 106.2's definition of "hostile environment harassment" as applied to discrimination on the basis of gender identity.

The Department is likely to succeed in showing the injunction is overbroad. And absent a partial stay, the district court's sweeping injunction will irreparably harm the Department's interest in stamping out sex discrimination and the public interest in ensuring that educational programs and activities are free from such discrimination. In contrast, plaintiffs will suffer no harm from the Department's requested stay.

The Rule's effective date is August 1. The Department respectfully requests a decision on this request by July 12 to allow the Solicitor General to decide whether to seek relief from the Supreme Court—and to allow the Court to consider any such request—if this Court denies relief.[1]

STATEMENT

A. Title IX and The Final Rule

Title IX provides that "[n]o 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 education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "Congress gave the statute['s]" prohibition on sex discrimination "a broad reach" subject only to a "list of narrow" statutory exclusions. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 175 (2005); *see* 20 U.S.C.

[1] Defendants filed a motion seeking identical relief from the district court on June 24. We will notify this Court if the district court acts on that motion.

§§ 1681(a), 1686. Congress also authorized the Department to "issu[e] rules, regulations, or orders of general applicability" to "achieve[] the objectives of the statute." 20 U.S.C. § 1682. And Congress established a detailed administrative scheme authorizing the Department to suspend or terminate federal financial assistance, or secure compliance by "any other means authorized by law," if it cannot secure voluntary compliance through informal means. *See id.* §§ 1234g(a), 1682-1683; *see also* 34 C.F.R. §§ 100.7(a)-(d), 100.8(a).

Since Title IX's enactment, the Department has regularly exercised its authority to promulgate regulations implementing the statute's prohibition on sex discrimination. It did so again in promulgating the Rule, 89 Fed. Reg. at 33,759, which makes a variety of changes to its current Title IX regulations, *id.* at 33,882-96. Among other things, the Rule streamlines administrative requirements related to the appointment and responsibilities of Title IX coordinators, *id.* at 33,885 (to be codified at 34 C.F.R. § 106.8(a)); revises recipients' notice of nondiscrimination and record-keeping requirements, *id.* at 33,885-86 (to be codified at 34 C.F.R. § 106.8(c), (f)); ensures access to lactation spaces for breastfeeding students, *id.* at 33,888 (to be codified at 34 C.F.R. § 106.40(b)(3)(v)); addresses a recipient's response to sex discrimination, *id.* at 33,888-91 (to be codified at 34 C.F.R. § 106.44); and provides additional flexibility in the development and implementation of procedures to respond to claims of sex discrimination, including sex-based harassment, *id.* at 33,888-95 (to be codified at 34 C.F.R. §§ 106.45-106.46).

This litigation concerns other provisions of the Rule. Section 106.10 delineates the scope of prohibited sex discrimination under Title IX. It provides that "[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." 89 Fed. Reg. at 33,886. As the Department explained, "discrimination on each of those bases is sex discrimination because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or 'biological distinctions between male and female.'" *Id.* at 33,802 (quoting *Bostock v. Clayton County*, 590 U.S. 644, 655 (2020)).

Separately, § 106.31(a)(2) details when otherwise permissible separation or differentiation on the basis of sex constitutes prohibited sex discrimination. It sets out the general principle that Title IX permits "different treatment or separation on the basis of sex" only to the extent that such differential treatment does not "discriminate[] ... by subjecting a person to more than de minimis harm." 89 Fed. Reg. at 33,887. The final sentence of § 106.31(a)(2) concerns a specific application of that principle, providing that a policy or practice that "prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex." *Id.* This provision also recognizes, however, that Congress specified certain contexts in which a school may permissibly differentiate on the basis of sex, even though greater-than-de-minimis harm may result. *See* 89 Fed. Reg. at 33,816; *see, e.g.*, 20 U.S.C.

§ 1681(a)(6) (fraternities or sororities); § 1686 ("separate living facilities"); 34 C.F.R. 106.41(b) (sex-separate athletic teams). The Rule does not alter the existing athletics regulations, which are the subject of a separate rulemaking. *See* 89 Fed. Reg. 33,817.

Lastly, § 106.2 defines many terms, including prohibited "sex-based harassment." One form of such harassment is "[h]ostile environment harassment," defined as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)." 89 Fed. Reg. at 33,884.

B. Prior Proceedings

Plaintiffs are Louisiana, Mississippi, Montana, and Idaho, as well as the Louisiana Department of Education and the School Board of Rapides Parish (SBRP).[2] Plaintiffs challenge the Rule's treatment of gender identity, claiming that the application of certain Rule provisions to contexts such as bathrooms and pronouns will cause them irreparable harm. *See* Dkt. No. 18-1, at 3-7 (States Mot.); Plaintiff's Memorandum in Support of Motion to Delay Effective Date and for Preliminary Injunction at 1, 3-7, *Rapides Par. Sch. Bd. v. U.S. Dep't of Educ.*, 1:24-cv-00567 (W.D. La.

[2] The court below consolidated the suit brought by SBRP with the suit brought by the plaintiff States and the Louisiana Department of Education. Dkt. No. 25. The court granted both sets of plaintiffs injunctive relief. Dkt. No. 53, at 3-4.

May 14, 2024), Dkt. No. 11-1 (SBRP Mot.). Plaintiffs sought preliminary injunctive relief against the Rule.[3]

On June 13, 2024, the district court entered a preliminary injunction barring the Department from enforcing all aspects of the Rule within the plaintiff States. Dkt. No. 53, at 39-40 (Op.). The court held that the inclusion of gender identity in the scope of prohibited sex discrimination was contrary to Title IX, reasoning that "'sex discrimination' clearly include[s] only discrimination against biological males and females." Op. 21. The court rejected the Department's reliance on *Bostock*, which it concluded "does not apply to Title IX." Op. 19. The court noted that "*Bostock* dealt with Title VII" and reasoned that "the purpose of Title VII to prohibit discrimination in hiring is different than Title IX's purpose to protect biological women from discrimination in education." Op. 21.

For similar reasons, the district court concluded that the major-questions doctrine and Spending Clause required clearer congressional authorization for the Rule. Op. 23-30. The court reasoned that the inclusion of gender identity in the scope of prohibited discrimination implicated questions of "vast economic and

[3] Others have also challenged the Rule. *See Texas v. United States*, No. 2:24-cv-86 (N.D. Tex. filed Apr. 29, 2024); *Alabama v. Cardona*, No. 7:24-cv-533 (N.D. Ala. filed Apr. 29, 2024); *Tennessee v. Cardona*, No. 2:24-cv-72 (E.D. Ky. filed Apr. 30, 2024); *Oklahoma State Dep't of Educ. v. United States*, No. 5:24-cv-459 (W.D. Okla. filed May 6, 2024); *Oklahoma v. Cardona*, No. 5:24-cv-461 (W.D. Okla. filed May 6, 2024); *Arkansas v. U.S. Dep't of Educ.*, No. 4:24-cv-636 (E.D. Mo. filed May 7, 2024); *Kansas v. U.S. Dep't of Educ.*, No. 5:24-cv-4041 (D. Kan. filed May 14, 2024); *Carroll Indep. Sch. Dist. v. U.S. Dep't of Educ.*, No. 4:24-cv-461 (N.D. Tex. filed May 21, 2024).

political significance" and that the Department lacked authority to "us[e] *Bostock* to make major changes in Title IX law." Op. 26-27. Likewise, the court held that the Rule violated the requirement that conditions on federal funding be unambiguous because Title IX's prohibition on sex discrimination did not provide notice "that the term 'sex' included gender identity." Op. 28.[4]

The court also concluded that the Rule's treatment of gender identity was arbitrary and capricious. According to the court, the Department failed to address several relevant factors related to compliance, privacy, enforcement, and non-binary students. Op. 32-34. The court also "question[ed]" how § 106.31(a)(2)'s de minimis harm standard applied in various contexts, suggesting that the provision was "ambiguous and therefore arbitrary and capricious." Op. 33-34.

Separately, the court held that the Rule's definition of hostile environment sex-based harassment would "require recipients of federal funding … to violate First Amendment rights." Op. 22. The court concluded that the harassment definition "compel[s] staff and students to use whatever pronouns a person demands" and "prohibits staff and students from expressing their own views" about gender identity. *Id.* The court acknowledged that federal agencies have applied a similar standard in the analogous context of Titles VI and VII "for decades." Op. 23. But the court concluded that it could not "simply apply the same standard to federally funded

[4] In light of its other holdings, the court declined to address plaintiffs' contention that the Rule violated the non-delegation doctrine. Op. 30.

educational institutions" because the "implications here are different" than other contexts. *Id.*

As to the remaining factors, the court concluded that plaintiffs faced irreparable harm in the form of compliance costs as well as "violation of First Amendment rights, preemption of state laws, loss of Title IX federal funds, pressure to change their laws, and invasion of state sovereignty." Op. 37. The court further concluded that the equities weighed in plaintiffs' favor because the interest in "keep[ing] the status quo" outweighed the Department's interests in "preventing discrimination in educational programs and activities." Op. 37-38.

In light of other challenges to the Rule, the court limited the injunction to plaintiffs. Op. 38. But the court did not limit the injunction to the provisions or applications of the Rule involving gender identity that the plaintiffs challenged or that the court deemed invalid. Instead, the court enjoined the Rule in its entirety. Op. 39-40.

ARGUMENT

In determining whether to grant a stay pending appeal, this Court considers (1) likelihood of success on appeal; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and

(4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Each factor weighs in favor of partially staying the injunction.

I. The Department is likely to succeed in showing that the district court's preliminary injunction is overbroad.

The Department is likely to succeed on its claim that the district court's injunction is overbroad. Constitutional and equitable principles require that injunctions be "tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018). An injunction "must be vacated" if it "is not narrowly tailored to remedy the specific action which gives rise to the order." *O'Donnell v. Harris County*, 892 F.3d 147, 155, 163 (5th Cir. 2018) (quotation marks omitted), *overruled on other grounds by Daves v. Dallas County*, 64 F.4th 616 (5th Cir. 2023) (en banc); *see, e.g.*, *Labrador v. Poe*, 144 S. Ct. 921, 921 (2024) (staying preliminary injunction to the extent it applied beyond the plaintiffs and enjoined provisions of a state law that the plaintiffs did not challenge). The district court's injunction defies this fundamental principle of equitable relief several times over.

A. The district court erred in enjoining provisions of the Rule not challenged by plaintiffs.

The district court's injunction is plainly overbroad in enjoining the many provisions of the Rule that plaintiffs do not challenge. As plaintiffs' filings make clear, their claims—and the purported harms underlying those claims—are grounded in objections to the Rule's treatment of gender identity. Dkt. No. 1 ¶ 3 (challenging Rule because it defines "discrimination based on 'sex' to include discrimination based

on 'gender identity'"); Complaint ¶ 64, *Rapides Par. Sch. Bd. v. U.S. Dep't of Educ.*, No. 1:24-cv-00567 (W.D. La. Apr. 30, 2024), Dkt. No. 1 (challenging Rule's "gender-identity mandates"). In particular, plaintiffs' challenges concern applications of three provisions of the Rule: the scope of prohibited discrimination in § 106.10; the de minimis harm standard in § 106.31(a)(2); and the definition of "hostile environment harassment" in § 106.2. *See* States Mot. 8-10; SBRP Mot. 4-7. The district court likewise focused on the effect of these provisions in enjoining the Rule. Op. 17-36.

The Rule, however, is hardly limited to those provisions. It revises many aspects of Title IX's current regulations—most of which have nothing to do with gender identity—such as provisions concerning the appointment of Title IX coordinators, 89 Fed. Reg. at 33,885 (to be codified at 34 C.F.R. § 106.8(a)); recipients' notice of nondiscrimination and record-keeping obligations, *id.* at 33,885-86 (to be codified at 34 C.F.R. § 106.8(c), (f)); access to lactation spaces, *id.* at 33,888 (to be codified at 34 C.F.R. § 106.40(b)(3)(v)); a recipient's response to sex discrimination, including supportive measures for involved parties, *id.* at 33,888-91 (to be codified at 34 C.F.R. § 106.44); grievance procedures for claims of sex discrimination, including sex-based harassment, *id.* at 33,888-95 (to be codified at 34 C.F.R. §§ 106.45-106.46); and prohibitions on retaliation, *id.* at 33,896 (to be codified at 34 C.F.R. §§ 106.2, 106.71).

Plaintiffs did not challenge any of these provisions in their request for injunctive relief. Nor did they identify any harm that they stand to suffer from these

provisions. Likewise, although the district court recognized that the Rule made changes to recipients' reporting requirements and school grievance procedures, Op. 2, the court nowhere suggested that those provisions were invalid or that they harmed plaintiffs. The district court nonetheless enjoined the entire Rule without any explanation as to why doing so was necessary to remedy the plaintiffs' asserted injuries.[5]

That was error. It contravenes bedrock principles of equity to enjoin provisions of the Rule beyond those challenged by plaintiffs—*i.e.*, beyond particular applications of §§ 106.10, 106.31(a)(2), and 106.2. *See, e.g.*, *Gill*, 585 U.S. at 73; *see also Labrador*, 144 S. Ct. at 923 (Gorsuch J., concurring in the grant of stay) (concluding that the "the district court clearly strayed from equity's traditional bounds" in enjoining provisions of a law that plaintiffs "failed to 'engage' with" and that "don't presently affect them"); *Southwestern Elec. Power Co. v. U.S. EPA*, 920 F.3d 999, 1033 (5th Cir. 2019) (limiting relief to "unlawful[] … portions" of agency rule).

Nor is this a case where the various provisions of the Rule are so intertwined with the challenged sections that it would be unworkable to enjoin the Rule only in

[5] The district court stated that courts "can vacate rules that are beyond the executive agencies' authority." Op. 39. The Department disputes that vacatur is ever an appropriate remedy under the Administrative Procedure Act. *See United States v. Texas*, 599 U.S. 670, 693 (2023) (Gorsuch, J., concurring in the judgment). In any event, the district court granted a preliminary injunction, not vacatur. Even if vacatur were an appropriate remedy, there would be no basis to vacate provisions that plaintiffs do not challenge. *See VanDerStok v. Garland*, 86 F. 4th 179, 196-97 (5th Cir. 2023).

part. The Department made an express severability determination, explaining that "each of the provisions of these final regulations discussed in this preamble serve an important, related, but distinct purpose," 89 Fed. Reg. at 33,848, removing any doubt that Department would have adopted the Rule's unchallenged provisions addressing grievance procedures, lactation accommodations, and other issues not related to gender identity on their own. *See id.* (discussing the Rule's severability provisions to be codified at 34 C.F.R. §§ 106.16 and 106.48, and existing provisions at 34 C.F.R. §§ 106.9, 106.24, 106.62, 106.72, and 106.82); *American Fuel & Petrochemical Mfrs. v. EPA*, 3 F.4th 373, 384 (D.C. Cir. 2021) (severability of regulations "depends on the issuing agency's intent," and whether the "agency would have adopted the severed portion on its own" to "operate[] independently" (quotation marks omitted)). At a minimum, therefore, the district court's injunction should be stayed to the extent it applies beyond the three provisions plaintiffs challenge.

B. Even as to the challenged provisions, the district court's injunction is overbroad.

The district court's injunction is overbroad even as to the few provisions plaintiffs challenge. Most importantly, plaintiffs identify no harm from § 106.10's prohibition on discriminating against students simply for being transgender. Their asserted injuries all stem from other provisions of the Rule—namely, § 106.31(a)(2)'s limitations on recipients' ability to engage in differential treatment based on sex with respect to students whose gender identities differ from their sex assigned at birth and

§ 106.2's definition of hostile-environment harassment as applied to discrimination on the basis of gender identity. Plaintiffs failed to establish their entitlement to an injunction that extends to § 106.10 or beyond § 106.31(a)(2) and the challenged aspects of § 106.2.

1. Plaintiffs are not entitled to an injunction against § 106.10's basic prohibition on gender-identity discrimination.

The problem of overbreadth is particularly evident with respect to § 106.10. As explained, Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681. Section 106.10 sets out the scope of that prohibition, explaining that "[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," 89 Fed. Reg. at 33,886, "because each necessarily involves consideration of a person's sex, even if that term is understood to mean only physiological or 'biological distinctions between male and female,'" *id.* at 33,802 (quoting *Bostock*, 590 U.S. at 655). Section 106.10 thus makes clear that prohibited sex discrimination for purposes of Title IX includes actions like excluding a student from homecoming for being pregnant, giving a student detention for being gay, or barring a student from band for being transgender. The district court erred in enjoining § 106.10 because the harms plaintiffs invoke flow from other provisions, not § 106.10. And the district court's decision to nonetheless enjoin § 106.10 was doubly flawed because plaintiffs cannot

succeed on the merits of their challenge to that provision, which represents a clear-cut application of *Bostock*.

a. The Department is likely to succeed in showing that the district court erred in enjoining § 106.10 because Plaintiffs identify no harm that flows from that provision. And the harms they do allege may be fully redressed by enjoining § 106.31(a)(2) and § 106.2's definition of hostile-environment harassment as it applies to gender identity discrimination.

As a preliminary matter, plaintiffs do not challenge all of § 106.10 such as the portions recognizing that prohibited discrimination includes discrimination on the basis of pregnancy or sexual orientation; indeed, plaintiffs nowhere suggest that they intend to engage in discrimination against students for being pregnant or gay at all. Plaintiffs thus offer no reason to enjoin these aspects of § 106.10.

Even as to § 106.10's inclusion of gender identity, plaintiffs do not suggest that an injunction is necessary because they intend to engage in the quintessential discrimination based on gender identity that the Supreme Court confronted in *Bostock*—treating transgender students worse "simply for being … transgender." 590 U.S. at 651-52. Plaintiffs do not, for instance, claim that they will be irreparably harmed if they cannot bar transgender students from participating in the science fair or student government because they are transgender. Yet if § 106.10 were enjoined, the Department's Title IX regulations would not expressly bar such sex discrimination.

Rather, plaintiffs object to the Rule's provisions regarding gender identity as applied to sex-separate facilities like bathrooms and the use of pronouns when addressing transgender students. *See* States Mot. 1-2; SBRP Mot. 3-7. But § 106.10 is not the cause of plaintiffs' harms; rather, plaintiffs' quarrel stems from the provisions of § 106.31(a)(2) regarding permissible sex-separation and § 106.2's definition of hostile-environment harassment as applied to gender identity discrimination. The Supreme Court's analysis in in *Bostock* reflects this distinction, holding that discrimination on the basis of gender identity is necessarily a form of prohibited sex discrimination without "purport[ing] to address bathrooms, locker rooms," or other sex-differentiated contexts. 590 U.S. at 681.

Accordingly, the portions of the injunction that the Department does not seek to stay will fully protect against their asserted harms while the appeal proceeds. And plaintiffs identify no other harms that would justify enjoining § 106.10, which the Department also expressly explained should operate independently if other provisions of the Rule were invalidated. *See* 89 Fed. Reg. 33,848 (identifying § 106.10 in its severability discussion as an example of a provision "intended to operate independently" of other provisions in the Rule, and in particular noting that it is "distinct" from the Rule's definition of "sex-based harassment[] … and the prevention of participation consistent with gender identity, which are addressed in §§ 106.2 and 106.31(a)"); *see also id.* (discussing severability regulation to be recodified at § 106.16).

b. The government is also likely to succeed in appealing the preliminary injunction against enforcement of § 106.10 because that provision reflects a straightforward application of *Bostock*. There, the Court confronted Title VII's provision making it unlawful "for an employer … to discriminate against any individual ... because of such individual's ... sex." 590 U.S. at 655 (quoting 42 U.S.C. § 2000e-2(a)(1)). The Court explained that Title VII's "because of" language "incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* at 656-57 (quotation marks omitted). "[S]ex is necessarily a but-for cause" of discrimination on the basis of sexual orientation or gender identity, the Court explained, "because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 660, 661 (emphasis omitted). Such discrimination would, for example, "penalize[] a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* at 660. That is true even on the assumption that "sex" in Title VII "refer[s] only to biological distinctions between male and female," *id.* at 655, and even without having to decide how the insight applies to contexts such as "bathrooms, locker rooms, and dress codes," *id.* at 681.

Bostock's reasoning applies with equal force to Title IX's prohibition on discrimination "on the basis of sex." Title IX imposes a causation standard no more stringent than but-for causation under Title VII. And as *Bostock* made clear, "sex is necessarily a but-for cause" of discrimination on the basis of sexual orientation and

gender identity. 590 U.S. at 661 (emphasis omitted). A school, no less than an employer, engages in sex discrimination when it "penalizes a person … for traits or actions that it tolerates" in persons identified as a different sex "at birth." *Id.* at 660.

Indeed, this Court has emphasized "Title IX's similarity to Title VII," explaining that "the prohibitions of discrimination on the basis of sex [in] Title IX and Title VII are the same." *Lakoski v. James*, 66 F.3d 751, 756-57 & n.3 (5th Cir. 1995). That is why various courts have concluded that in light of *Bostock*, discrimination on the basis of sexual orientation and gender identity are necessarily forms of prohibited sex discrimination under Title IX. *See, e.g.*, *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *A.C. ex rel. M.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grabowski v. Arizona Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023). That conclusion does not depend, the Department explained, on viewing the term "sex" in Title IX to mean anything other than "only physiological or 'biological distinctions between male and female.'" 89 Fed. Reg. at 33,802 (quoting *Bostock*, 590 U.S. at 655). The district court's conclusion that *Bostock*'s reasoning has no application to Title IX, Op. 18-22, was therefore error. Because plaintiffs' challenge to § 106.10 cannot be reconciled with Supreme Court precedent, the district court's injunction of that provision could be stayed on that basis alone, even setting aside the absence of harms.

2. The injunction is overbroad in enjoining § 106.2 in all respects.

The injunction is also overbroad insofar as it bars *all* applications of § 106.2. Notably, the Department's severability determination is not confined to the consequences of a whole provision within the Rule being invalidated; the Rule specifically provides that even "[i]f any provision of this subpart [containing § 106.2] *or its application to any person, act, or practice* is held invalid, the remainder of the subpart *or the application of its provisions to any person, act, or practice* shall not be affected thereby." 34 C.F.R. § 106.9) (emphases added); *see* 89 Fed. Reg. at 33,848.

Enjoining § 106.2 wholesale stretches far beyond plaintiffs' quarrel with this provision. To begin, § 106.2 defines many terms, but plaintiffs' challenges only involve its definition of one particular form of sex-based harassment: hostile-environment harassment. There is no justification for enjoining the definitions plaintiffs have not challenged.

Moreover, the injunction is overbroad even as it applies to the definition of hostile-environment harassment, which Section 106.2 describes as "[u]nwelcome sex-based conduct that[] … is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity." 89 Fed. Reg. at 33,884 (to be codified at 34

C.F.R. § 106.2).[6] Plaintiffs object only to the application of this standard to discrimination on the basis of gender identity, focusing on the use of pronouns and salutations. States Mot. 1-2; SBRP Mot. 7; *see also* Op. 22. But § 106.2's hostile-environment standard applies beyond gender-identity discrimination. It protects all students from "[u]nwelcome sex-based conduct." 89 Fed. Reg. at 33,884. Plaintiffs offer no explanation for how they are harmed by § 106.2's application outside the context of gender-identity-based discrimination. Indeed, the district court recognized that "harassment against any person, whether it be based on their gender identity or sexual orientation, is unacceptable" and that "[h]arassment against children in school" is especially "inappropriate." Op. 1.

II. The remaining factors favor a partial stay.

The remaining stay factors tilt decisively towards the Department. Every time the federal government "is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quotation marks omitted). The harm is particularly pronounced here because the Rule effectuates Title IX's twin goals of "avoid[ing] the use of federal resources to support discriminatory practices[] [and] provid[ing] individual citizens effective protection against those practices."

[6] Plaintiffs do not challenge the other prongs of § 106.2's definition of sex-based harassment, which include "quid pro quo harassment," or the dozens of other definitions within § 106.2.

Cannon v. University of Chi., 441 U.S. 677, 704 (1979). No one disputes that preventing discrimination serves a compelling public interest. *See EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 798 (5th Cir. 2016). Moreover, the overbroad injunction could impair the rights of individuals with respect to Rule provisions that are unrelated to plaintiffs' claims by, for example, precluding the Department from taking steps to ensure that breastfeeding students have access to lactation spaces or that students are not punished simply for being pregnant, gay, or transgender.

By contrast, plaintiffs suffer no harm from the proposed stay. As discussed, plaintiffs identify no cognizable harm from the many provisions of the Rule that they did not challenge. As to the provisions plaintiffs do challenge, they identify no harm from the application of those provisions in the mine-run of circumstances. Accordingly, the harms that the district court found justified preliminary relief are not implicated here, and, in any event, would not outweigh the harm to the Department from the court's overbroad injunction.

CONCLUSION

The district court's preliminary injunction should be stayed to the extent it extends beyond the following 2024 Rule provisions: (i) 34 C.F.R. § 106.31(a)(2), and (ii) 34 C.F.R. § 106.2's definition of "hostile environment harassment" as applied to discrimination on the basis of gender identity. The Department respectfully requests a decision on this request by July 12 to allow the Solicitor General to decide whether

to seek relief from the Supreme Court—and to allow the Court to consider any such request—if this Court denies relief.

Respectfully submitted,

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July 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,197 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

I further certify that this emergency motion complies with the requirements of Fifth Circuit Rules 27.3 and 27.4 because it was preceded by telephone calls to the Clerk's Office and to the offices of opposing counsel, advising of our intent to file it. Plaintiffs-appellees oppose this motion and will file an opposition. I further certify that the facts supporting emergency consideration of this motion are true and complete.

s/Jack Starcher
Jack Starcher

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jack Starcher
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No. 24-30399

In the United States Court of Appeals for the Fifth Circuit

STATE OF LOUISIANA, BY AND THROUGH ITS ATTORNEY GENERAL, ELIZABETH B. MURRILL; LOUISIANA DEPARTMENT OF EDUCATION; STATE OF MISSISSIPPI, BY AND THROUGH ITS ATTORNEY GENERAL, LYNN FITCH; STATE OF MONTANA, BY AND THROUGH ITS ATTORNEY GENERAL, AUSTIN KNUDSEN; STATE OF IDAHO, BY AND THROUGH ITS ATTORNEY GENERAL, RAUL LABRADOR; WEBSTER PARISH SCHOOL BOARD; RED RIVER PARISH SCHOOL BOARD; BOSSIER PARISH SCHOOL BOARD; SABINE PARISH SCHOOL BOARD; GRANT PARISH SCHOOL BOARD; WEST CARROLL PARISH SCHOOL BOARD; CADDO PARISH SCHOOL BOARD; NATCHITOCHES PARISH SCHOOL BOARD; CALDWELL PARISH SCHOOL BOARD; ALLEN PARISH SCHOOL BOARD; LASALLE PARISH SCHOOL BOARD; JEFFERSON DAVIS PARISH SCHOOL BOARD; OUACHITA PARISH SCHOOL BOARD; FRANKLIN PARISH SCHOOL BOARD; ACADIA PARISH SCHOOL BOARD; DESOTO PARISH SCHOOL BOARD; ST. TAMMANY PARISH SCHOOL BOARD,

Plaintiffs-Appellees,

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF EDUCATION; OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF EDUCATION; CATHERINE LHAMON, IN HER OFFICIAL CAPACITY AS THE ASSISTANT SECRETARY FOR CIVIL RIGHTS; UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE UNITED STATES; KRISTEN CLARKE, IN HER OFFICIAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE CIVIL RIGHTS DIVISION OF UNITED STATES DEPARTMENT OF JUSTICE,

Defendants-Appellants

RAPIDES PARISH SCHOOL BOARD,
Plaintiff-Appellee

v.

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF EDUCATION; OFFICE FOR CIVIL RIGHTS, UNITED STATES DEPARTMENT OF EDUCATION; CATHERINE LHAMON, IN HER OFFICIAL CAPACITY AS THE ASSISTANT SECRETARY FOR CIVIL RIGHTS; UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE UNITED STATES; KRISTEN CLARKE, IN HER OFFICIAL CAPACITY AS ASSISTANT ATTORNEY GENERAL FOR THE CIVIL RIGHTS DIVISION OF UNITED STATES DEPARTMENT OF JUSTICE,
Defendants-Appellants

On Appeal from the United States District Court
for the Western District of Louisiana
Nos. 3:24-CV-563, 1:24-CV-567

OPPOSITION TO EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A PARTIAL STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Under Fifth Circuit Rule 28.2.1, a certificate of interested persons is not required because Plaintiffs-Appellees are governmental parties.

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INTRODUCTION

Defendants-Appellees departed from decades of regulations in a new, not-yet-effective rule that rewrites Title IX and guts its promise of equal educational opportunities for both sexes. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (the "Rule"). The Rule's lawlessness is extensive and shocking. So are its harmful consequences. Accordingly, Plaintiffs-Appellees sued minutes after the Rule was published and promptly filed a motion for preliminary relief to preserve the status quo pending judicial review.

The district court acted quickly. It postponed the Rule's effective date and issued a preliminary injunction that preserves the status quo in the four Plaintiff States. Weeks later, Defendants filed an "emergency" motion, requesting a partial stay so that some of the Rule's provisions can go into effect. But there is no emergency. There is no urgent need to upset the decades-long status quo in four States and allow some provisions of the unlawful Rule to go into effect, especially when Defendants *themselves* delayed issuing the Rule multiple times. *Cf. BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 611 & n.11 (5th Cir. 2021).

Defendants fail to show any irreparable harm justifying a partial stay, much less any immediate need for relief that justifies disrupting "the normal appellate process." Fifth Cir. Rule 27.3. What is more, Defendants—who did not act for eleven days after the district court's ruling and then gave that court only seven days to rule on their stay motion—flout procedural requirements by attempting to leapfrog the district court. This warrants denying the motion. So too does the motion's meritless nature.

Tellingly, Defendants give short shrift to three of the four stay factors, because even they cannot seriously pretend those factors weigh in favor of a partial stay. It is apparent that (1) Defendants will experience *no* irreparable harm absent a stay; (2) Plaintiffs *will* be irreparably harmed by a stay; and (3) a stay undermines the public interest. Nevertheless, Defendants' cursory treatment of those factors is still better than Defendants' likelihood-of-success showing.

Defendants do not argue the merits of their appeal overall, but rather argue only that their scope-of-relief argument will likely succeed. That means, for purposes of this motion, Defendants do not dispute that the Rule likely conflicts with Title IX, exceeds statutory authority,

imposes conditions in violation of the Spending Clause, and is arbitrary and capricious. What is more, Plaintiffs have shown that the Rule's provisions operate together to unlawfully (1) increase their obligations, liability risks, and compliance costs, (2) coerce them into changing state laws and school board practices, and (3) induce them to violate constitutional rights. It thus follows that the current injunctive relief—which is geographically limited and applies to the entire Rule—is necessary to prevent irreparable harm and maintain the status quo. It also follows that Defendants cannot show their scope-of-relief argument is likely to succeed. That is why Defendants resort to mischaracterizing the scope of Plaintiffs' suit, the Rule's provisions, and precedent, and to overlooking the myriad ways the Rule harms Plaintiffs. The Court should reject such tactics and deny Defendants' procedurally deficient and meritless motion.

BACKGROUND

Motivated by the "corrosive and unjustified discrimination against women" in "all facets of education," 118 Cong. Rec. 5803 (Feb. 28, 1972) (Statement of Sen. Bayh), Congress enacted Title IX "to avoid the use of federal resources to support [such] discriminatory practices," *Cannon v.*

Univ. of Chicago, 441 U.S. 677, 704 (1979). To that end, Title IX prohibits, "on the basis of sex," "discrimination under any education program or activity receiving Federal financial assistance [with statutory exceptions]." 20 U.S.C. § 1681(a). The statutory exceptions permit, for example, single-sex groups and activities like sororities and fraternities. *Id.* § 1681(a)(6).

At the time of Title IX's enactment, the term "sex" meant a person's biological sex—male or female—which "is an immutable characteristic determined" at "birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.); *see, e.g.*, *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc). Title IX uses this ordinary meaning of "sex," as reflected throughout its provisions. *See Texas v. Cardona*, No. 4:23-CV-00604-O, 2024 WL 2947022, at *31 (N.D. Tex. June 11, 2024). Title IX thus generally prohibits federal funding recipients from discriminating against a person based on their biological sex.

At the same time, Title IX recognizes that biological differences occasionally demand differentiation between the two sexes. Section 1686 instructs, for example, that Title IX shall not "be construed" as prohibiting recipients "from maintaining separate living facilities for the

different sexes." 20 U.S.C. § 1686. This statutory instruction about how to interpret Title IX reflects that separating the sexes "where personal privacy must be preserved" and where biological differences matter is *not* discrimination. *Texas*, 2024 WL 2947022, at *32 (quotation omitted). And this comports with the meaning of *discrimination*, because boys and girls are not similarly situated in contexts where differences between the sexes matter. *See, e.g.*, *Bostock v. Clayton County*, 590 U.S. 644, 657 (2020) (discrimination means to treat "worse than others who are similarly situated"). Longstanding regulations, including the earliest ones that have special probative value, *see Grove City Coll. v. Bell*, 465 U.S. 555, 567–68 (1984); *Kisor v. Wilkie*, 588 U.S. 558, 594 (2019) (Gorsuch, J., concurring), further underscore that not all differentiation based on sex is discrimination under Title IX, *see, e.g.*, 40 Fed. Reg. 24,128, 24,141 (Jun. 4, 1975) (permitting "separate toilet, locker room, and shower facilities on the basis of sex" and separation of "students by sex within physical education classes"); *id.* (allowing "separate sessions for boys and girls" when dealing with "human sexuality"); *id.* at 24,132, 24,141 (requiring different standards in physical education classes where necessary so women are not adversely impacted).

On April 29, 2024, Defendants published the Rule, which would upend Title IX and the longstanding regulatory framework beginning August 1, 2024: the Rule's effective date. *See* 89 Fed. Reg. at 33,474. Among other changes, the Rule expands sex discrimination to include discrimination based on grounds other than biological sex: namely, "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *Id.* at 33,476. It also mandates that recipients (a) generally treat persons consistently with their self-professed gender identity, (b) allow persons to use whichever single-sex bathroom or locker room corresponds with their self-professed gender identity at that particular time, and (c) compel staff and students to use whatever pronouns are demanded. *See id.* at 33,516, 33,818, 33,886–87. The Rule warns that recipients cannot impose documentation requirements to verify a person's sincerity, such as evidence of a valid gender-dysphoria diagnosis, and allows any male, including individuals from the general community, who claims a female gender identity to use girls-only bathrooms and locker rooms. *See id.* at 33,816–18.

The Rule also adopts an expansive definition of "hostile environment harassment" that requires recipients to monitor and censor

speech related to "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity" and to consider speech outside of recipients' education programs if it could allegedly contribute to a hostile environment. *Id.* at 33,530, 33,884, 33,886. Moreover, the Rule increases compliance obligations, such as by expanding reporting, recordkeeping, and response requirements. *See, e.g.*, *id.* at 33,563, 33,597, 33,886, 33,888.

Plaintiffs filed a detailed complaint, amended complaint, and a motion for a postponement, a stay, or a preliminary injunction. *See* ECF 1, 11, 17–18, 24.[1] On June 13, 2024, the district court granted a preliminary injunction and postponed the Rule's effective date in the four Plaintiff States. ECF 53 at 39–40. It concluded Plaintiffs would likely succeed on their claims that the Rule is contrary to law, exceeds statutory authority, violates the Spending Clause, and is arbitrary and capricious. *Id.* at 16–36.

On June 24, 2024, Defendants moved for a partial stay pending appeal in the district court. ECF 59. The district court immediately

[1] This brief refers to Plaintiffs in case number 3:24-CV-563 below. Relatedly, cites to "ECF" refer to docket entries from that case.

expedited the briefing schedule, ordering the briefing to be completed by July 3. ECF 63. Defendants, however, filed an "emergency" motion for a partial stay with this Court on July 1—the same day Plaintiffs filed their stay opposition in the district court. ECF 66.

ARGUMENT

I. DEFENDANTS' MOTION IS PROCEDURALLY IMPROPER AND ASSERTS FORFEITED ARGUMENTS.

As a preliminary matter, Defendants failed to comply with the Federal Rules, which "ordinarily" requires a party to "move first in the district court" for a stay, state that the district court "failed to afford the relief requested," and provide "any reasons given." Fed. R. App. P. 8(a)(1), (2). Although the district court expedited briefing on Defendants' motion, Defendants filed a stay motion with this Court before that briefing was even completed and before the district court ruled. In the circumstances here, that means "this motion is premature" and should be denied. *Rhone v. City of Texas City*, No. 22-40551, 2022 WL 4310058, at *1 (5th Cir. Sept. 19, 2022) (per curiam).

The Court can also deny this motion because Defendants assert forfeited arguments. In their opposition below, Defendants made a cursory, undeveloped request for a narrow injunction. ECF 38 at 39.

Defendants referenced the Rule's severability discussion but failed to identify what specific provisions they believed should be severed or otherwise provide guidance regarding their desired relief. *Id.* Defendants also failed to explain (and even now fail to explain) how the "remainder of the regulation could function sensibly" without "the offending portion[s]." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).[2] By offering only a "cursory comment" about the scope of relief and not responding to arguments that the Rule's provisions operate together to cause harm, Defendants forfeited "any argument about the scope" of relief. *See Texas v. EPA*, 829 F.3d 405, 435 (5th Cir. 2016). This provides yet another reason to deny Defendants' motion.

II. DEFENDANTS CANNOT SATISFY THE STAY FACTORS.

The Court should also deny this motion on the merits, because Defendants cannot meet their "heavy burden" to show the "extraordinary relief" they seek is justified. *Plaquemines Parish v. Chevron USA, Inc.*, 84 F.4th 362, 373 (5th Cir. 2023) (quotations omitted).

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[2] Before this Court, Defendants simply point (at 13) to the Rule's severability statement, but that is insufficient. A severability provision is not conclusive of intent, and intent is only half of the severability analysis. *See id.* at 22–23; Ex. 1: Order, *Tennessee v. Cardona*, No. 2:24-cv-00072, ECF 117 at 19–20 (E.D. Ky. July 10, 2024).

In determining whether Defendants have satisfied this burden, the Court must apply the familiar four-factor test: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.* (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Because Defendants are applying for a stay, not opposing one, the factors remain "distinct." *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022) (per curiam). The two "most important" factors are likelihood of success and irreparable injury. *Plaquemines Parish*, 84 F.4th at 376. Defendants fail to show either factor weighs in their favor, and their half-hearted attempts on the remaining factors likewise fail. *See* Ex. 1.

A. Defendants Have Not Made a Strong Showing Their Appeal Is Likely to Succeed.

The Rule, among other legal defects, likely contravenes Title IX, violates the Spending Clause, and is arbitrary and capricious—as the district court properly concluded (and multiple courts have confirmed).

See ECF 53 at 16–36.[3] This precludes Defendants from making a "strong showing" that their appeal will likely succeed. *Nken*, 556 U.S. at 434. Indeed, Defendants do not develop any argument that their appeal will succeed overall but argue only that the injunction is overbroad.

But even Defendants' scope-of-relief argument is unlikely to succeed. The district court did not enjoin enforcement of a democratically enacted state statute, nor did it provide "'universal' relief." *Labrador v. Poe*, 144 S. Ct. 921, 921 (2024) (Gorsuch, J., concurring); *see* Stay Mot. 10 (citing *Labrador*, 144 S. Ct. at 921). The district court instead granted geographically limited relief to halt bureaucratic subversion of a democratically enacted, federal statute and to stop "a significant change in the status quo" that has existed for decades. ECF 53 at 38; *see R.J. Reynolds Vapor Co. v. FDA*, 65 F.4th 182, 194–95 (5th Cir. 2023) (emphasizing the importance of maintaining a seven-year status quo). 5 U.S.C. § 705 expressly authorizes courts to preserve the status quo pending review of an agency action, and this context does not raise the

[3] *See also Tennessee v. Cardona*, No. 2:24-cv-00072, 2024 WL 3019146, at *8–36 (E.D. Ky. June 17, 2024), *Kansas v. U.S. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *8–17 (D. Kan. July 2, 2024); *cf. Texas*, 2024 WL 2947022, at *29–43.

same concerns about federal intrusion into state sovereignty or judicial overreach into the legislative branch. *See Wages & White Lion Invs., L.L.C. v FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (recognizing courts can provide "interim relief" that "preserve[s] the *status quo ante*" that existed before the agency action); *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (Kavanaugh, J., statement regarding stay denial) (acknowledging relief granted in the APA context is different than enjoining a statute's enforcement); *cf. Loper Bright Enters. v. Raimondo*, No. 22-1219, 2024 WL 3208360, at *12 (U.S. June 28, 2024) (explaining the APA is "a check upon administrators whose zeal might otherwise" carry "them to excesses not contemplated in legislation" (quotation omitted)).

Moreover, Defendants disregard important differences between preliminary and final relief, including the purpose of preliminary relief: "to preserve the relative positions of the parties" until further judicial proceedings "can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Given that purpose and "the haste that is often necessary," parties need not "prove [their] case in full" at the preliminary-relief stage, *id.*, and district courts have "wide latitude" in determining the scope of

relief that fits the equities, *Doster v. Kendall*, 54 F.4th 398, 441 (6th Cir. 2022), *vacated as moot*, 144 S. Ct. 481 (2023). That means that "status-quo relief might look broader than the ultimate relief." *Id.* at 442.

In any event, enjoining enforcement of the entire Rule is necessary here to prevent further irreparable harm. That is because Plaintiffs challenge numerous provisions of the Rule—that are the heart of the Rule—and the provisions operate together to cause Plaintiffs' harm, including increased "costs for expanded recordkeeping requirements, expanded training requirements, and other compliance costs." ECF 53 at 36. Defendants' contrary arguments rely on blatant mischaracterizations of Plaintiffs' suit, the Rule, and *Bostock*. We address each misstep in turn.

First, Defendants argue the injunction is overbroad because (a) it applies beyond what they characterize as the challenged aspects of the Rule—"particular applications of §§ 106.10, 106.31(a)(2), and 106.2" in the gender-identity context—and (b) Plaintiffs' harms all stem from "the Rule's treatment of gender identity." Stay Mot. 10–14. But both premises are wrong. An accurate account of the suit and Plaintiffs' harms (substantiated by declarations and other evidence that Defendants ignore, *see* ECF 24-1–41) demonstrates that preliminary relief must

extend to the entire Rule to preserve the status quo and prevent irreparable harm.

Plaintiffs argued the Rule's expansion of "sex" to include *all* grounds other than biological sex constitutes an unlawful rewrite of Title IX and violates Spending Clause limits (among other defects). *See, e.g.*, ECF 24 at 7–9, 12–15, 19–21; ECF 11 ¶¶ 101–02; *see also* ECF 53 at 27. This dramatic expansion of obligations and liability necessarily harms Plaintiffs, especially when combined with the Rule's increased reporting, recordkeeping, and response requirements. *See, e.g.*, ECF 24-21 ¶¶ 30–32; Ex. 1 at 9–12; *cf. Tennessee v. Dep't of Educ.*, 104 F.4th 577, 613 (6th Cir. 2024) (explaining that "[r]ecognizing new forms of discrimination 'substantially changes the experience' for all regulated entities, in terms of how to carry out their obligations"). Although Plaintiffs focused on the gender-identity context (and additionally argued that the Rule's de minimis harm provision flouts Title IX), their arguments were not limited to that context. Indeed, Plaintiffs provided examples focused on other grounds, highlighted that sexual orientation is treated as distinct from sex in Title IX's text, and noted that discrimination based on sex stereotypes and sexual orientation does not always demand

consideration of a person's sex. *See* ECF 24 at 7–8 & n.6, 14–15; ECF 46 at 4.

Plaintiffs also challenged the Rule's sexual harassment definition across the board, arguing that it disregards Title IX's textual limitations, conflicts with the First Amendment, and would improperly increase Plaintiffs' obligations and liability despite Spending Clause limits. *See, e.g.*, ECF 24 at 16–21; ECF 46 at 4–6; ECF 11 ¶¶ 108–10; *see also* ECF 53 at 22. Plaintiffs explained how the new standard requires them to "monitor and censor speech on a myriad of topics," "particularly when combined with its expansion of 'sex' to include other concepts," and noted non-exhaustive, illustrative examples showing that the Rule would force them to police speech about gender identity, pregnancy, and sex stereotypes. *See* ECF 24 at 11 & n.11, 16–17; ECF 11 ¶ 109 n.4.

Additionally, Plaintiffs argued other provisions harm them by improperly increasing their obligations, compliance costs, and liability risks. *See, e.g.*, ECF 24 at 1; *id.* at 2, 16, 25–28; ECF 24-21 ¶¶ 23, 30–32; ECF 11 ¶¶ 112–15; *see also* ECF 53 at 12. And Plaintiffs argued the Rule is arbitrary and capricious because, among other reasons, Defendants failed to properly account for non-monetary harms (such as inducing

violations of constitutional rights) and the costs to review and understand the internally inconsistent Rule, revise policies, and undertake training requirements. ECF 24 at 25.

Second, Defendants gloss over the Rule's interrelated nature and the fact that the challenged provisions are the crux of the Rule—both of which make severance unworkable and improper, especially at the preliminary-relief stage. The Rule's executive summary describes the challenged provisions when explaining the "[p]urpose" of the Rule and lists them as "[m]ajor [p]rovisions." 89 Fed. Reg. at 33,476–77. Accordingly, "[w]ithout the challenged provisions, the Final Rule loses its primary purpose." *Mayor of Baltimore v. Azar*, 973 F.3d 258, 293 (4th Cir. 2020) (en banc). That creates "substantial doubt" that the Defendants would have issued the Rule without the challenged portions, notwithstanding "the severability clause." *Id.*

Furthermore, the Rule cannot "function sensibly" without "the offending portion[s]." *MD/DC/DE Broadcasters*, 236 F.3d at 22. It is not as though the challenged provisions have "no connection" to other provisions and can be severed without impacting the Rule's general operation. *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 352 (D.C.

Cir. 2019) (concluding price adjustments to certain mail types could be severed from rate changes that applied to other categories); *see Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1004 (5th Cir. 2019) (vacating "two discrete parts of the rule"). Instead, the challenged provisions "permeate[]" the Rule, making severance both infeasible and unnecessary here. *Tennessee*, 2024 WL 3019146, at *43; *see Kansas*, 2024 WL 3273285, at *18 (similar).[4] It is not the judiciary's "role to write or rewrite regulations or rules, especially those that substantively contravene existing legislation." *Texas v. Becerra*, No. 6:24-CV-211-JDK, 2024 WL 3297147, at *12 (E.D. Tex. July 3, 2024) (quotation omitted).

Third, Defendants argue (at 17–18) they will likely "succeed in appealing the preliminary injunction against enforcement of § 106.10 because that provision reflects a straightforward application of *Bostock*" and "discrimination on the basis of sexual orientation and gender identity are necessarily forms of prohibited sex discrimination." This is false. Not only do Defendants misrepresent *Bostock*, but they also wrongly assume *Bostock* applies to Title IX.

[4] *Cf. Chamber of Commerce U.S. Dep't of Labor*, 885 F.3d 360, 388 (5th Cir. 2018) ("[T]his comprehensive regulatory package is plainly not amenable to severance.").

In reality, "*Bostock* simply held that firing a homosexual or transgender employee qualifies as sex discrimination when the firing is 'because of' the employee's 'traits or actions' that the employer would otherwise tolerate in an employee of the opposite sex." *Texas*, 2024 WL 2947022, at *38 (quoting 590 U.S. at 660–61). The employers in *Bostock* engaged in sex discrimination when they fired men because of "traits or actions" (being attracted to men or presenting as a woman) that the employer tolerates in female employees. 590 U.S. at 660–61; *see L.W. v. Skrmetti*, 83 F.4th 460, 485 (6th Cir. 2023). That does not mean that adverse treatment based on grounds other than biological sex will *always* be prohibited sex discrimination. Even Defendants seem to concede this to some extent. S*ee* 89 Fed. Reg. at 33,811 ("[N]ot all conduct one might label 'sex stereotyping' necessarily violates Title IX.").

For example, a religious student group would not be considering sex *at all* if it excluded students who are bisexual or who claim a nonbinary gender identity from membership.[5] The group would not be tolerating the

[5] *See* ECF 24-7 at S80 (explaining "nonbinary" refers to "people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of

same traits—(a) being attracted to both sexes or (b) claiming a nonbinary gender identity—regardless of the excluded person's sex. Because the trait that is not "tolerated" in the hypothetical is identical for both sexes, Title IX has "nothing to say" even if *Bostock* applied. 590 U.S. at 660; *see Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 921 (5th Cir. 2023).

In any event, "*Bostock* does not apply to Title IX." ECF 53 at 19; *see, e.g.*, *L.W.*, 83 F.4th at 484 (similar). That is because: (1) the Supreme Court said so, explicitly limiting the opinion to Title VII and the specific question at issue there, 590 U.S. at 681; (2) the statutes differ "in important respects," including that Title IX allows differentiation between the sexes, *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021),[6] and (3) the employment context differs from the educational

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other genders (e.g., polygender, demiboy, demigirl), and/or who have a gender that changes over time (e.g., genderfluid)" or can be "a gender identity in its own right").

[6] Fifth Circuit precedent is not to the contrary notwithstanding Defendants' cite (at 18) to an employment discrimination case. *See Lakoski v. James,* 66 F.3d 751, 757–58 (5th Cir. 1995) (concluding that "Title IX prohibits the same employment practices proscribed by Title VII," so employees cannot "bypass" Title VII's procedures). This Court does not automatically apply Title VII precedent to Title IX, but rather recognizes important distinctions between the two statutes—including that Title IX was passed under Congress's spending power. *See, e.g.*, *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 656–57 (5th Cir. 1997) ("[W]e should be reluctant to treat Title IX's anti-discrimination

context, *see Adams*, 57 F.4th at 808 ("[T]he school is not the workplace."); *Texas*, 2024 WL 2947022, at *32 (explaining "equal educational opportunities for men and women necessarily requires differentiation and separation at times").

Defendants therefore have failed to make a strong showing that they are likely to succeed on appeal.

B. Defendants Will Suffer No Irreparable Harm Absent a Partial Stay.

Defendants also cannot show they will suffer any harm, much less irreparable harm absent a partial stay "during the pendency of the appeal." *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021). Defendants' claimed injury is alleged interference with their ability to enforce Title IX to prevent discrimination. But Defendants' cited authority is about irreparable injury to a *State* when a democratically enacted *state statute* is enjoined from being implemented by a federal court. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012). That is inapposite to this situation

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provisions in the same way that we treat Title VII's provisions."). The Supreme Court has also recognized that "Title VII is a vastly different statute" than Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168 (2005); *see also Texas*, 2024 WL 2947022, at *37; *Soule v. Connecticut Ass'n of Sch., Inc.*, 90 F.4th 34, 63 (2d Cir. 2023) (en banc) (Menashi, J., concurring).

where federal defendants are enjoined by a federal court from implementing a unilateral, bureaucratically issued rule that subverts a federal statute and conflicts with state laws. *See Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020) (alleged interference with the executive branch's implementation of a statute is "not irreparable"). Defendants have no irreparable injury from the APA working as it is intended to "check" bureaucrats that have exceeded statutory authority. *Cf. Loper Bright*, 2024 WL 3208360, at *12.

In any event, the injunction does not prevent Defendants from enforcing Title IX to prevent sex discrimination, nor does it prevent Defendants from enforcing longstanding Title IX regulations. All the injunction will do is prevent Defendants from enforcing the new, not-yet-effective Rule (in four States) that (a) has never been in effect and thus has generated no reliance interests and (b) subverts rather than effectuates Title IX. Defendants also cannot explain how they will suffer irreparable harm from delaying the Rule's effective date when Defendants *themselves* delayed the Rule's issuance multiple times. *See* ECF 24-26. If Defendants are right that delaying the Rule's effective date is irreparable harm, then Defendants have been engaged in irreparable

self-harm. This incoherence further demonstrates Defendants will suffer no irreparable harm absent a stay.

C. Plaintiffs Will Suffer Irreparable Harm if a Partial Stay Is Granted.

In contrast, Plaintiffs will suffer increased irreparable harm if the Court grants Defendants' requested stay. Plaintiffs offered substantial evidence of irreparable harm that the Rule will cause, *see, e.g.*, ECF 24-13–25, 24-32–34, which the district court credited, ECF 53 at 37, and Defendants have not rebutted.

A partial stay would, among other things, increase Plaintiffs' irreparable harm by destroying the status quo. Plaintiffs would be compelled to expend time and resources—on an incredibly short time frame—to understand their obligations under a blue-penciled Rule, revise policies, and train employees before August 1.[7] Plaintiffs would thus incur "nonrecoverable costs of complying with a putatively invalid regulation," which "constitute[s] irreparable harm." *Rest. Law Ctr. v.*

[7] It would be inequitable to impose such a burden on Plaintiffs when Defendants—who have far more resources—claim they cannot even compile the administrative record until September 20 due to "resource constraints." Defs.' Opp, *Tennessee*, No. 2:24-cv-00072, ECF 116 at 7 (E.D. Ky. July 8, 2024).

U.S. Dep't of Labor, 66 F.4th 593, 597 (5th Cir. 2023). Furthermore, a partial stay could amplify compliance costs because, if the scope of final relief differs from the preliminary relief when this case is ultimately resolved, Plaintiffs would need to expend resources to revise policies and update training a second time.

What is more, a partial stay will cause Plaintiffs to suffer all the irreparable harm that necessitated preliminary relief in the first place. Under Defendants' proposed relief, only enforcement of "(i) 34 C.F.R. § 106.31(a)(2), and (ii) 34 C.F.R. § 106.2's definition of 'hostile environment harassment' as applied to discrimination on the basis of gender identity" would be enjoined. Stay Mot. 21. Plaintiffs would thus still have to police an enormous amount of speech, be induced to violate Free Speech, Free Exercise, Due Process, and parental rights, have greater obligations and compliance costs, and face increased investigations and complaints. *See* ECF 24 at 25–27.

Plaintiffs would also still be subject to the unlawful gender-identity mandates, along with increased investigations and complaints, based on 34 C.F.R. § 106.10 and § 106.31(a)(1). Those provisions (a) equate gender-identity discrimination with sex discrimination and (b) prohibit

sex discrimination. That means Defendants will—as demonstrated in previous guidance (that is subject to a separate suit and preliminary injunction, *see Tennessee*, 104 F.4th 577)—classify treating persons consistently with their biological sex as prohibited sex discrimination under those provisions. *See* U.S. Dep't of Justice and U.S. Dep't of Educ., *Confronting Anti-LGBTQI+ Harassment in Schools* (June 23, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf (indicating that refusing to refer to students by whatever pronouns they choose or barring a biological male who claims to be a "transgender high school girl" from using the girls' restroom or trying out for the girls' cheerleading team is gender-identity discrimination).

Therefore, if the injunction is partially stayed, Plaintiffs will still face coercion to change state laws and school board practices and comply with the Rule or otherwise lose a significant amount of federal funding. And Plaintiff School Boards will still need to begin the expensive process of designing, modifying, and constructing bathrooms and locker rooms to comply with the Rule and lessen its harmful effects on privacy and safety. *See* ECF 24-21 ¶¶ 25–26; *see also* ECF 24-15–25. The fact a stay "will substantially injure" Plaintiffs thus also weighs against Defendants' stay

request. *Nken*, 556 U.S. at 434.

D. A Partial Stay Would Disserve the Public Interest.

The public interest weighs against Defendants' stay request too. Allowing Defendants to enforce portions of the unlawful and arbitrary and capricious Rule would undermine the public interest "in having governmental agencies abide by the federal laws that govern their existence and operations." *Texas*, 10 F.4th at 559 (quotation omitted).

A partial stay would also hurt the public's interest in the enforcement of democratically enacted state laws, academic freedom, and constitutional rights of students, parents, and teachers. *See, e.g.*, *Keyishian v. Bd. of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.'"); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013) ("[I]njunctions protecting First Amendment freedoms are always in the public interest." (quotation omitted)). And, because the requested partial stay would allow the gender-identity mandates to go into effect, the stay would also undermine the public's interest in protecting *all* children—children who do not wish to share bathrooms and locker rooms with adults and children of the opposite sex *and* children struggling with

gender-identity issues. *See* ECF 24 at 29 (discussing how "social transitioning can be harmful to a child's mental health and is a pathway to dangerous medical procedures that … 'will not be the best way to manage their gender-related distress'"); ECF 24-27–28, 24-37–41.

Finally, a partial stay would create confusion regarding what aspects of the Rule will go into effect, which will burden (a) schools and teachers trying to ascertain their obligations and (b) families deciding whether to find alternatives to public school as the new school year rapidly approaches.

CONCLUSION

The Court should preserve the decades-long status quo and deny Defendants' motion.

Dated: July 10, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2024, I filed the foregoing brief with the Court's CM/ECF system, which will automatically send an electronic notice of filing to all counsel of record.

/s/ Autumn Hamit Patterson
AUTUMN HAMIT PATTERSON

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that this motion complies with:

(1) the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,196 words; and

(2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016 (the same program used to calculate the word count).

/s/ Autumn Hamit Patterson
AUTUMN HAMIT PATTERSON

Dated: July 10, 2024

Exhibit 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
(at Covington)

STATE OF TENNESSEE, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 2: 24-072-DCR
	)	
V.	)	
	)	
MIGUEL CARDONA, in his Official Capacity as Secretary of Education, et al.,	)	**MEMORANDUM OPINION AND ORDER**
	)	
Defendants.	)	

*** *** *** ***

I. Introduction

On June 17, 2024, the Court enjoined enforcement of the Department of Education's (the "Department") newly promulgated rule implementing Title IX (the "Final Rule"). [*See* Record No. 100.] The Memorandum Opinion and Order entered that date outlined the substantive and procedural failings of the Final Rule while explaining how the plaintiffs had carried their burden of demonstrating the immediate and irreparable harm they would suffer in the absence of an injunction.

The Department filed a Notice of Appeal one week later and has moved this Court for a partial stay of the preliminary injunction pending the outcome of the Department's appeal to the United States Court of Appeals for the Sixth Circuit. [Record No. 104] The Department argues that the Court's injunction is overly broad, improperly enjoining provisions that were not challenged by the plaintiffs and for which no finding of harm was made. [*Id*. at 1] More specifically, it asserts that the allegations of harm raised in the motion for injunction concerned only two provisions—34 C.F.R. § 106.31(a)(2) and the definition of "hostile environment

harassment" within 34 C.F.R. § 106.2—and that the Court's injunction needlessly prevents the implementation of critical regulations that do not cause irreparable harm to the plaintiffs. [*Id.*] The Department, therefore, contends that the injunction should be limited to those specific provisions.

The preliminary injunction was issued after a comprehensive review of the Final Rule, which fundamentally alters the meaning of "discrimination on the basis of sex" under Title IX by improperly relying on the Supreme Court's holding in *Bostock v. Clayton County*, 590 U.S. 644 (2020).[1] The undersigned found that the Final Rule's provisions and embedded interpretations would most likely to cause significant and irreparable harm to the plaintiffs by compelling immediate and potentially conflicting changes in policy and practice, leading to widespread confusion and an enormous waste of resources. The Court further concluded that the Final Rule's severability clauses offered no remedy because the defects "permeate[]" the otherwise innocuous regulations—a position the Department refutes. [*See* Record No. 100, p. 90; *see also* Record No. 113, p. 2.]

After thorough consideration of the Department's motion, responsive filings, and the relevant legal standards, the motion for a partial stay of the injunction pending appeal will be denied. The injunction, as issued, is necessary to prevent immediate harm to the plaintiffs while the legality of the Final Rule is fully adjudicated. The Department has not demonstrated

[1] Throughout this Memorandum Opinion and Order, the phrase "discrimination on the basis of sex" may be referred to more broadly as "sex discrimination" or "sex-based discrimination." The use of these abbreviated phrases is not intended to suggest that the terms are inherently synonymous. Any relevant terms of art will appear in quotation marks with an appropriate citation, where applicable.

a sufficient likelihood of success on the merits of its appeal, nor has it shown that the balance of harms and consideration of the public interest weigh in favor of granting the stay.

II. Legal Standard

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States,* 272 U.S. 658, 672 (1926)). The decision to grant such a request is "an exercise of judicial discretion," *Virginian Ry. Co.,* 272 U.S. at 672, and "[t]he party requesting the stay bears the burden of showing that the circumstances justify an exercise of that discretion," *Nken*, 556 U.S. at 433–34. Courts are accorded "wide latitude" in their discretion to grant or deny stays "to avoid piecemeal, duplicative litigation and potentially conflicting results." *IBEW, Loc. Union No. 2020 v. AT&T Network Sys.*, 879 F.2d 864, 1989 WL 78212, at *8 (6th Cir. July 17, 1989) (table) (citing *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817–20 (1976)).

When evaluating a motion for a stay pending appeal, the Court evaluates four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits; (2) the likelihood that the moving party will be irreparably harmed; (3) the prospect that others will be harmed by the stay; and (4) the public interest in the stay." *Dalh v. Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 730 (6th Cir. 2021) (quoting *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016)). The third and fourth factors—the likely harm to others and the public interest—"merge when the Government is the opposing party." *Nken*, 556 U.S. at 435.

These factors are not prerequisites. Instead, they are "interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). While no one factor is dispositive, the Sixth Circuit has

recognized that "the likelihood of success on the merits often will be the determinative factor." *Thompson v. DeWine*, 959 F.3d 804, 807, 812 (6th Cir. 2020) (per curiam); *see Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir. 2006). This is particularly so where First Amendment concerns are implicated. *See Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012).

III. Analysis

The standard for granting a stay pending appeal mirrors the considerations for issuing a preliminary injunction but is viewed through a lens that seeks to maintain the status quo. *See United States v. Texas*, 144 S. Ct. 797, 798 n.2 (U.S. 2024). The Court remains mindful of this principle while observing that it is the Court's injunction that maintains the status quo by preserving a half-century's worth of interpretive consensus regarding the mandate of Title IX. But even without that consideration, a review of the relevant factors reinforces the undersigned's belief that enjoining the Final Rule in full is necessary to maintain regulatory stability and prevent irreparable harm during the pendency of this litigation.

A. Likelihood of Success on Appeal

The Department must put make a "strong showing" of its likelihood of success on the merits of its appeal to justify the requested stay. *Nken*, 556 U.S. at 434; *see Griepentrog*, 945 F.2d at 153 (requiring a stay applicant to "demonstrate more than the mere 'possibility' of success"). The Court addresses this factor by examining several key issues raised in the instant motion: the Department's case for maintaining 34 C.F.R. § 106.10, enjoining 34 C.F.R.

§ 106.2 in its entirety, enjoining "unchallenged" provisions of the Final Rule, and the effectiveness of the Final Rule's severability clauses.[2]

1. Section 106.10

The Department challenges the injunction regarding § 106.10, arguing that this provision, which redefines "discrimination on the basis of sex" to include sex-adjacent characteristics, does not harm the plaintiffs and should not be enjoined. [Record No. 104, pp. 5–6] It characterizes this provision as a straightforward application of the Supreme Court's reasoning in *Bostock*, further arguing that it "is not the cause of Plaintiffs' claimed harms." [*Id.* at 5] But the Department's contention ignores entirely the plaintiffs' underlying arguments, this Court's findings, and prior observations of the Supreme Court and Sixth Circuit.

a. *Bostock*'s Inapplicability

The Department accepts that "sex is binary and assigned at birth." [*See* Motion Hearing Transcript, p. 129.] And it acknowledges that Title IX prohibits discrimination "on the basis of sex." 20 U.S.C. § 1681(a). But it fails to recognize is that *Bostock*'s holding is entirely irreconcilable with the text and purpose of Title IX. By relying so heavily on this *Bostock* reasoning, the Final Rule was constructed on a foundation of quicksand.

In *Bostock*, the Supreme Court began its analysis by noting that Title VII prevents discrimination "because of" an individual's sex. 590 U.S. at 656. The Court found that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 346, 360 (2013)). These three phrasal prepositions

[2] While there is considerable overlap in some of these topics, the Court will address them separately to facilitate review on appeal.

express a straightforward relationship of cause-and-effect. Expressed in legal terms, "Title VII's 'because of' test incorporates the 'simple' and 'traditional' standard of but-for causation." *Id.* (quoting *Nassar*, 570 U.S. at 346, 360).

The majority opinion offers a useful illustration to help understand Title VII's but-for test in action.

> Consider an employer with a policy of firing any woman he discovers to be a Yankees fan. Carrying out that rule because an employee is a woman *and* a fan of the Yankees is a firing "because of sex" if the employer would have tolerated the same allegiance in a male employee. Likewise here. When an employer fires an employee because she is homosexual or transgender, two causal factors may be in play—*both* the individual's sex *and* something else (the sex to which the individual is attracted or with which the individual identifies).

Id. at 661. But, as outlined below, discrimination "because of such individual's sex" is not, and cannot, be the same as discrimination "on the basis of sex."[3]

Just as the Supreme Court did in *Bostock*, this Court begins by ascertaining the plain meaning of the words at issue: "on the basis of". *See Garland v. Cargill*, 602 U.S. 406, 415–16 (2024). The root word "basis" is of Latin origin, meaning "foundation" or "support." *Basis, Oxford Dictionary of English Etymology* 77 (C. T. Onions, ed., 1966); *see also Basis*, *Black's Law Dictionary* 185 (11th ed. 2019) ("A fundamental principle; an underlying fact or condition; a foundation or starting point."); *Basis, Mirriam-Webster's Dictionary of Law* 45 (Linda Picard Wood ed. 2016) ("1: something on which something else is established[;] . . . 2:

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[3] In the Memorandum Opinion and Order enjoining the Final Rule, the undersigned concluded that "on the basis of sex" was not ambiguous and that the Department was not entitled to *Chevron* deference. [Record No. 100, p. 16 n.6] While the undersigned's position has not changed, the Supreme Court's recent overruling of the *Chevron* doctrine further reinforces this Court's constitutional and statutory obligation to reject an agency interpretation at odds with the Court's independent judgment. *See Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360, at *22 (U.S. 2024).

a basic principle or method."); *Basis, Mirriam-Webster's Collegiate Dictionary* 72 (7th ed. 1973) ("1: Foundation; 2: the principal component of anything; 3: something on which anything is constructed or established; 4: the basic principle."). Rather than indicating cause-and-effect, "on the basis of" is a preposition that indicates a foundational criterion upon which distinctions are made. In the context of Title IX, that criterion is sex—male or female.

This reading is further reinforced by observing that Title VII's prohibition is victim-centric, whereas Title IX's makes a broad categorical distinction. Title VII bars discrimination "because of *such individual's*" sex—calling for a but-for analysis focused on the individual victim's sex. 42 U.S.C. § 2000e–2(a)(1) (emphasis added). Title IX imposes no such requirement, speaking instead in broad categorical terms: "*No person* in the United States shall, on the basis of sex, be excluded . . . ."[4] 20 U.S.C. § 1681(a) (emphasis added). This distinction reflects prior observations from the Supreme Court and Sixth Circuit that "Title VII . . . is a vastly different statute from Title IX." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *see also L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir. 2023) (noting that *Bostock*'s "text-driven reasoning applies only to Title VII"); *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021) ("Title VII differs from Title IX in important respects . . . Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context."). Giving meaning to these distinctions is

[4] The Supreme Court has acknowledged that Title IX's meaning would be altered if it instead prohibited discrimination "on the basis of *such individual's* sex." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 179 (2005) (emphasis in original); *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (noting in the context of Title VI and the Fourteenth Amendment: "That such differently worded provisions should mean the same thing is implausible on its face.").

necessary under Title IX's framework, where imposing Title VII's but-for test or victim-centric focus would entirely undermine the statute's purpose.

The Department acknowledges that "[s]ome courts have declined to extend the Supreme Court's reasoning in *Bostock* to Title IX by concluding that prohibitions on discrimination 'because of sex' and discrimination 'on the basis' of sex do not mean the same thing." 89 Fed. Reg. 33806. But it simply "disagrees" with those determinations, instead concluding that "[b]oth phrases simply refer to discrimination motivated *in some way* by sex." *Id.* (emphasis added). As explained below, such a reading is unworkable.

The Final Rule proclaims that "sex separation in certain circumstances, including in the context of bathrooms or locker rooms, is not presumptively unlawful sex discrimination." *Id.* at 33818. However, when sex separation "denies a transgender student access to a sex-separate facility or activity consistent with that student's gender identity," it violates Title IX's general nondiscrimination mandate. *Id.* This is a necessary result of adopting *Bostock*'s but-for test. But such a reading would also require schools to permit a non-transgender student to access the locker room or shower facility of his or her choosing: *But for* the high school quarterback being male, he would be able to access the female showers. Yet the Department would presumably reject such a claim, referring to the scenario as a "permissible sex separation or differentiation." *Id.* at 33816 (citing 34 C.F.R. § 106.33).

The Department uses the *Bostock* holding as a rationale for its entirely new reading of Title IX—one which creates a series of new protected classes not contemplated by the drafters of Title IX. The Department's "more than de minimis harm standard" serves as a clever, albeit transparent, attempt to neutralize the resulting absurdities—ensuring the new protections apply to some and not to others. Take for example the Final Rule's declaration that it causes "more

than de minimis injury" to prevent a transgender student from using the sex-separate facility consistent with the student's gender identity. *Id.* at 33818. When commenters pointed out that this "elevates protections for transgender students over other students, especially cisgender girls and women," *id.* at 33817, the Department explained that it was "unaware of instances in which cisgender students excluded from facilities inconsistent with their gender identity have experienced the harms transgender students experience as a result of exclusion from facilities consistent with their gender identity," *id.* at 33820. So to clarify, yes; the Department's Final Rule expressly grants preferential treatment to transgender students.

Under Title IX's framework, the adoption of *Bostock*'s but-for test would be contrary to statute and entirely unworkable. The Department's apparent remedy was to create regulatory carveouts aimed at limiting *Bostock*'s reasoning to the select class of individuals the Department set out to protect. In doing so, it created an impermissible litmus test that discriminates against those that Title VII's but-for test would otherwise protect (e.g., the quarterback). But because Title VII and Title IX combat discrimination in textually distinct ways, the Department's integration of *Bostock* is fatally flawed.

b. Unauthorized Statutory Expansion

Another obvious flaw with § 106.10 is found in its drafting. Title IX expressly authorizes the promulgation of rules prohibiting discrimination "on the basis of sex." 20 U.S.C. §§ 1681(a), 1682. The Department relies on *Bostock* to argue that "on the basis of" is expansive of the term "sex," to include things "inextricably bound up with sex." [Record No. 73, p. 16] (quoting *Bostock*, 590 U.S. at 660–61). Therefore, the Department reasons that "discriminating against someone based on their gender identity necessarily constitutes

discrimination 'on the basis of' the sex that they were assigned at birth." [*Id.*] However, § 106.10 takes it one step further.

The Final Rule declares that discrimination "on the basis of sex" includes discrimination "*on the basis of* sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. 33886 (adding 34 C.F.R. § 106.10). By preceding these new classifications with "on the basis of," a plain reading of § 106.10 coupled with the Department's *Bostock* interpretation would necessarily lead to the conclusion that Title IX also prohibits all things "inextricably bound up" with "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." The Department admits as much when it acknowledges that one's gender identity "may or may not be different from their sex assigned at birth." *Id.* at 33809. It also announces that it "interprets 'sex characteristics' to include 'intersex traits,'" and that "gender norms" and "gender expression" are "rooted in one or more of the bases already represented in § 106.10." *Id.* at 33803.

The Administrative Procedure Act ("APA") requires courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The Department's interpretation of Title IX transforms the familiar prohibition of sex-based discrimination into a sweeping anti-discrimination mandate, capable of regulating conduct that neither implicates the male/female dichotomy nor relates to sex at all. [*See* Record No. 100, p. 27.] After utilizing "all relevant interpretive tools," the undersigned concluded that the Department exceeded its legislative authority by expanding the plain meaning of discrimination "on the basis of sex." *See Loper Bright Enters. v. Raimondo*, No. 22-451, 2024 WL 3208360, at *16 (U.S. 2024).

This extraordinary departure from Title IX's purpose—equality of educational opportunity for girls and women—becomes even more evident when considering the following hypotheticals.

Section 106.10 of the Final Rule proscribes discrimination on the basis of *sex stereotypes*, which the Department concludes reaches "discrimination based on others' expectations regarding a person's pregnancy or related conditions and assumptions about limitations that may result." 89 Fed. Reg. 33756. Section 106.2's definition of "*Pregnancy or related conditions*" includes "medical conditions related to . . . lactation." *Id.* at 33883. Accordingly, the Department reads Title IX to prohibit discrimination based on others' expectations regarding a person's medical conditions related to lactation and assumptions about any limitations that may result. Would this provision be violated if a recipient failed to accommodate a biological male in his pursuit of lactation? The Final Rule notes that "being able to live consistent with one's gender identity is critical to the health and well-being of transgender youth." *See id.* at 33819 n.90 (citing World Professional Association for Transgender Health ("WPATH"), *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health S1 (2022)). The very authority cited in the Final Rule reports that "many" transgender biological males "express the desire to chest/breast feed." WPATH, *supra* at S161 (identifying a case in which a biological male was successful in "lactating and chest/breast feeding").

Similarly, § 106.10 bars discrimination on the basis of *sex characteristics*, which "is intended to refer to physiological sex-based characteristics," including, but not limited to "a person's anatomy, hormones, and chromosomes associated with [being] male or female." 89 Fed. Reg. 33811. The Final Rule announces that no "medical diagnosis" is required and that the provision covers discrimination "based on physiological sex characteristics that differ from

or align with expectations generally associated with male and female bodies." *Id.* Like the definition before, it is clear to see how this intentionally undefined definition could capture situations never remotely conceived by Title IX's authors. If a male with a high-pitched voice is denied the ability to sing a traditionally male part in the school choir, has the school's choir director impermissibly discriminated against him by assigning him to a traditionally female part that falls within his vocal range? The number of possible scenarios is limitless given the Department's refusal "to make definitive statements about examples." *Id.*

Given the way § 106.10 was written and the Department's insistence on using vague terms—often defined by their nested and equally undefined subterms—the provision far exceeds the that which is authorized under Title IX. The plaintiffs argue, and the undersigned agrees, that the Department's redefinition of sex discrimination in § 106.10 drastically and impermissibly alters the obligations of educational institutions under Title IX. [*See* Record Nos. 110, p. 3; 111, p. 4.] This expansive interpretation introduces considerable uncertainty and complexity, necessitating comprehensive changes in school policies, training, and enforcement mechanisms. The claim that this expansion "does not cause Plaintiffs any injury" is plainly without merit. [Record No. 113, p. 1]

c. Procedural Defects

Aside from the substantive issues already addressed, the injunction identifies significant concerns about the procedural validity of § 106.10. [*See* Record No. 100, pp. 66–77.] The Department's redefinition of discrimination "on the basis of sex" appears to have been implemented without adequate notice and comment, raising substantial questions under the APA. [*See id.* at 76.] ("It is an inescapable conclusion based on the foregoing discussion that the Department has effectively ignored the concerns of parents, teachers, and

students . . . ."). The Department's responses to concerns of bias, vagueness, and overbreadth often fell woefully short of that demanded by the APA. *See Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to "examine the relevant data and articulate a satisfactory explanation for its action"); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("[W]here the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law.").

Given these substantial legal and procedural issues, the Department has not shown a strong likelihood of success on the merits regarding the Court's decision to enjoin § 106.10. The provision's sweeping changes and the procedural deficiencies in its adoption support the decision to include it in the preliminary injunction.

2. Enjoining Section 106.2 in its Entirety

The Department contends that the Court's injunction improperly enjoins § 106.2 of the Final Rule in its entirety, arguing that the plaintiffs only challenged its definition of "hostile environment harassment" as applied to gender identity discrimination. It maintains that "hostile environment harassment" applies outside the context of gender identity and that the injunction improperly enjoined more than was necessary to mitigate the plaintiffs' alleged harms. [*See* Record No. 104, p. 6.]

This argument fails to recognize the extent to which other applications of "hostile environment harassment," and in fact other definitions in § 106.2 more broadly, have been irreparably tainted by overarching procedural defects and *Bostock* reasoning. This Court's Memorandum Opinion and Order explains, in some detail, how the Final Rule's definition of "hostile environment harassment" is likely to "compel[] speech and otherwise engage[] in

viewpoint discrimination." [Record No. 100, p. 48] The opinion also clear explains that the provision's reliance on amorphous and undefined terms make it "vague and overbroad in a way that impermissibly chills protected speech." [*Id.* at 56] Despite the Department's argument to the contrary, the plaintiffs' criticisms of the "hostile environment harassment" provision—and this Court's analysis—were not limited to the context of gender identity. [*See, e.g., id.* at 43 (discussing misgendering and compelled speech due to sex stereotyping).] The definition itself suffers from both procedural defects under the APA and constitutional deficiencies that are implicated regardless of the metric being used to define sex-discrimination. [*See id.* at 54.] The Court maintains that it is necessary to enjoin enforcement of the Final Rule's "hostile environment harassment" provision in its entirety.

The plaintiffs also have adequately demonstrated that other definitions and obligations found within § 106.2 are meaningless without first determining the meaning of sex discrimination. [*See* Record No. 110, p. 5.] For example, § 106.2 defines "relevant" to mean "related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46." 89 Fed. Reg. 33884. This necessarily depends on the scope of sex discrimination and the applicability of *Bostock*. Similarly, § 106.2's definition of "supportive measures" may or may not have to account for protections against discrimination based on gender identity and more. Depending on the meaning of sex discrimination, these definitions will influence the obligations of the Title IX coordinators and the procedures they must follow, thereby affecting the entire grievance process outlined in §§ 106.44 and 106.45. *See id.* at 33885. These changes are directly tied to key definitions and cannot function independently without creating significant regulatory confusion or an extraconstitutional judicial rewrite.

The Supreme Court has consistently recognized that when a statutory or regulatory provision is fundamentally flawed, its interconnected provisions cannot be severed without causing substantial disruption. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (noting that invalid provisions may be dropped where the remainder "is left fully operative as law"). Here, the challenged importation of *Bostock*'s reasoning is so central to the Final Rule that severing expressly challenged provisions is not a viable option. The Department's suggested remedy would require this Court to scour the Final Rule's more than four-hundred pages of text and make sweeping cuts in a manner that would impermissibly depart from the Court's judicial function and wade into the realm of executive rulemaking. *See infra* Section III.A.3. Absent such an endeavor, the Final Rule would be incoherent.

Moreover, the procedural deficiencies identified in the adoption of these definitions, like those addressed above, raise significant questions under the APA. The lack of adequate reasoned response to these substantial changes undermines the validity of the entire provision. *See FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 981 (2005) ("Unexplained inconsistency . . . [may be] a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.").

In summary, the definitions within § 106.2 are integrally connected to the redefinition of sex discrimination derived from *Bostock*, appearing in § 106.10, and articulated in the Final Rule's stated "Purpose". *See* 89 Fed. Red. 33476 (purporting "to provide greater clarity regarding . . . the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions,

sexual orientation, and gender identity"). The plaintiffs have convincingly argued that these definitions cannot be salvaged without causing significant disruption, regulatory confusion, and compliance cost. Thus, the Court's decision to enjoin § 106.2 in its entirety is justified.

3. Enjoining Other Sections of the Final Rule

The Department also challenges the injunction as it pertains to many other sections of the Final Rule, particularly those not expressly named by the plaintiffs. It contends that these sections should not be enjoined as they "have nothing to do with gender identity," and plaintiffs have not demonstrated imminent injury absent the injunction. [Record No. 104, p. 3] The Department provides the following examples:

> [P]rovisions regarding the role of Title IX coordinators, 89 Fed. Reg. at 33,885 (34 C.F.R. § 106.8(a)); recipients' notice and record-keeping obligations, *id.* at 33,885-86 (34 C.F.R. § 106.8(c), (f)); access to lactation spaces, *id.* at 33,888 (34 C.F.R. § 106.40(b)(3)(v)); a recipient's response to sex discrimination, *id.* at 33,888-91 (34 C.F.R. § 106.44); and grievance procedures for claims of sex discrimination, *id.* at 33,891-95 (34 C.F.R. §§ 106.45, 106.46).

[*Id.* at 3–4]

First, the Court must consider the broader context of these provisions and their interplay with the Final Rule's interpretive guidance and the provisions more directly at issue (i.e., §§ 106.2, 106.10, and 106.31(a)(2)). As observed previously, the Department's adoption of *Bostock* alone necessarily embeds a new meaning of sex discrimination into the entire Final Rule. *See, e.g.*, 89 Fed. Reg. 33802 (noting that the Department believes Title IX's prohibition on sex discrimination includes things which "necessarily involves consideration of a person's sex"). This impermissible expansion of Title IX's mandate is not confined to the creation of § 106.10—it directly flows from the Department's importation of *Bostock*'s Title VII-based reasoning.

For example, the Department suggests that provisions regarding the role of Title IX coordinators were improperly enjoined. [Record No. 104, p. 3] But this ignores the fact that the scope of these regulations is unascertainable without first resolving the central dispute arising under *Bostock*. Section 106.8(a) currently requires that a Title IX Coordinator be designated "to coordinate [the recipient's] efforts to comply with its responsibilities under [Part 106]." The Final Rule appears significantly more exacting, further insisting a Title IX Coordinator "ensure the recipient's consistent compliance with its responsibilities under Title IX and [Part 106]." 89 Fed. Reg. 33885. But that mandate necessarily calls for "consistent compliance" with responsibilities that the Final Rule defines in light of *Bostock*. *See, e.g.*, *id.* at 33569 (describing training obligations under § 106.8(d)(1), which require all employees to be trained "on the scope of conduct that constitutes sex discrimination under Title IX, including sex-based harassment").

The same issue presents itself when reviewing the recordkeeping obligations outlined in the Final Rule's § 106.8(f). The Department acknowledges that "§ 106.8(f) broadens the existing scope of the recordkeeping requirements . . . because the final recordkeeping requirement applies to all notifications to the Title IX Coordinator about conduct that reasonably may constitute sex discrimination and all complaints of sex discrimination." *Id.* at 33873 (estimating "that modifications to recipients' recordkeeping systems will cost approximately $13,022,034 in Year 1"). But this requirement is once again rendered meaningless without first determining the meaning of sex discrimination—the central focus of the plaintiffs' legal challenge.

The provisions identified by the Department as being captured in the Court's overbroad injunction impose new duties on recipients, all of which hinge on the Department's adoption

of an entirely new understanding of sex discrimination. [*See* Record No. 104, pp. 3–4.] Allowing these provisions to take effect while enjoining the definitions and interpretations from which they derive their meaning would require educational institutions to guess as to the provisions' scopes, creating an inconsistent and unmanageable regulatory framework.

The Supreme Court has emphasized the importance of regulated parties knowing what is required of them. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *see also Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). The plaintiffs have convincingly argued that the Final Rule, *in its entirety*, fails to provide such clarity, and the piecemeal enforcement suggested by the Department would only exacerbate this problem.

Moreover, the potential constitutional issues raised by the plaintiffs similarly extend to these remaining provisions. The Department's redefined sex discrimination standard and vague guidance implicates the same First Amendment protections on speech and religious expression that exist elsewhere. *See, e.g.*, 89 Fed. Reg. 33493 (declaring that "Title IX's broad prohibition on sex discrimination encompasses, at a minimum, discrimination against an individual based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity"). If the remaining provisions are preserved, the viewpoint discrimination inherent in the Final Rule remains likely to impose an impermissible constraint on an individual's ability to freely express certain religious and/or philosophical

viewpoints. [*See* Record No. 100, pp. 41–56.] Enjoining § 106.2's definitions of "sex-based harassment" and/or "hostile environment harassment" still leaves the existing "sexual harassment" standard in full force. *See* 34 C.F.R. § 106.30(a). Permitting the Department's redefinition of "on the basis of sex" to act through existing regulations is no remedy at all.

The Department has not demonstrated a likelihood of success on the merits regarding the indirectly contested provisions of the Final Rule, which inherently impose the same harms as those challenged with more specificity. This Court's injunction is not an overreach but a necessary measure to maintain regulatory coherence and prevent piecemeal implementation that could lead to significant administrative challenges and legal uncertainties.

4. Severability Clauses

Though sufficiently addressed in the preceding discussion, the undersigned will nonetheless directly address the Department's severability argument. It argues that the preliminary injunction is overly broad because the contested provisions of the Final Rule were expressly severable and intended to operate independently of each other.[5] [*See* Record No. 104, p. 4. *See also supra* Section III.A.2–3.] But "a severability clause is an aid merely; not an inexorable command." *Reno v. ACLU,* 521 U.S. 844, 884–85, n.49 (1997); *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."). Severability clauses do not function

[5] The Final Rule notes that "the severability clauses in part 106, . . . continue to be applicable," and identifies them by Subpart: § 106.9 (Subpart A—"Introduction"), § 106.16 (Subpart B—"Coverage"), § 106.24 (Subpart C—"Discrimination on the Basis of Sex in Admission and Recruitment Prohibited"), § 106.46 (Subpart D—"Discrimination on the Basis of Sex in Education Programs or Activities Prohibited"), § 106.62 (Subpart E—"Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited"), § 106.72 (Subpart F—"Retaliation"), and § 106.82 (Subpart G—"Procedures"). *See* 89 Fed. Reg. 33848.

as a get out of jail free card—redeemable by an Executive agency seeking to recruit the Court into the rulemaking process. *See Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 625 (2016) (quoting *Ayotte v. Planned Parenthood of N. New Eng.,* 546 U.S. 320, 329 (2006)) ("A severability clause is not grounds for a court to 'devise a judicial remedy that . . . entail[s] quintessentially legislative work.'").

Courts are not required "to proceed in piecemeal fashion," going "application by conceivable application" to effectively rewrite regulations in an effort to save them from their statutory and unconstitutional defects. *Id.* at 625–26. And even when severing a discrete provision is possible, "making distinctions in a murky constitutional context, or where line-drawing is inherently complex," may require an improper judicial excursion into the legislative domain. *Ayotte,* 546 U.S. at 330.

The doctrine of severability imposes a two-step inquiry on courts. First, a court must determine "whether the [regulation] will function in a *manner* consistent with the intent of [the agency]." *Alaska Airlines,* 480 U.S. at 685. *But see Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, J., dissenting) ("Even if the remaining provisions will operate in some coherent way, that alone does not save the statute."). Second, the reviewing court must determine whether the agency would have promulgated the rule in the absence of the severed provisions. *Alaska Airlines,* 480 U.S. at 685.

Here, the challenged provisions and embedded interpretive guidance is so integral to the Final Rule that attempting to salvage provisions through severance would leave an incoherent regulatory framework. The Department's melding of Title VII jurisprudence with the Title IX framework is not something that can be severed as a discrete, isolated provision. Instead, it fundamentally redefines the scope and application of Title IX across multiple

contexts. The inescapable interconnectedness of the Department's slew of new interpretations supports the undersigned's initial determination that a broad injunction is necessary to prevent irreparable harm and ensure regulatory coherence.

Because the Final Rule would fail to function in the absence of necessarily severed provisions, the Court need not determine whether the Department would have promulgated the Final Rule absent its glaring defects.[6] The Department's argument that the Final Rule's provisions can be meaningfully severed does not hold up under scrutiny, and thus, the Department has not demonstrated a substantial likelihood of success on this point.

B. Likelihood of Irreparable Harm

The Department also contends that it will suffer irreparable harm if the preliminary injunction is not partially stayed pending appeal. But to justify this assertion, it must demonstrate that the harm is "both certain and immediate, rather than speculative or theoretical." *Griepentrog*, 945 F.2d at 154.

The Department argues that "[e]very time the federal government 'is enjoined by a court from effecting statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" [Record No. 104, p. 6] (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)). This is a most curious citation for the Department to lean on. The full quotation recognizes the irreparable injury that occurs "any time a *State*" is prevented from effectuating statutes enacted *through the legislative process*. *See New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). And in this case, the Plaintiff States far more convincingly make that very claim. [*See* Record No.

[6] The Department makes quite clear its view that the severability provisions refute any suggestion to the contrary. [Record No. 113, p. 3]

1, p. 68.] They argue persuasively that the Final Rule undermines legislatively enacted State statutes with federal regulations imposed by unelected bureaucrats in Washington, D.C. [*See id.* ¶ 22.]

The Department also suggests that the injunction prevents the Final Rule from effectuating "Title IX's twin goals of 'avoiding the use of federal resources to support discriminatory practices and providing individual citizens effective protection against those practices.'" [Record No. 104, p. 7] (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)) (cleaned up). It goes on to suggest the injunction "*could* prematurely impair the rights of individuals" by preventing the Department from taking steps to ensure that, *inter alia*, "students are not being punished for being pregnant, gay, or transgender." [*Id.*] However, it offers no evidence or support that such acts are occurring and even acknowledges that the plaintiffs "nowhere suggest that they intend to engage in discrimination against students for being pregnant or gay at all." [*Id.* at 5] In short, to the extent such delayed enforcement would constitute a harm to the Department, it is premised on the entirely theoretical notion that students within the Plaintiff States *are* being punished for being pregnant, gay, or transgender.

The Department also suggests a stay would restore provisions that prohibit things like "forcing a student to sit in the back of a classroom because he is gay, excluding a student from the lunchroom because he is transgender, sexually harassing a cisgender woman in a manner that meets the regulatory definition of hostile environment harassment, or requiring a breastfeeding student to express breastmilk in a bathroom stall." [Record No. 113, p. 6] But once again, the Department provides no evidence of such things occurring within the Plaintiff States' jurisdictions.

The Department's arguments are unpersuasive for two clear reasons. First, the preliminary injunction does not eliminate protections against discrimination; it merely maintains the status quo pending a thorough judicial review of the Final Rule's legality. As the Supreme Court noted in *Nken*: "A stay is an 'intrusion into the ordinary processes of administration and judicial review,' and accordingly 'is not a matter of right, even if irreparable injury might otherwise result.'" 556 U.S. at 427 (first quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'm,* 259 F.2d 921, 925 (D.C. Cir. 1958) (*per curiam*); and then quoting *Virginian Ry. Co.,* 272 U.S. at 672).

Second, the Department has not demonstrated that the delay in implementing the Final Rule will cause immediate and irreparable harm. The protections under the *existing* regulatory framework remain in place, continuing to provide a mechanism for addressing discrimination. The speculative nature of the Department's claimed harm is insufficient to meet the rigorous standard required for a stay. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (standing for the proposition that a stay pending appeal must be supported by more than "a possibility of irreparable harm").

The Department has not met its burden of demonstrating that, absent a stay, it will suffer irreparable harm. The speculative nature of the claimed harms and the continued protection under existing regulations all weigh against the issuance of a stay.

C. Harm to Others and the Public

The third and fourth factors in determining whether to grant a stay pending appeal look to the potential harm that will be imposed upon others and the public if the stay is granted. In this case, the Court considers the harm that the plaintiffs, other interested parties, and the public will likely suffer if the preliminary injunction is stayed, thereby allowing portions of the Final

Rule to take effect in less than one month's time. These considerations are weighed against any potential harm faced by the Department. *See Winter*, 555 U.S. at 20 (noting that the balance of equities must weigh in favor of the party suffering the greater harm).

The plaintiffs argue that, should a stay be granted, the immediate burdens placed on educational institutions and their staff will be considerable. First, the implementation of the Final Rule without a clear resolution of its legality will create substantial administrative and operational challenges for schools. [*See* Record No. 110, p. 7.] Requiring schools to comply with some provisions, including those which derive meaning from enjoined provisions, will require schools to embark on the highly speculative and costly endeavor of overhauling existing policies and training programs while attempting to predict the Final Rule's ultimate form. [*See id.* at 8.] The harm to schools, measured in terms of time and money, has been well established by the plaintiffs and is neither trivial nor speculative. [*See* Record No. 100, Part V.]

Second, the risk of legal conflict is considerable. A partial stay would force States to navigate a complex and potentially contradictory regulatory landscape, attempting to reconcile existing state laws and policies with the Final Rule's mandates. [*See* Record No. 19-1, p. 31.] This uncertainty would likely result in inconsistent enforcement and could expose schools to additional litigation risks, arising under both Title IX and state law. [*See* Record No. 100, p. 63.] Such a scenario undermines the very purpose of regulatory clarity and stability that Title IX aims to achieve.

Third, the potential harm extends to students and staff who would be directly affected by the immediate changes in policies and practices. This includes infringement on religious freedoms and free speech rights, either through compelled or chilled speech. *See Sorrell v.*

IMS Health Inc., 564 U.S. 552, 566 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.") (citation omitted); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). The plaintiffs have presented credible arguments that the Final Rule's enforcement will likely lead to violations of these constitutional rights. [*See* Record No. 100, pp. 41–56.]

Fourth, beyond students and staff, the public has a significant interest in the evenhanded application of laws and regulations. This requires they be drafted in such a way as to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). When a vague regulation "abuts upon sensitive areas of basic First Amendment freedoms," uncertainty will inevitably "inhibit the exercise of those freedoms." *Id.* at 109 (citations omitted). The Final Rule raises those very concerns.[7] Allowing the Final Rule to take effect while its legal validity is still in question will disrupt existing clarity and likely leading to inconsistent application and enforcement across different states and educational institutions. [*See* Record No. 100, Part VI.]

The immediate harm to the plaintiffs will likely be substantial if a stay is granted. The administrative burdens, legal uncertainties, and potential constitutional violations underscore the need for maintaining the injunction until a final decision is issued. The injunction maintains the status quo and prevents the immediate and significant harm that would result

[7] In the Final Rule, the term "vague" appears thirty-two times; "vagueness," fourteen times; "overbroad," twenty-one times; and "First Amendment," two hundred sixty-nine times. *See generally* 89 Fed. Reg. 33474.

from the Final Rule's premature enforcement. The balance of equities clearly favors maintaining the preliminary injunction to prevent these significant harms while this matter is pending a final determination.

IV. Conclusion

The Department fails to demonstrate a substantial likelihood of success on the merits. Likewise, it fails to rebut the myriad substantive and procedural flaws with the Final Rule as discussed at length by the plaintiffs. Next, the Department's purported claim of irreparable harm is speculative at best, especially in light of the existing protections which remain in place. Conversely, the plaintiffs have made a strong showing that granting a stay would result in substantial and immediate harm to the States, their educational institutions, and all those who rely on the services they provide. Finally, the public interest in upholding regulatory clarity, protecting constitutional rights, and avoiding unnecessary upheaval in schools favors the plaintiffs.

Based on the foregoing analysis and discussion, it is hereby

ORDERED that the Motion for a Partial Stay Pending Appeal filed by the United States Department of Education and Miguel Cardona, Secretary of the U.S. Department of Education [Record No. 104] is **DENIED**.

Dated: July 10, 2024.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STATE OF LOUISIANA ET AL	**CASE NO. 3:24-CV-00563**
VERSUS	**JUDGE TERRY A. DOUGHTY**
U S DEPT OF EDUCATION ET AL	**MAG. JUDGE KAYLA D. MCCLUSKY**

MEMORANDUM ORDER

Pending before the Court is a Motion for a Partial Stay Pending Appeal [Doc. No. 59] filed by Defendants.[1] Plaintiff Rapides Parish School Board ("Rapides") and the Louisiana Plaintiffs filed Oppositions [Doc. Nos. 65, 66].[2] Defendants filed a Reply [Doc. No. 69].

For the reasons set forth herein, Defendants' Motion for a Partial Stay Pending Appeal is **DENIED**.

I. BACKGROUND

On April 29, 2024, the United States Department of Education issued a Final Rule, which redefined sexual discrimination in Title IX. The Final Rule redefines "sex discrimination" to include gender identity, sexual orientation, sex stereotypes, and sex characteristics. Further, it preempts state law to the contrary and requires students to be allowed access to bathrooms and

[1] Defendants consists of U S Department of Education; Miguel Cardona, in his official capacity as Secretary of Education; Office for Civil Rights, U S Dept. of Education; Catherine Lhamon, in her official capacity as the Assistant Secretary for Civil Rights; U S Dept of Justice, and Merrick B. Garland, in his official capacity as the Attorney General of the United States.[1]

[2] Louisiana Plaintiffs consist of: State of Louisiana, by and through its Attorney General, Elizabeth B. Murrill; LA Dept. of Education, State of Mississippi, by and through its Attorney General, Lynn Fitch; State of Montana, by and through its Attorney General, Austin Knudsen; State of Idaho, by and through its Attorney General, Raul Labrador; School Board of Webster Parish; School Board of Red River Parish; School Board of Bossier Parish; School Board of Sabine Parish; School Board of Grant Parish; School Board of West Carroll Parish; School Board of Caddo Parish; School Board of Natchitoches Parish; School Board of Caldwell Parish; School Board of Allen Parish; School Board of LaSalle Parish; School Board of Jefferson Davis Parish; School Board of Ouachita Parish; School Board of Franklin Parish; School Board of Acadia Parish; School Board of DeSoto Parish; and School Board of St. Tammany Parish.

locker rooms based on their gender identity. Additionally, it prohibits schools from requiring medical or other documentation to validate the student's gender identity, requires schools to use whatever pronouns the student prefers, and imposes additional requirements that will result in substantial costs to the recipient schools.

On April 29, 2024, Louisiana Plaintiffs filed a Complaint[3] against Defendants. Louisiana Plaintiffs amended the Complaint on May 3, 2024.[4] On April 30, 2024, Rapides filed a Complaint.[5] This Court consolidated both cases on May 15, 2024.[6]

On May 13, 2024, Louisiana Plaintiffs filed a Motion for a Postponement or Stay Under 5 U.S.C. § 705 or Preliminary Injunction[7] . On May 14, 2024, Rapides filed a Motion for Preliminary Injunction and Delay of Effective Date.[8] On June 13, 2024, this Court granted the Plaintiffs' Motions for Preliminary Injunctions. [9]

On June 24, 2024, Defendants filed a Notice of Appeal.[10] That same day, Defendants filed the instant Motion for a Partial Stay Pending Appeal.[11]

In Defendants' Motion for Partial Stay, Defendants move the Court to stay only 34 C.F.R. § 106.31(a)(2) and the definition of "hostile environment harassment" within 34 C.F.R. § 106.2. Defendants also move to lift the stay for other provisions of the Final Rule, including 34 C.F.R. § 106.2, which expands the definition of sex discrimination.

Defendants maintain the provisions are severable and that the Preliminary Injunction is overbroad. The Louisiana Plaintiffs and Rapides argue that Defendants waived the severability

[3] [Doc. No. 1]
[4] [Doc. No. 11]
[5] [Doc. No. 1, Case #1:24-cv-00567]
[6] [Doc. No. 25]
[7] [Doc. No. 17]
[8] [Doc. No. 11, Case #1:24-cv-00567]
[9] [Doc. No. 53, 54]
[10] [Doc. No. 58]
[11] [Doc. No. 59]

argument and that the entire set of provisions are so interrelated that a partial lifting of the stay would leave an incoherent collection of stray regulations.

II. LAW AND ANALYSIS

A. Law

To obtain a stay of a district court decision pending appeal, Defendants "bear a heavy burden." *Plaquemines Parish v. Chevron USA, Inc.*, 84 F.4th 362, 373 (5th Cir. 2023). In determining whether the stay applicant has satisfied their burden, the Court must consider four factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the stay will substantially injure the other parties interested in this proceeding; and (4) where the public interest lies. *Id*. When government Defendants are applying for a stay and Plaintiffs are the opposing party, the factors do not merge, and the public interest factor is distinct. *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 353 (5th Cir. 2022). Severability is not determined by what was challenged; rather, severability considers whether the removal of the unlawful provisions will "impair the function of the statute as a whole." *K-Mart Corp. v Cartier, Inc*., 486 U.S. 281, 294 (1988).

B. Analysis

Defendants cannot meet their burden of showing that they are likely to succeed on the merits, that Defendants would be irreparably harmed, that there would be substantial injury to parties in this proceeding, or that it is in the public interest for portions of the Final Rule to go into effect.

The challenged provisions are so central to the Final Rule, such that it cannot operate without them. Additionally, leaving portions of the Final Rule to go into effect would still result in uncollectable compliance costs to recipient schools.

The Court previously found eleven primary changes made by the Final Rule. The primary changes were: (1) 34 C.F.R. § 106.10 redefines discrimination of sex to include sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation or gender identity; (2) 34 C.F.R. § 106.6 declares the Final Rule preempts state law; (3) 34 C.F.R. § 106.8 requires recipient schools to designate, hire and pay for a Title IX Coordinator to ensure compliance with Title IX, and to provide training to employees; (4) 34 C.F.R. § 106.6 (b) prohibits any recipient school from adopting or implementing any practice or procedure which treats students differently on the basis of sex; (5) 34 C.F.R. § 106.44 requires recipients with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity to mandatorily report such conduct to the Title IX Coordinator; (6) amends 34 C.F.R. § 106.45 to require an investigation and to impose grievance procedures; (7) prohibits recipient schools from requiring medical or other documentation to validate the student's gender identity; (8) requires recipient schools to allow students to access bathrooms and locker rooms based upon their gender identity; (9) requires any student's claimed gender identity be treated as if it was his or her sex and requires recipients to compel staff and students to use whatever pronouns the student requests; (10) creates a new standard for "hostile environment harassment" that could include views critical of gender identity; and (11) sets the rule's effective date as August 1, 2024.

The Court concluded that (1) the Final Rule is contrary to law and exceeds the U.S. Department of Education's statutory authority, which includes a violation of the major questions doctrine; (2) the Final Rule is contrary to Title IX ; (3) violates the Free Speech and Free Exercise

Clauses of the First Amendment by compelling staff and students to use whatever pronouns a person demands; (4) the Final Rule violates the Spending Clause of the United States Constitution by implementing ambiguous provisions; and (5) the Final Rule is arbitrary and capricious under the Administrative Procedures Act.

This Court did not enjoin the Final Rule based upon only two provisions. Rather, the Court issued an injunction after finding that numerous provisions in the Final Rule violated the Constitution. The provisions are not severable because the removal of the unconstitutional provisions would impair the function of the statute as a whole.

Additionally, the Court found irreparable harm to Louisiana Plaintiffs and Rapides based upon costs for expanded record keeping requirements and expanded training requirements which were imminent and unreasonable. Irreparable harm was also found based upon First Amendment free speech and free exercise violations. Even if only portions of the Final Rule took effect, these Plaintiffs would still incur irreparable harm.

For these reasons, the request is **DENIED.**

III. CONCLUSION

For the reasons set forth herein,

IT IS ORDERED that the Motion for a Partial Stay Pending Appeal [Doc. No. 59] is **DENIED**.

MONROE, LOUISIANA, this 11th day of July 2024.

TERRY A. DOUGHTY, JUDGE
UNITED STATES DISTRICT COURT

No. 24-30399

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF LOUISIANA, et al.,

Plaintiffs-Appellees,

v.

U.S. DEPARTMENT OF EDUCATION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Louisiana

REPLY IN SUPORT OF EMERGENCY MOTION FOR A PARTIAL STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

A certificate of interested persons is not required under Fifth Circuit Rule 28.2.1 as appellants are all governmental parties.

s/Jack Starcher
Jack Starcher

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INTRODUCTION AND SUMMARY

The district court granted a preliminary injunction based on asserted harms related to the Rule's application to sex-differentiated restrooms, locker rooms, and pronouns with respect to transgender individuals. Even taking those purported harms at face value, the district court's sweeping preliminary injunction of the entire Rule was an abuse of discretion because it significantly exceeds what is necessary to address those harms, is not tailored to the aspects of the Rule that the court found likely unlawful, and disregards "the text of a severability clause" without anything akin to "extraordinary circumstances." *National Ass'n of Mfrs. v. U.S. SEC*, -- F. 4th --, 2024 WL 3175755, at *9 (5th Cir. June 26, 2024) (alteration and quotation marks omitted). Defendants therefore sought narrow relief, asking this Court to stay the injunction pending appeal only insofar as it sweeps more broadly than necessary, including to the extent it enjoins provisions that plaintiffs never challenged. *See* Mot. for Partial Stay (Mot.). Nothing in the opposition memoranda filed by the State plaintiffs or Rapides Parish School Board (together, plaintiffs) undermines defendants' entitlement to that modest relief. *See generally* States' Opp'n; RPSB's Opp'n. On the contrary, plaintiffs' continued focus on sex-differentiated spaces and language reinforces the propriety of a limited stay.

ARGUMENT

I. The preliminary injunction is overbroad.

A. There is no basis to enjoin provisions of the Rule that were not challenged and cause plaintiffs no harm.

Plaintiffs and the district court focused below on the application of a handful of the Rule's provisions to bathrooms, locker rooms, and pronouns. *See generally* Mot. 6-9. Yet the Rule effects many changes to Title IX's regulations that have nothing to do with those issues, Mot. 4, and plaintiffs identify no cognizable harm caused by these provisions. The district court erred in enjoining these unchallenged provisions.

1. Plaintiffs have no response to the fundamental disconnect between the defects identified by the district court and the injunction it issued. Plaintiff States acknowledge that they "focused on the gender identity" issues below, States' Opp'n 14, but claim that they object to more than just the Rule's gender-identity provisions, States' Opp'n 13-16. The district court's order, however, was premised on issues of gender identity discrimination. *See* Dkt. No. 53, at 19-34. The district court did not find that the unchallenged provisions of the Rule were likely unlawful, nor did it find that those provisions would independently cause plaintiffs any cognizable harm. It was an abuse of the district court's equitable authority to enjoin more than was "necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

Plaintiffs claim that the district court's injunction did not need to adhere to normal limitations on courts' authority because it preserves the "status quo." States' Opp'n 11-13; RPSB's Opp'n 9-10. That kind of argument "misconceives the central purpose of a preliminary injunction, which is to prevent irreparable harm." *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975) (per curiam); *see City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 285 (5th Cir. 2017). "Maintenance of the status quo is only a sometimes concomitant of preventing irreparable harm" and is "never the touchstone for such injunctive relief." *Parks*, 517 F.2d at 787. There is no principle providing that courts may disregard "precision" and abandon any attempt to match the preliminary relief to the harms asserted, RPSB's Opp'n 9. Nor is there any authority providing that the Court should skip a severability analysis simply because some parties might find it easier to implement a broader injunction than a tailored one, *contra* States' Opp'n 16-17; RPSB's Opp'n 18-19, 21-22.

Plaintiffs' arguments that severability analysis was not required at this stage, States' Opp'n 16-17; RPSB's Opp'n 9-10, are similarly misplaced. The district court was required to tailor its injunction "to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018); *ODonnell v. Harris County*, 892 F.3d 147, 155, 163 (5th Cir. 2018) (injunction "must be vacated" if "not narrowly tailored to remedy the specific action which gives rise to the order") (quotation marks omitted), *overruled on other grounds by Daves v. Dallas County*, 64 F.4th 616 (5th Cir. 2023) (en banc). The court did not do so, and that was error.

To the extent plaintiffs suggest broader relief was appropriate under 5 U.S.C. § 705, RPSB's Opp'n 9-10, that is wrong for at least two reasons. First, the district court did not issue a § 705 stay or even cite that provision. *See* Dkt. No. 53, at 39-40. More fundamentally, § 705 provides that courts may delay an action's effective date only "to the extent necessary to prevent irreparable injury." 5 U.S.C. § 705; *see* H.R. Rep. No. 79-1980, at 43 (1946) (this relief "is equitable"). As the Supreme Court recently explained, "[w]hen Congress empowers courts to grant equitable relief, there is a strong presumption that courts will exercise that authority in a manner consistent with traditional principles of equity." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). Those principles required the district court to issue a narrower injunction.

2. Plaintiffs alternatively claim that the district court's injunction is justified because no provision of the Rule is severable. States' Opp'n 16-17; RPSB's Opp'n 10-13. But plaintiffs are wrong that the Rule cannot function without the handful of challenged provisions. There is no reason why schools cannot do things like provide lactation spaces, keep records about sex discrimination, provide fair grievance procedures for sex-discrimination claims, or publish notices of nondiscrimination without applying those requirements to the narrow subset of issues concerning bathrooms, locker rooms, and pronouns upon which plaintiffs focus. *See* States' Opp'n 11; RPSB's Opp'n 13, 21-22. Plaintiffs would suffer no harm, nor would the Court be deprived of the ability to meaningfully review the challenged aspects of the Rule, if the unchallenged provisions took effect.

Plaintiffs' arguments are also contrary to the Rule's express severability provisions. Plaintiffs' approach to severability, under which a court would disregard an agency's severability determination in favor of its own judgment regarding the value of a rule after certain portions are held unlawful, is inconsistent with governing law. *See* States' Opp'n 16-17; RPSB's Opp'n 10-13. Instead, when a rule provision is deemed invalid, the remainder may go into effect "unless there is 'substantial doubt' that the *agency* would have left the balance of the rule intact." *Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 136 (D.C. Cir. 2022) (emphasis added). As this Court recently reaffirmed in applying a functionally identical severability clause, district courts "'should adhere to the text of a severability clause' in the absence of extraordinary circumstances,'" *Nat'l Ass'n of Mfrs. v. SEC*, -- F. 4th --, 2024 WL 3175755, at *9 (5th Cir. June 26, 2024) (*NAM*) (quoting *Barr v. American Ass'n of Political Consultants*, 591 U.S. 610, 624 (2020) (plurality opinion)), because such a clause "dispels any doubt about what the [agency] would have done if the" invalid provisions "were subtracted," *id.* at *10.

It is plaintiffs' position—not defendants'—that would require courts to "rewrite regulations [and] rules," States' Opp'n 17, by disregarding agencies' severability judgments. The severability provisions remove any doubt that the unchallenged provisions should go into effect here. Mot. 12-13, 16. Faced with an agency's conclusion that portions of a regulation can operate independently from invalidated provisions, this Court looked to whether the *challengers* have "shown that

the [remaining] portions … cannot function sensibly," *NAM*, 2024 WL 315755, at*10, a showing that plaintiffs have not made.

Ohio v. EPA, 603 U.S. --, 2024 WL 3187768 (U.S. June 27, 2024), provides no support for plaintiffs' unprecedented approach to severability. There, the Court stayed the challenged provisions of a rule that injured the challengers because it concluded that the agency had likely failed to adequately explain those provisions. *Id.* at *8. Under *Ohio*, a court thus may grant relief as to provisions that it concludes are likely invalid and that injure the challengers; it does not support disregarding an agency's express severability determination by extending relief to *valid* provisions that cause the plaintiffs no harm.

B. Plaintiffs misstate the effect of the challenged provisions.

Even as to the challenged provisions, the injunction is overbroad insofar as it enjoins provisions—and potential applications thereof—that do not cause the irreparable harms on which the district court relied.

1. Plaintiffs articulate no harms stemming from § 106.10's basic prohibition on gender-identity discrimination.

Plaintiffs' quarrel with § 106.10 rests upon a fundamental mischaracterization of what that provision does. This provision simply recognizes that discrimination on the basis of gender identity is a form of sex discrimination under Title IX. Just as under Title VII an employer cannot fire or discriminate against an employee for being gay or transgender, under Title IX a school cannot expel or otherwise discriminate

against a student for being gay or transgender. But § 106.10 does not "address bathrooms, locker rooms," or other sex-differentiated contexts. *Bostock*, 590 U.S. at 681. Instead, a separate provision of the Rule, § 106.31(a)(2), specifically addresses those contexts, stating that recipients may not carry out otherwise permissible sex separation in a manner that causes an individual more than de minimis harm. Indeed, plaintiffs appear to concede that *Bostock* declared "gender-identity discrimination … a form of sex discrimination" *without* addressing whether "all sex distinctions are a form of gender-identity discrimination," RPSB's Opp'n 16—and as defendants detailed, § 106.10 has precisely the same effect. Thus, RPSB is wrong that "the Government never explains how schools can comply with § 106.10 if it goes into effect but § 106.31(a)(2) does not." RPSB's Opp'n 22. In that scenario, the Department of Education could not find a school in violation of its regulations for barring a transgender girl from the women's restroom, but it could if the school barred her from the cafeteria.

The rule set forth in § 106.10 straightforwardly applies *Bostock*'s textual analysis to the materially similar text of Title IX. *See* Mot. 17-18. But even apart from defendants' likelihood of success on that issue, the Court should grant defendants' motion because plaintiffs have not established that they will suffer irreparable harm if prohibited from engaging in conduct that all parties agree would be discrimination against students simply for being gay or transgender. Indeed, while plaintiffs express concern about bathrooms, locker rooms, and pronouns, no plaintiff expresses any

desire to, *e.g.*, bar gay students from student government or put transgender students in detention.

It is no response that defendants opined, prior to the Rule's issuance, that Title IX requires recipients to afford transgender individuals access to restrooms and locker rooms consistent with their gender identity. *See* RPSB's Opp'n 15-16. This case challenges the Rule, and § 106.31(a)(2) is the only Rule provision that addresses which bathroom transgender students must be able to access. Accordingly, the requested stay—under which § 106.31(a)(2) would remain enjoined pending appeal—would prohibit the Rule from being applied to require that transgender students be permitted to access bathrooms or locker rooms consistent with their gender identity. There is no justification for enjoining a separate provision that plaintiffs do not wish to violate and that causes them no harm.

2. The district court's concerns regarding hostile-environment harassment under § 106.2 do not support a blanket injunction of that provision.

The injunction is also overbroad with respect to § 106.2. That provision defines many terms, but plaintiffs challenge only its definition of hostile-environment harassment. Moreover, plaintiffs are incorrect to suggest that the district court found that definition vague as a general matter, RPSB Opp'n 18-19; its analysis focused on that definition's application to matters regarding gender identity and did not address plaintiffs' general vagueness arguments. *See* Dkt. No. 53, at 22-23 (standard would "chill[] and punish[] protected speech" by "compel[ling] staff and students to use

whatever pronouns a person demands"). There is a profound "mismatch between" the harms the district court perceived "and the breadth of the injunction." *Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 364 (6th Cir. 2022). That is particularly so given the Department's clarity that "applications" of provisions are as severable as individual provisions, *see* Mot. 19, and the straightforward option of enjoining the definition of hostile-environment harassment as applied to discrimination on the basis of gender identity.

C. Defendants' scope arguments were not "forfeited," nor is the motion procedurally improper.

Plaintiffs' contention that defendants forfeited their severability arguments, States' Opp'n 8-9, RPSB's Opp'n 19-20, is wrong. Defendants' district court brief was perfectly clear: it cited the Rule's severability discussion, explained that plaintiffs "challenged only certain portions of the Rule," and cited precedent for the proposition that "if the Court grants preliminary relief as to any of those portions, the remainder of the Rule should be permitted to go into effect, as intended." Dkt. No. 38, at 38-40. That is a far cry from *Texas v. U.S. EPA*, 829 F.3d 405, 435 (5th Cir. 2016), where the agency made only a "passing" request that "any stay be 'narrowly tailored.'" Without knowing which provisions and applications the Court would find unlawful, the government could not have prepared a detailed severability analysis of an opinion that had not yet issued. That does not mean that it waived its argument that the Court needed to narrowly tailor any equitable relief it issued.

Nor is this motion "[p]rocedurally [i]mproper." States' Opp'n 8. Defendants sought a stay in district court on June 24 and informed the court that—given the impending August 1 effective date—defendants would "seek relief in the Court of Appeals should the [district court] fail to grant" relief by July 1. Dkt. No. 59-1, at 7. Having explained when and why defendants would move in this Court, nothing in the Federal Rules compelled defendants to further delay their motion. *See* Fed. R. App. P. 8(a)(1)-(2) (party must "ordinarily move first in the district court" and inform the court of appeals "the district court denied the motion *or* failed to afford the relief requested" (emphasis added)).

II. The remaining factors favor a partial stay.

The remaining factors tilt decisively in favor of the proposed stay. That stay would restore provisions that plaintiffs have not challenged or that prohibit conduct in which plaintiffs do not assert they intend to engage—including prohibitions on things like forcing a student to sit in the back of a classroom because he is gay, excluding a student from the lunchroom because he is transgender, sexually harassing a cisgender woman in a manner that meets the regulatory definition of hostile-environment harassment, or requiring a new mother to express breastmilk in a bathroom stall.

While plaintiffs allege they will incur costs to come into compliance with the Rule, States' Opp'n 23-24, RPSB's Opp'n 21-22, those alleged costs flow from provisions and applications that either have not been held unlawful or that would

remain enjoined under the requested stay. *See Haaland v. Brackeen*, 599 U.S. 255, 296 (2023) (no standing based on costs of record-keeping and notice requirements; "Texas would continue to incur the complained-of costs even if it were relieved of the duty" it challenged). Even if those costs were relevant, they would pale in comparison to the government's interest in stamping out sex discrimination. *Cf. Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008).

CONCLUSION

The preliminary injunction should be stayed to the extent it extends beyond the following 2024 Rule provisions: (i) 34 C.F.R. § 106.31(a)(2), and (ii) 34 C.F.R. § 106.2's definition of "hostile environment harassment" as applied to discrimination on the basis of gender identity. The Department respectfully requests a decision by July 12.

Respectfully submitted,

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July 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2,599 words. This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 365 in Garamond 14-point font, a proportionally spaced typeface.

s/Jack Starcher
Jack Starcher

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jack Starcher
Jack Starcher

The United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 17, 2024
Lyle W. Cayce
Clerk

No. 24-30399

STATE OF LOUISIANA, *by and through its Attorney General, Elizabeth B. Murrill*; LOUISIANA DEPARTMENT OF EDUCATION; STATE OF MISSISSIPPI, *by and through its Attorney General, Lynn Fitch*; STATE OF MONTANA, *by and through its Attorney General, Austin Knudsen*; STATE OF IDAHO, *by and through its Attorney General, Raul Labrador*; SCHOOL BOARD OF WEBSTER PARISH; SCHOOL BOARD OF RED RIVER PARISH; SCHOOL BOARD OF BOSSIER PARISH; SCHOOL BOARD SABINE PARISH; SCHOOL BOARD OF GRANT PARISH; SCHOOL BOARD OF WEST CARROLL PARISH; SCHOOL BOARD OF CADDO PARISH; SCHOOL BOARD OF NATCHITOCHES PARISH; SCHOOL BOARD OF CALDWELL PARISH; SCHOOL BOARD OF ALLEN PARISH; SCHOOL BOARD LASALLE PARISH; SCHOOL BOARD JEFFERSON DAVIS PARISH; SCHOOL BOARD OF OUACHITA PARISH; SCHOOL BOARD OF FRANKLIN PARISH; SCHOOL BOARD OF ACADIA PARISH; SCHOOL BOARD OF DESOTO PARISH; SCHOOL BOARD OF ST. TAMMANY PARISH; ALL PLAINTIFFS,

Plaintiffs—Appellees,

versus

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, *in his official capacity as Secretary of Education*; OFFICE FOR CIVIL RIGHTS, *United States Department of Education*; CATHERINE LHAMON, *in her official capacity as the Assistant Secretary for Civil Rights*; UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, *in his official capacity as the Attorney General of the United*

States; KRISTEN CLARKE, *in her official capacity as Assistant Attorney General for the Civil Rights Division of United States Department of Justice*,

Defendants—Appellants,

SCHOOL BOARD RAPIDES PARISH

Plaintiff—Appellee,

versus

UNITED STATES DEPARTMENT OF EDUCATION; MIGUEL CARDONA, *in his official capacity as Secretary of Education*; OFFICE FOR CIVIL RIGHTS, *United States Department of Education*; CATHERINE LHAMON, *in her official capacity as the Assistant Secretary for Civil Rights*; UNITED STATES DEPARTMENT OF JUSTICE; MERRICK B. GARLAND, *in his official capacity as the Attorney General of the United States*; KRISTEN CLARKE, *in her official capacity as Assistant Attorney General for the Civil Rights Division of United States Department of Justice*,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
USDC Nos. 1:24-CV-567, 3:24-CV-563

Before JONES, DUNCAN, and DOUGLAS[*], *Circuit Judges*.

PER CURIAM:[†]

[*] JUDGE DOUGLAS would grant the motion.

[†] Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

The Department of Education requests a partial stay of the district court's order granting a preliminary injunction against the operation of the agency's final rule amending its Title IX regulations. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (Title IX Rule). We DENY the motion.

Plaintiffs' complaint and request for preliminary injunction focused on three key provisions at the heart of the 423-page Rule: proposed 34 C.F.R. § 106.10 (including discrimination on the basis of sexual orientation and gender identity); § 106.2 (broadening definition of "hostile environment harassment"); and § 106.31(a)(2) (adopting "de minimis harm" standard for determining sex discrimination). The DOE argues that the district court's order was overbroad to the extent it enjoined implementation of the entire Rule, including provisions on reporting and record-keeping obligations, grievance procedures, role and hiring of Title IX coordinators and other facilitators, and pregnancy discrimination regulations. The DOE also contends that the injunction was overbroad as to § 106.10, the implementation of which will purportedly not harm Plaintiffs, and § 106.2's inclusion of many definitions besides "hostile environment harassment." The agency relies in part on the Rule's severability provision. *See* 89 Fed. Reg. at 33,848 (stating "that each of the provisions of these final regulations . . . serve an important, related, but distinct purpose").

A stay pending appeal is "extraordinary relief" that defendants bear a heavy burden to support. *See Vote.Org v. Callanen*, 39 F.4th 297, 300 (5th Cir. 2022). We consider four factors in determining whether to grant such a stay, the two most critical of which are likelihood of success on the merits and irreparable injury. *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761 (2009).

Because the DOE has given us little basis to assess the likelihood of success, its motion must fail. The primary question as to its overbreadth contention is whether the possibility of a partial preliminary injunction was adequately identified as an option to the district court. The answer is no. Plaintiffs from the outset of the litigation sought to overturn the entire Rule, which makes major changes in the scope of coverage of Title IX, adds complex, lengthy and burdensome recordkeeping and enforcement requirements, and extends Title IX to pregnancy for the first time. The DOE's initial response to Plaintiffs' motion for preliminary relief, according to the district court, was that the Rule only amounts to a "clarification" of Title IX and does not irreparably harm Plaintiffs. The DOE commented at the end of its response that any relief should be limited to the immediate parties rather than "universal relief," and, in two conclusory sentences, that the Rule's severability provision should enable the rest of the Rule to escape the preliminary injunction. The district court made no comment about this vague attempt to limit ultimate relief, though it limited the preliminary injunction to the parties before the court.

Even if the DOE did not forfeit its severability argument, its motion places this court in an untenable position. With no briefing or argument below on the consequences of a partial preliminary injunction, we would have to parse the 423-page Rule ourselves to determine the practicability and consequences of a limited stay. But "[a]s we have repeatedly observed, we are a court of review, not first view." *Stringer v. Town of Jonesboro*, 986 F.3d 502, 509 (5th Cir. 2021) (citation omitted).

Moreover, the historical purpose of a preliminary injunction, as ordered by the district court here, is to maintain the status quo pending litigation. *See Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974). Several implications flow from this. First, the district court has wide latitude to craft a temporary remedy in accordance with the equities. *Trump*

v. Int'l Refugee Assistance Project, 582 U.S. 571, 579, 137 S. Ct. 2080, 2087 (2017) (per curiam). Second, in doing so, the court will not abuse its discretion if its temporary order is broader than final relief. *See Doster v. Kendall*, 54 F.4th 398, 442 (6th Cir. 2022), *cert. granted, judgment vacated as moot*, 144 S. Ct. 481 (2023).

Taking these points together, granting a partial stay here would involve this court in making predictions without record support from the DOE about the interrelated effects of the remainder of the Rule on thousands of covered educational entities. This is especially problematic when the DOE is asking this court to maintain, on a temporary basis, tangential provisions that might or might not have been formulated in the absence of the heart of the Rule. This is contrary to severability analysis, which asks whether severance will "impair the function of the statute as a whole" and whether the regulation would have been enacted in the absence of the challenged provisions. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294, 108 S. Ct. 1811, 1819 (1988); *Nasdaq Stock Mkt. LLC v. SEC*, 38 F.4th 1126, 1144 (D.C. Cir. 2022) (citation omitted). Even more problematic would be our judicial rewriting of the Rule on what may only be a temporary basis. That, too, is not this court's job. *See also Ohio v. EPA*, 144 S. Ct. 2040 (2024) (stay of EPA rule granted pending appeal despite severability provision).

For these reasons, the DOE has not shown a likelihood of success in challenging the breadth of the district court's preliminary injunction.

In any event, Plaintiffs demonstrate beyond peradventure in affidavits and submissions that an order allowing the Rule to remain in place pending appeal would inflict enormous administrative costs and great legal uncertainty on recipients of federal funds. Irreparable harm is demonstrable by significant, unrecoverable compliance costs. *E.g., Rest. Law Ctr. v. Dep't of Labor*, 66 F.4th 593, 597 (5th Cir. 2023); *Career Colleges & Sch. of Tex. v.*

Dep't of Educ., 98 F.4th 220, 234 (5th Cir. 2024). As Plaintiffs argue, the implementation and compliance costs would double if the partially implemented Rule differs from a final judgment. They would first have to amend their policies, alter their procedures, and train their employees to comply with a partial version of the Rule pending appeal, and then they would have to do it all over again to comply with the Rule as it stands at the conclusion of the litigation. And, we note, the DOE gave covered recipients only three months' time to digest and comply with its behemoth Rule, less than half of which remains. Legal uncertainty would abound as to a multitude of matters like the extent of compelled recordkeeping, sufficiency of "complaints" of sex discrimination/harassment, and obligations to monitor "offensive" speech and behavior under any partially implemented Rule.

The DOE has not shown that it would suffer irreparable injury if the district court's injunction were not partially stayed. The injunction pending appeal does not prevent the DOE from enforcing Title IX or longstanding regulations to prevent sex discrimination. The DOE can hardly be said to be injured by putting off the enforcement of a Rule it took three years to promulgate after multiple delays. Nor does an administrative agency have the same claim to irreparable harm when its bureaucratically issued rule is enjoined as a democratically elected legislative body has when one of its statutes is enjoined. *See Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1144 (5th Cir. 2021) (courts can grant "interim relief" to "preserve the *status quo ante*"); *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 n.1 (2023) (statement of Kavanaugh, J.) (acknowledging APA context relief is different from enjoining a statute).

Finally, the public interest would not be served by a temporary judicial rewriting of the Rule that may be partly or fully undone by a final court judgment.

For these reasons, the motion for partial stay is DENIED.

No. 24-5588

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STATE OF TENNESSEE, et al.,

Plaintiffs-Appellees,

and

CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL, et al.,

Intervenors-Plaintiffs-Appellees,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, et al.,

Defendants-Appellants.

O R D E R

Before: SUTTON, Chief Judge; BATCHELDER and MATHIS, Circuit Judges.

SUTTON, Chief Judge. Secretary of Education Miguel Cardona and the U.S. Department of Education (collectively, the Department) seek a stay of parts of the district court's preliminary injunction with respect to an administrative rule promulgated under Title IX. For the reasons elaborated below, we deny the motion for a stay and expedite the appeal.

I.

The Rule. "No person in the United States," Title IX says, "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute empowers the Department to promulgate rules "consistent with achievement of the

objectives of" Title IX. *Id.* § 1682. On April 29, 2024, the Department promulgated a Rule under Title IX entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33474 (Apr. 29, 2024) (to be codified at 34 C.F.R. § 106). The Rule is scheduled to go into effect on August 1, 2024. *Id.* at 33476.

The Rule provides a new definition of "[d]iscrimination on the basis of sex" under 34 C.F.R. § 106.10. As amended, the Rule covers "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 89 Fed. Reg. 33886. The Rule also amends 34 C.F.R. § 106.2 to add a prohibition on "[h]ostile environment harassment," defined as "[u]nwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (*i.e.*, creates a hostile environment)." *Id.* at 33884. In view of the new scope of sex-based discrimination under § 106.10, this addition to § 106.2 covers the refusal to use a student's preferred pronoun. *See id.* at 33516. In addition, the Rule amends 34 C.F.R. § 106.31(a)(2) to clarify that schools may not "prevent[] a person from participating in an education program or activity consistent with the person's gender identity." *Id.* at 33887. As a result, § 106.31(a)(2) applies to "restrooms and locker rooms, access to classes and activities, and policies such as appearance codes (including dress and grooming codes)." *Id.* at 33816 (internal citations omitted).

Procedural history. Four States (Indiana, Ohio, Tennessee, and West Virginia) and two Commonwealths (Kentucky and Virginia) filed this lawsuit against the Department to block enforcement of the Rule. They claim that § 106.10 "contravenes Title IX's text and the meaning of the Department's own regulations," that § 106.2 runs afoul of the First and Fourteenth Amendments, and that the Rule generally violates the Spending Clause, exceeds the agency's authority, and turns on arbitrary and capricious rulemaking. R.1 at 70. Soon after the States filed this lawsuit, the Christian Educators Association International, a voluntary membership

organization comprised of Christians in the teaching profession, intervened to support the action. So too did A.C., a fifteen-year-old middle school student in West Virginia. She complained that a student who was assigned male at birth but identifies as female was allowed to compete against, and share facilities with, A.C. and the rest of the girls' track and field team. The intervenors challenged § 106.2 on First Amendment grounds and § 106.31(a)(2)'s inclusivity mandate as violating students' and school employees' rights to bodily privacy, safety, and sporting integrity.

The plaintiffs moved the district court for a preliminary injunction preventing the Department from enforcing the Rule. In a thorough 93-page opinion, the district court granted the motion and enjoined the Rule in its entirety. The Department appealed.

The Department moved the district court for a stay of one aspect of its merits ruling and a partial stay of the scope of the injunction pending appeal. As to the merits, the Department challenged the court's decision that § 106.10's new definition of sex discrimination violated the statute. As to the court's other legal conclusions—the Rule's provisions, for example, regarding "sex-separated bathrooms" and "sex-specific pronouns"—the Department accepted them for the time being, namely during the pendency of the appeal. R.104 at 1. In addition, the Department maintained that the district court should have issued a narrower injunction, one that enjoined just (i) 34 C.F.R. § 106.31(a)(2), and (ii) 34 C.F.R. § 106.2's definition of "hostile environment harassment" as applied to "discrimination on the basis of gender identity." R.104 at 2. The Department asked the district court to stay the preliminary injunction as to all other provisions of the Rule, including § 106.10's new definition of sex discrimination. In yet another thorough opinion, this one 26 pages long, the district court rejected the motion for a partial stay. It did not have any second thoughts about its § 106.10 ruling, making it inappropriate to limit the preliminary injunction to §§ 106.2 and 106.31(a). And it reasoned that the only way to address the plaintiffs' harms given the interconnected nature of the definition of sex discrimination with respect to the other key provisions was to enjoin the Rule in its entirety.

The Department now seeks similar relief from us on an expedited basis.

II.

Four factors guide the stay inquiry: (1) likelihood of success on the merits; (2) irreparable harm to the plaintiffs; (3) harm to others; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Granting a stay pending appeal is always "an exercise of judicial discretion," and "not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (quotation omitted).

Likelihood of success. With respect to the first factor, the Department premises its stay motion on (1) one aspect of the district court's analysis of the underlying claims and (2) the scope of the injunction. As for the underlying legal claim, the Department argues that the district court likely erred in assessing the validity of § 106.10's definition of sex discrimination. As for the scope of the injunction, it claims that the district court likely erred in extending the injunction beyond § 106.2 and § 106.31(a). We consider each argument in turn.

Start with the definition of sex discrimination under Title IX. As we see it, the district court likely concluded correctly that the Rule's definition of sex discrimination exceeds the Department's authority. In defining "discrimination on the basis of sex" in Title IX to extend to discrimination on the basis of "gender identity," among other categories, § 106.10, 89 Fed. Reg. 33886, the Department mainly relied on *Bostock v. Clayton County*, 590 U.S. 644, 669 (2020). But *Bostock* is a Title VII case. As many jurists have explained, Title VII's definition of discrimination, together with the employment-specific defenses that come with it, do not neatly map onto other areas of discrimination. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290, 308 (2023) (Gorsuch, J., concurring) (distinguishing the Equal Protection Clause from Titles VI and VII); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 808 (11th Cir. 2022) (en banc)*; Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023); *Brandt ex rel. Brandt v. Rutledge*, No. 21-2875, 2022

WL 16957734, at *1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., dissenting from denial of rehearing en banc). Title VII's definition of sex discrimination under *Bostock* simply does not mean the same thing for other anti-discrimination mandates, whether under the Equal Protection Clause, Title VI, or Title IX.

As to the relationship between Title VII and Title IX, the statutes use materially different language: discrimination "because of" sex in Title VII and discrimination "on the basis of" sex in Title IX. *See* 42 U.S.C. § 2000e–2(a)(1); 20 U.S.C. § 1681(a). In addition, the two statutes serve different goals and have distinct defenses. For these reasons, "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021). No less importantly, Congress enacted Title IX as an exercise of its Spending Clause power, U.S. Const. Art. I, § 8, cl. 1, which means that Congress must speak with a clear voice before it imposes new mandates on the States. *See Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The same is not true of Title VII. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–453 & n.9 (1976). All of this explains why we have been skeptical of attempts to export Title VII's expansive meaning of sex discrimination to other settings. *See, e.g.*, *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 484 (6th Cir.), *cert. granted sub nom. United States v. Skrmetti*, No. 23-477, 2024 WL 3089532 (U.S. June 24, 2024) (Equal Protection Clause); *Gore v. Lee*, No. 23-5669, __ F.4th __, 2024 WL 3385247, at *5 (6th Cir. July 12, 2024) (same); *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) (Age Discrimination in Employment Act).

All three members of the panel, it bears emphasis, agree that these central provisions of the Rule should not be allowed to go into effect on August 1. Our modest disagreement turns on the question, in this emergency setting, of whether the other parts of the Rule can be separated from these central provisions.

Turn, then, to the scope of the preliminary injunction. As just shown, we disagree with the key premise of the Department's scope-of-the-injunction argument: its position that the court should not have extended the injunction to § 106.10's new definition of sex discrimination. Our reasoning shows at a minimum that the preliminary injunction properly extends to three central provisions of the Rule: §§ 106.10, 106.2's definition of hostile environment harassment, and 106.31(a).

After that, the problem is that these provisions, particularly the new definition of sex discrimination, appear to touch every substantive provision of the Rule. It is thus unsurprising, as the Department fairly acknowledges, that there are "numerous" references to sex discrimination throughout the Rule. Dep't Supp. Br. 3. In reality, each of the remaining provisions that the Department seeks to implement on August 1 implicates the new definition of sex discrimination. Take the Rule's record-keeping provision, § 106.8(f), which requires schools to preserve any notice sent to the Title IX coordinator of "conduct that reasonably may constitute sex discrimination," as well as the investigation and grievance records for "each complaint of sex discrimination." 89 Fed. Reg. 33886. Or § 106.2's definition of sex-based harassment, which amounts to "a form of sex discrimination . . . including on the bases identified in § 106.10, that [includes] . . . [h]ostile environment harassment." *Id.* at 33884. Or § 106.8, which imposes various new obligations on schools to comply with the new sex discrimination requirements: appointing Title IX coordinators, requiring training on the new scope of sex discrimination, and the like. *Id.* at 33885. Or § 106.11, which clarifies that the Rule generally requires schools to respond to sex discrimination in the United States and sometimes to sex discrimination elsewhere. *Id.* at 33886. Or § 106.40, which requires Title IX coordinators to "promptly and effectively prevent sex discrimination" by taking actions like ensuring access to lactation spaces. *Id.* at 33887–88. Or § 106.44, which requires any funding recipient "with knowledge of conduct that reasonably may constitute sex discrimination" to respond promptly with a series of corrective

measures. *Id.* at 33888. Or the Rule's grievance procedures and retaliation provision, §§ 106.45–.46, .71, which impose new rules for dealing with complaints of sex discrimination, sex-based harassment, and retaliation for reporting the same. *Id.* at 33891–96.

Through it all, each of the provisions that the Department wishes to begin enforcing on August 1 implicates the new definition of sex discrimination. It is hard to see how all of the schools covered by Title IX could comply with this wide swath of new obligations if the Rule's definition of sex discrimination remains enjoined. Harder still, we question how the schools could properly train their teachers on compliance in this unusual setting with so little time before the start of the new school year.

The Department resists this conclusion. It argues that the schools could enforce these provisions by relying on the prior definition of sex discrimination under its rules and regulations. If we denied the stay only as to the three core provisions identified above, the Department thus hypothesizes, the pre-existing definition could govern the rest of the Rule on August 1. We see a few problems with this argument. One is that we do not know the meaning of that pre-existing definition. As the Department points out, even that definition is "the subject of separate litigation." Dep't Supp. Br. 3 n.1 (citing *Tennessee v. Dep't of Educ.*, 104 F.4th 577 (6th Cir. 2024)). Another problem is that the Department has not identified any evidence that it contemplated, during the rulemaking process, how the remainder of the Rule would apply without any of its core provisions. Yes, there are severability provisions that would apply to the Rule, and the Department considered the possibility that a court might sever § 106.10 from the rest of the Rule. 89 Fed. Reg. 33848. But it did not contemplate enforcement of the Rule without *any* of the core provisions. Nor is there any suggestion that the cost-benefit analyses underlying the Rule contemplated the idea of allowing these provisions to go into effect with a *different* definition of sex discrimination.

In addition, it bears emphasizing how the Department framed its arguments below. The Department, to be sure, did identify the severability provisions. But it mainly used them to permit

the new definition of sex discrimination to go into effect, not to allow other provisions to go into effect under the prior definition of sex discrimination. In fact, the Department mentioned severability below in just a few lines of its briefs without telling the district court which other provisions should be severed. At least in the context of this emergency stay motion, we are uncomfortable granting more relief than the Department sought below. As shown, all of the provisions the Department now asks to go into effect implicate the new definition of sex discrimination.

The other stay factors. The equities, too, favor this approach. From an equitable perspective, educators should not be forced to determine whether this or that section of the new Rule must be followed when the new definition of sex discrimination might or might not touch the Rule. The States presented evidence that rolling out hundreds of pages of a new rule on August 1, just before the start of the school year, will place an onerous burden on them—loads of time and lots of costs that will only escalate if we leave confusion over the States' obligations under the Rule. That is particularly problematic given that the new definition of sex discrimination affects each provision of the Rule that the Department asked to go into immediate effect.

The States, to be sure, have acknowledged that some technical provisions of the Rule do not necessarily implicate the new definition of sex discrimination and are not already covered by prior regulations. But the Department did not identify these provisions in its request for relief. And with good reason, it appears. The provisions merely include definitions of four terms ("parental status," "party," "pregnancy or related conditions," and "student with a disability"), as well as eight technical amendments to existing Title IX regulations. *See* States' Supp. Br. 25 (citing § 106.3 [Amended]; § 106.15 (amending existing § 106.15); § 106.16 [Removed]; § 106.17 [Removed]; § 106.18 [Redesignated as § 106.16]; § 106.41 [Amended] (removing existing § 106.41(d)); § 106.46 [Redesignated as § 106.48]; and § 106.51 [Employment] (amending existing § 106.51(b)(6))). Although a merits panel is free to consider whether the scope of the

injunction should be narrowed to permit these technical provisions to go forward, the Department at this stage has not identified any harms that come from the preliminary injunction's coverage of these particular provisions. For that reason, and with the goal of avoiding any confusion that would come from enjoining all but the most technical portions of the Rule on the eve of a new school year, we will not exercise our "judicial discretion" to grant a stay on these points. *Nken*, 556 U.S. at 433.

We therefore deny the motion to stay the district court's preliminary injunction. To mitigate any harm to the Department, we will expedite its appeal of the district court's issuance of a preliminary injunction and direct the Clerk's Office to set a briefing schedule so that the case may be heard by a randomly assigned argument merits panel during the October sitting.

MATHIS, Circuit Judge, dissenting. The U.S. Department of Education promulgated an administrative rule under Title IX called "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33474 (Apr. 29, 2024). The Rule, which is set to take effect on August 1, 2024, adds or revises dozens of Title IX regulations. The State and Intervenor Plaintiffs take issue with three provisions that they say constitute a "gender-identity mandate" and have sought, among other things, injunctive relief. The district court preliminarily enjoined the entire Rule. The Department seeks to stay part of the preliminary injunction pending appeal. Because I would grant the Department's motion in part, I respectfully dissent.

For decades, Title IX has stood as a bulwark against discrimination in education. It states that "[n]o 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 education program or activity receiving Federal financial assistance," with few exceptions. 20 U.S.C. § 1681(a). Congress has

authorized the Department to issue rules and regulations that are "consistent with achievement of the objectives of" Title IX. *Id.* § 1682. The Department passed the Rule pursuant to that authority.

The Rule "amends the regulations implementing Title IX of the Education Amendments of 1972." 89 Fed. Reg. at 33474. In addition to changes like revising the record-keeping requirements in 34 C.F.R. § 106.8(f), 89 Fed. Reg. at 33886, and adding a requirement in 34 C.F.R. § 106.40 that schools provide accommodations and facilities for breastfeeding students and employees, 89 Fed. Reg. at 33887–88, the Rule made amendments intended to address discrimination based on gender identity.

Plaintiffs focused their requests for injunctive relief on three provisions in the Rule. One provision defines "[d]iscrimination on the basis of sex" to include "discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." 34 C.F.R. § 106.10. The second provision defines "[s]ex-based harassment" as:

> a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the bases described in § 106.10, that is:
> . . .
>
> (2) Hostile environment harassment. Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment).

Id. § 106.2. The third provision prohibits sex separation or differentiation that causes more than de minimis harm:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, except as permitted by 20 U.S.C. 1681(a)(1) through (9) and the corresponding regulations §§ 106.12 through 106.15, 20 U.S.C. 1686 and its corresponding regulation § 106.32(b)(1), or § 106.41(b). Adopting a policy or engaging in a

> practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

34 C.F.R. § 106.31(a)(2). These provisions, according to Plaintiffs, constitute the Rule's gender-identity mandate.

The Department included severability statements in each of the subparts where the three above-mentioned provisions are located. Those statements provide: "If any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or applications of its provision to any person, act, or practice shall not be affected thereby." *Id.* §§ 106.9, 106.16, 106.48.

The Department appeals and moves for a partial stay of the injunction to allow the Rule to take effect except as to the three provisions expressly challenged by Plaintiffs. This court considers four factors when deciding whether to stay a district court's injunction: (1) the likelihood that the movant will succeed on the merits of the appeal; (2) the likelihood that the movant will suffer irreparable harm absent a stay; (3) whether a stay will cause substantial harm to others; and (4) whether a stay serves the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). "These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Still, the first two factors "are the most critical." *Nken*, 556 U.S. at 434. The movant must show more than a "possibility" of irreparable injury, *id.* at 434–35, and even if a movant can demonstrate irreparable harm, "he is still required to show, at a minimum, serious questions going to the merits," *Griepentrog*, 945 F.2d at 153–54 (internal quotation marks omitted).

I would grant the Department's motion and limit the injunction to the provisions Plaintiffs challenge. The Department is likely to succeed on the merits for those provisions that Plaintiffs have not challenged. The Supreme Court has cautioned lower courts that "[a] plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 585 U.S. 48, 73

(2018), and "limited to the inadequacy that produced the injury in fact that the plaintiff has established," *id*. at 68 (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)). To that end, "a federal court may not issue an equitable remedy 'more burdensome to the defendant than necessary to [redress]' the plaintiff's injuries." *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 923 (2024) (mem.) (Gorsuch, J., concurring) (alteration in original) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). An injunction can "stray[] from equity's traditional bounds" by barring the enforcement of provisions that do not harm the plaintiffs. *Id.* That is precisely what has happened here.

The parties and the district court spend considerable time discussing whether § 106.10 is consistent with the Supreme Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644, 669 (2020), which held that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." But we need not resolve that debate to determine that the district court's preliminary injunction preventing enforcement of the entire Rule is broader than necessary to prevent Plaintiffs' alleged irreparable harms. *Gill*, 585 U.S. at 68; *Poe*, 144 S. Ct. at 923 (Gorsuch, J., concurring). Enjoining only those provisions targeted by Plaintiffs' injunction motions would be sufficient.

Is the Department irreparably harmed by an enjoining the Rule even though Plaintiffs only challenge three provisions of the Rule? I believe so. The purpose of the Rule was "to fully effectuate Title IX's sex discrimination prohibition." 89 Fed. Reg. at 33476. Through their motions for preliminary injunctions, Plaintiffs challenged the lawfulness of the three supposed gender-identity-mandate provisions. The Department is irreparably harmed by the interference with its rule-making authority, which it uses to protect students from sex discrimination. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

The harm to Plaintiffs is lessened because the provisions of the Rule that they have challenged would remain enjoined. Thus, a partial stay would advance Title IX's core purpose of

eliminating sex-based discrimination in education while still preventing the irreparable harms enumerated by Plaintiffs. As it relates to the Rule's definition of sex discrimination in § 106.10, there is no reason the Department could not use its pre-Rule understanding of what constitutes sex discrimination under Title IX.

I am cognizant of Plaintiffs' argument that the benefits of enacting the Rule's unchallenged provisions are outweighed by the expense or confusion of phased implementation. But most of the expense is attributable to provisions that Plaintiffs neither directly challenge nor cite as a source of harm.

Injunctive relief should be tailored, specific, and no broader than necessary. The district court's preliminary injunction does not satisfy those requirements. Therefore, I would stay the injunction except for prohibiting the Department from enforcing the three provisions Plaintiffs have challenged. Because the majority holds otherwise, I respectfully dissent.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk