September 6, 2022

The Honorable Miguel Cardona
Secretary of Education
Ms. Catherine E. Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, D.C. 20202

Submitted via Federal eRulemaking Portal at www.regulations.gov

Re: Comment on Docket ID ED-2021-OCR-0166-0001

Dear Secretary Cardona:

The Foundation Against Intolerance & Racism (FAIR) is a nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties for all Americans, and promoting a common culture based on fairness, understanding, and humanity. We submit this comment regarding the Department of Education's proposed regulations to Title IX of the Civil Rights Act.

In summary, by requiring schools and universities to allow students to participate in sex-specific activities that are consistent with their "gender identity," the federal government usurps functions and judgments that are better left to institutions or through the democratic process. Complying with that requirement would also obligate schools and universities to multiply or refashion all of their sex-segregated facilities, to a degree that is cost-prohibitive and unmanageable. Additionally, the new definition of "sex-based harassment" will hold students and employees to a less favorable standard than that enjoyed by powerful universities and schools, and will infringe upon statutory free speech rights to which students are entitled. Furthermore, the proposed regulations strip individuals of due process norms by permitting grievance procedures to be launched based only on vague suspicions, allowing individuals to be punished before the adjudication process has begun, granting Title IX Coordinators plenary power over sex discrimination proceedings, and opening the door to universities imposing different rules on the accuser and the accused.

FAIR respectfully requests that the Department amend the proposed regulations, as set forth in Section VI of this comment.[1]

[1] Our use of the word "sex" in this comment refers to biological sex (male or female).

I. Background and the Proposed Regulations

A. Title IX and Its Scope

Title IX of the Civil Rights Act prohibits federally-funded educational institutions from discriminating "on the basis of sex":

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance….

20 U.S.C. § 1681(a).

Title IX's reach is immense. It applies to all federally-funded schools, from preschool through graduate level, and vocational schools. Virtually all public schools, public universities, and private universities receive federal funding. In fact, out of the approximately 5,300 colleges and universities in the nation, fewer than twenty accept no federal funds. *See* Dean Clancy, *A List of Colleges That Don't Take Federal Money* (updated Aug. 10, 2020); Eric Schmidt, *Private Colleges Accept Federal Money* (The College Fix, Feb. 28, 2020). Thus, any proposed regulation under Title IX will affect the majority of the educational system in the United States, from preschool through the bestowal of a Ph.D and everything in between.[2]

B. The Proposed Regulations

The Department's proposed amendments to the regulations are not minor; they would dramatically alter the nature of Title IX. The changes include the following:

- Adding "gender identity" as a protected trait for purposes of both sex discrimination and sex-based harassment. Prop. Reg. §§ 106.10, 106.2.
- Requiring schools and universities with sex-segregated facilities and activities to allow individuals to access activities and spaces that align with their gender identity, as opposed to their biological sex. Prop. Reg. § 106.31(a)(2).
- Obligating school and university employees to report conduct that "may" constitute sex discrimination, with no requirement of a reasonable belief that the conduct rises to the level of prohibited sex discrimination. Prop. Reg. § 106.44(b)(2)(c).
- Empowering Title IX Coordinators to remove students from their classes, dormitories, and extracurricular activities and send them to "training and education programs" before the adjudication process has begun. Prop. Reg. § 106.44(f)(3), (h)(1).

[2] The exception is private K-12 schools. However, many of those schools (as much as 35%) receive some form of federal financial assistance.

- Granting Title IX Coordinators the power to initiate complaints, preside over the grievance process, determine which questions may be asked of the witnesses, determine guilt, and impose penalties, all in the same case. Prop. Reg. § 106.45(a)(2)(iii), (b)(2), (h)(3).
- Replacing the existing requirement that university students have "equal" access to evidence with "equitable" access to evidence. Prop. Reg. § 106.48(e)(7).

II. Elevating Gender Identity-Based Rights Over Sex-Based Rights Is a Decision That Must be Left to States and Individual Institutions

The proposed regulations would require schools and universities to allow individuals to participate in sex-specific activities in accordance with their gender identity, even if different from their biological sex:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.

Prop. Reg. § 106.31(a)(2). "Education program or activity" covers "all of the operations" of a school or university. 20 U.S.C. § 1687. Thus, educational institutions with sex-specific facilities or activities, which is virtually all of them, must henceforth segregate based on gender identity rather than sex. Anyone who identifies as a girl or woman, regardless of their biological sex, must be able to join female sports teams, live in all-female housing, participate in female-only sex education classes, be eligible for school-sponsored scholarships reserved for females, and use communal locker rooms and other facilities designated for females.[3]

Whether to segregate based on sex or gender identity is a decision that should be left to individual institutions and states through the democratic process, and not mandated by the executive branch of the federal government. That question presents a legitimate dispute over which reasonable persons can and do disagree. On the one hand, some individuals do not feel their gender identity aligns with their sex and wish to participate in activities consistent with how they personally identify. Those individuals should be treated with compassion and understanding. On the other hand, it is entirely legitimate to designate limited spaces for females for reasons of safety, privacy, and fairness, given the real physical differences between the sexes. The American public tends to agree with the latter position: most believe transgender individuals should be protected from arbitrary discrimination (such as being terminated from their job), but support maintaining female-only spaces in certain sports, changing rooms, and locker rooms. *See*

[3] The Department announced it would promulgate separate regulations regarding athletics. However, the current proposals contain numerous provisions and amendments applying to athletics, including proposed regulation 106.31(a)(2).

Nationwide WOLF Poll (Spry Strategies, Oct. 20-23, 2020); WOLF New York State Policy Poll (Spry Strategies, Mar. 9, 2021).

Statutory and case law underscore the legitimacy of that position. Approximately eighteen states, including Texas, Florida, and Iowa, have enacted laws restricting girls' school sports teams to females.[4] *See, e.g.,* Tex. Educ. Code § 33.0834; Fl. Stat. § 1006.205; Ia. Stat. § 261I.2. In the non-education context, Title VII permits employers to hire employees based on sex if it is a "bona fide occupational qualification." *See* 42 U.S.C. § 2000e-2(e). Guards in female prisons, staff in facilities to treat survivors of sexual abuse, and personal care hygienists may all be sex-specific for reasons of security, privacy, and the average physical differences between males and females. *See Teamsters v. Washington Dept. of Corrections*, 789 F.3d 979, 991 (9th Cir. 2015) (prison guards); *Healey v. Southwood Psychiatric Hosp.*, 78 F. 3d 128 (3rd Cir. 1996) (sexual abuse survivor staff); *AFSMCE v. Michigan*, 3635 F. Supp. 1010, 1013-4 (E.D. Mich. 1986) (hygienists); *see also Hernandez v. University of St. Thomas*, 793 F. Supp. 214, 218 (D. Minn. 1992) (university could have "a factual basis for believing that intrusions on legitimate privacy interests are an essential part of maintaining a college dormitory with communal bathrooms"). Rather than compelling schools and universities across the nation to adopt the preferences of the current administration, the Department should allow states and institutions to decide this important and reasonably-disputed matter for themselves, based on the wishes of their respective constituents and community members.

Local institutions are better suited than the federal government to tailoring the most appropriate solution for their own constituents. Many schools and communities agree with the Department's proposals and have already implemented policies similar to the Department's. But some might choose to allow males to participate in women's sports only if they supply proof of medical transition. Others might decide to allow males to try out only for non-competitive female teams. Some have concluded that fairness and safety require separation of the sexes for all sports, but have different policies outside of athletics. Yet others might create all-gender teams for sports where safety and fairness are of less concern. The Department's blanket and unnuanced proposal ignores the complexity of this issue and incorrectly assumes there can be only one approach.[5]

The Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), does not require gender identity to be substituted for biological sex for all purposes and in all contexts. The relevant part of that decision only holds that, under Title VII, an employer cannot terminate a transgender employee

[4] Other such states include Alabama, Arkansas, Indiana, Kentucky, Louisiana, South Carolina, South Dakota, Utah, and West Virginia.

[5] Some have argued that separation based on sex (rather than gender identity) in limited situations is akin to the pernicious "separate but equal" doctrine of *Plessy v. Ferguson*. That comparison is inapt. "Separate but equal" was based on bigotry: there can be no moral or legitimate reason to exclude an individual because of their skin color. In contrast, the argument for limited sex-specific spaces is based on the fact that post-pubescent males, on average, have superior physical strength to females, which is neither erased nor equalized by a declaration of gender identity. While most men do not overpower and abuse women, the subjectivity and ease of gender identification makes it impossible for woman and girls to distinguish transgender women from predatory males.

simply because they are transgender.[6] *Id.* at 1737-8, 1754. *Bostock* had nothing to do with sex-segregated facilities. The transgender plaintiff in *Bostock* did not sue because she wished to enter a space designated for females but was barred from doing so. Rather, she sued because her employer did not want to employ any transgender individuals at all.

The Department argues that in view of *Bostock*, treating individuals in accordance with their biological sex is always impermissible sex-based discrimination, unless it imposes only "de miminis harm." Respectfully, that is incorrect. First, the "de minimis harm" standard is a new creation of the Department that appears nowhere in *Bostock* or Title IX.[7] Second, the Department does not accurately state the holding of *Bostock*. That case determined that employers discriminate based on sex when they fire a person *simply for being transgender*. Sex-based bona fide occupational qualifications—which are the Title VII analog to Title IX sex-segregation—were not at issue in *Bostock* and were nowhere discussed.

FAIR wholeheartedly agrees with *Bostock* that individuals should not suffer arbitrary discrimination or bigotry because of their gender identity. But nothing in that opinion forecloses sex-based segregation in limited circumstances in the education context. There may be times and places where it is reasonable to restrict access based on sex rather than gender identity. Competitive athletics and intimate spaces such as common showers and shared sleeping quarters are among them. Given the legitimate disagreement on this issue and the need for tailored solutions, schools, universities, and states should decide for themselves whether to create sex-specific spaces in limited and appropriate circumstances.

III. Requiring Schools to Segregate Based on Gender Identity Rather Than Sex is Unworkable

As worded, the proposed requirement that schools and universities segregate based on gender identity will result in unmanageable outcomes. Girl/woman and boy/man are not the only gender identities. Hundreds of others have been thus far identified and claimed, including agender, adeptogender, clowncoric, cluttergender, genderfaun, nanogender, rosboy, quoigender, ultigender, and wistrafluid. *See Gender Identities* (Gender Wiki, accessed on Sept. 2, 2022). In theory, the number is infinite. To comply with the new regulations, schools and universities would need to have an endless number of facilities and activities to account for each gender identity. Failure to have a cluttergender swim team and locker room, for example, would prevent cluttergender persons "from participating in an education program or activity consistent with [their] gender identity," in violation of proposed regulation 106.31(a)(2).[8] Because cluttergender persons and scores of other genders identify as neither male nor female, requiring them to choose between only the men's team and the women's team would cause them more than "de minimis

[6] *Bostock* addressed both discrimination based on gender identity and discrimination based on sexual orientation.

[7] The malleability of the term "de minimis harm" will enable schools, universities, and the Department to act arbitrarily rather than based on objective criteria. One could just as well argue that the anxiety many females will experience in mixed-sex sleeping quarters and changing rooms is more than "de minimis harm," but the Department has summarily decided, on no factual basis, that it is not.

[8] It is irrelevant that relatively few students may identify as genders other than girl/woman or boy/man. The proposed regulations contain no exceptions for paucity of membership in any gender identity group. Nor could there be, for a school with a very small number of girls/women would still need to offer facilities and activities for its female students under Title IX.

harm" under the Department's own rationale. Needless to say, it would be all but impossible for schools and universities to comply.

The only alternatives to creating facilities for each of the numerous genders would be either to dispense with *all* segregated facilities and activities, having only all-gender sports teams, locker rooms, and dormitories, or to rebuild all dormitories and locker rooms into single bedrooms/stalls and fractionate all athletics on non-gendered bases such as weight, height, strength, and so forth. Neither is a solution. All-gender competitive teams would present an unreasonable risk to females, and reconstruction and fractionation would be available only at enormous cost. Given that schools have ten to fourteen separate classes for wrestling, each sports team would require numerous classes for purposes of safety and avoidance of legal liability. Reconfiguring facilities into single-occupancy use would likely cost in the millions for each building. In 2021, a California high school announced plans to build an aquatic center with single-occupancy changing and showering stalls. The total projected cost was $23 million. *Wilson High School in Long Beach Plans Gender-Neutral Locker Room* (CBSNews.com, Dec. 1, 2021).

In some cases, basing accommodations on gender identity rather than sex has absurd unintended consequences. For example, Title IX regulations permit schools to exclude females from trying out for men's contact sports teams such as boxing, wrestling, rugby, ice hockey, football, and basketball, even if there is no corresponding team for women. *See* Prop. Reg. § 106.41(b). The reason is safety: because of average differences in size and strength, females have a greater chance than males of being badly injured in men's contact sports, and schools will bear any resulting legal liability. Yet at the same time, the proposed regulations require schools to allow transgender students to try out for the team that aligns with their gender identity. *See* Prop. Reg. §§ 106.31(a)(2), 106.41(a). Thus, a natal female who identifies as a transman must be allowed to try out for the men's rugby team, while a natal female who identifies as a woman can be excluded from that same team. That is the case even if the two natal females are physically identical in all relevant respects, such as weight, height, ability, and so on. The complexities associated with the interplay of sex and gender identity warrant only one solution: allow institutions to decide those policies for themselves.

IV. The Proposed "Sex-Based Harassment" Definition Holds Individuals to a Less Favorable Standard than Schools and Disregards Students' Statutory Free Speech Rights

Under the current regulations, sex-based harassment is defined in accordance with current Supreme Court law: unwelcome, sex-based conduct that is "so severe, pervasive, and objectively offensive" that it denies a person equal access to education. The proposed regulations broaden that definition, changing "severe, pervasive, and objectively offensive" to "severe *or* pervasive" (emphasis added), dispensing with the "objectively offensive" prong entirely, and adding gender identity.

If adopted, the proposed definition will allow individuals to be brought up on harassment charges on far less evidence than required by law. According to the Supreme Court, a hostile environment under Title IX exists if the conduct is severe *and* pervasive *and* objectively offensive. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999). The proposed regulations require only severity *or* pervasiveness (not both) and

omit the "objectively offensive" requirement. In its notes, the Department claims the *Davis* standard applies only to lawsuits against Title IX recipients (*i.e.,* schools and universities) for monetary damages, and not to administrative proceedings against students and employees. The Department must acknowledge the upside-down power imbalance created by that position. Large and powerful universities will enjoy the benefit of the higher Supreme Court standard if they are sued under Title IX, while individual students and employees can be terminated or expelled under the far lower standard proposed by the Department. That is hardly equitable. An individual who has lost their job or seat at college suffers far more than an institution ordered to make a monetary payment, particularly given the massive endowments colleges and universities enjoy.[9] There is no legal or moral basis for holding individuals with substantially more to lose to a less favorable standard than the institutions to which they belong.

Additionally, the proposed definition unlawfully abridges state free speech protections. Declining to use the preferred gender pronouns of others could be deemed "sex-based harassment" under the proposed definition. Nevertheless, given the First Amendment, students at public schools and universities could not be disciplined on such grounds. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969) (public schools may not punish student speech unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"); *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943) (public schools may not require students to recite Pledge of Allegiance); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."); *Oliver v. Arnold*, 3 F.4th 152, 162 (5th Cir. 2021) (public schools may not require students to recite ideological beliefs such as the Pledge of Allegiance). The Department seems to acknowledge that, as the regulations explicitly restrict no First Amendment rights. Prop. Reg. § 106.6(d).

But the proposed regulations make no allowance for state laws extending free speech rights to students at *private* schools. In fact, they claim to preempt those laws. Prop. Reg. § 106.6(b) ("The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement."). California has one such law. It gives students at private high schools and universities the same First Amendment speech rights they have when off campus:

> A school district operating one or more high schools, a charter school, or a private secondary school shall not make or enforce a rule subjecting a high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment to the United States Constitution….
>
> No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other

[9] The median endowment for all colleges and universities is $200 million, and the average is $1.1 billion. Emma Whitford, *College Endowments Boomed in Fiscal 2021* (InsideHigherEd.com, Feb. 18, 2022). Ivy League endowments range from $4.4 billion to a staggering $41.9 billion. Aine Givens, *How Ivy League Endowments Have Grown Over the Past Two Decades* (Tuscon.com, Aug. 30, 2022).

> communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution….

Cal. Educ. Code §§ 48950, 94367; *see Yu v. University of LaVerne*, 196 Cal. App. 4th 779, 791 (2011) (private university cannot discipline a student for on-campus speech that would have been protected had she engaged in that speech off campus).

The federal government, including the Department, cannot preempt a free speech law of California or any other state. It may only preempt state laws if it has the power to regulate the relevant field in the first place. *City of Hoboken v. Chevron Corp.*, 45 F. 4th — (3rd Cir. 2022); *Louisiana Indep. Pharmacies Ass'v v. Express Scripts, Inc.*, 41 F.4th 473, 479 (5th Cir. 2022). First Amendment jurisprudence denies the federal government any authority to regulate the field of protected speech. *See Tinker*, 393 U.S. at 513; *Barnette,* 319 U.S. at 642; *Wooley*, 430 U.S. at 714. The regulations' preemption provision must be amended accordingly.

V. The Proposed Procedural Changes Violate Due Process Norms

While constitutionally required only in legal proceedings, due process is foundational to American society. Notice, some form of probable cause, a reasonable opportunity to be heard , and basic fairness are routinely honored (and expected) in extrajudicial contexts, including private employment, private arbitration, revocation of social privileges, and other private endeavors. That is particularly the case where the proceedings are quasi-judicial in nature and the potential consequences are significant, such as suspension or removal from one's seat at a school, college, or university. Even being the subject of an investigation for sex discrimination or harassment will likely inflict reputational damage, as it may become known by others in the community through word of mouth or obvious "supportive measures," and will end up in written records. Accordingly, before taking action that could harm students' and employees' educational or employment prospects, at least a reasonable degree of due process should be extended.

A. <u>The Reporting Threshold Is Too Low</u>

The proposed regulations, however, deny due process norms from the start. Instead of needing some level or analog of probable cause, school employees must file a discrimination report if they see or overhear something that "*may* constitute sex discrimination under Title IX." Prop. Reg. § 106.44(b)(2)(c) (emphasis added). That report sets the grievance process in motion: upon receipt, the Title IX Coordinator must offer "supportive measures" and take other action, and may initiate a complaint on his or her own, even if the allegedly injured party does not wish to pursue it.

Thus, if that proposal is adopted, reports will be made based on no more than vague suspicions and individuals will be investigated for innocent conduct. By way of illustration, suppose a teacher sees a male student approach a female student and say something inaudible to her, and then sees the female

student frown and walk away. The teacher would be *required* to report that incident to the Title IX Coordinator, despite not hearing what the male student said, because his inaudible comment "may" have been discriminatory. But it is just as likely that it had nothing to do with sex discrimination. It could have been something as innocuous as a remark that he disliked her musical tastes, could not attend her graduation party, or something else unrelated to sex discrimination. But the report would need to be submitted anyway. To safeguard their jobs, employees will err on the side of over-reporting. Title IX Coordinators will be inundated with reports and individuals will be unnecessarily tarnished with the stigma of being the subject of a Title IX report.[10] Ultimately, the low reporting threshold will create a campus environment of fear and silence.

B. "Supportive Measures" Punish Students Who Have Not Been Found Guilty

Additionally, measures that are essentially punitive can be imposed before the adjudication process even begins. Immediately upon receipt of a report, the Title IX Coordinator must implement "supportive measures," which could apply to either the accuser or the accused (or both). Prop. Reg. § 106.44(f)(3). "Supportive measures" is a partial misnomer, as it includes not only actions that actually support students, such as extensions of deadlines, but also those that burden them, such as "involuntary changes in class, work, housing, or extracurricular or any other activity" and participation in "training and education programs related to sex-based harassment." Prop. Reg. § 106.44(h)(1). The regulations style all such measures as "non-punitive." But being removed from classes, a dormitory, or an athletic team or being forced into a harassment training program would likely be considered unjust punishment by an accused who has not yet been found guilty of anything. Before removing a student from his or her living quarters, classes, or other activities or sending them to counseling or "training and education programs," a school or university should be required to have made at least some preliminary finding that the allegations are likely true and rise to the level of sex-based discrimination.

C. The Title IX Coordinator Is Authorized to Act as Prosecutor, Judge, and Jury

The proposed regulations unnecessarily grant the Title IX Coordinator expansive power over the adjudication process. That Coordinator, who is typically one person, receives reports, may initiate a complaint of sex discrimination, presides over meetings and hearings, determines which questions can be asked of the witnesses, decides whether sex discrimination occurred, and imposes any remedies. Prop. Reg §§106.45(a)(2)(iii), (b)(2), (h)(3). He or she may perform all of those functions in a single case. Consolidating all of those quasi-judicial roles within a single person deprives the parties of the protections inherent in diffusing functions and authority among different individuals. A person who files a complaint should not also be the person deciding guilt or determining which questions should be asked during the adjudication process.

[10] No matter the precautions taken to guard privacy, the fact that a sex discrimination or harassment report has been made will likely spread to others in the classroom, dormitory, teacher's lounge, and other campus spaces. Many commonly-applied "supportive measures," such as restrictions on contact, will be obvious to third parties.

D. The Accuser and the Accused May Be Treated Unequally in University Proceedings

Currently, in cases of alleged sex-based harassment involving university students, the regulations require the parties to have "equal" access to the evidence. The proposed regulations would replace that with "*equitable* access" to the evidence. Prop. Reg. § 106.48(e)(7) (emphasis added). The Department's notes indicate that change is to allow for different modes and manners of delivery—for example, providing a translator only for the party who needs it or assistance for persons with disabilities. The text of the proposed regulation, however, does not reflect that interpretive intent. As such, it leaves the door open for universities to deny one party access to the evidence if they believe doing so would be "equitable." Differential access to evidence is inconsistent with due process. *See, e.g.*, *James v West Virginia Bd. of Educ.*, 322 F. Supp. 217, 227 (S.D.W. Va. 1971) (due process "mean[s] that the rights of all persons must rest on the same rules and be similarly applied in like circumstances"). The regulations must be amended to clarify the intention, scope, and meaning of "equitable access to the evidence."

VI. FAIR's Proposed Changes

FAIR supports efforts to reduce and eradicate unlawful sex discrimination in educational institutions. But in their current form, the proposed Title IX regulations go too far. They decide matters that should be left to individual institutions and the political process, impose impossible burdens on schools and universities, apply standards to students and employees that are less favorable than those extended to their schools and universities, restrict state-based free speech rights, and disregard many due process norms.

Accordingly, FAIR urges the Department to amend the proposed regulations as follows:

1. Section 106.2: Under "sex-based harassment," replace the first sentence of the definition of "hostile environment harassment" with: "Unwelcome conduct that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the person's educational experience, that the person is effectively denied equal access to the recipient's resources and opportunities."
2. Section 106.6(d): Change the heading to "Constitutional and State Protections" and add subsection (3) to state, "Restrict any rights that would otherwise be protected under any State law guaranteeing free speech."
3. Section 106.10: Add the following sentence at the end: "Notwithstanding, recipients shall not be precluded from separating based on biological sex rather than gender identity when reasonable to ensure privacy, safety, and fairness."
4. Section 106.31(a)(2): Delete the final sentence that begins with "Adopting a policy" and ends with "de minimis harm on the basis of sex," and replace with: "Recipients with sex-specific facilities, activities, and programs shall not be required to create or maintain facilities, activities, or programs for gender identities other than male and female."
5. Section 106.44: Replace each use of the phrase "conduct that may constitute sex discrimination under Title IX" with the following language: "conduct the employee reasonably believes constitutes sex discrimination under Title IX."
6. Section 106.44(f): Delete subsection (5).

7. Section 106.44(g)(2): Add the following language: "No supportive measure that results in the involuntary removal of the respondent from campus, any class, or the respondent's housing, or that requires the respondent to participate in counseling, training, or education programs, may be imposed without a preliminary finding of probable cause that sex discrimination occurred."

8. Section 106.45(b)(2): Replace the final sentence with, "The decision maker may not be the same person as the Title IX Coordinator or investigator."

9. Section 106.48(e)(7): Add subsection (v) as follows: "The term 'equitable access to the evidence' refers to the manner and mode of delivery of evidence, and shall not be read as permitting a postsecondary institution to withhold any relevant and not otherwise impermissible evidence from any party."

FAIR believes those amendments will protect individuals against sex discrimination while respecting the rights of all school community members.

Respectfully submitted,

The Foundation Against Intolerance & Racism