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September 12, 2022

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Comments to the Notice of Proposed Rulemaking Titled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" – Docket ID ED–2021–OCR–0166; RIN 1870–AA16

Dear Secretary Cardona:

By way of introduction, the Parental Rights Foundation is a nationwide organization dedicated to protecting children by empowering parents. The Parental Rights Foundation was founded in 2014 to support the work of ParentalRights.org, which was established in 2007 to advance, defend, and protect the rights of parents to direct the education, upbringing, nurture, and care of their children. We write to you today on behalf of our organization, as well as on behalf of all parents, grandparents, and supporters of the traditional right of parents to direct the education and upbringing of their children.

There are six issues we wish to raise in our public comments to this Notice of Proposed Rulemaking (NPRM) from the U.S. Department of Education.

1. The NPRM fails to address the regulatory impact on families and parental rights.

Federal law requires that federal agencies "assess the impact of proposed agency actions on family well-being[.]" Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, P. L. 105-277, Div. A, § 101(h), Tit. VI, § 654, 112 Stat. 2681-528 (Oct. 21, 1998), codified at 5 U.S.C. § 601 note (Assessment of Federal regulations and policies on families).

Federal law additionally requires the following:

> "Before implementing policies and regulations that may affect family well-being, each agency shall assess such actions with respect to whether—
> "(1) the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;
> "(2) the action strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;
> "(3) the action helps the family perform its functions, or substitutes governmental activity for the function;
> "(4) the action increases or decreases disposable income or poverty of families and children;
> "(5) the proposed benefits of the action justify the financial impact on the family;
> "(6) the action may be carried out by State or local government or by the family; and
> "(7) the action establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society." *Id.*

Nothing in the NPRM meets this requirement. We call on the U.S Department of Education to provide an analysis that meets the requirements of this provision in federal law in any Final Rule.

There is no question that the issues raised in this proposed rule will significantly affect the rights of parents in the education, nurture, and supervision of their children. In the past year, multiple federal lawsuits have been filed by parents against school systems alleging that school systems – in the name of supporting minor children in their exploration of their gender identity – engaged in care and counseling of the minor children without their own parents' consent or even knowledge.[1] These issues – and the impact of this proposed rule on parental rights and family well-being – must be assessed by the U.S. Department of Education in any Final Rule.

2. The NPRM fails to adequately acknowledge and protect the fundamental rights of parents.

The NPRM does a disservice to our nation's history and long-standing U.S. Supreme Court precedent that parental rights are a fundamental right by not acknowledging the current tension between public schools and parents when it comes to gender identity issues.

[1] *See, e.g.,* Amended Complaint for Injunctive Relief, Declaratory Judgement, and Damages, *Foote et al v. Ludlow School Committee et al.*, No. 3:22-cv-30041-MGM (D. Mass. June 21, 2022); Verified Complaint for Preliminary & Permanent Injunctive Relief, Declaratory Judgment and Damages, *Littlejohn v. School Board of Leon County, et al.*, No. 4:21-CV-00415 (N.D. Fl. Oct. 18, 2021).

The U.S. Supreme Court has held that parental rights are a fundamental right for nearly a century.

In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) the Court said "[u]nder the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 534.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972) the Court said "the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

In *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court said "[t]his Court has long recognized that freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 639.

In *Parham v. J.R.*, 442 U.S. 584 (1979) the Court said "[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is 'the mere creature of the State' and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare their children for additional obligations. Surely, this includes a high duty to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* at 602 (*cleaned up*).

In *Santosky v. Kramer*, 455 U.S. 745 (1982) the Court said "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.* at 753.

And most recently, in *Troxel v. Granville*, 530 U.S. 57 (2000) the Court said "[t]he liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65.

We urge the U.S. Department of Education to incorporate this language to make it clear without a shadow of a doubt that parents – not government officials – have the fundamental right to direct the education, upbringing, nurture, and care of their minor children. Without strong language about the importance of preserving and protecting the primacy of parental rights in all areas, particularly when it comes to gender identity issues concerning minor children, any Final Rule will only exacerbate this issue, giving rise to more litigation and confusion, all at the expense of the well-being of children and families. We call on the U.S. Department of Education to make it abundantly clear that parental rights are fundamental, and that public schools must ensure that they are protecting parental rights when it comes to all aspects of enforcing and implementing Title IX.

Failure to do so raises legitimate questions about whether the U.S. Department of Education is acting in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law [and] contrary to [a] constitutional right[.]" 5 U.S.C. § 706(2)(A)-(B).

3. The NPRM's proposal to define "status as a parent" needs additional clarification to prevent confusion.

The U.S. Department of Education is, for the first time ever, proposing to create via regulation a definition of "parental status" in Title IX. While the preamble to the NPRM states that this definition will apply to proposed 34 C.F.R. §§ 106.21(c)(2)(i), 106.40(a), and 106.57(a)(1), and current § 106.37(a)(3), all of which reference different treatment based on sex related to the parental status of applicants for admission or employment, students, and employees, we believe that more clarification is needed, either in the preamble or in any Final Rule, to explain that this new definition of "parental status" is only related to differential treatment.

We are concerned that if this is not clarified, there is a possibility that the new definition in any Final Rule could be misread as an attempt by the U.S. Department of Education to vastly broaden who is a parent of a minor student. If this were to occur, it would threaten parental rights. For example, without clarification from the U.S. Department of Education, a public-school teacher could claim that he or she had an "*in loco parentis*" relationship with a minor student. Without clarification, a relative of a student – or even a non-relative – could argue that he or she was "actively seeking legal custody, guardianship, visitation, or adoption of such a person" and therefore should be considered to have "parental status" even if a court had not made a ruling on custody or termination of parental rights, or even if no legal documents had been filed with a court, and only a meeting had been held with an attorney. And without clarification, the language about foster parents could open the door to battles over key decisions in minor children's lives between foster parents and biological or adoptive parents, when a court has not yet made a custody decision or even considered termination of parental rights. This issue could easily come up in the context of removals of children by a state's Child Protection Services when children are removed from their home and temporarily placed in the custody of a foster

family. We believe that more clarification is needed to ensure that this language in any Final Rule is not misconstrued by state and local authorities, state courts, and the general public.

4. The NPRM's reference to public schools being "in loco parentis" raises concerns and needs more clarification or should be removed.

The preamble to the NPRM states on page 41437 of the Federal Register that "elementary and secondary schools generally operate under the doctrine of in loco parentis, under which the school stands in the place of a parent with respect to certain authority over, and responsibility for, its students[.]" *(quotations omitted)* The NPRM's sole citation for this claim is to a Final Rule published at 85 Fed. Reg. 30026, 30040 (May 19, 2020), which made the same claim.

This claim in the NPRM raises concerns that did not exist in past years. Because of the way that so many public schools have acted, specifically over the past two years, many parents across the nation have legitimate worries that public schools are actively attempting to usurp their rights and responsibilities over their own children. Using this language – that public schools stand in the place of parents – seems to be squarely attacking parents and parental rights. Any Final Rule should make it clear that parents – not public schools – are the ones who are responsible for their own children, and that parents do not surrender their rights and responsibilities at the schoolhouse door.[2]

Furthermore, this claim in the NPRM – and in the Final Rule from 2020 – relies on thin legal precedent. The NPRM cites nothing in support of this claim and relies solely on the Final Rule from 2020. The Final Rule from 2020 cited one source – a law review article from 2002 – and its quote from a U.S. Supreme Court decision dating back to 1986. That decision, *Bethel School District v. Fraser*, 478 U.S. 675 (1986), itself a 5-4 decision, did not make a blanket statement that public schools stand *in loco parentis.* The Court merely said – after reviewing numerous precedents dealing with public schools taking action to protect students from vulgarity and sexually explicit materials – the following: "[t]hese cases recognize the obvious concern on the

[2] *See, e.g., C. N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 n.26 (3rd Cir. 2005): "[W]e do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyers-Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and if so, then the claim will fail." *(cleaned up)* Additionally, it is important to note that the Ninth Circuit Court itself walked back some of the more controversial holdings in its original opinion in *Fields v. Palmdale School District* saying the following in its denial of *en banc* review: "[t]o make our holding more precise we delete the sentence appearing at lines 9-10 of page 15076 of the Slip Opinion ("In sum, we affirm that the *Meyer-Pierce* right does not extend beyond the threshold of the school door.") and substitute therefore the following: "In sum, we affirm that the *Meyer-Pierce* due process right of parents to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions, or to collect monetary damages based on the information the schools provide." *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), *reh'g denied*, 447 F.3d 1187, 1190-1191 (9th Cir. 2006) (per curiam), *cert. denied*, 127 S. Ct. 725 (2006).

part of parents, and school authorities acting *in loco parentis*, to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 684.

Even a more recent decision from the U.S. Supreme Court, *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038 (2021), discusses the doctrine of *in loco parentis* solely in the context of public schools disciplining students for vulgar speech. The Court took pains to make it clear that *in loco parentis* is limited: "[o]ne such characteristic, which we have stressed, is the fact that schools ***at times*** stand *in loco parentis, i.e.*, in the place of parents." *Id.* at 2045 *(emphasis added).*

Prior to the Court's decision in *Mahanoy Area School District*, the last time the U.S. Supreme Court discussed the doctrine of *in loco parentis* was in 1995, in the case of *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). In that case, the Court's sole use (outside of direct quotes from other sources or decisions) of *in loco parentis* was in relation to it being in the context of private, not public, education: "[w]hen parents place minor children in ***private schools*** for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them." *Id.* at 654 *(emphasis added).*

Because there is such limited U.S. Supreme Court precedent related to the doctrine of *in loco parentis* as a major component of public education, particularly contrasted with the long-standing holding that parental rights are a fundamental right, and because of the current tensions surrounding parental rights and public schools, any Final Rule must at the very least clarify that the U.S. Department of Education is not trying to elevate public schools above parents when it comes to a parent's own children. We ask that any Final Rule remove language stating that public schools and employees of public schools act *in loco parentis* to the minor children enrolled by their parents in the local public school. It is the year 2022, not 1822. Notwithstanding Sir William Blackstone, parents are no longer hours away from their children in the local public school, and public schools must not displace parents when it comes to decisions affecting their children.

5. Without clarification, the NPRM appears to conflict with FERPA.

Page 41544 of the NPRM under the title "Interaction with Family Educational Rights and Privacy Act (FERPA) (proposed § 106.6(e))" asks commenters to address "the intersection between the proposed Title IX regulations and FERPA, any challenges that recipients may face as a result of the intersection between the two laws, and any steps the Department might take to address those challenges in the Title IX regulations."

This is a valid concern. We have seen organizations conflate the provisions of FERPA with their own advocacy directed toward urging children and public schools to keep secrets from the

child's own parents.[3] This directly contradicts FERPA's own provisions which reflect that parents are the ones with the authority over their own minor child's records (20 U.S.C. § 1232g(a)(1)(A); § 1232g(a)(1)(B); § 1232g(a)(2); § 1232g(b)(1); § 1232g(b)(2)(A); § 1232g(d); and § 1232g(e)). Congress was very clear in drafting FERPA that it protects the privacy of minor students by empowering parents. That is why FERPA states:

> "**(d) Students' rather than parents' permission or consent.** For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student." 20 U.S.C. § 1232g(d).

This is additionally clear in the following section:

> "**(e) Informing parents or students of rights under this section.** No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section." 20 U.S.C. § 1232g(e).

And the U.S. Department of Education's own regulations implementing FERPA make this abundantly clear:

> "34 C.F.R. § 99.4 What are the rights of parents? An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights."
>
> "34 C.F.R. § 99.5 What are the rights of students?
>
> (a) (1) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student.
>
> (2) Nothing in this section prevents an educational agency or institution from disclosing education records, or personally identifiable information from education records, to a parent without the prior written consent of an eligible student if the

[3] *See, e.g.*, Open Letter To Schools About LGBT Student Privacy, ACLU (Aug. 26, 2020), https://www.aclu.org/sites/default/files/field_document/student_privacy_ltr_fall_2020.pdf.

disclosure meets the conditions in § 99.31(a)(8), § 99.31(a)(10), § 99.31(a)(15), or any other provision in § 99.31(a).

(b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents."

Based on these applicable sections from FERPA, the U.S. Department of Education needs to clarify in any Final Rule that public schools are not permitted to hide information from a minor student's parents.

6. Any Final Rule should not remove the reference to FERPA in the proposed amendments to 34 C.F.R. § 106.45(b)(5)(i).

The preamble to the NPRM proposes on page 41471 of the Federal Register to remove the references to the FERPA regulations at 34 C.F.R. § 99.3 in the proposed amendments to 34 C.F.R. § 106.45(b)(5)(i). The U.S. Department of Education purports to rationalize this change on page 41471 of the Federal Register "because the proposed regulations would make clear, in proposed § 106.6(g), that nothing in these regulations would limit the rights of a parent, guardian, or otherwise authorized legal representative to act on behalf of their child[.]"

However, as described *supra* in our public comments, there is currently great confusion over FERPA in public education and among the general public. Despite the protections afforded to a student's data in the law and accompanying regulations by empowering parents over their own children's educational records and data, as we have previously pointed out, those protections are being actively undermined. Therefore, the U.S. Department of Education should include more references to FERPA, not less. There should be more reminders of the rights of parents, not less.

Additionally, the U.S. Department of Education goes on to say in the preamble to the NPRM on pages 41471-41472 of the Federal Register, "[w]hen evaluating evidence that is relevant but may be impermissible, the Department expects recipients to be mindful of the rights of parents, guardians, and other authorized legal representatives under proposed § 106.6(g). These rights may include the authority to provide consent on behalf of a minor student for the use of such evidence."

Given this acknowledgement, it is incongruous for the U.S. Department of Education to propose removing a reference that makes it very clear what these "rights of parents, guardians, and other authorized legal representatives" actually are.

We call on the U.S. Department of Education to not remove the references to the FERPA regulations at 34 C.F.R. § 99.3 in the proposed amendments to 34 C.F.R. § 106.45(b)(5)(i).

Thank you for your time in reading our comments to this proposed rule. Please do not hesitate to contact us if you have any additional questions.

Very truly yours,

William A. Estrada, Esq.
President
Parental Rights Foundation