September 12, 2022

Secretary Miguel A. Cardona
United States Department of Education
Lyndon Baines Johnson Building
400 Maryland Ave., SW
Washington, DC 20202

Docket No: ED-2021-OCR-0166

Re: Comment of Independent Women's Law Center and Independent Women's Forum regarding free speech concerns with proposed rule redefining unlawful harassment under Title IX.

Dear Secretary Cardona:

Educational institutions, particularly colleges and universities, should be places that foster the free exchange of ideas, places where people are free to dissent from campus orthodoxies. The Department of Education's notice of proposed rulemaking entitled, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," set forth at 87 Federal Register 41,390 ("the proposed rule") purports simply to enforce Title IX. But the proposed rule defines sex-based harassment so broadly that it encourages schools to punish what should be protected speech. In addition, by redefining "sex" to include "gender" and "gender identity," the proposed rule vastly expands the category of speech that schools will now seek to punish. Combined, these distortions of Title IX will encourage all schools that receive federal money to punish speech regarding sex, gender, sex roles, gender identity, and pronoun usage. The proposed rule thus incentivizes repressive speech codes and threatens to usher in a new era of Orwellian speech monitors and enforced political correctness that violates the First Amendment. The proposed rule should be withdrawn.

Independent Women's Law Center and Independent Women's Forum

Independent Women's Law Center (IWLC) is a project of Independent Women's Forum (IWF), a non-profit, non-partisan 501(c)(3) organization founded by women to foster education and debate on legal, social, and economic policy issues. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and the rights of women and girls.

IWLC and IWF strongly oppose the proposed rule and submit these comments to highlight the negative impact of the proposed rule on ***free speech***.

Title IX and Sex-Based Harassment

One of the proposed rule's major deficiencies is its departure from Supreme Court precedent and past Department practice to expand the scope of harassment purportedly covered by Title IX. Title IX prohibits recipients of federal funds, including most schools, from discriminating "on the basis of sex." But American anti-discrimination law is not a federal civility code that prohibits all sex-related speech. And not every instance of inappropriate conduct or sex-related speech constitutes discrimination. To the contrary, unlawful harassment occurs when an environment is so tinged with abuse that it becomes unequal for members of one sex or the other. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (outlining the contours of workplace sexual harassment).

In the education context, the Supreme Court has held that a school that tolerates or perpetuates sex-based harassment violates Title IX's prohibition on sex discrimination. *See Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 290 (1998) (holding that a school board may be liable for a *teacher's* sexual harassment of a student if an official with authority to address the harassment acts with deliberate indifference that amounts to "an official decision by the [school] not to remedy the violation"); *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629, 642–43 (1999) (holding that a school board can be held liable for *student-on-student* harassment if the school's own "deliberate indifference effectively 'cause[d]' the discrimination") (citation omitted).

The Department's proposed rule, however, far exceeds the boundaries of liability established by the Supreme Court and, with respect to public schools, likely violates the First Amendment. It should be withdrawn.

A. Rejecting the *Davis* Standard

To begin, the proposed rule is problematic because it fails to follow Supreme Court precedent governing Title IX. The Supreme Court has held that sex-based misconduct by a student only implicates Title IX if it is so ***severe, pervasive, and objectively offensive*** that it denies the victim "equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651–52. The Court in *Davis* made clear that harassment claims resting on "simple acts of teasing and name-calling among school children" or a victim's "decline in grades" would not be enough to survive a motion to dismiss. *Id*. at 652. Indeed, the *Davis* Court expressly held that federal law imposes liability for harassment only when the harassment has "a systemic effect on educational programs or activities." *Id*. at 653.

Contrary to this precedent, the proposed rule adopts a standard for harassment that encompasses *either* severe *or* pervasive conduct and eliminates the limitation that harassment be "objectively offensive." 87 Fed. Reg. at 41,569 (proposed § 106.2). That proposal is flawed in several respects.

First, by allowing for a finding of misconduct for pervasive, but not necessarily objectively offensive, misbehavior, the proposed regulation opens schools up to a floodgate of complaints for objectively minor occurrences. The regulation is particularly untenable in the elementary school context, where the daily array of immature behavior is undoubtedly "pervasive" and could threaten a Title IX investigation every time a second-grade class goes to recess.

Second, the proposed rule fails to give an adequate reason for the Department's new and unworkable formulation. While the Department may adopt prophylactic requirements that are broader than the requirement that institutions refrain from discrimination on the basis of sex, these prophylactic requirements must be designed to prevent *actual* sex discrimination under the plain meaning of Title IX. Here, the Department instead has redefined sex discrimination itself. In addition, the proposed rule entirely fails to explain why it is dropping the previous limitation that instances of harassment be "objectively offensive."

> All of this leads to our first request: ***Please clarify what you believe the standard for offensive behavior will be now that conduct no longer has to be objectively offensive to violate the statute.***

Third, although the Department argues that its new formulation better aligns Title IX with Title VII, which prohibits workplace discrimination, it fails to explain why that alignment is necessary or desirable. The Department admits that the analysis of whether a school has a sex-based "hostile environment" is fact-specific and should take into account how a *student* reasonably perceives her educational environment, which may differ from how an employee would perceive her workplace. *See* 87 Fed. Reg. 41,416. Most students, after all, are children, and they both behave and perceive behavior differently than their adult counterparts.

> ***Please clarify what benefits accrue to schools from attempting to align Title VII and Title IX, given that the workplace and schools are fundamentally different environments and given that schools must use different analyses for students than for employees.***

Finally, the proposed regulation is particularly untenable for schools that have adopted restorative justice systems that seek to avoid punishment for first-time offenders by instead bringing the victim and perpetrator together to come to a mutual understanding. *See*, *e.g.*, Matt Davis, *Restorative Justice: Resources for Schools*, Edutopia (updated October 29, 2015), https://tinyurl.com/yatusdzd (noting that a growing number of schools are adopting restorative practices whereby they empower students to resolve conflicts on their own and in small groups). The *Davis* Court was clear that schools are liable for damages under Title IX only for their own deliberate indifference to student-on-student sexual harassment. *See* 526 U.S. at 653. Despite the narrowness of *Davis*'s holding, however, some lower courts have held, incorrectly, that a school's decision not to punish an accused perpetrator in response to a single uncorroborated allegation of sexual harassment can constitute deliberate indifference, and thus illegal conduct. *See*, *e.g.*, *Doe v. Fairfax Cty School Board*, 1 F.4th 257, 263 (4th Cir. 2021) (allowing student to sue her school when it failed to take immediate action against accused perpetrator for a single incident of alleged harassment). By adopting a standard for harassment that eliminates the "objectively offensive" standard, the proposed rule exacerbates this error and wrongly suggests that a school may be held liable for harassment if it attempts to deal with minor misconduct through restorative practices, rather than immediate punishment.

> ***Please clarify whether the proposed rule would permit the revocation of funding from, or a lawsuit against, a school that does not punish a grammar school student for single instance of severely offensive language.***

B. Trampling Free Speech

Another serious problem with the proposed rule is its total disregard of the limitations imposed on educational institutions by the First Amendment. An institution that fails to intervene when an employee or student repeatedly targets a member of the opposite sex for ridicule may be held liable for discrimination in violation of Title IX.[1] But public schools may not regulate sex-based speech generally without running afoul of the First Amendment. *See*, *e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214–218 (3d Cir. 2001) (Alito, J.) (school district's policy restricting "unwelcome" and "offensive" speech on public school grounds violates the First Amendment's Free Speech Clause).

In higher education,[2] the First Amendment's protections are arguably even more robust. Indeed, outside the Title IX context, the Court has been clear that the "vigilant protection of constitutional freedoms is nowhere more vital" than at public colleges and universities. *See*, *e.g.*, *Healy v. James*, 408 U.S. 169, 180 (1972) ("the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas'"); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (at the collegiate level, academic freedom is a special concern of the First Amendment, which "does not tolerate laws that cast a pall of orthodoxy over the classroom"); *see also Meriwether v. Hartop,* 992 F.3d 492, 505 (6th Cir., 2021) (professors at public universities retain First Amendment protections when engaged in core academic functions, such as teaching and scholarship).

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[1] *See generally* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791, 1799, 1868 (1992) (explaining that speech that targets or singles out an employee for verbal abuse or repeated sex-based ridicule crosses over into the realm of conduct); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) (noting that, in some circumstances, speech can become unlawful conduct). As Justice Antonin Scalia explained in *R.A.V.*, giving away the nation's defense secrets is unlawful treason. Likewise, "sexually derogatory 'fighting words,' among other words, may produce a violation of [federal] prohibition[s] against sexual discrimination." *Id*. at 389; *see also Meriwhether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021) (explaining that a basketball coach yelling "racial epithets" at his players is harassing conduct not protected speech) (citation omitted).

[2] Private colleges and universities are, of course, not bound by the First Amendment, However, many such schools have policies that purport to advance free expression and thus have an implied duty to protect student and faculty speech. *See* José A. Cabranes, *For Freedom of Expression, For Due Process, and For Yale*, 35 Yale L. & Pol'y Rev. 345, 352 (2017).

By adopting such vague and broad standards for misconduct, the Department of Education's proposed rule encourages schools to attempt to protect themselves from liability or loss of federal funding by adopting policies that punish protected speech—whether that speech is a one-time callous remark or the pervasive expression of an "offensive viewpoint." But lower federal courts routinely strike down such policies at public universities as contrary to the First Amendment. *See*, *e.g.*, *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (policy prohibiting "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational" environment); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 362 (M.D. Pa. 2003) (policy prohibiting "acts of intolerance" and any means of communication that might "provoke" another); *Roberts v. Haragan* 346 F. Supp. 2d 853 (N.D. Tex. 2004) (policy prohibiting sexually harassing speech).

> This analysis leads to an additional request: ***Please clarify how the proposed rule can be applied consistent with the dictates of the First Amendment, not only in elementary and secondary schools but also on college campuses.***

C. Expanding the scope of coverage

The proposed rule is further problematic due to its vast expansion of coverage, not only in terms of the Department's definition of "sex" but also in light of its geographic scope.

1. Gender and Gender Identity

In addition to expanding the definition of harassment, the proposed rule unilaterally redefines "sex" to mean "gender" and "gender identity," significantly expanding the category of speech that schools will now seek to punish. These new categories will undoubtedly encompass the expression of legitimate political viewpoints on gender identity issues, as well as instances of "misgendering" (failing to use a person's preferred pronoun) and "deadnaming" (referring to someone by the name that he or she used prior to transitioning).

Many schools already claim that Title IX requires them to punish such speech, and the proposed rule will exacerbate this epidemic of speech restrictions. For example, a school district in Wisconsin recently opened a sexual harassment investigation into three eighth-grade boys who used the pronoun "she" in reference to a female

classmate who had asked to be called "they" the previous month. School officials claimed that Title IX required the investigation. *See* Jennifer C. Braceras, *Wisconsin School Opens Title IX Sexual Harassment Investigation Into Boys Who 'Misgendered' Classmate,* Indep. Women's Forum (May 27, 2022), https://tinyurl.com/IWFWisMisgender; Madeleine Kearns & Jennifer C. Braceras, *Weaponizing Title IX to Punish Speech*, Nat'l Rev. (August 6, 2022), https://tinyurl.com/NatRevTitleIX (citing other examples of schools that claim Title IX requires punishment of students who "misgender" others); *see also Taking Offense v. California,* 66 Cal.App.5th 696 (Cal. Ct. App. 2021) (interpreting California law making misgendering nursing home residents a crime punishable by up to one year in prison and a $1,000 fine violates the First Amendment).

The proposed rule would give such policies the force of law and could also prohibit legitimate political debate about hot button topics, such as whether biological males who identify as women should be allowed to compete in women's sports, be housed in women's prisons, or have a right to share dorm rooms with female students. Such topics pose thorny public policy concerns, which means discussions surrounding these topics are bound to offend someone.

> As a result, we ask that the agency: ***Please clarify whether the Department would consider a school in violation of Title IX if it does not promptly discipline a student or faculty member who refuses to use preferred (as opposed to biological) pronouns.***
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> ***Please clarify how the proposed rule applies to public universities in light of the 2021 ruling by the United States Court of Appeals for the Sixth Circuit in* Meriwether v. Hartop*, 992 F.3d 492 (2021), holding that a state university's punishment of faculty for using biological pronouns may violate the First Amendment.***
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> ***Please clarify whether the Department would consider a school in violation of Title IX if it allowed a student group to invite lawyers from Alliance Defending Freedom to speak to students about their work on behalf of female athletes who have lost women's athletic competitions to biological males.***

2. Strict Liability and Geographic Scope

The proposed rule is further problematic because of the way in which it requires schools to seek out evidence of vaguely-defined discrimination everywhere, even beyond campus borders. Title IX is best understood to prohibit recipients from purposefully discriminating on the basis of sex, with full awareness they were doing so. *See Gebser*, 524 U.S. at 289–91. The proposed rule, however, goes much further, providing that:

- "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." 87 Fed. Reg. 41,572 (proposed § 106.44(a)).

- "A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States." 87 Fed. Reg. 41,571 (proposed § 106.11).

The proposed rule would thus require schools proactively to root out and punish potential acts of discrimination by anyone connected with the school, wherever such acts may occur. ,In doing so, the rule would empower an army of roving Title IX officers to fan out across campus—or wherever students and faculty may gather—to hunt down potential discriminators, deputizing professors and advisors "to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that *may* constitute sex discrimination under Title IX." 87 Fed. Reg. 41,572 (proposed § 106.44(c)(2)(ii)) (emphasis added). Even in cases where the student does not feel victimized or even offended, the Title IX Coordinator must move forward with an investigation *regardless whether anyone wants to file a complaint*. *See* 87 Fed. Reg. at 41,573 (proposed § 106.44(f)(5)).

Remarkably, the school's duty to monitor is not limited to in-person interactions on campus, despite the Supreme Court's warning that "the leeway the First Amendment grants to schools" to control speech is "diminished" when it comes to off-campus speech, in part because "off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2046 (2021). The preamble to the proposed rule states that "when an employee *has information* about sex-based harassment among its students that took place on *social media* or other online platforms and created a hostile

environment in the recipient's education program or activity, the recipient would have an obligation to address that conduct." 87 Fed. Reg. at 41,440 (emphasis added). This creates a duty to report every time a teacher becomes aware of a mean, potentially sex-based jibe—online, in person, on-campus, or off.

The proposed rule thereby invites liability beyond what the statute contemplates. In doing so, it invites recipients to violate the First Amendment and invade the privacy of students at home.

> This leads to our final request: ***Please clarify how educational institutions are supposed to determine whether actions taken on social media create a hostile environment in the education program itself.***

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IWF and IWLC respectfully request that the Department withdraw the proposed rule.

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