UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

DAVID SPRING, Director, Washington Parents Network, BOB RUNNELS, Director, Informed Choice Washington, BRIAN NOBLE, Director, Family Policy Institute of Washington, WILLIAM M. SULLIVAN, Parent,

Plaintiff(s),

v.

MIGUEL CARDONA, Secretary, U.S. Department of Education,

Defendant(s).

CASE NO. _____
[to be filled in by Clerk's Office]

COMPLAINT AND REQUEST FOR PRELIMINARY INJUNCTION

I. THE PARTIES TO THIS COMPLAINT

A. Plaintiff(s)

Provide the information below for each plaintiff named in the complaint. Attach additional pages if needed.

Name	David Spring Director Washington State Parents Network
Street Address	6183 Evergreen Way
City and County	Ferndale, Whatcom County
State and Zip Code	Washington 98248
Telephone Number	425-876-9149

Name	Bob Runnells, Director, Informed Choice Washington
Street Address	
City and County	
State and Zip Code	
Telephone Number	

Name	Brian Noble, Director, Family Policy Institute of Washington
Street Address	P. O. Box 975
City and County	Lynnwood
State and Zip Code	WA 98046
Telephone Number	425-207-3079

Name	William M. Sullivan
Street Address	7020 Jumpoff Road
City and County	Wenatchee
State and Zip Code	WA 98801
Telephone Number	

B. The Defendant(s)

Defendant No. 1

Name	Miguel Cardona
Job or Title	Secretary US Department of Education
Street Address	
City and County	
State and Zip Code	
Telephone Number	

II. BASIS FOR JURISDICTION

Under 28 U.S.C. § 1331, a case arising under the United States Constitution or federal laws is a federal question case. This is a Federal Question case as it concerns both the First Amendment Right of Free Speech and a federal law called Title IX which protects the rights of women and girls to equal treatment by any educational organization receiving federal funds.

Plaintiffs hereby move pursuant to Federal Rule of Civil Procedure 65 for a preliminary injunction prohibiting Defendants from enforcing their Title IX Final Rule, published on April 29, 2024 and scheduled to take effect on **August 1, 2024** until this Court has an opportunity to issue a final judgment on the merits. If an August 1, 2024 injunction is not possible, then in the alternative, we seek an injunction before the first day of school which in nearly all school districts in Washington state will occur during the week of **August 24, 2024**.

Plaintiffs make this motion for a preliminary injunction on the grounds that

(1) Plaintiffs have demonstrated a likelihood of succeeding on the merits of their claim that Defendant has exceeded his authority in issuing a Final Rule that is contrary to the expressed purpose of Title IX and that the Final Rule violates the First Amendment Rights of students, parents, teachers, coaches and scientists.

(2) Plaintiffs are likely to suffer irreparable harm in the absence of the relief requested due to the loss of their First Amendment rights and due to the risk of being charged with sexual harassment based on subjective, arbitrary and ambiguous standards;

(3) the harm Plaintiffs are likely to suffer if the preliminary injunction is denied outweighs the harm that Defendants are likely to suffer as a result of the preliminary injunction; and

(4) the public interest favors issuing the preliminary injunction.

PRELIMINARY STATEMENT

The Defendant, Miguel Cardona, is the Secretary of the US Department of Education and is the person who published the Final Rule to Title IX on April 19, 2024. While Title IX as originally published in 1972 was only 3 pages long, the Final Rule is 1577 pages long and included hundreds of pages of new rules that are not supported by the language in Title IX. Some of these rules increase the risk that teachers or students will be unjustly accused of sexual harassment. Other rules prohibit free speech or demand compelled speech with the punishment for non-compliance being a teacher losing their job or a student being expelled from school.

Within days of the Final Rule being published, a total of 26 states filed federal complaints for Injunction. So far, Final Rule injunctions have been granted in 14 states with judges in the remaining 12 states likely to issue orders very soon. No federal judge has ruled against the States. All court orders have stated that plaintiffs would suffer irreparable harm if an injunction was not issued. Unfortunately none of the courts has issued a National Injunction – which has compelled us to request this preliminary injunction for Plaintiffs here in Washington state.

The facts in this case are similar to the facts in all of the other Injunction cases. Because we are filing this cause so close to August 1, 2024, we are asking for a temporary injunction to maintain the status quo while the court considers the case for a permanent injunction on its merits.

STANDING: The Plaintiff **Washington Parents Network** is a non-partisan group of more than 2,000 parents with members in every county in Washington State. Our mission is to protect the right of parents to be the primary stakeholders in the education of their children. We believe that our schools should preserve the essential parent-child relationship and focus on teaching kids the basic skills they need to succeed in life. We are concerned that, in the past few years, our schools have been turned into an ideological battleground where our kids are literally

being encouraged to form alternate identities, called gender identities, and then lie to their parents about their new alternative identities. Many of our members are Christians who have deeply held beliefs and fear that their children will be subject to unreasonable punishment, such as being accused of sexual harassment, just for expressing their spiritual convictions in school. Some of our members are teachers and scientists who also fear that they will be accused of sexual harassment if they disagree with the Gender Identity narrative.

We assert that we have standing as an association because the Final Rule harms the First Amendment rights of all of our members and our children and our teachers and scientists as we describe below. Therefore, all of our members would have standing in their own right and the issues in this complaint are directly related to our mission which is to protect the rights of parents. In addition, because the claims and relief sought are primarily questions of law, we can represent the views of our members without the need for each of our individual member to file a complaint.

Regarding standing of Parents Rights organizations, the Kansas Federal court July 2, 2024 order stated on Page 15:

"Turning to the Plaintiff Organizations, they have standing to sue on behalf of their members when (1) their members have standing in their own right; (2) the interests at stake are relevant to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the individual members to participate in the lawsuit. See Friends of the Earth v. Laidlaw Envtl. Serv.,528 U.S. 167, 181 (2000). Based on the affidavits submitted by the members of the Plaintiff Organizations, the court finds that those members have established standing to challenge the constitutionality of the Final Rule based on a potential chilling of their speech in violation of the First Amendment. See Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist., 83 F.4th 658, 666 (8th Cir. 2023) ("Parents have standing to sue when the practices

and policies of a school threaten the rights and interests of their minor children.") (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 718–19 (2007)).

Next, the interest at stake must be relevant to the organization's purpose. All three Plaintiff Organizations have submitted declarations setting forth their purpose. Moms for Liberty is a nationwide organization with chapters across the country. Moms for Liberty's mission is to defend the fundamental right of parents to raise their children in accordance with their values and morals. (Doc. 43-6.) Its mission would be impeded if the Final Rule went into effect by deterring its members and their children from expressing their viewpoints about gender identity and transgenderism in schools and by placing them in uncomfortable and unsafe positions in private places such as restrooms and locker rooms… Based on this review, the court finds that the interests at stake are relevant to the Plaintiff Organizations' purposes. Finally, neither the claim nor the relief sought requires that the individual members participate. Plaintiffs are merely seeking declaratory and injunctive relief. (Doc. 1 at 81–83.) As such, the individual members do not need to participate. See New Mexico ex rel. Richardson v. Bureau of Land Mgmt., 565 F.3d 683, 696 n.13 (10th Cir. 2009). Based on the foregoing, the court finds that Plaintiffs have standing to challenge the Final Rule."

Plaintiff David Spring also has standing for the following reasons. In addition to being the Director of the Washington Parents Network, he is also a teacher and scientist with a Masters Degree in Child Development from the University of Washington and a Bachelors Degree in Science Education from Washington State University. He has been offered a teaching contract at an Public School in Whatcom County this fall which he has tentatively accepted. But if the new Title IX Final Rule is allowed to take effect, he will be forced to resign because, as a scientist, it will be impossible for him to not tell children and parents the truth about the scientifically proven drawbacks of Transgenderism. If he even mentions any of the scientific studies he cited in this

report, he will be accused of sexual harassment and he will have no defense as the new Final Rule amends the definition for sexual harassment in such an ambiguous way that almost anything qualifies as sexual harassment.

Should David (or any other teacher) be found guilty of sexual harassment that will be the end of his teaching career. This is not mere speculation. Teachers in Washington state have already been fired for saying much less even before the new Final Rule provisions came out. It is impossible for anyone to be a truly effective teacher with such a loaded gun pointed at their head any time they say anything in their classroom.

Plaintiff Informed Choice Washington (ICW) also has standing as they are a medical information advocacy group who believes that education is critical to informed medical decision-making, and absolutely essential to freedom. Many of their members have children in Washington state public schools whose freedom of speech rights would be harmed if the Final Rule takes effect. Stifling freedom of speech in our schools will severely threaten vigorous open debate over medical freedom issues.

ICW members and their children want to be able to have open and robust intellectual debates and discussions about controversial issues—such as biological males participating in women's sports or using women's spaces based on their gender identity. And they want to be able to engage in discourse surrounding these topics at school, in their community, and online.

When a fellow athlete, classmate, or another member of the community voices contrary views about these and other controversial topics, ICW's members want to point out the flaws in their arguments and attempt to change their minds. ICW's members want to speak directly to their classmates about these topics. Given their views, ICW's members want to have these conversations because they feel strongly about these issues. If the rule challenged in this case becomes effective, however, ICW's members and their children will be forced to limit their

speech because they reasonably fear that their speech will be considered "harassment" or "misgendering" under the policies that the rule requires schools to adopt.

Plaintiff Brian Noble is the Director of the Family Policy Institute of Washington. (FPIW). The Family Policy Institute of Washington is a non-partisan organization with thousands of members here in Washington State. FPIW advocates for life, marriage, religious liberty, and parental rights. FPIW believes parents have the right to choose how to raise their children. From educational choice to vaccine exemptions, FPIW opposes government efforts to force parents into decisions, with which they do not agree. Many of our members have children in Washington state public schools whose freedom of speech rights would be harmed if the Final Rule takes effect. Stifling freedom of speech in our schools will severely threaten vigorous open debate over religious liberty issues. FPIW members and their children want to be able to have open and robust intellectual debates and discussions about controversial issues—such as biological males participating in women's sports or using women's locker rooms based on their gender identity. And they want to be able to engage in discourse surrounding these topics at school, in their community, and online. When a fellow athlete, classmate, or another member of the community voices contrary views about these and other controversial topics, FPIW members want to point out the flaws in their arguments and attempt to change their minds. FPIW members want to speak directly to their classmates about these topics. Given their views, FPIW members know that many of these conversations will be passionate. But they want to have these conversations because they feel strongly about these issues. If a preliminary injunction against the 2024 Title IX Final Rule is not granted, our members and their children will be irreparably harmed because FPIW members and their children will be forced to limit their speech because they reasonably fear that their speech will be considered "harassment" or "misgendering" under the policies that the rule requires schools to adopt.

Plaintiff William M. Sullivan is the parent of S. D. S. who is a 16 year old female student at a public high school in Washington state. As he explains in his Declaration, his daughter is a student-athlete and multi-season sport State Championship competitor, meaning she spends more time in the locker room changing than the average student. Last year, she was repeatedly subjected to biological males in the girls locker room at her high school – in violation of her Title IX right to privacy.

Plaintiff Sullivan sent emails to school administrators explaining that his daughter's right to privacy was being violated. Unfortunately, his complaints to school administrators fell on deaf ears. If the new Title IX Final Rules are allowed to take effect, not only will his daughter's right to privacy continue to be violated, but if she says anything about it, she she will be accused of sexual harassment under the new File Rule and this charge could wind up on her permanent record adversely affecting her future in college and in a career in violation of her First Amendment right of free speech.

III. STATEMENT OF CLAIM

Write a short and plain statement of the claim. Do not make legal arguments. State as briefly as possible the facts showing that each plaintiff is entitled to the injunction or other relief sought. State how each defendant was involved and what each defendant did that caused the plaintiff harm or violated the plaintiff's rights, including the dates and places of that involvement or conduct.

We assert two claims.

Claim #1: We assert that Miguel Cardona exceeded his authority in issuing his Title IX Final Rule on April 29, 2024 by improperly changed the word "sex" - which means biological male or female - to the word "gender identity" which can mean almost anything. Title IX is a 52 year old federal law intended to protect the rights of women and girls to fair treatment in educational programs that receive federal funding. 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."*

Since its enactment in 1972, Title IX has led to an explosion in the participation of girls and women in sports. During the 1971-1972 school year, only 7 percent of high school athletes were girls. In the 2010-2011 school year, by comparison, girls made up over 41 percent of all high school athletes. Changing the meaning of the word "sex" to "gender identity" replaces the rights of women and girls with "gender identity" rights.

Claim #2: The Final Rule adds enforcement of "compelled speech" Provisions which violate the First Amendment Freedom of Speech rights of students, teachers, coaches parents and scientists by imposing severe adverse consequences on them for either failing to use compelled speech or for stating their beliefs opposing compelled speech.

The Final Rule instructs that Title IX administrators are to take "prompt" action to investigate and respond to any speech that "reasonably may" constitute harassment. See 33,509, 33,533, 33,562. Such responses might include "emergency removal" of alleged offenders from educational programs and activities, see 33,616; see also 33,890 (amended 34 C.F.R. § 106.44(h))… The Final Rule violates the First Amendment right of teachers, scientists, coaches, parents and students as almost anything they might say might be viewed as offensive to a student's subjective gender identity.

The Final Rule impermissibly conditions federal funding on States' and school recipients' taking unconstitutional actions against faculty and students for engaging in protected expression. See South Dakota v. Dole, 483 U.S. 203, 210-11 (1987); 242-44. Also see Meriwether, 992 F.3d at 498-500, 505, 512 and 514

Background

Title IX is a 52 year old law passed by Congress in 1972 to protect the rights of women and girls to equal treatment in educational and athletic activities by any educational organization that receives federal funds. Title IX was only three pages long.

On December 11, 1979, the first Title IX guidance document was issued. It was 36 pages long. Also in 1979, the US Department of Education was created and given authority to administer Title IX issues.

In 1990, the Title IX Athletics Investigator's Manual was issued. It was 170 pages. It does not mention sexual harassment or gender identity.

In 1992, the NCAA published a "Gender Equity Study". However, it used the term "gender" to refer to biological males and females and concluded that the participation rate of females was still far below the participation rate of males.

On January 16, 1996, the Office of Civil Rights (a division of the Department of Education) issued a Clarification which was 14 pages long. It did not address the issue of sexual harassment and did not address gender identity. Instead, it covered the right of women and girls to fairly participate in sports.

In 1998, OCR issued a Dear Colleague Letter. This letter used the term "gender". However, it then went on to describe the genders as males and females. It did not address sexual harassment or gender identity.

On January 19, 2001, OCR published a 48 page document called "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties."

https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf

The 2001 Title IX guidance discussed preventing sexual harassment but again only used the terms males and females. Page 6 includes the following section:

"Several commenters requested that we expand the discussion and include examples of gender-based harassment predicated on sex stereotyping. We have not further expanded this section because, while we are also concerned with the important issue of gender-based harassment, we believe that harassment of a sexual nature raises unique and sufficiently important issues that distinguish it from other types of gender-based harassment and warrants its own guidance."

"Nevertheless, we have clarified this section of the guidance in several ways. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Thus, it can be discrimination on the basis of sex to harass a student on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity. Although this type of harassment is not covered by the guidance, if it is sufficiently serious, gender-based harassment is a school's responsibility, and the same standards will apply. "

Then on Page 12, the document adds*: "**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"*

The document then provides an example of a gay student being bullied and noting that the gay student should be protected from bullying just like any other student should

be protected from bullying. But the harassment must rise to the level of denial of educational opportunity.

Citation 13 on page 36 was two federal cases from 1989 and 1990 both of which upheld the original meaning of Title IX which was based on biological sex and intended to protect biological girls and women.

Citation 14 referred to a 1996 case that found that "a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause in a case in which a school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation."

In short, the 2001 Guidance was that it would be a violation of the Equal Protection clause if a school prevented a transgender biological boy to participate on a boys sports team just because the boy was transgender. However, it is not a violation of the equal protection clause to require all boys to use the boys bathroom and all girls to use the girls bathroom as the policy covers all students equally and does not discriminate based on a students gender identity.

On April 10, 2010, the Obama administration OCR published a "Dear colleague" letter which made no reference to gender identity in applying Title IX to sports participation. It merely clarified a three step process for making sure that females were fairly represented in sports programs. Here is a link to this document:
https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf
On October 26, 2010, the Obama administration OCR published the 2010 Title IX Guidance letter which for the first time claimed that Title IX covered "gender-based harassment."

Here is the link: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf Page 7 states: *"Title IX prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. "*

It then cites the January 19, 2001 OCR document. However, the 2001 OCR document never claimed that Title IX prohibited "gender-based harassment." Instead, the 2001 OCR document cited a Supreme Court ruling concluding that gender-based harassment was covered by the Equal Protection Clause.

This error is important because the 2010 Guidance document was then used as the basis of all the remaining Obama era Guidance documents. Here is a link to the 2011 Obama Dear Colleague Guidance document.

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf

Footnote 9 states: "Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the 2001 Guidance, and in the 2010 Dear Colleague letter on Harassment and Bullying."

Note the gradual expansion into Title IX of the term "gender-based harassment" to include even acts that do not involve conduct of a sexual nature. This statement is important because this false interpretation of Title IX would eventually find its way into federal court rulings and eventually became the foundation for the Final Rule published by the Department of Education on April 19, 2024.

https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html?page=3&offset=20

On May 13, 2016, the Obama administration Department of Education published another Dear Colleague Guidance letter that made even more radical claims about the new requirements of Title IX. Here is a link to this letter: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

Here is a quote from this letter: *"The Department treats a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. "*

The 2016 Obama era guidance then went on to falsely claim that Title IX requires that transgender males must be allowed to use the girls bathrooms and locker rooms and be allowed to participant in girls sports. In fact, none of the claims made in this guidance letter have any link to Title IX and instead were policies in direct opposition to the single sex requirements of Title IX to protect the privacy rights of biological females to have their own bathrooms and locker rooms and participate in their own sports.

The Obama administration threatened to withhold federal education funding from any state that did not comply with their Dear Colleague Letter. In response, on May 25, 2016, 13 states filed a complaint in federal court asking for a Temporary Injunction. See Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. 2016).

The judge issued an order granting the preliminary injunction on August 21, 2016. The judge held that the 2016 Department of Education Dear Colleague Letter was not

entitled to deference because Title IX was not ambiguous and referred to biological sex – not gender identity. Here is a link to the August 21, 2016 38 page Court Order: https://clearinghouse.net/doc/87993/

Here is a quote from this ruling:

"The Court finds that Plaintiffs have shown a likelihood of success on the merits because: (1) Defendants bypassed the notice and comment process required by the APA; (2) Title IX and § 106.33's text is not ambiguous; and (3) Defendants are not entitled to agency deference under Auer v. Robbins, 519 U.S. 452 (1997)"

The Obama Department of Education appealed the preliminary injunction to the Fifth Circuit Court of Appeals on October 21, 2016. The district court denied a stay on the injunction on November 20, 2016, finding that the defendants were unlikely to succeed on appeal and suffered no irreparable harm. The case was dismissed on March 3, 2017 after the Trump administration published new guidance that restored the original meaning of Title IX.

On February 22, 2017, the new Trump administration OCR published a Dear Colleague Letter withdrawing the statements of policy and guidance reflected in a May 3, 2016, "Dear Colleague" Letter stating that the claims made in the 2016 Guidance letter were *"without adequate legal analysis or explanation of how the position is consistent with the express language of Title IX, and without engaging in any formal public review process. "*

Here is a link to the 2017 Trump administration letter:

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf

On September 22, 2017, the Trump OCR issued another Dear Colleague letter which withdrew statements made in the Obama 2011 and 2014 Dear Colleague letters. Here is a link to this letter:

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf

Here is a quote from this guidance letter which referred to a statement signed by 16 members of the Penn Law School faculty: *"Legal commentators have criticized the 2011 Letter and the 2014 Questions and Answers for placing "improper pressure upon universities to adopt procedures that do not afford fundamental fairness." As a result, many schools have established procedures for resolving allegations that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."*

Note the emphasis in the above Guidance was on restoring the original meaning of Title IX and also protecting the rights of people accused of sexual harassment of their Due Process rights under the US Constitution. The Trump OCR then stated that they would return to the standards and policies of the 2001 OCR guidance document while they were submitting their own proposed rules for public comment which is required for any federal rule change – but which the Obama administration failed to do.

After submitting their proposed rules to comments, on May 19, 2020, the Trump OCR published their own "Final Rules." These rules were 554 pages long. But several hundred of the pages were taken up responding to hundreds of comments that had been submitted by the public. You can read the 2020 Final Rules at this link:

https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf

These rules were in part focused on how to address sexual harassment allegations and other alleged Title IX violations. The rules set up a process which the drafters of the

rules claim were need to protect the rights of everyone to First Amendment free speech and also the right to due process.

The 2020 rule adopted the Supreme Court's definition of sexual harassment from Davis "verbatim." 85 Fed. Reg. at 30,036. The 2020 Rule stated that "broader definitions of harassment have "infringed on constitutionally protected speech" and have led "'many potential speakers to conclude that it is better to stay silent.'" Id. at 30,164-65 & nn.738-39. The Davis standard "ensures that speech … is not peremptorily chilled or restricted" because it applies only when harassment rises to the level of "serious conduct unprotected by the First Amendment." Id. at 30,151-52; accord id. at 30,162-63.

Finally, the 2020 rule strengthened the rights of students accused of sexual harassment under Title IX. The rule required schools to, among other things, provide the accused with written notice of the charges against them, 85 Fed. Reg. at 30,571, let a representative accompany them to disciplinary hearings, id. at 30,577, and let that counsel cross-examine witnesses, id. It also prohibited the use a single-investigator model where the same person investigates, prosecutes, and sentences students, id. at 30,366-72.

Shortly after the 2020 Final Rules were published, four different groups filed federal complaints asking for Temporary Injunctions. The complaints basically alleged that the rules for investigating sexual harassment were too strict and complex and were too much in favor of the accused instead of siding with the accuser.

The first complaint was by the ACLU and called Know Your IX et al. v. DeVos. It was filed in the U.S. District Court for the District of Maryland. The federal judge ruled that none of the four groups filing the complaint had standing because they were basically all lawyers and none of them were parents and none of them suffered any actual harm. So that case was dismissed. Here is a quote from the court:

"the Supreme Court has clarified that to show that its members would have standing, an organization must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." Summers, 555 U.S. at 498

The second complaint for Temporary Injunction was brought by 18 states, including Washington state. It was called COMMONWEALTH OF PENNSYLVANIA et al v ELISABETH D. DEVOS. It was filed in U.S. District Court for the District of Columbia. The judge found that *"the arguments brought on behalf of the plaintiffs are likely not strong enough to prove that the new regulations are illegal and will cause irreparable harm."* The judge therefore refused to grant the temporary injunction and the case was eventually dismissed.

The third case was by the State of New York. It was called State of New York v. United States Department of Education. It was filed in the Southern District of New York. The federal judge ruled that the New York Attorney General did not have a substantive enough argument to warrant granting a preliminary injunction and therefore denied her request. The case was eventually dismissed.

The fourth and final case was by the National Womens Law Center. It was called VICTIM RIGHTS LAW CENTER v ELISABETH D. DEVOS. The complaint was filed in U.S. District Court for the District of Massachusetts. The decision was not made until 2021. The Judge found that only one section (in fact one sentence) out of the entire 557 pages was in violation of the law and that the rest of the Final Rule was acceptable. Here is a quote from the court's order: "*the Court finds and rules and, thus declares, that with the exception of section 106.45(b)(6)(i)'s prohibition on all statements not subject to cross-examination, the Final Rule does not violate the APA or the Fifth Amendment."*

Therefore, the 2020 Final Rules are the rules that are currently in effect and will remain in effect if the court rules in favor of the temporary injunction of the 2024 Final Rules.

WHY THE TITLE VII BOSTOCK RULING DOES NOT APPLY TO TITLE IX.

Because the Final Rule repeatedly refers to the Bostock ruling to defend its many changes, we need to briefly explain why the Title IX Bostock ruling does not apply to Title IX. Proponents of the theory that "sex discrimination under Title IX applies to gender identity," are quick to cite the Supreme Court Ruling ruling in Bostock v. Clayton County, Georgia, 590 U.S. 644 (decided June 15 2020). Bostock was a Title VII case which covered gender identity discrimination in employment. But this "Bostock applies to Title IX" theory ignores several facts:

First, the Supreme Court specifically did not determine whether Bostock applied to other federal laws. 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…* **Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind."**

The above comment by the Supreme Court was likely made in an attempt to reassure several Womens Rights groups who had filed Amicus Briefs expressing a fear that a Bostock ruling would take away their right to have private bathrooms and locker rooms as is required by Title IX.

Second, several federal courts have stated that Bostock is limited to Title VII.

In Eknes-Tucker, the circuit reaffirmed that Bostock was a Title VII decision with

"minimal relevance" outside that context. Eknes-Tucker v. Gov'r of Ala., 80 F.4th 1205, 1229 (11th Cir. 2023)

On December 30, 2022, in Adams v. School Board of St. Johns County, Florida, the U.S. Court of Appeals for the Eleventh Circuit issued a 7-4 en banc decision affirming that public schools have the right to segregate bathrooms and locker rooms by biological sex. Here is a link to this 150 page ruling: https://media.ca11.uscourts.gov/opinions/pub/files/201813592.2.pdf Here is a quote from this ruling: "Separating school bathrooms based on biological sex passes constitutional muster and comports with Title IX."

Quoting the U.S. Supreme Court's 1973 decision in *Frontiero v. Richardson*, the court held that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."

The Eleventh Circuit distinguished the U.S. Supreme Court's decision in Bostock v. Clayton County, Ga., on the grounds that there are textual and structural differences between Title VII and Title IX. Specifically, the court reasoned that Title IX and its regulations explicitly allow recipients of federal funds to separate living facilities on the ground of biological sex. Such a provision is not present in Title VII, which was the basis of Bostock's challenge.

Here is a quote from the 2024 Tennessee Order a few weeks ago: *"the Sixth Circuit has explained that "the Court in Bostock was clear on the narrow reach of its decision and how it was limited only to Title VII itself. The [Supreme] Court noted that 'none of' the many laws that might be touched by their decision were before them and that they 'do not prejudge any such question today.'"*

Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) (quoting Bostock, 590 U.S. at 681-82). As a result, the Sixth Circuit properly concluded that "Bostock extends no further than Title VII." Id; see also Skrmetti, 83 F.4th at 484 (holding that Bostock's reasoning "applies only to Title VII.")

Third, the field of educational and athletic programs is completely different from the field of employment. Males do not have an inherent physical advantage over females on a job application. But they certainly do on an athletic field.

Fourth, the language in Title IX is completely different from the language in Title VII. For example, there are "exceptions" listed in Title IX that are not present in Title VII. These include the exception that allows for separate boys and girls bathrooms, locker rooms and living spaced.

Fifth, changing the word sex to the concept of gender identity undermines the entire purpose of Title IX which was to prevent discrimination of biological women.

How the Grimm Court was mislead by the 2016 Obama Guidance Letter and Misinterpreted the 2020 Bostock Supreme Court Ruling

On August 28, 2020, just two months after Bostock was published, a split federal court used Bostock to decide a Title IX "gender identity" case called Grimm v Gloucester County School Board. The two to one majority decided that Title IX required that transgender boys be allowed to use the girls bathrooms and vice versa.

On page 52, the majority states: *"After the Supreme Court's recent decision in Bostock v. Clayton County, 140 S. Ct. 1731 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on*

*the basis of sex…**In Bostock, the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex."***

There was no discussion by the majority about why Title IX had sections on separating the girls and boys bathrooms. However, the Dissenting Judge in this case was certainly aware of this provision in Title IX. He wrote: *"Contrary to Grimm's claim, Title IX and its regulations explicitly authorize the policy followed by the High School. While the law prohibits discrimination on the basis of sex in the provision of educational benefits, it allows schools to provide "separate living facilities for the different sexes," 20 U.S.C. § 1686, including "toilet, locker room, and shower facilities," 34 C.F.R. § 106.33. "*

In addition, on page 23, **the majority gave deference to a 2016 Obama Guidance document which stated that Gender Identity was protected by Title IX. However, as we have previously shown the 2016 Obama era Guidance document was based on a 2010 Obama era Guidance document that was based on a misreading of the 2001 Guidance document.**

Put in plain English, **the entire "gender identity is covered by Title IX" House of Cards is based on a series of inaccurate Guidance documents beginning with the October 2010 Obama era guidance document** – which was then given deference by the 2020 Grimms Court which also misread the 2020 Bostock Supreme Court ruling.

A. EVIDENCE THAT THE TITLE IX FINAL RULE IS CONTRARY TO TITLE IX

On April 29, 2024, Miguel Cardona published his Title IX Final Rule.

26 states so far have asked for Preliminary Injunctions against this new Title IX Final Rule. Our complaint and request for Preliminary Injunction makes Washington

state the 27th state – and the first state not controlled by Republicans to ask for an Injunction - and the first state where the Preliminary Injunction request is being made by parents, teachers and scientists rather than state attorney generals. Here is a brief summary of these federal cases since the Title IX Final Rule was published.

On April 30, 2024, Tennessee Attorney General Herbert Slater filed a federal motion asking for a preliminary injunction against the Final Rule. His motion was joined by the states of Kentucky, Indiana, Ohio, Virginia and West Virginia. The motion asserted that the word "sex" in Title IX means biological sex not gender identity. The motion also asserted that the enforcement changes made to Title IX violated the First amendment rights of students and teachers. On June 17, 2024, the federal court granted the Preliminary Injunction but limited the injunction to the above six states.

Also on April 29, 2024, the Texas Attorney General, Ken Paxton, filed a federal motion asking for a preliminary injunction against the Final Rule. The motion stated essentially the same facts as the Tennessee case. On July 11, 2024, the federal court issued a 112 page ruling granted the Injunction but limited the injunction to the state of Texas.

Also on April 29, 2024, the Louisiana Attorney General, Elizabeth Murril, filed a federal motion asking for a preliminary injunction against the Final Rule. Her motion was joined by the states of Mississippi, Montana and Idaho. The motion stated essentially the same facts as the Tennessee case. The federal court granted the preliminary injunction on June 12, 2024 but limited the injunction to the four states that filed the compliant. The US Department of Education filed an appeal on June 24, 2024. STATE OF LOUISIANA et al., v. U.S. DEPARTMENT OF EDUCATION

Also on April 29, 2024, the Alabama Attorney General, Steve Marshall, filed a federal motion asking for a preliminary injunction against the Final Rule. His motion was joined by the states of Florida, Georgia, South Carolina and three other advocacy groups which included a Free Speech advocacy group and a parents rights group. The motion stated essentially the same facts as the Tennessee case. A hearing on this matter was held in late June and the Plaintiffs filed a declaration on July 2, 2024 giving the court a copy of the Kansas ruling which we review below. The Alabama court has not yet issued an Injunction Order. However, the court's ruling is expected very soon. ALABAMA et al., v. CARDONA

On May 6, 2024, the Oklahoma Attorney General filed a federal motion asking for an Injunction against the Final Rule. The motion stated essentially the same facts as the Tennessee case. The court has not yet issued an injunction but it could happen soon.

Therefore, we will just quote a couple of paragraphs from the 43 page complaint:

"The Department attempts to make these drastic and detrimental changes while relying on a Supreme Court case that has no connection to Title IX. The Department's reliance on Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (2020), as a basis to redefine sex discrimination under Title IX, is wholly misplaced. For starters, Bostock does not support the Final Rule because it involves a different statute, different language, a different group of individuals, and different factual groundwork.

The Final Rule attempts to expand the meaning of Title IX in a way that is unreasonable and unconstitutional… In accordance with the Department's reinvention of Title IX, the Final Rule threatens to withhold federal funding from schools that do not allow students access to "restrooms and locker rooms" … based on gender identity. See, e.g., 89 Fed. Reg. at 33,816. The Final Rule dictates that a school violates Title IX's

nondiscrimination prohibition if a transgender student is denied access to a bathroom or locker room of the opposite biological sex. See, e.g., 89 Fed. Reg. At 33,818…

"The Final Rule also institutes a new, lower standard for sexual harassment. The Final Rule stipulates that "[s]ex-based harassment, including harassment predicated on sex stereotyping or gender identity, is covered by Title IX."

On May 7, 2024, the Arkansas Attorney General filed a federal motion asking for an injunction against the Final Rule. His motion was joined by the states of Missouri, Iowa, Nebraska, North Dakota and South Dakota. The motion stated essentially the same facts as the Tennessee case. The court has not yet issued an injunction but it could happen soon. Therefore, we will just quote one paragraph from their 62 page complaint:

"That (Final) rule takes effect August 1, 2024, and it requires States, schools, and universities to ignore biological sex in favor of self-professed "gender identity." Indeed, if allowed to take effect, that rule will gut the very athletic opportunities that Title IX was designed to provide; destroy the privacy protections women and girls currently enjoy in restrooms, locker rooms, shower facilities, and overnight accommodations; preempt numerous State laws; <u>silence and threaten with investigation any student, faculty member, or administrator who doesn't share the Department's view of sex</u>; and deny federal funding to any school or university that doesn't adhere to those views. For numerous reasons, that rule violates the federal Constitution and the Administrative Procedures Act. It should immediately be set aside."

On May 14, 2024, the Kansas Attorney General filed a federal motion asking for an injunction against the Final Rule. His motion was joined by the states of Alaska, Utah and Wyoming and several advocacy groups including Moms for Liberty. The motion

stated essentially the same facts as the Tennessee case. On July 2, 2024, the federal court granted the Injunction but limited the injunction to the four states that filed the injunction.

The Kansas order stated that it would be inappropriate to issue a national injunction because the matter is still being litigated in other states. This claim ignores the fact that irreparable harm will occur in any state that is not covered by an injunction by the August 1, 2024 implementation date. This is not acceptable as the clear meaning of Title IX is that it protects women and girls in ALL SCHOOLS that receive federal funds – which includes all schools in Washington state.

Therefore, the injunction against the Final Rule is now in place in 15 states and a ruling in favor of 11 additional states may occur any day. Assuming the final federal court reviewing the Alabama motion does not issue a national injunction and limits it to only the four states covered by the Alabama motion, this means that the girls and women in 24 states, including Washington state, will no longer have the protection of Title IX when the new Final Rule takes effect on August 1, 2024.

We have watched all of these cases closely and had hoped that at least one federal judge would issue a national injunction. But after the July 2, 2024 Kansas ruling, we concluded that the only way all girls and women would be protected here in Washington state is if we filed this motion for an Temporary Injunction while the court considers whether a permanent injunction should be granted based on the merits.

In their Title IX Final Rule opinions, Federal judges have recently written hundreds of pages explaining what everyone knows… that the word SEX in Title IX refers to biological sex – not gender identity – a concept that did not even exist in 1972 when Title IX was passed. Surely, it can not be possible for Title IX to mean biological

sex in some states and gender identity in the other states. But that is exactly what will happen if an injunction against the Final Rule is not granted before August 1, 2024.

B. ***CLAIM #2 THAT THE FINAL RULE VIOLATES THE FIRST AMENDMENT RIGHTS OF PLAINTIFFS***

In addition, if the Final Rule takes effect on August 1, 2021, it will have a chilling effect on the First Amendment rights of students, teachers, parents, coaches and scientists here in Washington and any other state not covered by an injunction.

Regarding the Compelled Speech issue, the Kansas federal court order on Page 32 stated: *"Notably, during the hearing, the court asked the DoE's counsel whether students could engage in a civil discourse regarding the issue of gender identity without being fearful of an accusation of sex-based harassment. Specifically, the court asked defense counsel if a student were to state that she believes that sex and gender are the same, they are immutable, and/or that a person's gender identity cannot deviate from his or her biological sex, would that person be subjected to an actionable discrimination complaint under the Final Rule? Defense counsel could not definitively answer the question… it is an entirely subjective standard that is potentially met whenever the complainant alleges that the conduct or speech somehow impacts the complainant's education.*

And there is no objective standard to measure whether the complainant was actually impacted because there is no need to demonstrate harm… There was not one lawyer in the courtroom, including the undersigned, who was able to offer any possible explanation of what a parent should tell their child about the limits of legal speech at their schools on the topic of gender identity or sexual orientation under the Final Rule. The result is that speech is chilled because what student wants to "run the risk of being

accused of" sex-based harassment and subjected to an investigation and potential discipline."

The new compelled speech rules would make it impossible for Plaintiff David Spring to teach. David Spring has degrees in Child Development and Science Education. He is aware that the longest followup scientific study ever published found that males with 14 years of testosterone suppression remain 20% stronger and have 20% greater heart and lung capacity than females. Male advantage is not erased even with over a decade of testosterone suppression. https://bjsm.bmj.com/content/56/22/1292.long

Many studies provide the following differences between post-pubescent males and females: Males jump 25% percent higher than Females; Males throw 25% further than Females; Males run 11% faster than Females; Males accelerate 20% faster than Females. Jennifer C. Braceras, et al, Competition: Title IX, Male-Bodied Athletes, & the Threat to Women's Sports, (2023).

However, if a Science teacher pointed this fact out, he or she could be accused of harassment under the new Title IX Final Rule schedule to take effect on August 1, 2024 and could face losing their job.

The threat to students and teachers of speaking out against allowing boys to enter girls locker rooms and take over girls sports only to be expelled from school or lose their job is not merely conjecture. As just one example, in 2022, a 14 year old high school girl named Blake Allen was on a High School Girls Volleyball team. A 14 year old boy decided to join the volley ball team apparently to gain access to the girls locker room where he would stare at the girls as they changed clothes. The girl Blake Allen complained about the boy in the girls locker room to school administrators – who then expelled the girl from the school. Blake's dad spoke out in an attempt to defend Blake

Allen's right to privacy. Sadly, Blake's dad was the Boys High School Soccer coach and he was fired for speaking out. Blake and her Dad were forced to hire an attorney who sued the school administrators. The matter is currently going through the federal courts. This incident made national news and videos about it have gotten millions of views.

The message is clear. If you want to keep your job, you better not say anything. But with the new Final Rule, scheduled to take effect on August 1, 2024 here in Washington state, it is about to get much worse due to the new Final Rule speech chilling provisions. Every teacher in Washington state will be placed at risk of losing their job due to the subjective and ambiguous wording of the new Final Rule.

SUMMARY

This complaint rests almost entirely on three simple legal questions:

First, does the word "sex" in Title IX mean biological sex or can it be changed to an entirely different concept called "gender identity"?

Second, is the purpose of Title IX to protect and promote equal opportunity for biological girls and women attending education programs that receive federal funding - or can the purpose of Title IX be changed – without the approval of Congress - to protect and promote a relatively new group of people using the concept called "gender identity"?

Third, do the compelled speech provisions of the Final Rule violate the First Amendment rights of students, teachers, coaches, parents and scientists?

We have provided citations to four recent decisions by federal judges who wrote a total of 292 pages explaining why the word "sex" as used in Title IX must mean biological sex and can not possibly mean "gender identity." Each of these recent

opinions also concluded that the Final Rule violated the First Amendment rights of the Plaintiffs. Here are the page counts for each of these recent federal decisions:

June 11, 2024 Texas ruling – 112 pages

June 13, 2024 Louisiana ruling – 40 pages.

June 17, 2024 Tennessee ruling – 93 pages.

July 2, 2024 Kansas ruling - 47 pages.

Total pages of all four rulings – 292 pages

Here is a sentence from the Texas judge:

"the plain meaning of the term sex as used in § 106.33 when it was enacted by [the Department] following passage of Title IX meant the biological and anatomical differences between male and female students as determined at their birth."

Here is a paragraph from the Tennessee judge:

"Title IX was enacted for the protection against 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. 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. This result is not only impossible to square with Title IX, but with the broader guarantee of educational protection for all students. "

ARGUMENT FOR A PRELIMINARY INJUNCTION

I. The Plaintiffs Have Made the Required Showing for a Preliminary Injunction based on the four required factors of likely success, irreparable harm, balance of equities, and public interest.

A. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

The fact that at least four federal courts have already ruled in favor of an injunction based on a nearly identical set of facts during the past few weeks makes it highly likely that the motion will succeed on its merits. The Department's new Final Rule violates Title IX in at least three ways. First, it illegally redefines sex discrimination to include "gender identity." Second, it illegally rewrites the Supreme Court's definition of sexual harassment. And third, it illegally changes key Due Process procedures for the accused. Here is a briefly discussion of each of these three issues.

1. The rule illegally redefines Title IX's prohibition on "sex" discrimination.

The challenged rule's redefinition of "sex" to include "gender identity" is illegal for two independent reasons. First, it conflicts with Title IX's text, context, and purpose. And second the Department didn't reasonably justify it.

i. The redefinition of sex discrimination misreads Title IX.

The rule's redefinition of "sex" to include "gender identity" is not a permissible reading of Title IX. That statute bans discrimination "on the basis of sex" in "education programs or activities" that receive federal funds. 20 U.S.C. §1681(a). It allows recipients to "maintain separate living facilities for the different sexes"—i.e., "for" males and females. §1686. And Title IX's regulations have long allowed separation of the sexes in housing, 34 C.F.R. §106.32(b), in "toilet, locker room, and shower facilities," §106.33, and in athletics, §106.41(b). Title IX clearly does not cover discrimination based on "gender identity."

The Department ignores the text, its own regulations, and the history of Title IX to declare that sex discrimination "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 (Proposed §106.10). This interpretation ignores the fact that Title IX clearly permits longstanding practices like single-sex bathrooms locker rooms and sports teams.

The Department does not define "sex" but also never disputes that "sex" means what it has always meant in Title IX: "biological sex." The Department instead contends that, "even assuming 'sex' means 'biological sex,'" Title IX's "prohibition on sex discrimination encompasses sexual orientation and gender identity discrimination." Id. at 33,807; accord id. at 33,804. But the Department is playing word games; it's clear that the Department is trying to inject, for the first time, gender ideology into Title IX, contrary to longstanding practice and the statute's original meaning. It also ignores the fact that in Adams, the en banc court held that the original public meaning of Title IX's use of "sex" means biological sex and does not include "gender identity."

ii. The redefinition of sex discrimination is arbitrary and capricious.

The Department's redefinition of sex discrimination violates the APA's demand for reasoned decision making in at least four ways. First, it unreasonably renders its own bathroom regulations inconsistent. Second, it fails to consider sports. Third, it leaves key questions about "gender identity" unresolved. Fourth, it fails to grapple with the conflicts it creates with parental rights.

Bathrooms: The rule makes a mess of the Department's own regulations. On the one hand, the rule announces that schools violate Title IX if they don't allow transgender students access to the bathroom reserved for the opposite biological sex. 89 Fed. Reg. at

33,820-21. On the other hand, the Department acknowledges that an existing regulation allows schools to have sex-separated bathrooms, and that the best reading of that regulation is that schools can reserve access to sex-separated bathrooms based on biological sex. Id. And then the Department says, bizarrely, that it is leaving that existing bathroom regulation in place. Id. at 33,821. The Department says the existing regulation is void because it violates Title IX itself, id., leaving the regulation in a zombie-like state where it still appears on the books but supposedly has no force. Perhaps the Department didn't want to take the political hit of actually saying that it is forcing schools to let males into female bathrooms, locker rooms, and showers. But creating a scheme where its regulations are now in direct conflict—confusing recipients and students alike—was not a reasonable approach to rule making.

Sports: The redefinition of sex discrimination to include gender identity fails to reasonably handle athletics, one of the most important aspects of the problem. Instead of considering how its redefinition affects sports, the Department tries to punt. It claims that the rule has no effect on athletics because the Department has a regulation that expressly allows sex-separate sports. 89 Fed. Reg. at 33,817-18, 33,839. Yet the same was true for bathrooms, and the Department bulldozed that regulation by claiming it is invalid. See id. at 33,819-21.

Worse, the Department hides the ball by omitting that, just like the bathroom regulation, it thinks the sports regulation is invalid. See B.P.J. v. West Virginia, Doc. 42, No. 2:21-cv-316 (S.D. W. Va. June 17, 2021) (arguing that Title IX and the Constitution invalidate policies that "categorically exclude transgender girls from participating in single-sex sports restricted to girls"); U.S. Amicus Br. 24-27, B.P.J. v. W.V. State Bd. of Educ., Nos. 23-1078, 23-1130 (4th Cir. Apr. 3, 2023).

More fundamentally, the Department cannot save for later an important aspect of the problem when the validity of its current rule depends on the answers. And that's the case with sports: The soundness of the Department's interpretation of sex discrimination depends on context and the history of Title IX, for which sports has always been central. See Adams, 57 F.4th at 816 (stressing that a decision about bathrooms "would have broad implications for sex-separated sports"). Nor could the Department meaningfully consider the practicability or wiseness of its policy decisions without factoring in sports. See id. at 821 (Lagoa, J., concurring)(explaining that a bathroom determination "would open the door to eroding Title IX's beneficial legacy for girls and women in sports" and "harm not only girls' and women's prospects in sports, but also … their development and opportunities beyond the realm of sports"). The unfairness of letting men dominate sports is one of the core reasons why Congress passed Title IX; it is not something the Department could pretend is not part of the debate over its redefinition of sex to include gender identity.

In other words, **the Department claims to permit women's sports, so long as women's sports are open to men.** The rule thus requires—or will predictably coerce—schools to allow biological males to compete on athletic teams for women or girls, denying female students equal athletic opportunities, playing time, and fair competition. And it affects sports by changing the rule for sex-separated locker rooms.

Gender Identity: The Department also fails to adequately define "gender identity." The Department's reasoning on this issue renders its rule vague and impossible to apply. The Department declines to provide "a specific definition of 'gender identity.'" 89 Fed. Reg. At 33,809. At the same time, it defines "gender identity" as "an individual's sense of their gender, which may or may not be different from their sex assigned at

birth." Id. This (non)definition is unworkable. It provides schools no guidance on what "gender identities" they must accept or how they can "verify" them. "It oversimplifies matters to say that gender dysphoric people" merely identify "opposite from their birth sex." United States v. Varner, 948 F.3d 250, 256 (5th Cir. 2020).

"Gender identity" is not a "'discrete'" category but "can describe 'a huge variety of gender identities and expressions.'" L.W., 83 F.4th at 487. According to some, "gender is not binary but rather a three-dimensional 'galaxy.'" Varner, 948 F.3d at 257. One of the Department's leading sources, WPATH, insists that someone can be "more than one gender identity simultaneously or at different times (e.g., bigender)," "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)," or "have a gender that changes over time (e.g., genderfluid)." Standards of Care for the Health of Transgender and Gender Diverse People, S80, World Prof. Ass'n Transgender Health (8th ed. 2022) (cited at 89 Fed. Reg. at 33,819 & n.90 as a "well-established medical organizatio[n]"). They "may use the pronouns they/them/theirs, or neopronouns which include e/em/eir, ze/zir/hir, er/ers/erself among others." Id.

How are districts supposed to verify a student's gender identity? The rule doesn't say. It says the Department is "aware" that "many recipients rely on a student's consistent assertion," but the Department never approves that approach. 89 Fed. Reg. at 33,819. It only warns that "requiring a student to submit to invasive medical inquiries or burdensome documentation" is not allowed. Id. But that one example of "what not to do" is a far cry from reasonable guidance about how to navigate this real and obvious issue. The Department hasn't given recipients fair notice of their obligations, even though it must. See Wages & White Lion Invs. v. FDA, 90 F.4th 357, 374 (5th Cir. 2024) (en banc)

Parental Rights: Finally, the Department injected gender identity into Title IX without adequately considering parental rights. The Final Rule says it trumps parents' rights, including their right to access their child's information under FERPA and state laws. See, e.g., 89 Fed. Reg. At 33,885 (Proposed 34 C.F.R. §106.6(e)). Commenters pressed concerns that the rule would bar a recipient from "treating a student according to their" biological sex "if requested by the parents to do so," "notifying a student's parents of the student's gender transition or gender identity," or letting parents access "their child's educational records, including information about their child's gender identity." Id. at 33,821-22. Rather than deny these concerns, the Department concedes that the rule can require such results, even when state law guarantees these parental rights, and then "declines to opine" on any specifics. Id. at 33,822. But "bare acknowledgment is no substitute for reasoned consideration." Louisiana, 90 F.4th at 473. An agency can't adopt a radical change and then not directly address the significant consequences of its amendment by stating that it is saving the tough judgments for later. Especially when the change affects a constitutional right like parents' right to make decisions about the care, custody, and control of their children. Troxel v. Granville, 530 U.S. 57, 66 (2000).

The challenged rule declares that it trumps parents' rights, including their right to access their child's information under the Family Educational Rights and Privacy Act and state laws. Commenters pressed concerns that the rule would bar a recipient from "treating a student according to their" biological sex "if requested by the parents to do so," "notifying a student's parents of the student's gender transition or gender identity," or letting parents access "their child's educational records, including information about their child's gender identity." 89 Fed. Reg. at 33,821. Rather than deny these concerns,

the Department concedes that the rule can require such results, even when state law requires these parental rights.

Each of these errors dooms the rule. And none of the Department's errors are harmless. "[A]n agency decision is harmless only 'when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached.'" Bidi, 47 F.4th at 1205. These legal violations are the substance of the Final Rule.

2. The challenged rule illegally redefines "sex-based harassment."

The current 2020 rule defines hostile-environment harassment by adhering "verbatim" to the Supreme Court's definition in Davis: "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." 34 C.F.R. §106.30(a)(2); accord Davis, 526 U.S. at 652.

The 2024 challenged rule, however, rejects Davis's interpretation of Title IX and imports the Title VII standard for sexual harassment instead. This redefinition is contrary to law because it defines harassment far more broadly than Davis and thus infringes on First Amendment rights. It prohibits "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." 89 Fed. Reg. at 33,884 (Proposed 34 C.F.R. §106.2).

The Department concedes that its new definition of harassment is "broader" than the definition in the 2020 rule and Davis. Id. at 33,498. The rule applies even if the

harassment merely "limits" a person's "ability to participate in or benefit from" a program or activity, rather than "denies" a person "access to the educational opportunities or benefits provided by the school," Davis, 526 U.S. at 651-53. The rule also expands Title IX to cover harassment that's "severe or pervasive," 89 Fed. Reg. at 33,884, rather than "severe and pervasive," Davis, 526 U.S. at 652-53. Broader still, the rule requires recipients to "promptly and effectively end any sex discrimination," regardless whether they were deliberately indifferent to it. See 89 Fed. Reg. at 33,889 (Proposed 34 C.F.R. §106.44(f)(1)); contra Davis, 526 U.S. at 650-52.

This new, broader definition of harassment—combined with the Department's inclusion of gender identity—is sweeping. It effectively requires recipients to ensure that students use "pronouns and names consistent with a student's gender identity." 2016 Dear Colleague Letter on Title IX and Transgender Students 3, U.S. Dep'ts of Educ. & Justice (May 13, 2016) (2016 letter), perma.cc/2VTQ-RUYP. The rule suggests as much. See generally Compl. ¶76. And it extends to conduct that occurs online, off campus, outside the United States, or even before the relevant individuals attended the school. 89 Fed. Reg. at 33,886, 33,527.

i. The redefinition of sexual harassment is contrary to law.

The Supreme Court has already defined Title IX's obligations for sexual harassment. In Davis, the Court held that recipients can violate Title IX only if they have "actual knowledge" of sexual harassment and are "deliberately indifferent" to it. 526 U.S. at 650. And the harassment in question must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education." Id. at 652. This standard intentionally excludes "a single instance of one-on-one peer harassment," even if

"sufficiently severe," and harassment that has only negative effects like "a mere 'decline in grades.'" Id. At 652-53.

When crafting the Davis standard, the Supreme Court made clear that it chose this stringent definition in part to avoid constitutional concerns. E.g., id. at 648-49, 652-53. In the dissent, Justice Kennedy had argued that, if schools are liable for student-on-student harassment, then they will adopt "campus speech codes" that "may infringe students' First Amendment rights." Id. at 682; see id. at 667 (noting that schools' "power to discipline its students" for harassment is "circumscribed by the First Amendment"). In response, the majority explained that its narrow definition accounts for "the practical realities of responding to student behavior." Id. at 652-53 (citing the dissent). Those "practical realities," the Court agreed, include the need to comply with the First Amendment. See id. At 649.

Notably, Davis refused to adopt the definition of harassment that governs the workplace under Title VII. While actionable harassment under Title VII can be "severe or pervasive," students are not employees and Title IX's "severe and pervasive" standard reflects the greater First Amendment concerns that arise in the educational context. See id. at 651 (distinguishing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)). In short, "the school is not the workplace." Adams, 57 F.4th at 808 (discussing Davis). Hence why the 2020 Final Rule "adopted" the Davis standard "verbatim." 85 Fed. Reg. at 30,036; accord id. at 30,151-52, 30,164-65 & nn.738-39; 34 C.F.R. §106.30(a).

Broader definitions of harassment, the Department found, have "infringed on constitutionally protected speech" and have led "'many potential speakers to conclude that it is better to stay silent.'" 85 Fed. Reg. at 30,164-65 & nn.738-39. According to the Department then, the Davis standard "ensures that speech … is not peremptorily chilled

or restricted" because it applies only when harassment rises to the level of "serious conduct unprotected by the First Amendment." Id. at 30,151-52.

The Department's new definition deviates from Davis in several key ways. The rule expands Title IX to cover conduct that's "severe or pervasive" rather than "severe and pervasive," so the rule necessarily reaches single and isolated incidents. 89 Fed. Reg. at 33,884 (Proposed §106.2). A recipient also can violate Title IX if the harassment "limits" a person's ability to participate in, or benefit from, a program or activity, 89 Fed. Reg. at 33,884 (Proposed §106.2), instead of Davis's requirement that the harassment "denies the victims of access to the educational opportunities or benefits provided by the school," 526 U.S. at 652-53. So the new rule covers, contra Davis, all negative effects like "a mere 'decline in grades,'" a choice to skip class, or a decision not to attend a campus activity. Id. at 653; see 89 Fed. Reg. at 33,511 ("[A] complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials." The rule also requires a recipient to "promptly and effectively end any sex discrimination," regardless whether it has been deliberately indifferent. See id. at 33,889 (Proposed §106.44(f)(1)); contra Davis, 526 U.S. at 650-52.

These deviations from Davis are not minor or technical. The Eleventh Circuit has already held that a harassment definition materially similar to the rule's harassment definition, when adopted by a public university, likely violates the First Amendment. In Cartwright, a university defined "'Hostile Environment Harassment'" as "discriminatory harassment that is so severe or pervasive that it unreasonably interferes with, limits, deprives, or alters the terms or conditions of education … or participation in a university program or activity … when viewed from both a subjective and objective perspective."

32 F.4th at 1114-15. The Eleventh Circuit held that this policy was "almost certainly unconstitutionally overbroad" and "an impermissible content- and viewpoint-based speech restriction." Id. At 1125. Other courts agree. E.g., Speech First, Inc. v. Fenves, 979 F.3d 319, 337 n.16 (5th Cir. 2020) (similar non-Davis-compliant harassment policy objectively chilled protected speech); Speech First, Inc. v. Khator, 603 F. Supp. 3d 480, 482 & n.6 (S.D. Tex. 2022) ("Speech First will likely succeed on the merits because the original [harassment] policy does not comport with the standard adopted by the Supreme Court" in Davis.). The Department's rule thus walks public universities into a First Amendment trap—the very trap that the Davis standard is designed to avoid.

One clear takeaway is that schools must now prohibit "misgendering," where a student refuses to use others' "preferred pronouns" instead of the pronouns that match their biological sex. Worse, the rule makes clear that a single instance of intentional or purposeful misgendering can violate the Department's definition.

In short, Davis authoritatively defined when sexual harassment by students makes a school liable for sex discrimination under Title IX. The Department had no power to adopt a different definition or eliminate Davis's key limitations.

ii. The challenged rule eliminates due process procedures for the accused.

The rule makes several changes that restrict students' ability to defend themselves from accusations of misconduct under Title IX. Many of these changes, such as ending the right to a live hearing with cross-examination and resurrecting the single-investigator model, have been almost universally condemned, including by the ACLU. See ACLU Comment on U.S. Department of Education's Final Title IX Rule, Press Release (Apr. 19, 2024) ("The ACLU opposes the provisions in the final regulation" that "do not

require universities to provide a live hearing and an opportunity for cross-examination" and that allow "the single investigator model").

To start, the rule eliminates the accused's right to a live hearing with cross-examination by their representative at postsecondary institutions. See 89 Fed. Reg. at 33,895 (Proposed 34 C.F.R. §106.46(g)). Under the 2020 rule, students accused of Title IX misconduct had the right to defend themselves in person and have their representative cross-examine witnesses, including their accuser. 85 Fed. Reg. at 30,313-34. Now, their universities can deny requests for in-person hearings and thus meaningful cross-examination. Even if schools give the accused some sort of hearing, the accused still has no right to cross-examine the accuser or witnesses.

Instead, the rule requires only that "the decision maker" can question parties and witnesses and assess credibility—and only "to the extent credibility is both in dispute and relevant." 89 Fed. Reg. at 33,893 (Proposed 34 C.F.R. §106.45(f)-(g)). College students accused of misconduct also no longer have a right to have an advisor (lawyer) participate at all proceedings. Instead, postsecondary schools can limit their attendance. Id. at 33,894 (Proposed §106.46(e)(2)).

The rule removes the right of students to inspect all the evidence against them. Under the 2020 rule, "both parties had an equal opportunity to inspect and review any evidence obtained as part of the investigation that is related to the allegations raised in a formal complaint." 34 C.F.R. §106.45(b)(5)(vi). The challenged rule instead allows the parties to access a mere "description" of the "relevant and not otherwise impermissible evidence" unless the parties go out of their way to request an "equal opportunity to access" it. (Proposed §§106.45(f), 106.46(e)). And even then, the decision maker can

withhold any evidence he decides is not "relevant" or "otherwise impermissible," id. At 33,892, rather than everything "related to the allegations," 34 C.F.R. §106.45(b)(5)(vi).

The rule permits a single-investigator "Kangaroo Court" model. Under the 2020 rule, schools could not use a model that allowed a single employee to be the judge, jury, and executioner of a Title IX complaint. 85 Fed. Reg. at 30,366-72. Under the challenged rule, the Department will no longer require that separation. (Proposed §106.45(b)(2)). Instead, the same individual can hear the original allegations, decide whether to investigate, do the investigation, evaluate the evidence, and make a final decision.

The rule also allows an investigation to begin without any formal written complaint. Under the 2020 rule, recipients could begin investigations only in response to a formal written complaint from the accuser. 85 Fed. Reg. at 30,126-35. Under the challenged rule, a recipient need only receive an "oral" statement that a recipient can "objectively" understand as a "request" to "investigate." (Proposed §106.2). More, the rule now permits the Title IX coordinator to initiate a grievance procedure even in "the absence of a complaint or the withdrawal of any or all of the allegations in a complaint." (Proposed §106.44(f)(1)(v))

The challenged rule threatens due-process rights of children too. Especially because the rule's definitions are so broad and vague, children could easily cross the line and be reported and investigated for harassment or misgendering. Disciplinary proceedings based on false accusations of sexual harassment without notice of the charges, adjudication by a neutral decision maker, cross-examination, and other basic protections are fundamentally unfair and risk erroneous decisions with life-altering consequences for these students. A finding of guilt, or even the opening of an investigation, can create a permanent and life-altering stigma that irreparably harms a

student's educational, professional, and social prospects, even if the finding is later reversed or the investigation is dropped.

B. Plaintiffs Are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

Federal judges have stated that any violation of First Amendment rights is Irreparable Harm. *"It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury."* Hernandez v. Sessions, 872 F.3d 976, 994 (9th Cir. 2017)

However, the primary reason we are urgently seeking an immediate temporary injunction is that the new school year will be starting during the week of August 26, 2024. If we do not get an injunction, teachers will be forced to endure training and orientation classes based on the Final Rule. Many like Plaintiff David Spring will conclude that the new Final Rule will make teaching impossible and decide to resign from their teaching contract – costing them salary that they will never get back – and possibly ending their teaching career entirely.

In addition, students of our members will be subjected to illegal regulations that deny their First Amendment right of free speech. They will also be denied of their Fourteenth Amendment Due Process rights. These impending harms have caused us to seek a temporary injunction while the full issue is being litigated.

C. The Balance of Equities Favors the Plaintiffs

Maintaining the status quo of retaining the 2020 Final Rule during the litigation will not harm the defendant. But the harm of allowing the 2024 Final Rule to go into effect on the Plaintiffs will be the loss of their income as well as the loss of their First Amendment Free Speech rights and Fourteenth Amendment Due Process rights.

D. The Issuance of a Preliminary Injunction is in the Public Interest

It is in the public interest to protect the First Amendment rights of students, teachers, coaches parents and scientists. *"The public interest and the balance of the equities favor preventing the violation of a party's constitutional rights,"* Ariz. Dream Act, 757 F.3d at 1060. It is also in the public interest to protect teachers and students from unjust sexual harassment charges.

IV. RELIEF

State briefly and precisely what damages or other relief the plaintiff asks the court to order. Do not make legal arguments. Include any basis for claiming that the wrongs alleged are continuing at the present time. Include the amounts of any actual damages claimed for the acts alleged and the basis for these amounts. Include any punitive or exemplary damages claimed, the amounts, and the reasons you claim you are entitled to actual or punitive money damages. Attach additional pages if needed.

We ask for a Temporary Injunction against the Title IX Final Rule here in Washington state similar to the injunction that has already been granted in 15 to 26 other states. If an August 1, 2024 injunction is not possible, then in the alternative, we seek an injunction before the first day of school which in nearly all school districts in Washington state will occur during the week of August 24, 2024.

Though Plaintiffs expect that this case can be resolved on cross-motions for summary judgment based solely on the administrative record, Plaintiffs doubt that process could begin and end before the August 24, 2024 start of school.

CONCLUSION

For the foregoing reasons, this Court should grant the injunctive relief Plaintiffs request and order such further relief as this Court deems appropriate.

V. CERTIFICATION AND CLOSING

Under Federal Rule of Civil Procedure 11, by signing below, I certify to the best of my knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the complaint otherwise complies with the requirements of Rule 11.

I agree to provide the Clerk's Office with any changes to my address where case-related papers may be served. I understand that my failure to keep a current address on file with the Clerk's Office may result in the dismissal of my case.

Date of signing: _____

Signature of Plaintiff _____

Printed Name of Plaintiff _____

Date of signing: _____

Signature of Plaintiff _____

Printed Name of Plaintiff _____

Date of signing: _____

Signature of Plaintiff _____

Printed Name of Plaintiff _____

Date of signing: _____

Signature of Plaintiff _____

Printed Name of Plaintiff _____