September 12, 2022

Submitted electronically
Alejandro Reyes
Program Legal Director
U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
PCP-6125
Washington, DC 20202

Re: Public comment regarding the proposed rule "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance"
RIN: 1870-AA16

Dear Director Reyes:

Family Research Council (FRC) respectfully submits the following comments regarding the proposed rule issued by the U.S. Department of Education entitled, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." A separate comment from Family Research Council's Center for Human Dignity addresses questions regarding the Notice of Proposed Rule Making's (NPRM) impact on issues relating to pregnancy, pregnancy-related conditions, and lactation.

There are four main areas of concern addressed in this comment:

1. The proposed rule's regulatory impact on families.
2. The proposed rule's undermining of protections for women *vis a vis* "gender identity" as a component of "discrimination on the basis of sex."
3. The proposed rule's proposed definition of "parental status" and concerns about *in loco parentis* as a "doctrine" in law.
4. The proposed rule's encouragement of "gender affirming" policies and practices that are dangerous for children, undermine the family by negating parental rights, and have real costs for schools.

Regulatory Impact on Families

Federal agencies are required by law to "assess the impact of proposed agency actions on family well-being," per the Omnibus Consolidated and Emergency Supplemental Appropriations Act.[1] Federal law requires the following:

> 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.[2]

The NPRM fails to meet this requirement.

We hereby request such an impact analysis, particularly concerning parental rights and family well-being with regard to regulations proposing the application of Title IX to include "sexual orientation" and "gender identity" relating to minor students. We believe the NPRM negatively impacts family well-being in all seven impact areas and that it would be impossible to balance these harms by "benefits" from a purported expansion of rights as proposed in the NPRM.

Undermining of Protections for Women and Girls

The proposed regulations claim to prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.[3] By including "gender identity," rational understanding of the term "sex" is impossible. Moreover, this makes it impossible to prohibit any discrimination on the basis of sex. By the logic of the NPRM, if a female objects to having biological males who identify as women present in intimate spaces like dormitory rooms, bathrooms, locker rooms, and the like, she will be guilty of sex discrimination on the basis of gender identity rather than protected from sexual harassment/discrimination on the basis of sex.

If a female college student is assigned a roommate who is biologically male but claims another gender identity, will the female student be guilty of sex discrimination if she refuses to sleep in the same room based on her discomfort with sharing an intimate space with a male-bodied person? Would the female student's case be treated any differently if she was recovering from sexual assault, and sharing sleeping quarters and lavatory space with a male-bodied person caused her distress? The proposed rule would make assigning dormitories to students based on "sex" effectively impossible.

Consider the implications for minors and parental rights. What obligation does a school, whether public or private, have to honor the wishes of a parent who objects to their minor female child being assigned a male-bodied room or bedmate while on an educational or extracurricular overnight trip? What if the minor female student objects to sharing a room or bed with a male-bodied student? Will women and girls be accommodated, protected, or punished under this new interpretation of Title IX?

Proposed Definition of "Parental Status" and Concerns about *in Loco Parentis*

For the first time, the U.S. Department of Education is proposing to define "parental status" as part of a federal regulation in Title IX. The preamble to the NPRM states that this definition will only apply to sections that reference the parental status of applicants for admission or employment, students, and employees.[4] We are skeptical of this limitation and expect that this department, other agencies, and other educational institutions will misapply or misconstrue what is a tortured and unnecessary definition of "parental status." Within this NPRM, case law related to Title VII in *Bostock v. Clayton County* (2020) is misinterpreted to apply to Title IX. The redefinition of "sex" to include nebulous concepts like "sexual orientation" and "gender identity" are evidence of the current administration's inability to confine itself to the bounds of nature and reason, let alone common sense. Expecting the proposed definition to remain limited to employment law seems naïve.

We are concerned that this "parental status" definition will be interpreted as broadening the definition of precisely who may act as a parent of a minor student. Under such an interpretation, the proposed definition introduces confusion and diminishment of parental rights. Children have a right to their parents; this right is natural and exists prior to political consideration. Parents have pre-political rights regarding their children and enjoy fundamental parental rights well established in American law.[5]

The NPRM's seven "categories" of people who have "parental status" seem to have no hierarchy or priority. This lack of hierarchy and clarity will contribute to much confusion about who can make decisions for minor students. The first enumerated person with "parental status" is a "biological parent." The second enumerated person is an "adoptive parent." Does the "adoptive parent" have priority in decision-making over the "biological parent"? In many states, "foster parents" are limited in their ability to consent to services or make decisions in educational settings on behalf of minor children temporarily in their care. Does this NPRM grant a "foster parent" decision-making status that competes with "biological" or "adoptive parents"? Which "stepparent" has "parental status" in cases of multiple dissolved marriages? Could a "stepparent" overrule a "biological parent" under the NPRM's proposed rule?

The proposed definition of "parental status" includes "(6) in loco parentis with respect to such a person; or (7) actively seeking legal custody, guardianship, visitation, or adoption of such a person."[6] These represent the most troubling implications. Could a teacher or school administrator claim to have parental status based on an "*in loco parentis*" relationship with a minor student? Could a relative or non-relative assert their ability to enjoy "parental status" based on their "actively seeking legal custody, guardianship, visitation, or adoption" of a minor child? The NPRM and the proposed rule itself are not clear on these points. The entire section of the NPRM must be deleted.

The NPRM's claim that schools generally operate under the doctrine of *in loco parentis* is not well grounded in case law.[7] Such a common law concept that might have been understood by most of society in previous generations can hardly be assumed to be agreed upon today. Given that school attendance is compulsory, many parents send their children to public school with the understanding that *in loco parentis* represents the school's obligation to act as the parent would in cases of emergency (*e.g.*, if the school is on fire, the children must be removed; if a medical emergency arises, emergency treatment is administered to the child until the parent can respond in person; if someone physically strikes a child at school, a nearby adult intervenes, etc.). Parents understand they do not give up their parental rights simply by sending their children to (public) school, as is required by law. Some school administrators and staff seem to think that acting *in loco parentis* means replacing the parent at the request of the child. Sometimes another adult is acting *in loco parentis*, as when a minor lives with their 21-year-old sibling or a grandparent. Case law deals directly with *in loco parentis* mostly in relation to private schools and boarding schools, where the parent grants much more responsibility for the care and welfare of the child to the school.[8]

Given the multiplicity of interpretations and applications of *in loco parentis* and the very minimal case law referencing a doctrine related to *in loco parentis* in public schools, any claim made by the NPRM must emphasize the fundamental rights of parents in school and education settings. It must be made clear that schools may not act in place of parents with regard to "gender-affirming" decisions, vaccinations, medical treatments, or any other life-altering decision regarding a child.

Danger to Children and Costs for Schools

The NPRM's misapplication of *Bostock*'s reasoning to Title IX law is a danger to children. Promulgating this rule will encourage schools across the country to put vulnerable children on a path to mutilating surgeries and sterilization. School administrators are not mental health practitioners with the expertise to direct "social transition" practices, such as name changes for children based on presumed or claimed gender dysphoria or the teaching of gender ideology as a belief system by enforcing the use of preferred pronouns. Hiding these kinds of school-based interventions from parents will become a pervasive practice allowed by the logic of this NPRM, pitting schools against parents and wounding children in the process.

We ask that you explain exactly what educational, financial, and healthcare obligations the new rule will entail for schools with regard to social transition, chemical transition, surgical transition,[9] and detransition[10] of students in K-12 and post-secondary settings. We further ask you to clarify how parental rights will be ensured if the NPRM is enforced.

Conclusion

As proposed, this "expansion" of Title IX is a danger to children, parental rights, and education itself. The redefinition of "sex" to include concepts such as "gender identity" is well beyond the scope and original intent of Title IX. Because of the undermining of parental rights and the danger that the proposed rule's gender ideology enforcement poses to students' well-being and fundamental freedoms,

the agency should not finalize this rule. The agency should not attempt to define "parental status" in Title IX or anywhere else.

We look forward to reviewing the family impact assessment.

Respectfully submitted,

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Appendix: Parental Rights and Case Law

I. Parental Rights Case Law

a.) The U.S. Supreme Court has held that parental rights are fundamental for at least the past 100 years. In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), the Court said:

> Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. 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 534.

b.) In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court said:

> [T]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. *Id.* at 232.

c.) In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court said:

This Court has long recognized that freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 639.

d.) In *Parham v. J.R.,* 442 U.S. 584 (1979), the Court said:

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. Surely, this includes a high duty to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. *Id.* at 602 (*cleaned up*).

e.) In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court said:

[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Id.* at 753.

f.) In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court said:

The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. *Id.* at 65.

II. Recent Articles

a.) Jennifer Bauwens, "The Ideology of Relativism is Unraveling," The Washington Stand, July 7, 2022, https://washingtonstand.com/commentary/the-ideology-of-relativism-is-unraveling.

b.) Jennifer Bauwens and Brooks Robinson, "Should We Always 'Follow the Science'?," The Washington Stand, June 13, 2022, https://washingtonstand.com/commentary/should-we-always-follow-the-science-.

c.) Jennifer Bauwens, "The Groomer Controversy: What's Actually Going On?," The Washington Stand, May 19, 2022, https://washingtonstand.com/commentary/the-groomer-controversy-whats-actually-going-on.

d.) Jennifer Bauwens, "Protecting Children in a Post-Trans Ideological World," Family Research Council, May 2, 2022, https://www.frcblog.com/2022/05/protecting-children-post-trans-ideological-world/.

e.) Jennifer Bauwens, "Diagnosing Gender Dysphoria in Children: An Explainer," Family Research Council, May 2022, https://www.frc.org/genderdysphoria.

f.) Jennifer Bauwens, "Transgenderism Has a Science Problem," Family Research Council, March 22, 2022, https://www.frcblog.com/2022/03/transgenderism-has-science-problem/.

g.) Jennifer Bauwens, "Bringing Awareness to the Experiences of Detransitioners," Family Research Council, March 10, 2022, https://www.frcblog.com/2022/03/bringing-awareness-experiences-detransitioners/.

h.) Jennifer Bauwens, "Suicide Risk and Gender Transition: The Facts," Family Research Council, July 23, 2021, https://www.frc.org/blog/2021/07/suicide-risk-and-gender-transition-facts.

i.) Jennifer Bauwens, "Finland Looks Reasonable on Gender Transition for Minors," Family Research Council, July 26, 2021, https://www.frc.org/updatearticle/20210726/finland-gender.

j.) Jennifer Bauwens, "Do Not Sterilize Children: Why Physiological Gender Transition Procedures for Minors Should Be Prohibited," Family Research Council, July 2021, https://www.frc.org/issueanalysis/do-not-sterilize-children-why-physiological-gender-transition-procedures-for-minors-should-be-prohibited.

k.) Jennifer Bauwens, "Protecting the Vulnerable: A Call to Uphold Ethical Standards in Treating Gender Confusion," Family Research Council, June 2021, https://www.frc.org/issuebrief/protecting-the-vulnerable-a-call-to-uphold-ethical-standards-in-treating-gender-confusion.

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[1] Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P. L. 105-277, Div. A, § 101(h), Tit. VI, § 654, 112 Stat. 2681-528 (Oct. 21, 1998), codified at 5 U.S.C. § 601 note (Assessment of Federal Regulations and Policies on Families).
[2] Ibid.
[3] Proposed § 106.10.
[4] Proposed §§ 106.21(c)(2)(i), 106.40(a), and 106.57(a)(1), and current § 106.37(a)(3).
[5] See appendix.
[6] Proposed § 106.2.
[7] The NPRM cites nothing in support of this claim and relies solely on the NPRM from 2020. The NPRM from 2020 cited one source—a law review article from 2002—which itself cited one case from the U.S. Supreme Court dating back to 1986. That case, *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675 (1986), did not say that public schools stand *in loco parentis.* It merely said (after reviewing numerous precedents dealing with public schools taking action to protect students from vulgarity and

sexually explicit materials) the following: "These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech." Even a more recent precedent, *Mahanoy Area Sch. Dist. v. B.L.,* 141 S. Ct. 2038 (2021), discusses the doctrine of *in loco parentis* solely in the context of public schools disciplining students for vulgar speech. The Court in *Mahanoy Area Sch. Dist. v. B.L.* takes pains to make it clear that *in loco parentis* is limited: "One such characteristic, which we have stressed, is the fact that schools ***at times*** stand *in loco parentis*, *i.e.,* in the place of parents" (emphasis added). Prior to *Mahanoy Area Sch. Dist. v. B.L.,* the last time the U.S. Supreme Court discussed the doctrine of *in loco parentis* was in 1995, in the case of *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646 (1995).

[8] Walton, S. Ernie, "In Loco Parentis, the First Amendment, and Parental Rights—Can they Coexist in Public Schools?," *Texas Tech Law Review*, August 3, 2022, last revised August 26, 2022, https://ssrn.com/abstract=4180593.

[9] Jennifer Bauwens, "Do Not Sterilize Children: Why Physiological Gender Transition Procedures for Minors Should Be Prohibited," Family Research Council, July 2021, https://www.frc.org/issueanalysis/do-not-sterilize-children-why-physiological-gender-transition-procedures-for-minors-should-be-prohibited.

[10] Jennifer Bauwens, "Transgenderism Has a Science Problem," Family Research Council, March 22, 2022, https://www.frcblog.com/2022/03/transgenderism-has-science-problem/; Jennifer Bauwens, "Bringing Awareness to the Experiences of Detransitioners," Family Research Council, March 10, 2022, https://www.frcblog.com/2022/03/bringing-awareness-experiences-detransitioners/.