



February 1, 2023

VIA EDFOIAManager@ed.gov

U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

**Freedom of Information Act Request: Notice of Proposed Rulemaking for the Protection of Pupil Rights Amendment**

Dear Sir or Madam:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL’s email list contains over 45,000 unique addresses, our Twitter page has approximately 54,100 followers, the Twitter page of our Founder and President has over 399,500 followers, our Facebook page has 109,000 followers, and we have another approximately 31,600 followers on GETTR.

**I. Introduction**

The Protection of Pupil Rights Amendment, 20 U.S.C. §1232h (“PPRA”), codifies, in part, parents’ Constitutional right to control the education and upbringing of their children. The PPRA was first passed in 1974 and was last amended in 2015.<sup>1</sup> On September 6, 1984, the Department of Education promulgated the PPRA’s regulations, 34 CFR Part 98.<sup>2</sup>

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<sup>1</sup> See 20 U.S. Code § 1232h - Protection of Pupil Rights, CORNELL L. SCH. LEGAL INFO. INST., <https://bit.ly/3HkiSWA> (last visited Jan. 19, 2023).

<sup>2</sup> See § 98.4 - Protection of Students’ Privacy in Examination, Testing, or Treatment, GOVREGS, <https://bit.ly/3QQizWy> (last visited Jan. 19, 2023).

On February 2, 2022, America First Legal (“AFL”) released and posted on its website a PPRA Toolkit to provide parents with a resource that informs and explains their PPRA rights and how to exercise them.<sup>3</sup> Thereafter, on March 28, 2022, AFL released a downloadable version of the AFL Toolkit for Parents to facilitate their use and share with others.<sup>4</sup>

On September 15, 2022, AFL supplemented this Toolkit by posting a “Parental Rights Demand Letter Template” on its website to further assist parents to exercise their PPRA rights.<sup>5</sup>

On August 16, 2022, AFL sent a demand letter to the Department of Education on behalf of parents in Cedar Grove, New Jersey, who had previously filed requests with the Department to investigate their school district for violations of the PPRA but whose requests went unanswered.<sup>6</sup> Following AFL’s demand letter, the Department’s Student Privacy Policy Office sent an October 20, 2022, letter to AFL’s clients informing them that the Department was investigating and apologizing for the delay.<sup>7</sup>

On September 7, 2022, and November 23, 2022, AFL filed two lawsuits in U.S. district courts in the Sixth<sup>8</sup> and Seventh<sup>9</sup> Circuits on behalf of aggrieved K-12 parents alleging that the subject school districts had violated their rights. These lawsuits included claims arising from alleged PPRA violations based, in part, on the Department’s longstanding regulatory text.

On January 9, 2023, the Department announced it would be issuing a Notice of Proposed Rulemaking to “update, clarify, and improve current regulations by addressing outstanding policy issues,” among other things.<sup>10</sup>

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<sup>3</sup> See *AFL Launches Toolkit to Help Parents Protect Their Children from Woke Indoctrination in Public Schools*, AMERICA FIRST LEGAL (Feb. 2, 2022), <https://bit.ly/3D0CFrk>.

<sup>4</sup> See *AFL Releases Printable Version of “The Protection of Pupil Rights Amendment: A Toolkit for Parents,”* AMERICA FIRST LEGAL (March 28, 2022), <https://bit.ly/3XD1zYM>.

<sup>5</sup> See *AFL Releases Parental Consent Letter, Arming Parents to Combat Sinister Woke Agenda in American Public Schools*, AMERICA FIRST LEGAL (Sept. 15, 2022), <https://bit.ly/3GUA57n>.

<sup>6</sup> See *AFL Demands Answers from the U.S. Department of Education for Failing to Respond to PPRA Complaints of Cedar Grove, NJ Parents Whose Children Were Unlawfully Subjected to Invasive Family Demographics Survey*, AMERICA FIRST LEGAL (Aug. 16, 2022), <https://bit.ly/3Xn0aDe>.

<sup>7</sup> See *Following AFL Intervention, U.S. Department of Education Investigates Woke New Jersey School District*, AMERICA FIRST LEGAL (Nov. 15, 2022), <https://bit.ly/3ZMFgPp>.

<sup>8</sup> See *AFL Sues Bethel School Board in Ohio for Forcing Children to Share Bathrooms and Locker Rooms with Members of the Opposite Sex and for Violating Parents’ Rights*, AMERICA FIRST LEGAL (Nov. 23, 2022), <https://bit.ly/3kjsQhC>.

<sup>9</sup> See *AFL Sues to Stop the Eau Claire Area School District, Board of Education Members, from Encouraging Children to “Transition” Gender Identity and Deceiving Parents*, AMERICA FIRST LEGAL (Sept. 7, 2022), <https://bit.ly/3kwgnaJ>.

<sup>10</sup> See *Protection of Pupil Rights Amendments*, U.S. OFF. OF INFO. AND REGUL. AFFS., <https://bit.ly/3XLnABJ> (last visited Jan. 19, 2023).

Given the importance of the PPRA and its existing regulations to parents seeking to exercise their Constitutional rights of oversight and control regarding their children's education, this Freedom of Information Act request is crucial to provide transparency on the Department's process and motivations for the proposed rulemaking, and to ensure the Department's current political leadership is held accountable for any action that limits or impairs parental rights.

## **II. Definitions**

For the purposes of this request:

"PPRA" means 20 U.S.C. § 1232h

"PPRA regulations" means 34 CFR Part 98 and all of its sections

## **III. Custodians**

- A. All political appointees in the Office of the Secretary including, but not limited to, the following:
  - a. Miguel Cardona
  - b. Shelia Nix
  - c. LaWanda Toney
  
- B. James Lane and all political appointees and career employees in the Office of Elementary and Secondary Education with a grade of GS-14 or its equivalent
  
- C. Gwen Graham and all political appointees in the Office of Legislation and Congressional Affairs
  
- D. Kelly Leon and all political appointees in the Office of Communications and Outreach
  
- E. Cindy Marten and all political appointees in the Office of the Deputy Secretary
  
- F. In the Office of the General Counsel:
  - a. Lisa Brown
  - b. Lynn Eisenberg
  - c. Greg Schmidt
  - d. Toby Merrill
  - e. John Bailey

- f. Joanna Darcus
  - g. Will Desmond
  - h. Jessica Mirtle
  - i. Gypsy Moore
  - j. Ron Petracca
  - k. Rob Wexler
  - l. Lynn Mahaffie
  - m. Amanda Amann
  - n. Hilary Malawar
  - o. Phil Rosenfelt
  - p. All political appointees and career employees with a grade equivalent of GS-13 and higher
- G. In the Student Privacy Policy Office:
- a. Kevin Herms
  - b. Frank Miller
  - c. Ross Lemke
  - d. Bernie Cieplak
- H. Roberto Rodriguez, Dale King, and all political appointees and career employees with a grade equivalent of GS-13 or higher in the Office of Planning, Evaluation and Policy Development.

#### **IV. Requested Records**

The timeframe for each of the following items is February 2, 2022, to the date each item is processed.

- A. All records regarding or relating to RIN: 1875-AA13 and its subject matter as published in the Unified Agenda at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1875-AA13>.
- B. All calendar items containing the terms “Protection of Pupil Rights Amendment” or “PPRA.”
- C. All emails regarding, referring, or relating to PPRA and/or the PPRA regulations, including *but not limited to* emails to or from persons with email addresses containing “nea.org,” “aft.org,” “nsba.org,” and “eop.gov.”
- D. All records containing the terms “America First Legal” or “AFL” or “NEA” or “AFT” *and* “Protection of Pupil Rights Amendment,” “PPRA,” or any of the PPRA regulations.

E. All records containing the terms “NPRM” or “Notice of Proposed Rulemaking” or “proposed rule” *and* “Protection of Pupil Rights Amendment” or “PPRA.”

F. All records containing the terms “Cedar Grove” or “Clear Creek” *and* “Protection of Pupil Rights Amendment,” “PPRA,” or “AFL”.

## **V. Fee Waiver**

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public’s understanding of your policies and practices will be enhanced through AFL’s analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL’s financial interest. This has previously been recognized by the Department of Education, as well as the Departments of Defense, Energy, Interior, State, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.”<sup>11</sup>

## **VI. Processing and Production**

Processing should occur in strict compliance with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines. If you have any questions about our request or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, then please contact me at FOIA@aflegal.org. If AFL’s request for a fee waiver is not granted in full, please contact us immediately upon making that determination. To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or

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<sup>11</sup> 5 U.S.C. § 552(a)(4)(A)(iii).

in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

We note that redactions are disfavored as the FOIA's exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, the Department must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; see also *Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, the Department should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.
- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program or similar policies. These systems

provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency's archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.

Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

## **VII. Request for Expedited Processing**

AFL requests expedited processing for items A and F of this request. In support thereof, AFL certifies its compelling need for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 34 CFR § 5.21(a)(i)(2)(i)(B), which provides in relevant part:

(2) *Expedited processing.* (i) The Department gives expedited treatment to FOIA requests and appeals whenever the Department determines that a FOIA request involves one or more of the following . . . (B) The urgent need of a person primarily engaged in disseminating information to inform the public about an actual or alleged Federal Government activity; or (C) Other circumstances that the Department determines demonstrate a compelling need for expedited processing.

First, as other federal agencies have acknowledged in granting AFL expedited processing, AFL is primarily engaged in disseminating information.

Second, there is an urgent need to inform the public about the Department's PPRA-related activity. There is extensive public and media interest in parents' rights to protect their children at school and in the Department's role in attempting to limit those rights. The Department's back-room involvement in the infamous Garland Memorandum (labeling parents as "domestic terrorists"), its cynically unlawful formation of the National Parents and Families Engagement Council, its close collaboration with and/or capture by organizations such as the National Education

Association and the American Federation of Teachers that are dedicated to denying parents their statutory and Constitutional rights, and its historic failure to enforce the PPRA suggest a politically motivated pattern and practice of intentional disregard for statutory duties, raising serious and exigent questions and concerns regarding the lawfulness and integrity of its political leadership. These questions demand answers now.

Thank you in advance for your cooperation.

Sincerely,

/s/ Ian D. Prior

Ian D. Prior

America First Legal Foundation