

June 23, 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: EXPEDITED PROCESSING REQUEST FOR DFI'S TITLE IX-RELATED FOIAs:**

22-02221-F – Submitted March 14, 2022 – 20 Day Notification - April 8, 2022  
22-02294-F – Submitted March 17, 2022 – 20 Day Notification – April 20, 2022  
22-02361-F – Submitted March 28, 2022 – “In Process”  
22-02365-F – Submitted March 28, 2022 – 20 Day Notification – April 27, 2022  
22-02366-F – Submitted March 29, 2022 – “In Process”

Dear FOIA Public Liaison:

Today, on the 50<sup>th</sup> anniversary of the enactment of Title IX,<sup>1</sup> which prohibited sex-based discrimination in order to protect the rights of girls and women, the U.S. Department of Education (“ED”) announced its notice of proposed rulemaking<sup>2</sup> (“NPRM”) to its Title IX regulations. The proposed regulations would diminish the due process and privacy protections afforded accused students and faculty at American colleges and universities and would conflate Title IX’s clear sex-based protections<sup>3</sup> with elusive gender identity concepts. ED’s proposed regulations may lay the

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<sup>1</sup> 20 U.S.C. § 1681(a).

<sup>2</sup> See <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>.

<sup>3</sup> 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, 93<sup>rd</sup> Cong., 2<sup>nd</sup> Sess. 4271 (1974). In 1975, federal rules were promulgated (by the Department of Health, Education, and 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).



foundation for undermining the sex-based distinctions that have allowed biological girls and women to compete against other biological girls and women in scholastic athletic competitions.<sup>4</sup>

ED had anticipated today's announcement for more than a year. On April 6, 2021, ED's Office for Civil Rights ("OCR") announced a "comprehensive review" of the current Title IX regulations ("2020 Rule"),<sup>5</sup> including an anticipated notice of proposed rulemaking ("NPRM").<sup>6</sup> 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."<sup>7</sup> On December 10, 2021, OCR announced that ED would issue an NPRM regarding Title IX (to revise the 2020 Rule's implementing regulations) by April 2022.<sup>8</sup>

The Defense of Freedom Institute for Policy Studies, Inc. ("DFI"), submitted five FOIA requests (identified *supra* and incorporated in full by reference<sup>9</sup>) for records related to Title IX to ED between March 14 and March 29, 2022. In April, ED issued three "20-Day Notification" letters to DFI, indicating that ED intended to complete the requests as promptly as possible and to provide records on a rolling basis as the records became available. Two of these requests continue to be assigned an "In Process" status by ED. At this time, ED has failed to provide a single record to DFI in response to DFI's five Title IX-related FOIA requests.

DFI's five Title IX-related FOIA requests, all submitted to ED in March 2022, were for the following records:

- **22-02221-F** Records regarding ED's communications with particular interest groups that have publicly demanded the changes to Title IX implementing regulations that ED has announced today

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<sup>4</sup> "The Department plans to issue a separate notice of proposed rulemaking to address whether and how the Department should amend the Title IX regulations to address students' eligibility to participate on a particular male or female athletics team." See <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>.

<sup>5</sup> 34 C.F.R. Part 106.

<sup>6</sup> See <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

<sup>7</sup> See <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

<sup>8</sup> 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>.

<sup>9</sup> This request is for the expedited processing of each of the referenced FOIA requests previously submitted to ED by DFI and incorporates the content of each of those FOIA requests by reference (and to which FOIA request(s) submissions ED has full access).



- **22-02294-F** Records of ED’s Congressional communications (Members and staff) regarding proposed revisions to the Title IX implementing regulations that ED has announced today
- **22-02361-F** Records of ED’s communications with teachers’ unions regarding proposed revisions to the Title IX implementing regulations that ED has announced today
- **22-02365-F** Records of ED’s communications with particular K-12 interest groups regarding proposed revisions to the Title IX implementing regulations that ED has announced today
- **22-02366-F** Records of ED’s communications with particular higher education interest groups regarding proposed revisions to the Title IX implementing regulations that ED has announced today

The public has an urgent interest in knowing how the outside interest groups identified in DFI’s FOIA requests and members of Congress (and Congressional staff) have impacted ED’s proposed massive revisions of Title IX’s historical protections. These policies will deliberately and undeniably impact the rights of millions of American students, families, and taxpayers.

ED’s failure to produce the records in a timely manner is of tremendous concern to DFI, particularly given ED’ announcement today which *necessitates DFI’s request for expedited processing of the requested records*. The right of the American people to the records DFI has requested is critical to informed comments during the 60-day commenting period announced by ED. Failure to timely provide the requested records effectively denies commenters information that may be highly relevant to ED’s proposed rulemaking and informed commenting.

**DFI thus seeks ED’s expedited processing of records related to each of DFI’s Title IX-related FOIAs (identified above).** As referenced in each of DFI’s FOIA requests, it welcomes rolling production. DFI has also acknowledged that the responsive records may be voluminous but that the volume of potential records is driven by the sheer scope of ED’s proposed regulatory changes.

### **Expedited Processing Request**

I, the undersigned, hereby certify to the truth of the circumstances described herein, pursuant to the requirements of 35 C.F.R. § 5.21(i)(2)(iii):

As discussed *supra*, ED has today announced dramatic changes to the implementing regulations of Title IX, which would impact the due process and privacy rights of students and faculty, victims and the accused, re-define sexual identity to encompass gender identity, and may eventually undermine the right of biological girls and women to compete in scholastic athletic competitions against other biological girls and women. Implementation of ED’s proposed regulations, as drafted, will be enormously consequential to tens of millions of American students, families, and



taxpayers. Access to the requested records will better inform commenters who choose to respond to ED's proposed regulations and the general public.

Therefore, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(B), there is an urgent need for DFI to inform the public about actual and alleged Federal Government activity, thereby justifying *expedited processing* of DFI's five Title IX-related FOIA requests. As discussed *infra*, DFI is primarily engaged in disseminating such information to inform the public about actual and alleged Federal Government activities such as those policy and rulemaking activities by ED (described in detail herein and in the five FOIA requests). In addition, pursuant to 35 C.F.R. § 5.21(i)(2)(i)(C), ED may find that "other circumstances" demonstrate a compelling need for expedited processing, to include the considerable impact of ED's proposed Title IX rulemaking and policies (as described *supra*) and the involvement in the formulation of those policies of various outside interest groups which appear to have had considerable impact on ED's proposed regulations.

ED has had months to retrieve, consider, and produce the requested records. It has failed to provide a single record, even on a rolling basis. *Now, with the issuance of the NPRM and the associated comment period, expedited provision of the requested records is necessary for the public to be meaningfully informed (and so informed in a timely manner), particularly given the 60-day comment period for the NPRM.*

I, the undersigned, hereby certify to ED that the circumstances described herein are true and accurate to the best of my knowledge and belief, so justifying expedited processing of this request for the records identified in the five referenced DFI FOIA requests, as required by 35 C.F.R. § 5.21(i)(2)(iii).

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 requests *expedited provision* of the records within your possession and/or control identified in response to the above-referenced FOIA requests (and, by reference, this request for expedited provision of the requested records incorporates the entire contents of DFI's five Title IX-related FOIA requests but amends those requests by seeking *expedited provision* of the requested records).

### **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 requestor<sup>10</sup> 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."<sup>11</sup> Upon request, ED must "promptly" make the requested records available to the requester.<sup>12</sup> Notably,

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<sup>10</sup> 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).

<sup>11</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>12</sup> 5 U.S.C. § 552(a)(3)(A).



covered agency records include materials provided to ED by both private and governmental organizations.<sup>13</sup> 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,<sup>14</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>15</sup> 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.”<sup>16</sup>

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.<sup>17</sup>

**Disclosure of the requested records is in the public interest.**

I further certify to ED that expedited 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 proposed Title IX implementing regulations that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate ED’s policies and planning (*e.g.*, rulemaking). 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.

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<sup>13</sup> *Id.* at 144.

<sup>14</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>15</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>16</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>17</sup> 5 U.S.C. § 552(a)(6)(A)(i).



DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums).

As an organization primarily engaged in the dissemination of information to inform the public about actual or alleged Federal Government activities and the urgent (i.e., timely) need to so inform the public, **DFI satisfies the criteria for expedited processing of its request.**

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.**

I further certify to ED that, in addition to the fee waiver request based upon the public interest (as described in DFI's FOIA requests identified *supra*), 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.”<sup>18</sup> 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.

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<sup>18</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



## Conclusion

The subject matter of the five Title IX-related FOIA requests submitted by DFI in March 2022 regards identifiable operations and activities of ED and, more specifically, the involvement of specific outside interest groups and members of Congress (and staff) in the formulation of ED's proposed Title IX implementing regulations, announced today. Expedited processing of the requested records will meaningfully inform the general public about significant developments in important ED policies and rulemaking, which affect millions of American students, their families, and taxpayers. These are significant policy issues with tremendous impact on the general public and worthy of transparency in service of the public's right to know (now, in light of ED's issuance of the NPRM and 60-day comment period, an urgent 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 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 the expedited provision of records pursuant to FOIA, which will provide important information to the American people regarding the formation and execution of ED's policies and related rulemaking, which are of tremendous interest and consequence to American students, families, and taxpayers.

Please contact me immediately if this request for expedited processing is not granted.

If you have any questions or I can further clarify this request, please contact me at your earliest convenience at [paul.moore@dfipolicy.org](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

*/s/ Paul R. Moore*

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.