United States Senate
WASHINGTON, DC 20510
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September 12, 2022

Docket (ED-2021-OCR-0166-0001)

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 a shocking revocation of due process rights. We write today in opposition to the proposed rule, ask that you rescind it, and instead, enforce the existing Title IX regulations.

The proposed rule eviscerates due process protections guarded by the current regulations. The existing rule, which has been in effect since August 2020, 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 pernicious campus procedures of the Obama administration, which were heavily criticized by liberal law professors, Democrats, and even former Supreme Court Justice Ruth Bader Ginsburg.[2] These unconstitutional processes also led to hundreds of inconsistent judgments and more than 300 lawsuits in federal court.[3]

The Department's attempt at rolling back protections for students is not only ill-founded but also arbitrary. The regulations that the Department aims to repeal were the culmination of a nearly three-year, thorough and deliberate process. Listening sessions began in 2017; then, the Department issued a detailed 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

[1] https://www.washingtonpost.com/opinions/what-betsy-devoss-new-title-ix-changes-get-right--and-wrong/2018/12/14/a8d485e2-feea-11e8-ad40-cdfd0e0dd65a_story.html.
[2] https://dash.harvard.edu/handle/1/33789434; https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millenials/553409/.
[3] https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf .

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. This administration and the Department now seek to undo three years of dedicated work in half the time.

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. The existing regulations are founded on long-standing legal principles and have withstood multiple legal challenges.[4] In addition, the existing regulations went into effect in the middle of the pandemic and given that much of the time they have been in effect, students were not on campus, they have largely gone untested. Therefore, it appears that with little, if any, evidence that the existing regulations result in adverse outcomes, the Department is acting on a desire to satisfy its political allies. In doing so, it will revoke students' due process rights, create ambiguity for both the complainant and the respondent, and place schools back into legal jeopardy.

NPRM Encourages Highly Flawed Single-Investigator Model

Most egregiously, the Department proposes to remove the prohibition on the highly flawed single-investigator model.[5] Under this model, one university official could interview the parties and witnesses, collect and examine any evidence, and then decide whether an accused student is guilty. This means the same university official serves as judge, jury, and executioner.

It is broadly agreed that the single-investigator model is one of the greatest threats to accuracy and fairness in Title IX proceedings. For example, liberal professor and lifelong Democrat, KC Johnson concluded that the resurrection of the single-investigator model is the most alarming aspect of the proposed rules, stating "[t]he possibility of wrongful findings … dramatically increases under such a procedural regime."[6] Moreover, courts have struck the model down, or expressed skepticism towards it. For example, in *Doe v. Brandeis University*, a U.S. District Court stated that "[t]he dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions."[7]

Sexual assault prevention advocates argue that the single-investigator model offers the least traumatic path for victims to share their stories. However, this model has led to hundreds of students suing their institution alleging their cases have been mishandled, which, in turn, could

[4] *see* e.g. Pennsylvania v. DeVos, 480 F. Supp. 3d 47 (D.D.C. 2020).
[5] *see* Doe v. Brandeis Univ., 177 F. Supp. 3d 561(D. Mass. 2016).
[6] https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus/.
[7] 177 F. Supp. 3d. at 606.

cause victims to relive their trauma again in the courts.[8] The reality is that single-investigator models can undermine the credibility of these sensitive cases.

As the NPRM notes, the existing regulations preclude the single-investigator model because "separating the roles of investigation from adjudication protects the parties by making it more likely that the fact-based determination regarding responsibility is based on an objective evaluation of relevant evidence."[9] Ignoring this basic principle of fairness, the Department appears to be more concerned about the burden schools faced by doing away with the flawed single-investigator model. In particular, the Department notes that during listening sessions in June of 2021, in the height of the COVID-19 pandemic, some schools "argued that using the single-investigator model permits recipients to investigate and resolve complaints expeditiously."[10] The Department continues that many of these schools are small or under-resourced, which makes the existing ban on the single investigator model a burden.[11] While lowering the burden on institutions and ensuring a prompt outcome of these procedures is important, it cannot be achieved at the expense of accuracy and fairness.

NPRM Eviscerates Due Process Protections

The Department states that the NPRM "include[s] a number of key safeguards to ensure that a recipient's grievance procedures provide a fair process for all involved."[12] While the Department claims the single-investigator model can ensure fairness "when implemented in conjunction with the other proposed measures," these measures are contradictory and leave little effective power of review for the parties.

For example, the Department touts that they are implementing a broader requirement for the decision maker to address credibility in all allegations of sex-based discrimination rather than only in allegations of sexual harassment.[13] This expansion is, however, misleading. Instead of maintaining the requirement to have a hearing and the opportunity for cross-examination to assess the allegations, the proposed rules only require a less robust process to assess credibility of parties and witnesses "when necessary."[14] Specifically, students are only promised a process that "allow[s] the decisionmaker to ask [questions]" and "each party to propose to the [decisionmaker] relevant questions and follow-up questions."[15] There is no requirement for the parties to be present during the questioning and the decision maker is encouraged to conduct questioning at individual meetings with each party or witness separately.[16] While institutions can choose to provide a hearing and cross-examination, students no longer have a right to either. It

[8] https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf
[9] 85 FR at 30369-70.
[10] 87 FR at 41467.
[11] *Id*.
[12] 87 FR at 41485.
[13] 87 FR at 41502-03.
[14] *Id*.
[15] *Id*.
[16] *Id*.

seems unlikely institutions would chose to provide such safe-guards when they have complained those safe-guards are a burden.

The Department states "neither Title IX nor due process and fundamental fairness require postsecondary institutions to hold a live hearing with advisor conducted cross-examination in *all* cases."[17] [emphasis added]. In effect, the Department's proclamation concedes that such protections are required in *some* cases, and if they are required in some cases, then fairness demands they should be required in all. The U.S. Sixth Circuit Court of Appeals has discussed why a hearing and cross-examination are pillars of a fair campus disciplinary process, stating:[18]

> "[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test [their] memory, intelligence, or potential ulterior motives. Nor can the fact-finder observe the witness's demeanor under that questioning. For that reason, written statements cannot substitute for cross-examination."[19]

The Department did not stop there; the pernicious revocation of a student's right to a hearing and cross-examination is compounded by the proposed changes to students' access to evidence. The existing rules rightly guarantee that both parties are entitled to "inspect and review any evidence obtained as part of the investigation."[20] However, under the proposed rules, parties will only be guaranteed a "*description* of evidence that is relevant."[21] [emphasis added]. To make matters worse, the description does not have to be in writing. Instead, universities may opt to provide it "orally or in writing."[22]

In the proposed rule, these changes are bizarrely explained as an expansion of protections by requiring a description of relevant evidence as part of *all* investigations of sex discrimination.[23] However, this is misleading because under the existing regulations, institutions are unable to take disciplinary action against a student unless a formal complaint has been filed. If there is no formal complaint, a student would not need access to all evidence.

The Department continues to mislead by claiming it is maintaining "key safeguards" of the current rule. However, this claim is far from reality. For example, the proposed rule notes that it preserves the presumption of innocence, otherwise known as the "presumption of non-responsibility," and states that "[c]onsistent with the current regulations, the proposed regulations would not permit a recipient to impose disciplinary sanctions on a respondent prior to the conclusion of the grievance procedures because imposing a non-temporary or punitive consequence before reaching a determination would be contrary to the requirement to have an adequate, reliable, and impartial investigation and resolution of complaints."[24] It later guts this

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[17] 87 FR at 41505.
[18] Doe v. Baum, 903 F.3d 575 (6th Cir. 2018).
[19] 903 F.3d at 582.
[20] 85 FR at 30428.
[21] 87 FR at 41481.
[22] *Id*.
[23] *Id*. at 41481-82.
[24] *Id*. at 41422.

protection under the guise of "supportive measures" by allowing schools to effectively punish accused students by implementing a "temporary measur[e]" that could "burden a respondent…."[25] The purpose of the presumption of innocence is to ensure that an accused student is not punished before there is a determination of guilt, even if temporarily. Allowing such punishments is counterintuitive to the presumption of innocence.

Finally, to further undermine a fair process, the proposed rule no longer allows institutions to easily choose between a clear and convincing or preponderance of evidence standard of proof for sexual harassment allegations. Yet, it appears to allow institutions to use a clear and convincing standard for faculty. For an administration that is greatly concerned about equity, and discusses the importance of equity in the proposed rule, allowing different standards of proof for students and faculty is inexplicable and unfair.

Expanded Definition of Title IX Violates Free Speech and Exceeds the Departments Statutory Authority

The proposed rule expands the definition of sex discrimination in a way that is not only likely to infringe on free speech, but also exceeds the Department's statutory authority. Specifically, students who hold views about women's rights, or gender-based ideals and choose to express them could be accused of sex discrimination. In fact, the Department of Education recently announced that 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.

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 muzzle varying viewpoints.

This application of Title IX is also an unimaginable expansion of Congress' intent when the law was originally passed. Title IX's statutory language 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."[26]

The Department now provides an ever growing definition of what constitutes "on the basis of sex" in Title IX based on the U.S. Supreme Court's decision in *Bostock v. Clayton County*.[27]

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[25] *Id*. at 41422 (stating that "the Department proposes clarifying that a supportive measure that may burden a respondent during the pendency of a grievance procedure may be imposed as a temporary supportive measure, but only when such a supportive measure is imposed for non-punitive and non-disciplinary reasons").
[26] 20 U.S.C. § 1681.
[27] Bostock v. Clayton County, 140 S. Ct. 1731 (2020).

However, the Department blatantly ignores the Supreme Court's holding in *Bostock,* which narrowly applied to Title VII of the Civil Rights Act. Indeed, the court stated that its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."[28] While the court expressly declined to apply its decision to Title IX, now the Department inappropriately seeks to ignore that declaration.

Further, since the Department released the proposed rule, a Federal District Court spoke on this erroneous application of *Bostock* in Department guidance on Title IX.[29] The court held that "in applying *Bostock* to Title IX, the Department overlooked the caveats expressly recognized by the Supreme Court and created new law."

Conclusion

Many of the Department's proposed changes are made under claims that the existing regulations are burdensome, have led to a decrease in reporting, and a decrease in individuals wanting to pursue formal complaints. However, there is only anecdotal evidence of these claims. It is arbitrary to revoke fundamental fairness in disciplinary proceedings using these claims, especially when the Department admits in the NPRM that "recipients had a limited amount of time to assess the impact of the 2020 amendments'."[30]

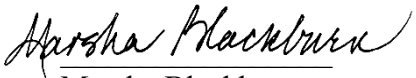
The existing regulations get it right. They created a balanced and fair system that provides protections for victims while respecting the due process rights of the accused. Rescinding or revising the existing Title IX regulations not only jeopardizes key protections for victims and the due process rights of the accused, but also places institutions back into legal jeopardy. The Department cannot continue to play ping-pong with student's rights; students deserve a fair process they can rely on. Therefore, we ask that you rescind these proposed regulations and instead enforce the existing regulations in order to ensure Title IX is fairly and adequately enforced.

Sincerely,

Richard Burr
United States Senator

John Barrasso
United States Senator

[28] *Id*. at 1753.
[29] Tennessee v. United States Dep't of Educ., No. 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022).
[30] 87 FR 41505.



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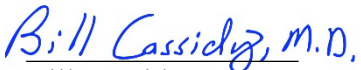

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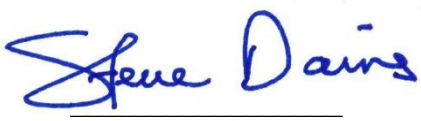

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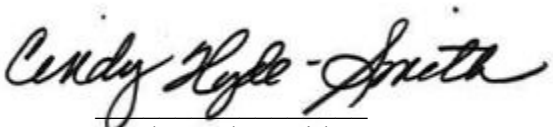

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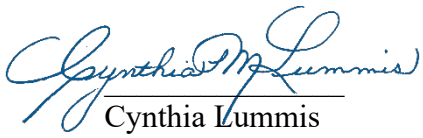

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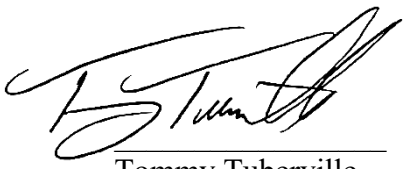

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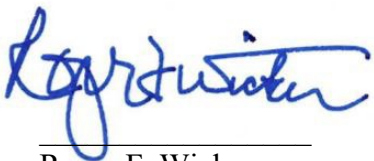

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