

March 17, 2022

VIA ELECTRONIC MAIL

U.S. Department of Education
Office of the Executive Secretariat
FOIA Service Center
400 Maryland Ave. SW, LBJ 7W106A
Washington, D.C. 20202-4536
EDFOIAManager@ed.gov
ATTN: FOIA Public Liaison

Re: FOIA Request: Congressional Communications related to Title IX Policies and Enforcement
(DFI FOIA No. 100-8-22-2)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

On May 6, 2020, under Secretary Betsy DeVos, the U.S. Department of Education (“ED”) issued its final regulations¹ clarifying and modifying Title IX of the Education Amendments of 1972 (“Title IX”) including strengthening the due process and privacy rights of students and faculty in campus sexual assault matters, following an extensive rulemaking process that began with ED’s July 31, 2018, notice of proposed rulemaking (“NPRM”).² During the rulemaking process, ED received more than 124,000 comments on the proposed rule, reviewed and responded fully to those comments as required by the Administrative Procedure Act, and issued a final rule³ (“Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”) (“2020 Rule”).

The 2020 Rule was ED’s first full rulemaking regarding sexual harassment in the Department’s history and protected the fundamental rights of students and faculty⁴ by: (1) defining sexual harassment as unlawful discrimination to include sexual assault, domestic violence, dating violence, and stalking; (2) restoring due process rights for survivors and the accused; (3) requiring

¹ 34 C.F.R. Part 106.

² See <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>.

³ See <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf>.

⁴ See <https://www2.ed.gov/news/newsletters/edreview/2020/0515.html>.



colleges to provide dorm and classroom reassignments, among other supportive measures; (4) holding colleges responsible for certain off-campus sexual harassment; (5) adding privacy and rape shield protections; (5) expanding protections for children and minors; and (6) protecting survivors against retaliation.

The 2020 Rule’s lawful implementation and enactment of due process protections for students and faculty contrasted sharply with ED’s prior issuance of a “Dear Colleague” letter (“DCL”) on April 4, 2011 (the same day that President Obama announced his reelection campaign).⁵ The 2011 DCL to colleges and universities broadened the definition of sexual harassment, imposed a more likely than not (preponderance) standard on campus sexual assault adjudications, denied the right of the accused to meaningful representation, and otherwise diminished the due process and free speech rights of accused students and faculty.⁶ Because of its substantive flaws (lacking critical due process protections for the accused and victims) and the manner of its implementation (lacking the lawful authority of a regulation that had been properly subjected to requisite rulemaking notice and comment procedures), the DCL was withdrawn by ED’s Office for Civil Rights (“OCR”) on September 22, 2017.⁷

Since January 20, 2021, the Biden Administration has indicated its intent to substantially revise the 2020 Rule. For example, on March 8, 2021, President Biden issued an Executive Order (“EO”) directing ED to review Title IX policies for consistency with the EO’s shifting views of sexual harassment and sex-based discrimination.⁸ This EO followed other related EOs prompting new definitions of sexual identity and gender identities, including an EO establishing the “White House Gender Policy Council”⁹ and an EO more broadly regarding sexual orientation and gender identities.¹⁰ Those EOs may have considerable impact on ED’s Title IX enforcement policies.

On April 6, 2021, OCR issued a letter announcing a “comprehensive review” of the 2020 Rule, including an upcoming public hearing¹¹, a forthcoming question-and-answer document¹², and an

⁵ See <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁶ KC Johnson and Stuart Taylor, “The path to Obama’s ‘Dear Colleague’ letter,” WASHINGTON POST (January 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/>.

⁷ See <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

⁸ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>.

⁹ See <https://www.federalregister.gov/documents/2021/03/11/2021-05183/establishment-of-the-white-house-gender-policy-council>.

¹⁰ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

¹¹ See <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-publichearing.pdf>.

¹² See <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.



anticipated NPRM.¹³ On June 16, 2021, OCR issued a Notice of Interpretation expanding its enforcement view of Title IX’s prohibition of sex-based discrimination to include “discrimination based on gender identity.”¹⁴ On December 10, 2021, OCR Assistant Secretary Catherine Lhamon announced that ED anticipated issuing an NPRM regarding Title IX (to revise the 2020 Rule’s implementing regulations) by April 2022 (a month earlier than previously announced in ED’s Spring 2021 “Unified Agenda”).¹⁵

Lhamon’s announcement followed considerable known public pressures from members of Congress opposed to the 2020 Rule. For example, on May 22, 2020, 105 members of the U.S. House of Representatives sent a letter to Secretary DeVos demanding revocation of the 2020 Rule.¹⁶ On March 13, 2021, Speaker Nancy Pelosi introduced the “Equality Act,” which would effectively bar sex-specific competitive athletic sports for girls and women in high school and college.¹⁷ In response to these pressures, among others, ED initiated changes to the 2020 Rule.¹⁸

Title IX of the Education Amendments of 1972 was enacted by Congress to prohibit sex-based discrimination in educational programs or activities by entities that receive federal financial assistance, with certain limited exceptions. With great clarity, Title IX provides that “[n]o 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.”¹⁹ ED’s actions appear aimed at, *inter alia*, diminishing the due process protections afforded accused students and faculty at American colleges and universities, conflating Title IX’s clear sex-based protections²⁰ with elusive gender identity concepts, and

¹³ See <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

¹⁴ See <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

¹⁵ See <https://www.ed.gov/news/press-releases/statement-us-department-education-assistant-secretary-office-civil-rights-catherine-lhamon-title-ix-update-fall-2021-unified-agenda-and-regulatory-plan>.

¹⁶ See <https://speier.house.gov/cache/files/9/0/90be4af7-2f92-456f-9ae8-e6d5cbdb6aeb/54BA1D51D053DE655A66870419485BCD.letter-to-department-of-education-to-rescind-title-ix-rule.pdf>.

¹⁷ See <https://www.heritage.org/gender/heritage-explains/the-equality-act>.

¹⁸ Lauren Camera, “Education Department Begins Sweeping Rewrite of Title IX Sexual Misconduct Rules,” U.S. NEWS & WORLD REPORT (June 7, 2021), <https://www.usnews.com/news/education-news/articles/2021-06-07/education-department-begins-sweeping-rewrite-of-title-ix-sexual-misconduct-rules>.

¹⁹ 20 U.S.C. § 1681(a).

²⁰ Title IX was enacted primarily to ensure equal opportunities for women and girls through prohibitions against programs or activities that failed to protect those opportunities. In 1974, for example, Congress explicitly passed an amendment regarding women’s sports that required the issuance of regulations “with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.” SEN. CONF. REP. NO. 1026, 93rd Cong., 2nd Sess. 4271 (1974). In 1975, federal rules were promulgated (by the Department of Health, Education, and



effectively undermining the tremendous progress attained by girls and women in competitive high school and collegiate competitive athletics since Title IX's enactment in 1972.²¹

The public has an interest in knowing how communications from members of Congress and congressional staff may be affecting ED's Title IX enforcement efforts and policy agenda, particularly regarding the anticipated rescission of the 2020 Rule's due process safeguards for the accused. DFI is also concerned that changes to the 2020 Rule may imperil sex-based equal opportunities for girls and women to compete in sex-segregated competitive athletics, denying them the protections ensured by Title IX.²²

DFI thus seeks records of Congressional communications related to the formation and revision of ED's Title IX enforcement policies since November 3, 2020.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED, 34 C.F.R. Part 5 ("Availability of Information to the Public"), DFI makes the following request for records within your possession and/or control:

Requested Records

DFI requests that ED produce the following records within twenty (20) business days:

1. All records from any person or entity using an email address ending in mail.house.gov and senate.gov, including but not limited to electronic mail ("email"), texts, letters, memoranda, and other documentation to, from, or copying any and all ED officials (see Item 2), (particularly all ED officials within the Office of the Secretary, Office of the Deputy Secretary, Office for Civil Rights, Office of the General Counsel, Office of Communications and Outreach, Office of Legislation and Congressional Affairs) from November 3, 2020, through the date the search is conducted, which reference:
 - a. "Title IX"
 - b. "2020 Rule"
 - c. "DeVos Rule"
 - d. "Trump Title IX Rule"

Welfare) providing that schools "may operate or sponsor separate teams for members of each sex where selection for such teams is based on competitive skill" and permitted single-sex athletic teams if "equal athletic opportunity for members of both sexes" was provided. 34 C.F.R. § 106.41(b)-(c).

²¹ "Title IX and the Rise of Female Athletes in America," WOMEN'S SPORTS FOUNDATION (September 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/>.

²² EDUCATION AMENDMENTS ACT OF 1972, 20 U.S.C. §§ 1681-1688 (2018).



- e. “Title IX Regulations”
 - f. “TIX”
 - g. “T9”
 - h. “IX”
 - i. “9”
 - j. “sexual”
 - k. “assault”
 - l. “Clery”
 - m. “Candice”
 - n. “Jackson”
 - o. “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”
 - p. “Bostock”
 - q. “Notice of Interpretation”
 - r. “NOI”
 - s. “Gender identity”
2. The search for records described in Item 1 should be limited to “ED officials” employed in each of the following appointment categories:
- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
 - b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
 - c. “SES” (Non-Career Senior Executive Service)
 - d. “SES” (Career Senior Executive Service)
 - e. “SC” (Schedule C Confidential or Policymaking Positions)

Definitions

Absent contrary statutory directives, words and phrases contained herein should be accorded their usual, plain, and ordinary meaning. Please note the following statutory definition:

“**Records**” are defined at 44 U.S.C. § 3301(a)(1-2) as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them” and further “includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form, such as emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.



Identification and Production of the Requested Records

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor²³ if ED (1) created or obtained the requested materials, and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”²⁴ Upon request, ED must “promptly” make the requested records available to the requester.²⁵ Notably, covered agency records include materials provided to ED by both private and governmental organizations.²⁶ Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,²⁷ ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.²⁸ In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”²⁹

Upon receipt of this request, ED has twenty business days to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.³⁰

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian’s files by the custodian or representations by that likely custodian, but

²³ FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).

²⁴ *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

²⁵ 5 U.S.C. § 552(a)(3)(A).

²⁶ *Id.* at 144.

²⁷ 5 U.S.C. § 552(a)(3)(A)(i).

²⁸ *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

²⁹ 5 U.S.C. § 552(a)(3)(B).

³⁰ 5 U.S.C. § 552(a)(6)(A)(i).



should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian's possible deletion or modification of responsive records.

- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED's business operations. Responsive records include official business conducted on unofficial systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED's official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack. Failure to identify and produce records responsive to this request from such unofficial systems would constitute a knowing concealment by ED calculated to deflect its compliance with FOIA's requirements.
- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a "record" and avoiding unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested records (*e.g.*, if a particular email is clearly responsive to this request, the response to the request should include all other emails forming the email chain, to include any attachments accompanying the emails).
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA"³¹ and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.

³¹ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIH format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33 and 34 C.F.R. § 5.32(b)(1)(ii), DFI requests a waiver of all fees associated with this FOIA request for agency records.

Disclosure of the requested records is in the public interest.

Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public's understanding of ED's Title IX policies, which ED has indicated are about to undergo significant revisions and which policies are highly relevant to students, faculty, and taxpayers. Disclosure of the requested materials will illuminate ED's Title IX enforcement and planning (*e.g.*, rulemaking and enforcement decisions). Further, the requested information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

Provision of the requested records will not commercially benefit DFI (a nonprofit, nonpartisan organization interested in the transparency of ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in ED's operations and governance.

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various public forums).

Federal law makes clear that when the disclosure is in the public interest and the information contained within the disclosed records is not primarily in the commercial interests of the requester (here, DFI), statutory fee waiver is appropriate.



DFI is a representative of the news media.

In addition to the fee waiver request based upon the public interest, DFI also requests a fee waiver on the basis that DFI is a **representative of the news media**, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).

FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”³² DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation’s largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various public forums).

As a qualified non-commercial public education and news media requester with demonstrated ability to review and analyze publicly-available information and to provide insight regarding that information, DFI is thus entitled to a fee waiver under FOIA as a representative of the news media.

Conclusion

The subject of this request regards identifiable operations and activities of ED and, more specifically, the enforcement and anticipated modification of its Title IX policies. Provision of the requested records will meaningfully inform the general public about significant developments in ED civil rights policies affecting students, faculty, and the public. As noted above, ED’s Title IX enforcement policies have previously resulted in greater due process rights for students and faculty and vastly improved equal opportunities for girls and women in high school and collegiate competitive athletics, among other policy impacts. These are significant issues with tremendous impact on the general public and worthy of transparency in service of the public’s right to know.

DFI is an independent 501(c)(3) nonprofit organization without a commercial purpose primarily engaged in the dissemination of information about government policies to the public. DFI is

³² See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



engaged in the collection, analysis, and dissemination of information to educate the public about government policies that impact the civil and constitutional rights of American families, students, entrepreneurs, and workers. DFI actively publishes information and related analyses on its public website and promotes access to that information and analyses on social media platforms, including but not limited to distribution via Facebook and Twitter.

DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding ED's Title IX enforcement policies and the efforts of outside interest groups impacting ED's planned revisions of Title IX regulations.

Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at paul.moore@dfipolicy.org.

Sincerely yours,

/s/ Paul R. Moore

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.