To: Office of Civil Rights
U.S. Department of Education
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From: Thomas More Society, 309 W. Washington Street, Ste 1250, Chicago, IL 60606;
Christian Legal Society, 8001 Braddock Road, Ste 302, Springfield, VA 22151; and
National Association of Evangelicals, Post Office Box 23269, Washington, DC 20026

Date: Friday, September 9, 2022

RE: Comments on Proposed Rulemaking: ***Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance***, 87 Fed. Reg. 41309 – 41579 (July 12, 2022)

*** Comments submitted via the Federal eRulemaking Portal at *http://www.regulations.gov*
Microsoft Word "print-to-PDF" format

We write in response to the Notice of Proposed Rulemaking (hereinafter "NPRM") first posted by the Office of Civil Rights on June 23, 2022, and published in the Federal Register on July 12, 2022. The NPRM proposes new regulations as well as amendments to existing regulations pertaining to sex discrimination as prohibited by Title IX of the Education Amendments of 1972 (Pub. L. 92-318), 20 U.S.C. §§ 1681, 1682, 1683,[1] 1685, 1686, 1687, and 1688, as amended (hereinafter "Title IX"). The existing and proposed regulations for Title IX are codified at 34 C.F.R. Pt. 106.

[1] Title 20 U.S.C. § 1684 pertains to discrimination based on blindness or other visual impairment, which is also prohibited by Title IX.

We comment below only on select proposed regulations, as follows:

1. Proposed 106.10 (inclusion of sexual orientation and gender identity as protected classes): In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court of the United States was asked to resolve a discrete legal issue: whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of . . . sex," prohibits an employer from firing someone simply for being homosexual or transgender. *Id.* at 1738-39. The Court answered this question in the affirmative. The majority explained that Title VII's "because of . . . sex" text incorporates a "but for" causation standard. So long as "sex" was one "but for" cause of an employee's termination, that was sufficient to state a prima facie case under Title VII. *Id.* at 1739. The Court further explained that "sex" refers to the biological distinctions between males and females. *Id.* Taken together, the Court believed "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on [biological] sex." *Id.* at 1741. The majority went on to reason that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* "[H]omosexuality and transgender status are inextricably bound up with sex" because "to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their [biological] sex." *Id.* at 1742. It follows that, as a prima facie claim under Title VII, "employers are prohibited from firing employees on the basis of homosexuality or transgender status." *Id.* at 1753.

The Court was careful to stress the narrowness of its opinion. *Id.* In particular, its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," nor did the High Court's decision "purport to address bathrooms, locker rooms, [dress codes,] or anything else of the kind." *Id.* The Court expressly declined to "prejudge" any laws or issues not before it, observing instead that "[w]hether policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases." *Id. See also* Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) (by its own terms *Bostock* is of limited reach); Meriwether v. Hartop, 922 F.3d 492, 510 n.4 (6th Cir. 2021) (the principles in *Bostock* do not automatically extend to Title IX).[2]

At this writing it is unknown if the High Court will follow the interpretive literalism of *Bostock* when seeking the original congressional meaning when it comes to the set of protected classes in Title IX first enacted in 1972. *See* House Report of the Education and Labor Committee, No. 92-554 (Oct. 8, 1971); Senate Report of the Labor and Public Welfare Committee, No. 92-346 (Aug. 3, 1971); and Senate Conference Report, No. 92-798 (May 22, 1972).[3] The congressional debate in 1971-72 shows a complete absence of any consideration of discrimination on basis of sexual orientation or gender identity. If and when the Court rules on the meaning of sex discrimination in Title IX, we do not expect it to conclude it extends to sexual orientation and gender identity. Rather, as in the *Bostock* dissents by Justices Alito and Kavanaugh, we expect the Supreme Court will hold that Congress, when first enacting the

[2] We are aware that there are federal circuit cases that extend *Bostock* to Title IX. *See* Grimm v. Gloucester Cnty. Sch. Bd, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (U.S. June 28, 2021) (No. 20-1163). But our point is that we do not think that the U.S. Supreme Court will apply the rationale of *Bostock* to Title IX.

[3] All three reports are collected at 1972 U.S. Code, Cong. & Admin. News vol. 2, pp. 2462, 2559, and 2608. For discussion of the precursor to Title IX, *see id.* at 2467, 2511-12, 2566-67, 2671-72.

Education Amendments of 1972, meant only to prohibit discrimination on the two bases of sex (biologically male and female) and blindness or visual impairment.

For similar reasons, we do not find persuasive the interpretation of Title IX found in the President's *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Executive Order No. 13988, 86 Fed. Reg. 7023-7025 (Jan. 20, 2021).[4] In any event, an executive order cannot unilaterally enlarge upon the rule-making authority that Congress delegated to the U.S. Department of Education (hereinafter "ED").

In State of Tennessee v. U.S. Department of Education, No. 3:21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), a federal district court noted that in 2021 the Department of Education had issued guidance documents to schools applying the interpretive rule of *Bostock* to Title IX. Slip op. 3-5. The court went on to find that such guidance was likely procedurally and substantively unlawful under the Administrative Procedure Act. Slip op. 6, 19-20, 38-42. Indeed, the guidance documents had "overlooked the caveats" in *Bostock* that the decision was limited to Title VII and "created new law." Slip op. 41. The ED guidance wrongly purported "to expand the footprint of Title IX's 'on the basis of sex' language." *Id.* The district court concluded, inter alia, that there was a likelihood of plaintiffs' success on the merits and issued a preliminary injunction against the Department of Education.[5]

2. Proposed 106.10 (sexual orientation and gender identity as protected classes and the Major Question Doctrine): As a separate and independent ground for rejecting the brief that the prohibition on sex discrimination in Title IX includes discrimination on the bases of sexual orientation and gender identity, we look to the recent decision in West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022). The Supreme Court held that the EPA does not have congressional authority to limit emissions at existing power plants through what is called "generation shifting" to renewable energy sources such as solar and wind. Finding that the proposed action of the EPA's Clean Power Plan fell under the "major question doctrine," the Court held that the plan required specific congressional approval for such a momentous agency directive. Chief Justice Roberts, for the Court, wrote that in "certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes us 'reluctant to read into ambiguous statutory text' the delegation claimed [by the EPA] to be lurking there. [citation omitted] To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609. Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion. Justice Gorsuch noted the importance of the major

[4] *See also* Executive Order 14075, Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, 87 Fed. Reg. 37189 (signed June 15, 2022); Executive Order 14021, Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity, 86 Fed. Reg. 13803 (signed March 8, 2021).

[5] *See also* Judge Grasz, dissenting in The School of the Ozarks, Inc. v. Biden, No. 21-2270, 2022 WL 2963474 (8th Cir. July 27, 2022), noting that memorandum of understanding issued pursuant to president's executive order by Department of Housing and Urban Development to implement a change in interpretation concerning sex discrimination as prohibited by the Fair Housing Act of 1968 should be enjoined because of failure to give notice and opportunity to file comments as required by the Administrative Procedure Act. The panel majority dismissed for plaintiff's lack of standing and so did not reach the merits.

question doctrine, stating that it "seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions" on the areas of "self-government, equality, fair notice, federalism, and the separation of powers." *Id.* at 2620.

It is an understatement that the addition of sexual orientation and gender identity to Title IX's existing protected classes of sex and visual impairment raises major questions of political, economic, religious, and ethical significance. There is a complete absence of direction in Title IX from Congress on how to balance these new competing interests. For example, the ED's unilateral actions implicate educational curriculum in the medical colleges and elsewhere. It implicates hospitals and health-care clinics at universities. It implicates health insurance coverage of employees and students, same-sex female competitive sports, preferred pronouns, and privacy in restroom, locker room, and dormitory assignments. Past guidance on Title IX has some school districts hiding from parents the school's efforts to treat their children as of a sex other than that determined at birth. It implicates the religious freedom of religious students and faculty at K-12 secular schools and institutions of higher education. It implicates freedom of speech and freedom of association when students invoke Title IX to stop their fellow students from expressing their beliefs because the complainant feels in need of a "safe space." True, *Bostock* already applies to employment discrimination under Title VII, but that still leaves Title IX coverage of employment at preschools that have less than 15 employees—plus these proposed rules seek to uniquely monitor the behavior of volunteers no matter the size of the workforce. In multiple and various circumstances, impossible to predict, state and local laws and longstanding policies will be preempted by these regulations. This damages federalism, especially so in a subject area (education) which has been traditionally left to the states. Finally, the medical specialty of pediatrics is still embroiled in a heated and complex debate concerning how best for schools to care for young adult students reporting gender dysphoria.

Before the Executive Branch unilaterally expands Title IX beyond the protected classes of sex and visual impairment, W*est Virginia v. EPA* requires that Congress (subject to the president's veto power) must act clearly through the bicameral legislative process of Article I. For years, Congress has had pending legislation that would add sexual orientation and gender identity to Title IX (as well as other venerable nondiscrimination acts), but the bills repeatedly have died in the House or Senate. That continued failure to pass legislation, in an elected body regularly subject to the voters, is also democracy in action—a saying "no" to this expansion. Congress—even in this day—cannot enact a bill that adds sexual orientation and gender identity to Title IX. And that was certainly not the original meaning when Congress first drafted, debated, and finally enacted Title IX fifty years ago. *See* 1972 U.S. Code, Cong. & Admin. News pp. 2462, 2559, and 2608 (three congressional reports cited in footnote 3, above).

3. Proposed 106.2 (definition of "sex-based harassment"): In this rule, the definition of sexual harassment is altered and expanded to "sex-based harassment." The new term presages an enlargement in the title's coverage to include, inter alia, sexual harassment, harassment based on sex stereotypes, sex characteristics, sexual orientation, and gender identity. There is an inadequate showing of need for such an expansion. Moreover, it is impossible for recipients to anticipate the scope of their liability given this increase in the regulation's sweep.

The proposed definition also covers harassment that creates a "hostile environment." However, the established definition of hostile environment is altered to: "unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity." This reflects, inter alia, an enlargement of liability "based on the totality of the circumstances . . . evaluated subjectively." A subjective standard introduces into the definition an absence of bright lines. There will be inconsistent results across this vast nation and given the many and varied institutions involved. Accordingly, it is not possible for recipients to gauge the scope of their liability or take sure defensive measures. This amounts to a lack of notice concerning the new scope of legal liability and thus a denial of recipients' due process as safeguarded by the Fifth Amendment.

Not only do a recipient's employees have to be trained and monitored to not engage in sexual harassment, but the proposal attempts to extend that duty and liability to an institution's volunteers.[6]

Proposed 106.2 further defines sex-based harassment to include "unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances . . . denies *or* limits a person's ability to participate" in a program. In contrast, the existing rule at 34 C.F.R. § 106.30(a)(2) turns on "conduct that a reasonable person would determine is so severe, pervasive, *and* objectively offensive . . . [it] effectively denies a person equal access" to a program. The shift from "and" to "or" greatly inflates the meaning of sexual harassment, as well as overshoots the case law definition. The existing rule should be retained.

4. Proposed 106.10 (sexual orientation and gender identity in a university's provision of health care; K-12 responses to students reporting gender dysphoria): Should these proposed regulations be promulgated, we anticipate that individuals, including children and adolescents, will raise claims that they are in the "wrong body" and therefore must undergo gender transition, either to relieve distress or as an expression of personal autonomy. Sometimes this will involve psycho-social changes: the person asserts a new identity, reinforced by a different name, pronouns, and wardrobe. At other times it will involve a medical or surgical change, in which case the individual seeks pharmacological or surgical interventions that alter the body's function and appearance and may even impair or destroy healthy reproductive organs. At its core, the individual who takes on a transgender identity rejects the physiological fact and significance of the sexed body, and seeks to enforce cultural, medical, and legal validation of the person's unilaterally declared identity—a demand called gender affirmation.

For a university-based hospital or medical clinic that receives federal financial assistance these claims bring on multiple issues of medical ethics. For the recipient who is also a religious organization, these claims manifest issues of religious liberty and church autonomy. For any such recipient, secular or religious, which has physicians and other medical staff who are religious, these regulations present issues of religious conscience experienced by these individual physicians, nurses, and other medical staff.

[6] 87 Fed. Reg. at 41412.

It should not be "sex discrimination" under Title IX, as enacted, for recipients that provide healthcare through hospitals or medical clinics to refuse to perform gender-transition procedures (e.g., puberty blockers, cross-sex hormones, and transition surgeries).[7] If the recipient is faith-based, there are sincere, well-known, and widely held religious objections that must be respected by the government.[8] Quite apart from religious conscience, there are credible ethical objections rooted in what the treating physician or other medical professional believes is in the best medical interest of the patient. A cardinal rule of medical ethics is: first, do no harm.

Legislation presently before Congress seeks to balance the interests of persons seeking gender transition services and the service providers who object to providing these services in particular instances, whether on medical, ethical, or religious grounds. *See, e.g.*, H.R. 1440, 117th Cong. (Feb. 26, 2021). The ED does not have the authority to usurp this role assigned to Congress by Article I by proceeding alone to set policy in these contentious areas.

Even the popular press is reporting on a sincere and science-based debate among American and European pediatrics concerning how best to treat adolescents regarding high levels of gender dysphoria. The debate is not even close to reaching a resolution, with direct implications for Title IX and this pending NPRM. To quote one recent article:

> [The American Academy of Pediatrics'] new position also raises serious concerns about the Biden administration's proposed Title IX rules. If implemented, these would put enormous pressure on schools to defer uncritically to their students' self-identification, often without parental knowledge or approval. Researchers and clinicians working in the area of pediatric gender medicine have observed that "social transition"—using a child's preferred name and pronouns—carries serious risks of iatrogenesis, meaning an intervention that is itself the cause of illness. When a school treats a child as his or her stated identity, that school, whether intentionally or not, may be locking in a state of temporary distress or confusion and helping it congeal into an "identity." Such a child faces much higher chances of going down the medical path. If [Moira] Szilagyi [, president of AAP] is right, then the Biden administration's proposed rules are a step in the wrong direction—with potentially devastating consequences.[9]

We quote this posting by Dr. Leor Sapir, not because it necessarily states the correct side of the debate (we think it does), but because ED cannot ignore that there is a large and ongoing clash

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[7] The Office for Civil Rights of the U.S. Department of Health and Human Services enforces section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, which in federally funded programs prohibits discrimination on the basis of race, color, national origin, age, disability, or sex. On August 4, 2022, HHS published a notice in the Federal Register informing "the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning May 10, 2021, the Department . . . will interpret and enforce section 1557 . . . prohibition on discrimination on the basis of sex to include: Discrimination on the basis of sexual orientation; and discrimination on the basis of gender identity." https://www.federalregister.gov/documents/2021/05/25/2021-10477/notification-of-interpretation-and-enforcement-of-section-1557-of-the-affordable-care-act-and-title#print. By its terms, the HHS interpretive rule claims to borrow the definition of sex from Title IX. As of this writing, what will become of the HHS 2022 NPRM is unknown.

[8] Some religious conscience protections are also in place under the 1973 Frank Church Amendments to the Hill-Burton Act, such that religious hospitals and individuals receiving federal funds for health care may refuse to provide certain medical services. *See* 42 U.S.C. § 300a-7.

[9] Leor Sapir, *A Victory for Child Welfare? Did the American Academy of Pediatrics tacitly reverse its stance on pediatric gender medicine?* CITY JOURNAL https://www.city-journal.org/did-the-aap-just-reverse-its-gender-transition-policy (Aug. 22, 2022).

among credible medical experts, and to proceed now with the medical science being in such turmoil is to charge ahead in reckless disregard of the wellbeing of thousands of school-age teens.

5. Proposed 106.10 (sexual orientation and gender identity and the provision of health insurance): The regulations should state that it is not unlawful sex discrimination under Title IX for religious recipients to refuse to provide health insurance to students and/or employees to cover gender-transition procedures (e.g., puberty blockers, cross-sex hormones, and sex-change surgeries). This is a matter of religious freedom protected by the religious-tenets exemption, RFRA, and the First Amendment and statutory rights. *See, e.g.,* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that RFRA protects religious conscience from federal regulatory contraceptive mandate).

In passing, we note that it is not illegal sex discrimination under Title IX for a college to refuse to offer its students the purchase of a health insurance policy that covers elective abortion. *See* 20 U.S.C. § 1688 (Title IX is neutral as to abortion). This rule is part of the Danforth Amendment added as part of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 100th Cong., 2nd Sess. (Mar. 22, 1988) (sec. 8). A school need not be religious to benefits from the amendment. The Danforth Amendment is not a mere exemption. Rather, it is a rule of construction. Section 1688 is an integral part of how Title IX defines "sex discrimination."

6. Proposed 106.11 (off-campus conduct contributing to hostile environment): Under this proposed regulation, conduct that occurs in a building owned or controlled by a university-recognized student organization is covered by Title IX's prohibition on sex-based harassment contributing to a hostile environment. We presume the primary target here is residential Greek-letter fraternities and sororities. However, it is common for local churches and other faith-based organizations to operate ministries to college students. These ministries often seek and receive university recognition, for only with such status can they meet on campus and have access to university resources on the same basis as secular student organizations. University recognition, without more, is insufficient nexus to assert Title IX authority to regulate buildings owned by private sector off-campus organizations that are geared to students.

Churches and other student religious organizations that operate university-recognized student organizations commonly have their own buildings off campus where the students meet and carry-on ministerial activities (e.g., Baptist Student Union, Christian Campus House), including worship on the Sabbath. For there to be Title IX authority over a church or other faith-based organizational building would deeply implicate the doctrine of church autonomy—and in most instances violate it. *See* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012).[10] Church autonomy affords complete immunity from regulation concerning matters of internal governance that touch on doctrinal questions, polity, who is employed as a minister, and who qualifies as a member. For example, religious student organizations have the authority to place conditions of doctrinal belief or religiously moral conduct on the qualifications of their student

[10] In the situation described in the text, the religious exemptions in 28 U.S.C. § 1681(a)(3) and the end of § 1687 are inapplicable. Those exemptions apply to religious colleges and other educational institutions, not public universities.

leaders. InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State University, No. 19-10375, 2021 WL 1253302, at *10 (E.D. Mich. Apr. 5, 2021) (holding church autonomy doctrine allowed student religious organization to impose conformity to a statement of faith by its leaders notwithstanding this countermanded university's nondiscrimination policy). *Cf.* existing 34 C.F.R. § 106.6(c) providing that the internal bylaws of private organizations are overridden by Title IX; however, when applied to religious organizations this regulation would be overridden by the church autonomy doctrine in the First Amendment.

7. Existing 106.12 (religious-tenets exemption): It is proper that existing rule 106.12 remain unchanged. The exemption from Title IX for religious recipients of federal financial assistance appears at 20 U.S.C. § 1681(a)(3) and at the end of § 1687. This exemption was recently upheld and elucidated in Maxon v. Fuller Theological Seminary, No. 2:19-cv-09969, 2021 WL 5882035 (9th Cir. 2021). A unanimous panel there held that a religious Title IX recipient need not first apply for and be precleared for the exemption by the Department of Education, that a recipient asserting the exemption need not be controlled by a separate corporation or denomination, and that the court would not second-guess the seminary's assertion that its religious tenets did not permit retaining the complaining students because of the nature of their homosexual conduct. In accord with *Maxon* was a recent directive by the USDA advising religious K-12 schools that under Title IX they were automatically exempt from nondiscrimination requirements that came with the subsidized school lunch program.[11]

8. Proposed 106.44(a) (recipient's duty to respond): This proposed rule requires schools to take "prompt and effective action" to stop any sex discrimination that occurs in their programs regardless of actual knowledge of the alleged discrimination. This is a standard of strict liability. Consequently, it is overly costly, chills free expression in the workplace, and violates due process. Under the present rule, schools are already efficiently and effectively informed by routine observational reports and complaints. This is superior to the intensive workplace surveillance proposed. The present standard of actual knowledge should be retained. *See* 34 C.F.R. §§ 106.44(a), 106.30(a).

9. Proposed 106.44(c)(1) (K-12 school employee's duty to report): This proposed regulation provides that all employees at a K-12 school have a duty to report Title IX violations. This would impose a massive new duty at the primary and secondary level to monitor the behavior of all students and fellow employees. Compliance will be expensive and is not shown to be necessary. Such intrusive surveillance by the school administration will not only chill the free speech of students and teachers, but it will divert scarce educational dollars from classroom instruction by forcing schools to hire more staff to fulfill these obligations. Our primary and secondary

[11] Office of the Assistant Secretary for Civil Rights, U.S. Department of Agriculture, *Religious Exemptions Under Title IX of the Education Amendments*, https://www.usda.gov/sites/default/files/documents/religious-exemption-clarification.pdf?mkt_tok=NzEwLVFSUi0yMDkAAAGGR7WeexaNLC9xG_RY9sf-pMcKKSbmxf_S7x5gxYdI-EqsnK5YbjJXnHGlh8wfOb3rSHuhKwRRQJILSPwyOwXVVT0seHFGIdRPuSzJpB0s5MY (Aug. 12, 2022). Preclearance approval of exempt schools was an option at the USDA (*see* 7 C.F.R. § 15a.205), but not required to invoke the religious-tenets exemption, as well as to benefit from RFRA.

personnel are presently overwhelmed, morale is low, and teachers are leaving the profession in droves. They do not need yet one more unfunded responsibility. Retain the existing rule.

10. Proposed 106.44(f) and (g), 106.2 (responses to sex discrimination; definition of "remedies"; no-contact orders): The regulations require a recipient to ensure that its Title IX Coordinator take certain steps upon being notified about possible sex discrimination in its program or activity. Proposed 106.44(f)(1) to (6) requires that the Coordinator take appropriate steps to ensure that any reported sex discrimination is discontinued. Proposed 106.44(g) looks more to the complaining and responding parties and, inter alia, requires that the Coordinator provide appropriate interim supportive measures (remedies) to an individual complainant. Apparently one such supportive measure is for the Coordinator to issue a no-contact order to the respondent directing him to physically keep his distance from the complainant and to cease all communications with her. Proposed 106.44(g)(1). This is a preliminary remedy that seeks to prevent more harm to the complainant. Proposed 106.44(g)(2) provides that supportive measures that burden a respondent can only be imposed during the pendency of a grievance procedure under 106.45 or 106.46.

The definition of "remedies" in proposed 106.2 provides that no remedy can be awarded a complainant until "after a recipient *determines* that sex discrimination occurred." When a no-contact order is unilaterally issued without notice and an opportunity for a hearing, the constitutional rights (e.g., due process, free speech) of the respondent are violated. The regulations must more clearly state that there can be no determination by the Coordinator issuing a no-contact order or other supportive measure until first there is notice to the respondent and an opportunity for a hearing. To fail to clarify that the definition of "remedies" as being awarded only after notice and opportunity for a hearing is to abandon the presumption of the respondent's innocence—a cardinal rule of due process. Of course, it is a different matter when there is a true emergency. *See* proposed 106.44(h).

When the requirements of notice and hearing are not more detailed in the regulations, all too often Coordinators, especially those without formal legal training, get caught up in their zeal to eradicate discrimination and they neglect the basic constitutional rights of the accused. *See, e.g.,* Perlot v. Green, President of the University of Idaho, No. 3:22-cv-00183, 2022 WL 2355532 (D. Idaho June 30, 2022) (no-contact orders issued unilaterally by university's Title IX office were found to violate the First Amendment free speech rights of the complainant's fellow students based on these students' right to peacefully articulate ideas with which the complainant disagreed, ideas that were shared in the hallways and classrooms at a state law school). The *Perlot* case illustrates how easy it is for a misguided complainant, one seeking a "safe space" from the viewpoints of fellow students, to convert Title IX into an instrument of oppression. The university's Coordinator obviously should have known better, but it is equally obvious that she was so immersed in gender-affirming ideology that she was incapable of realizing that there was something larger going on here than perceived illegal discrimination. Accordingly, for reasons of due process and free expression these regulations must be more detailed in warning against such clumsy violations of the elemental civil rights of others.

11. Proposed 106.45 (procedures pertaining to all complaints of sex discrimination): These proposed rules adapt the current regulations, which apply to all complaints of sex discrimination, with adjustments that take into account: the age, maturity, and level of independence of students in various educational settings; the particular circumstances of employees and third parties; and the need to ensure that recipients adopt grievance procedures that include requirements of fairness and reliability for all parties suited to implementing the title's nondiscrimination guarantees.

Proposed 106.45(b)(2) permits the decisionmaker to be the same person as the Title IX Coordinator or investigator. This is a fundamental denial of due process of law. One cannot be both prosecutor and judge in the same case.[12] The existing regulation at 34 C.F.R. § 106.45(b)(7)(i) should be retained.

12. Proposed 106.46(e) and (f) (additional procedures at postsecondary institutions): At postsecondary institutions, the grievance procedures for complaints of sex-based harassment involving a student are to include all the requirements of proposed 106.45, plus the additional requirements of proposed 106.46.

Due process requires that the complainant and respondent have a right to have an advisor (often a licensed attorney) present during any interview by an investigator. This holds true as well for other meetings or proceedings with the investigator. This is presently not required by proposed 106.46(e)(1), (2), and (3) and must be corrected.

Proposed 106.46(e)(6) pertains to access by parties to investigative reports and evidence. The existing rule requires an "equal opportunity" for each party to access the information. *See* 34 C.F.R. § 106.45(b)(5)(vi). The proposed rule requires schools to offer "equitable access" to the parties. *See* 106.46(e)(6). "Equity" is not the same as "equal." Due process requires retention of the existing rule requiring *equal* access.

In cases that turn on credibility of the complainant or of the respondent, or materially so, any hearing leading to a determination must permit the parties to be subject to cross-examination by the complainant's and the respondent's advisor. This is presently allowed but not required by proposed 106.46(f)(1) and must be corrected.

Proposed 106.46(f)(4) should be stricken. If a party refuses to respond to questions about his or her credibility, that should be considered by the decisionmaker. Further, the decisionmaker should be able to give such a refusal the weight he or she deems appropriate under the totality of the circumstances.

13. Proposed 106.45 and 106.46 (limitations on filing complaints): We ask that a statute of limitations be adopted for the operation of proposed 106.45 and 106.46. This is a matter of fundamental fairness and due process. A time limitation on filing complaints is even more compelling given that the proposed rules drop the requirement that a complainant continue as a

[12] *Cf.* proposed 106.45(d)(3)(ii) where this legal principle is properly embodied.

student in the recipient's program. *See* proposed 106.2 (definition of "complainant"). A period of one year would be best. A complaint of discrimination is very serious; it cries out for prompt resolution to avoid becoming a matter that for years casts a pall over the lives of the parties. If complaints are not filed within one year, evidence will have been lost and memories will have faded. Meanwhile the students involved, as well as student witnesses, will have been promoted to a higher grade or even graduated.

A statute of limitations can be tolled if a party elects to pursue informal resolution processes.

14. Proposed 106.2 (definition of "pregnancy or related conditions"), 106.10, 106.21(c), 106.40(b) and 106.57: These rules collectively address discrimination based on pregnancy and related conditions, such as the needs of newborns and mothers with newborns.

We encourage couples to have children and believe that the government ought to support the couple when they choose to do so. Accordingly, as a general matter we favor prohibiting discrimination based on pregnancy, as well as related medical and child-rearing consequences, as a type of sex discrimination; we favor assistance to mothers (e.g., accommodations for nursing the baby, as well as enabling the choice to express and store breast milk) in caring for their newborns while attending school or working at the mother's place of employment.

Proposed 106.2 defines "pregnancy or related conditions" to include "termination of pregnancy." For a woman to choose to have an elective abortion is *not* a condition related to pregnancy; it is *ending* a pregnancy. The definition of "pregnancy or related conditions" must be altered to make that clear by striking "termination of pregnancy."

Moreover, 20 U.S.C. § 1688 (the Danforth Amendment) ensures that Title IX is neutral as to abortion.[13] The Danforth Amendment is not a mere exception but a rule of construction binding on all Title IX and what it means to discriminate on the basis of sex. To the extent that the definition of pregnancy includes elective abortion, it is contrary to § 1688 and thereby void.

15. Proposed 106.71 (retaliation): This proposed regulation drops the very useful reference to First Amendment defenses and the clarification that raising them is not retaliation. The ED should keep existing regulation 34 C.F.R. § 107.71(b)(1). Some of the players to these disputes are so immersed in gender-affirming ideology that it does not occur to them that a respondent referencing freedom of speech or freedom of association is not making a threat but exercising a constitutional right. The existing regulatory reminder here will likely help avoid later civil-rights lawsuits to vindicate these First Amendment rights only after they have been violated.

[13] The Danforth Amendment was added to Title IX as part of the Civil Rights Restoration Act of 1987. It ensures that a claim of sex discrimination does not cause the recipient to have to provide or pay for an abortion. See *"Senate Passes Civil Rights Bill with Abortion-Limiting Amendment" Assoc. Press News*. For example, if health insurance is made available by a college to students, it is not sex discrimination if the policy does not cover elective abortions. A college does not have to be religious to invoke the Danforth Amendment.

16. Proposed 106.10, 106.31(a)(2) (conscience; privacy): Those claiming a transgender identity (or seeking to transition) often adopt new names and pronouns that reflect their declared identity and insist that others use these names and pronouns. Such use might seem innocuous and even appear to be an innocent way of signaling kindness and acceptance of the person. But it poses a profound difficulty: by acquiescing to the demands, persons of integrity will be openly affirming something they know to be untrue. These individuals believe that to use names and pronouns that contradict a person's sexual identity given by nature is to speak falsely.

Diversity is a two-way street. Individuals should not be coerced into using gender-affirming terms or pronouns that convey approval of a person's gender identity. It is not hateful or unlawful discrimination to decline to use such language. In no circumstance should individuals be compelled to use language that in their view is not true. As Justice Jackson, writing for the Court in West Virginia v. Barnette, 319 U.S. 624, 642 (1943), said "[i]f 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." The right to speak truth inheres in each human person and is inalienable in the face of would-be hegemonic human agency. Attempts by the government to compel such terminology, particularly by threats of litigation or job sanctions, are themselves intolerant and a violation of the First Amendment. It is now well established that both freedom of speech and religious exercise safeguard a person's right to refrain from using the preferred pronouns of others. *See* Meriwether v. Hartop, 922 F.3d 492 (6th Cir. 2021) (holding that religious philosophy professor was unconstitutionally dismissed by state university for refusing to use pronouns that were at odds with a student's biological sex); Loudoun County Sch. Bd. v. Cross, No. 210584 (Va. Aug. 30, 2021) (state supreme court deciding that public school must reinstate teacher who was unconstitutionally dismissed for refusing, out of religious conscience, to use students' preferred pronouns).

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For close to a decade now K-12 schools have struggled with how to accommodate, in restrooms and locker rooms, a male who declares to have transitioned to a female. The remedial focus cannot be on the transitioned student alone. Both girls and boys must be able to avoid exposure of their genitalia and (for females) breasts to other students they regard as of the opposite sex. This innate desire for privacy, which is healthy and laudable, must be respected and maintained. Accommodating student needs for modesty must not be a Title IX violation. Rather than ED short-circuiting the democratic process, on most occasions locally elected school boards can be relied upon to reach suitable compromises. For example, a recipient's equipping of restrooms and locker rooms with privacy panels, as well as separate dressing and shower stalls where physically and financially feasible, is perhaps one means for all parties concerned to achieve their objective.

17. Proposed 106.6(g) (parental rights): There are increasing instances where faculty and staff at recipient K-12 schools have withheld information from parents of students concerning their son or daughter evidencing gender dysphoria. *See* Ricard v. USD 475 Geary County, KS School Board, No. 5:22-cv-04015-HLT, 2022 WL 1471372 (D. Kan. May 9, 2022) (sufficient showing had been made of likelihood of success on the merits for entry of preliminary injunction in support of teacher's claim that her free exercise of religion had been violated by school board's

policy of compelling teachers to withhold information from parents about their son or daughter manifesting gender dysphoria).

Proposed 106.6(g) ("exercise of rights by parents …") fails to address this offense. These regulations must more explicitly warn against such conduct by recipient schools. To withhold such information is contrary to the constitutional right of parents to direct the upbringing of their child, including their child's education, health care, religion, and general well-being. Pierce v. Society of Sisters, 268 U.S. 510 (1925). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id*. at 535. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (reaffirming *Pierce* as a First Amendment right vested in the religious rights of parents); Troxel v. Granville, 530 U.S. 57 (2000) (reaffirming a constitutional right of parents to direct the upbring of their children, even in the face of a claim for regular visitation brought by grandparents).

18. Biological females and single-sex sports: We note that the NPRM states that later rulemaking under Title IX is anticipated by the Department of Education with respect to transgenderism and participation in single-sex female athletic teams and sanctioned athletic competitions. 87 Fed. Reg. at 41537-38.[14] We take the representation as made in good faith and we rely upon it.[15] Accordingly, for now we withhold our comments on the subject.

Thank you for your attention to the foregoing Comments.

Respectfully submitted,

Thomas More Society, Christian Legal Society, and National Association of Evangelicals

Timothy Belz, Esq.
Ottsen, Leggat & Belz, L.C.
112 South Hanley, Suite 200
St. Louis, MO 63105
Special Counsel to Thomas More Society

Carl H. Esbeck
R. B. Price Professor Emeritus and Isabelle Wade & Paul C. Lyda Professor of Law Emeritus
209 Hulston Hall
Ninth & Conley Streets
Columbia, Missouri 65211

[14] Regarding girls' and women's sports, the Department of Education states it will issue a separate NPRM "to address whether and how" it should amend current regulations on single-sex athletics and "the question of what criteria, if any, recipients should be permitted to use to establish students' eligibility to participate on a particular male or female athletics team." 87 Fed. Reg. at 41537.

[15] *Cf.* Rachel N. Morrison, *Biden Education Department's Fake Punt on Women's Sports*, https://eppc.org/publication/education-departments-fake-punt-on-womens-sports/ (Aug. 9, 2022).