

United States Senate

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July 20, 2022

[Docket \(ED-2021-OCR-0166-0001\)](#)

Delivered via E-Mail

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

Dear Secretary Cardona:

On June 23, 2022, the U.S. Department of Education (Department) released its Notice of Proposed Rule Making (NPRM) entitled “*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*” (Title IX proposed rule or proposed rule), which is terribly misguided and rewrites sound policy. We write today in opposition to the proposed rule and to request an extension of the public comment period by at least 30 days.

The proposed rule repeals due process protections guarded by the current regulations. The existing rule, which has been in effect since August 2020, struck a balance that follows the law and is fair to both parties. It was recognized by *The Washington Post*’s Editorial Board as striking a “needed balance” between victims’ protections and the rights of the accused.¹ In contrast, the proposed rule threatens students’ Constitutional right to due process and the core American value of justice for all. Instead of upholding the key tenets of our judicial system, the Department’s proposal returns to the deeply flawed campus disciplinary process of the Obama administration, which was heavily criticized by liberal law professors, Democrats, and even a former liberal Supreme Court justice. These flawed processes also led to hundreds of inconsistent judgments and more than 300 lawsuits in federal court.²

The regulations that the Department aims to repeal were also the culmination of a nearly three-year, thorough and deliberate process. Listening sessions began in 2017; then, the Department issued a proposed rule in November 2018. Over the course of the next year-and-a-half, the Department received and reviewed more than 124,000 public comments, and the Office of Management and Budget conducted 102 stakeholder meetings, with nearly half of those meetings being with victim advocates. In May 2020, the Department issued the final Title IX regulations specifying how recipients of Federal financial assistance covered by Title IX must respond to allegations of sexual harassment, including sexual assault. The existing rule runs 2,033 pages, which includes the regulation, the Department’s legally sound rationale, and its response to the thousands of public comments. Today, this administration and the Department seek to undo three years of dedicated work in half the time.

¹ https://www.washingtonpost.com/opinions/what-betsy-devoss-new-title-ix-changes-get-right--and-wrong/2018/12/14/a8d485e2-fcea-11e8-ad40-cdfd0e0dd65a_story.html

² <https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf>

Allegations of sexual assault and harassment are a serious and difficult issue, which is why the previous administration was careful to get the Title IX regulations right. It created a balanced and fair system that provides protections for victims while respecting the due process rights of the accused. Moreover, the existing regulations are founded on long-standing legal principles and have withstood multiple legal challenges.³

By contrast, the new proposed rule encourages institutions to adopt processes that have either been struck down or been viewed skeptically by multiple courts.⁴ For example, the proposed rule allows schools to use the highly flawed single-investigator model, where one person acts as the judge, jury, and executioner. The Department touts that schools support such a model but fails to recognize the inherent bias with the same individual investigating a complaint also making the final decision. The proposed rule also does away with a requirement for live cross-examination, allowing this same decision maker to simply interview the parties individually to determine the credibility of their stories. Rescinding or revising the existing Title IX regulations jeopardizes key protections for victims and the due process rights of the accused and places institutions back into legal jeopardy.

In addition, the proposed rule expands the definition of sex discrimination in a way that is likely to infringe on free speech. Title IX should be celebrated for its legacy of improving outcomes for women and girls in every facet of education. These improvements have come largely from women and girls being able to use their voices to advance their educational opportunities. However, this administration now attempts to destroy that progress in the name of equality. Under the proposed rules, students who hold views about the importance of women's rights and choose to express them could be accused of sex discrimination. In fact, the Department of Education recently announced a school was in violation of Title IX for, among other reasons, failing to police the use of proper pronouns amongst students. We are concerned that our educational institutions will no longer be a place for harboring the free exchange of ideas, but instead a place where students are afraid to speak their minds.

Therefore, we ask that you, at a minimum, extend the public comment period by at least 30 days to ensure that the American public has the proper time to review this troublesome attack on due process protections and the expansion of Title IX.

Sincerely,



Richard Burr
United States Senator



John Barrasso
United States Senator

³ see e.g. *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47 (D.D.C. 2020).

⁴ see *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561(D. Mass. 2016).



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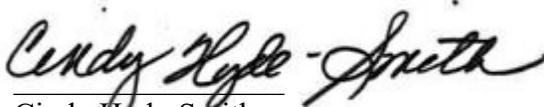
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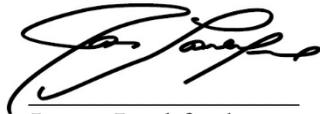
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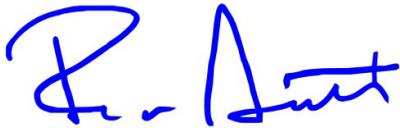
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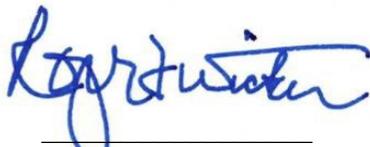
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