

Congress of the United States

Washington, D.C. 20515

March 23, 2021

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 March 8, 2021, President Biden issued an Executive Order directing the Department of Education (Department) to review and “consider suspending, revising, or rescinding” the Department’s rule entitled “*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*” (Title IX rule or rule). We write to you today to urge you to keep the rule in place and unchanged.

The Title IX rule, for the first time, codified regulations that specifically address “sexual harassment.” It was recognized by *The Washington Post*’s Editorial Board for striking a “needed balance” between victims’ protections and the rights of the accused and is a well-developed, fair rule. It also is a much needed change from years of non-binding guidance documents issued by the Department without stakeholder feedback.

The Department undertook a thorough, deliberate process to get the Title IX rule right. 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 over 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 rule specifying how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, must respond to allegations of sexual harassment, including sexual assault. The final rule runs 2,033 pages, which include the regulation, the Department’s legally sound rationale, and its response to the thousands of public comments.

The Title IX rule is fair to all parties, follows the law, and is supported by court rulings. For example, it provides a clear regulatory definition of sexual harassment, based on Supreme Court precedent, and prohibits it. It provides key protections for victims, such as a variety of reporting options; supportive measures like class or dorm reassignments, regardless of whether a victim wants to file a formal complaint; the option to choose mediation; the option to avoid being face-to-face with an accused student; and protections for victims from being asked irrelevant or harassing questions and from being asked about their prior sexual history.

In addition, the rule ensures a fair hearing process for both the victim and the accused, ensuring important due process rights, should the victim decide to pursue a formal complaint. For example, postsecondary institutions and schools must give both parties written notice of the allegations, an equal opportunity to select an advisor of the party's choice, and an equal opportunity to submit and review evidence throughout the investigation. The rule only requires postsecondary institutions to hold a live hearing with cross-examination of both parties and witnesses conducted by an advisor of the party's choice. As the 3rd Circuit Court of Appeals explained in *Doe v. University of Sciences*, "the basic elements of federal procedural fairness in a Title IX sexual-misconduct proceeding include a real, meaningful hearing and, when credibility determinations are at issue, the opportunity for cross-examination of witnesses." Similarly, former Supreme Court Justice Ruth Bader Ginsburg told *The Atlantic* that "there's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know, everyone deserves a fair hearing."

Finally, the rule is a much needed change from the reliance on guidance to govern how institutions are expected to respond to sexual harassment. In the decades since the Supreme Court held that sexual harassment violates Title IX, the Department did not issue any Title IX regulations specifically addressing sexual harassment as a form of sex discrimination. Instead, it addressed the complex and sensitive issue of sexual harassment through informal guidance documents that were not legally enforceable, which created confusion, uncertainty, and sometimes a guilty-upon-accusation environment at many schools.

Sexual harassment is a serious and difficult issue, which is why the previous Administration took nearly three years to get the Title IX rule right. It created a balanced and fair system that provides protections for victims while respecting the due process rights of the accused. Moreover, the rule is founded on long-standing legal principles and has withstood multiple legal challenges. By contrast, the Department's past guidance encouraged institutions to adopt processes that have been struck down by multiple courts. Rescinding or revising the Title IX rule could jeopardize key protections for victims and the due process rights of the accused and place institutions back into legal jeopardy. We ask that you maintain the Title IX rule to ensure victims receive the protections they deserve and every student's rights, including due process rights, are protected.

Sincerely,



Richard Burr
Ranking Member
U.S. Senate Committee on Health, Education,
Labor and Pensions



Virginia Foxx
Ranking Member
U.S. House Committee on Education
and Labor