DFI Defense of Freedom Institute

September 13, 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: Records Regarding the Department's Communications with the Office of the Federal Register Concerning the Title IX NPRM (Agency/Docket Number: ED-2021-OCR-0166)
(DFI FOIA No. 100-31-22)

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. DFI includes former U.S. Department of Education appointees who are experts in education law and policy and the operation of the Department. 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.

The Department has proposed an unprecedented transformation of Title IX's longstanding protections on matters of considerable public concern

On July 12, 2022, the U.S. Department of Education's ("ED" or "Department") Office for Civil Rights ("OCR") published a Notice of Proposed Rulemaking ("NPRM") "to provide greater clarity regarding the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[1] The Department's proposed regulations purport to act under Title IX's statutory authority, which simply and unambiguously prohibits discrimination on the basis of sex in educational programs receiving federal financial aid.[2] The comment period on the NPRM ended on September 12, 2022.

[1] 87 Fed. Reg. 41,390 (Jul. 12, 2022) ("NPRM").
[2] Education Amendments of 1972, §§ 901-907, 20 U.S.C. §§ 1681–1686 (1976).

Now, *inter alia*, the Department's NPRM would effectively redefine "sex" to include additional categories that Congress did not include in Title IX and would strip important procedural protections from students, teachers, and employees who have been accused of sex-based harassment. It would vastly expand potentially impermissible conduct (to include *subjectively* offensive conduct) and would severely chill freedom of speech at America's schools, colleges, and universities.

The NPRM constitutes an unprecedented reinterpretation of Congress's Title IX anti-discriminatory sex-based protections, created primarily to ensure equal educational opportunities for girls and women. The Department's rulemaking would usurp Congress's role by adding entirely new forms of discrimination to Title IX, including gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions.[3]

The Department correctly describes Title IX as "landmark civil rights law that has opened the doors for generations of women and girls."[4] Yet, the NPRM proposes massive changes to Title IX that would undermine those protections for female students. Immense public interest in the Department's proposed rulemaking is not surprising.

The Department's previous Title IX rulemaking prompted considerable public attention

On May 19, 2020, under the leadership of Secretary Betsy DeVos, the Department issued regulations under its Title IX rulemaking authority ("2020 Rule") that, for the first time, recognized that sexual harassment (including sexual assault) is a form of sex discrimination prohibited by Title IX, required recipients of federal education funding to respond to reports of sexual harassment by offering supportive measures to alleged victims ("complainants"), and outlined a grievance process for investigating and evaluating complaints of sexual harassment under Title IX that is carefully calibrated to require recipients to offer equitable procedural protections to both complainants and those accused of such harassment ("respondents").

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[3] In sharp contrast to gender identity, sexual orientation, sex stereotypes, and sex characteristics, pregnancy or related conditions are appropriately and reasonably encompassed by Congress's sex-based protections when it enacted Title IX (although DFI is very concerned with the Department's unclear view of what may constitute "reasonable modifications," pursuant to proposed 34 C.F.R. § 106.40(b)(3)–(4), which would require educational institutions to provide such modifications to their education programs or activities for students [in addition to private lactation stations, separate from restrooms]).

[4] On June 23, 2022, the U.S. Department of Education issued a press release on the 50th anniversary of Title IX, which it described as "the landmark civil rights law that has opened doors for generations of women and girls . . ." *See* https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

The issuance of the 2020 Rule[5] came nearly 18 months after the Department's publication of its proposed rules ("2018 NPRM") and involved the painstaking review of and response to over 124,000 comments from the public[6] that resulted in nearly 550 pages of explanation, analysis, revisions, and justification of the rule's provisions.

The official government record of comments submitted in response to the NPRM

As the Department's 2020 Rule experience demonstrated, Title IX rulemaking is incredibly likely to prompt massive public interest. An NPRM that proposes a radical reinterpretation in the meaning and application of Title IX and includes redefining "sex" to include gender identity, sexual orientation, sex stereotypes, and sex characteristics, is quite likely to result in an even larger volume of public comments. The NPRM's sweeping regulatory proposal has, unsurprisingly, received considerable national media coverage (both for and against the NPRM).

It was then not surprising when POLITICO reported (on September 6, 2022) that the NPRM had already drawn "more than 349,000" comments by the public, with six remaining days for the public to offer additional comments.[7] POLITICO'S reporter properly cited the official rulemaking docket, which that day indicated more than 349,000 comments had been received by the federal government in response to the proposed rule.

Something strange then occurred on the same official rulemaking docket: by September 12, 2022, six days later, the same rulemaking docket indicated that only 210,594 comments had been received – indicating a decrease in comments received of nearly 140,000.[8] The same official rulemaking docket indicated on September 8, 2022, that just over 163,000 comments had been received (a decline in received comments from two days before of approximately 186,000 comments.

The famed British economist, John Maynard Keynes, is believed to have stated that "it is better to be roughly right than precisely wrong," but the wildly ricocheting tally of comments officially submitted in response to the NPRM defies all logic.

The public has a right to know why the officially published docket numbers of comments filed in response to the Department's NPRM apparently varied widely, particularly given the importance of the NPRM to America's students, teachers, parents, and taxpayers.

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[5] 85 Fed. Reg. 30026 (Aug. 14, 2020).
[6] 2020 Rule at 30,055.
[7] Bianca Quilantan, "Cardona's Title IX rule draws more than 349K comments," POLITICO (Sept. 6, 2022), https://www.politico.com/newsletters/weekly-education/2022/09/06/cardonas-title-ix-rule-draws-more-than-349k-comments-00054840.
[8] *See* https://www.regulations.gov/docket/ED-2021-OCR-0166.

The NPRM is a matter garnering considerable public interest because it involves the imposition of radically different Title IX regulatory policies on America's schools, colleges, and universities

The NPRM would:

- Fundamentally alter Title IX's meaning and purpose by redefining the binary definition of "sex" to include additional protected classes never envisioned by Congress when it enacted Title IX in 1972;

- Impose the Department's current policy preferences by redefining "sex" to include gender identity, sexual orientation, sex stereotypes, sex characteristics, and pregnancy or related conditions, contrary to Title IX's clear requirements;

- Infringe on parental rights, in defiance of the PPRA, FERPA, and the Department of Education Organization Act, and without meeting the requirement that the Department conduct a Family Policymaking Assessment prior to implementing its proposed regulatory scheme;

- Fail to assure the reasonable privacy and safety interests of female students (in the use of restrooms, locker rooms, and other intimate facilities), as ensured by Title IX and various State laws;

- Undermine the rights of female students to compete against other female students in scholastic athletic competitions by requiring that educational institutions facilitate transgender (*i.e.*, biological male) participation in those female-only athletic activities and programs;
- Misapply the U.S. Supreme Court's *Bostock v. Clayton County*[9] decision and fail to address the Court's decision limiting excessive agency rulemaking in *West Virginia v. EPA*;[10]

- Violate the Administrative Procedure Act's ("APA") requirement that the Department's rulemaking not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

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[9] 140 S. Ct. 1731, 1753 (2020). The *Bostock* Court held that Title VII's employment sex-based discrimination prohibition included the employee's status as homosexual or transgender but expressly did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination."

[10] 597 U.S. __ (2022).

- Fail to justify its rulemaking with "good reasons" and demonstrate its permissibility under the statute, despite decades of serious reliance interests by hundreds of thousands of American educational institutions;

- Redefine sexual harassment to include conduct that is evaluated objectively *and* subjectively to determine whether a hostile environment has been created;

- Elevate Title IX Coordinators into all-powerful "Campus Commissars" with the obligation and unchecked authority to unceasingly monitor and prevent any activities or potentially offensive speech that he or she deems to be incompatible with the Department's newly enacted prohibitions;

- Eviscerate the procedural rights of accused students, teachers, and employees in sexual discrimination proceedings by eliminating the right to live hearings and cross-examination of witnesses and restricting access to review the available evidence;

- Severely chill constitutionally protected free speech that may be subjectively offensive to other students;

- Severely diminish fundamental fairness for accused students, teachers, and employees by permitting a return to the "single-investigator" model, allowing the same person to serve as investigator, presider, and decisionmaker in sexual discrimination proceedings;

- Lower the required standard of proof for "conviction" of an accused student, teacher, or employee to a preponderance of the evidence standard;

- Allow the decisionmaker to arbitrarily block any questions that he or she deems to be "unclear" or "harassing";

The NPRM's proposed changes are truly dramatic and the public would be expected to submit a considerable volume of comments on it.

The NPRM will diminish procedural safeguards for students, teachers, and educational institution employees

Although the 2020 Rule has only been effective since August 2020, the NPRM now abruptly shifts course to sweep away in a single stroke the balanced and important protections the 2020 Rule offered complainants and respondents in sexual harassment proceedings merely two years after their issuance. In some cases, as with the return of the "single investigator" model, the NPRM

would simply turn back the clock and pretend that the 2020 Rule never happened, discounting any reliance interest recipients placed on the clear path set out by the previous administration. In other cases, as with live hearings and access to evidence, the Department's proposed rule either eliminates or waters down the rights protected in the 2020 Rule to the extent they are meaningless, often citing the need for discretion among recipients but ignoring the fact that the critical due process rights that benefit both complainants and respondents should be beyond the reach of such discretion.

The NPRM delivers the ultimate blow to the 2020 Rule's due process protections by *instructing* recipients to use a "preponderance of the evidence" standard—the lowest standard commonly offered in the U.S. justice system—for sexual harassment complaints unless it uses a higher standard in all other "comparable proceedings," thus all but ensuring that recipients will use the lower standard.

The proposed rule would turn Title IX sexual harassment proceedings into mere theatre, impose needless suffering on complainants and respondents in these proceedings, and result in costly uncertainty for recipients about what is required in such proceedings, all of which conflict with sound principles of common-sense and experience, as well as the constitutional and legal obligations of recipients toward their students and employees. In short, the Department should withdraw its proposed rule, allow recipients to continue to implement the requirements of the 2020 Rule, and abandon its planned assault on the due process rights of those involved in Title IX sexual harassment proceedings.

The NPRM rewrites Congress's intent when it enacted Title IX, encroaching on Congress's legislative function as the representatives of the American people

Congress expressly enacted Title IX to prevent sex-based discrimination, not discrimination based on gender identity, sexual orientation, sex stereotypes, or sex characteristics. To do so, it would have had expressly to include those additional protections or statutory text granting the Department with clear congressional authority to adopt regulations to do so. It did neither, affirming the "outer limits" of its statutory intent.

In defiance of Congressional intent, the NPRM proposes to radically expand the meaning of "sex" encompassed in Title IX's protections, even though Congress did not and could not delegate such an important policy decision, of vast economic and political consequence, to the Department without a clear, unambiguous directive from Congress to do so. Congress made no such delegation to the Department.

The NPRM fails to include definitions of its key terms, despite the significance of the meaning of those terms to the public

In an act of remarkable omission, the Department chose not to include proposed definitions of key terms in the NPRM. Those terms include gender identity, sexual orientation, sex stereotypes, and sex characteristics.

Some guidance on what may constitute "gender identity" has been provided by the Biden administration's leading gender identity health expert. Admiral Rachel Levine,[11] the biologically male Assistant Secretary of Health at the U.S. Department of Health and Human Services ("HHS") who identifies as a woman, maintains an official biography that emphasizes a focus "on the intersection between mental and physical health, treating children, adolescents, and young adults."[12]

Under Admiral Levine's leadership, HHS defines "gender identity" as "[o]ne's internal sense of self as man, woman, both or neither."[13] Gender identity is, according to HHS, an internal sense of gender—possibly a man, a woman, both, or neither.

Admiral Levine has long expressly advocated the provision of puberty blockers, cross-sex hormones, mastectomies, and castrations for sex reassignment "transitions" for youth.[14] During the Admiral's confirmation hearings, Levine refused to answer whether "minors are capable of making such a life-changing decision as changing one's sex" and whether the government should be permitted to "override the parent's consent [in order] to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia."[15]

Under Admiral Levine's leadership, gender identity guidance has been forthcoming. For example, HHS recently issued guidance, "Gender-Affirming Care and Young People," stating that "[g]ender-affirming care is a supportive form of healthcare" and "may include medical, surgical, mental health, and non-medical services for trans gender and nonbinary people."[16] It advocates

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[11] *See* https://www.hhs.gov/about/leadership/rachel-levine.html.
[12] *Id*.
[13] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.
[14] *See* Rachel Levine, Address at Franklin & Marshall College, "It's a Transgeneration: Issues in Transgender Medicine" (Jan. 19, 2017), *available at* https://www.fandm.edu/common-hour/common-hour-archive/2017/01/30/it-s-a-transgeneration-issues-in-transgender-medicine.
[15] Madeleine Kearns, *The Absurd Criticism of Rand Paul's Rachel Levine Questioning*, NAT'L REV., Feb. 26, 2021, https://www.nationalreview.com/2021/02/the-absurd-criticism-of-rand-pauls-rachel-levine-questioning/?gclid=CjwKCAjwx7GYBhB7EiwA0d8oewgUsxWiD8lk5iSpuLpRFefGRxksoc3QtYyuI7ZOhdWjMlxY3Xn-ZRoC-wsQAvD_BwE.
[16] *See* https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf.

that "*early gender-affirming care is crucial to overall health and well-being as it allows the child or adolescent* to focus on social transitions and can increase their confidence . . ."[17]

Given the failure of the Department to provide definitions for the NPRM's key terms, such as gender identity," and the Biden administration's leading health expert's pronouncements on gender identity and "gender-affirming care," the public would be expected to have a heightened interest in the NPRM's contents and a correspondingly high volume of submitted comments.

The NPRM would reverse nearly fifty years of the Department's own Title IX guidance, despite serious reliance interests on that guidance by educational institutions, many of which are likely to submit comments on the NPRM

For nearly five decades, the Department's guidance to schools, colleges, and universities regarding the meaning and purpose of Title IX remained almost entirely consistent, through administrations of both political parties. The Department notes as much in the NPRM, where it "acknowledges that the proposed regulations deviate from some past agency statements on Title IX's coverage of discrimination based on sexual orientation and gender identity."[18]

The Department's own interpretive guidance regarding Title IX had been remarkably consistent, excepting the period from May 13, 2016, through February 22, 2017. Educational institutions across America have seriously relied on that consistent guidance. But now, with the introduction of this NPRM, schools, colleges, and universities are once more on notice of a return, based not in statute but in policymaking executive orders, to OCR's novel interpretation previously announced in its guidance to educational institutions on May 13, 2016.

The Department's radically transformative reading of Title IX, announced in the NPRM, is a recent phenomenon, beginning faintly in 2010, imposed more directly in 2016 (mere months before the presidential election), reversed by OCR in 2017, and reimposed in 2021.

- On **October 26, 2010**, OCR issued a Dear Colleague letter which asserted that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[19] OCR also acknowledged in the same sentence that "Title IX does not prohibit discrimination based solely on sexual orientation . . ."[20] Without creating a new prohibited class of victims, OCR simply affirmed that the Title IX's sex-based anti-discriminatory provisions apply to all students—whatever additional characteristics they might possess.

[17] *Id.*
[18] NPRM at 41,391.
[19] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[20] *See id.*

- On **April 4, 2011**, OCR discreetly referenced gender-based protections in a footnote to supplemental guidance: "Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment. Gender-based harassment is discussed in more detail in the 2001 Guidance, and in the 2010 Dear Colleague letter on Harassment and Bullying . . ."[21]

- On **April 29, 2014**, OCR issued additional guidance in its "Questions and Answers on Title IX and Sexual Violence" and asserted that Title IX's sex-based prohibitions included "claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."[22] On September 22, 2017, OCR rescinded this guidance, citing the imposition of "regulatory burdens without affording notice and the opportunity for public comment."[23]

- On **May 13, 2016**, OCR (in coordination with the Department of Justice's ("DOJ") Civil Rights Division) issued a Dear Colleague letter[24] instructing schools and universities that Title IX's sex-based prohibitions also included discrimination based on gender identity (which it defined as an "internal sense of gender"[25]). On February 22, 2017, OCR (and DOJ's Civil Rights Division) rescinded this guidance, citing the lack of a notice and comment opportunity and insufficient legal analysis explaining how the newfound protection for gender identity was consistent with Title IX's express language.[26]

- On **February 22, 2017**, OCR (and DOJ) issued a letter withdrawing the guidance it had issued in its May 13, 2016 Dear Colleague letter, while noting that "withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment."[27]

- On **June 23, 2021**, OCR issued a Notice of Interpretation announcing that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and

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[21] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html at n.9.
[22] *See* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[23] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
[24] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf.
[25] *See id.*
[26] *See* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.
[27] *See* https://www.cmu.edu/title-ix/2-22-17-guidance_letter1.pdf.

gender identity"[28] (on July 15, 2022, a federal district court preliminarily enjoined the Department from enforcing this guidance in twenty states[29]).

From June 23, 1972, until May 13, 2016, and from February 22, 2017, until June 23, 2021, the Department did not interpret Title IX to include sexual orientation and gender identity. The arbitrary and capricious shift of position taken by the Department in the NPRM reveals that it had somehow miraculously failed, through administrations of both political parties, to discover the additional categories of Title IX protections for nearly five decades. Before June 23, 2022, the Department had not even attempted to promulgate a regulatory scheme to transform Title IX's protections to expand the scope of Title IX in the manner contemplated by the NPRM.[30]

The Department's fundamental reinterpretation of Title IX is certain to provoke widespread public comments on the NPRM.

The American people have a right to reliable information being provided by the federal government, particularly regarding tracking the number of comments received through the government's official rulemaking docket (portal). Manipulation of the apparent numbers of comments submitted could conceivably diminish the perceived need by concerned citizens considering whether to submit a comment.

Based on unbiased media reports, it appears that those numbers may be unreliable and a cause for tremendous concern by the American people.

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 provision of records within your possession and/or control:

Requested Records

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

1. All communications, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation between ED officials (see "Custodians" *infra*) and POLITICO reporters Bianca Quilantan, Juan Perez Jr,

[28] *See* https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf.
[29] *See State of Tenn. et al. v. U.S. Dep't of Educ*., No. 3:21-cv-308 (E.D. Tenn. Jul. 15, 2022).
[30] This includes Title IX interpretation by the Department's predecessor agency, the U.S. Department of Health, Education, and Welfare, which published Title IX's implementing regulations at 45 C.F.R. Part 86, effective July 21, 1975. *See* https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-86.

Michael Stratford, and any other POLITICO employees from June 22, 2022, through the date the search is conducted. Their email addresses are:

a. bquilantan@politico.com
b. jperez@politico.com
c. mstratford@politico.com
d. Any other email addresses ending in politico.com

2. All internal communications of ED officials (see "Custodians" *infra*), including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation of ED officials, from June 22, 2022, through the date the search is conducted, which in any way reference POLITICO'S September 6, 2022, report entitled "Cardona's Title IX rule draws more than 349K comments," by Bianca Quilantan, accessible at https://www.politico.com/newsletters/weekly-education/2022/09/06/cardonas-title-ix-rule-draws-more-than-349k-comments-00054840.

3. All internal, non-deliberative communications, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation of ED officials (see "Custodians" *infra*) which reference "Politico" or "Bianca Quilantan" or "Politico Reporter" or "Title IX" or "NPRM" or "Public Comments" or "Rulemaking Docket" or "ED-2021-OCR-0166" or "Office of the Federal Register" or "National Archives" from June 22, 2022, through the date the search is conducted.

4. All records to or from any person or entity using an email address ending in fedregister.gov, archives.gov, and nara.gov, including but not limited to electronic mail ("email"), email attachments, texts, letters, memoranda, and other documentation with ED officials (see "Custodians" *infra*) from June 22, 2022, through the date the search is conducted, which reference "Title IX," or "NPRM" or "Public Comment" or "Rulemaking Docket" or "ED-2021-OCR-0166" or "Politico" or "Bianca Quilantan."

Custodians

The search for records described in Items 1-4 should be limited to "ED officials" within the Office of the Secretary, Office of the Deputy Secretary, and the Office for Civil Rights, who are classified as any of the following or referenced with the following job titles:

a. "PAS" (Presidential Appointments Requiring Senate Confirmation)
b. "PA" (Presidential Appointments Not Requiring Senate Confirmation)
c. "NC-SES" (Non-Career Senior Executive Service)
d. "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 requestor[31] 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."[32] Upon request, ED must "promptly" make the requested records available to the requester.[33] Notably, covered agency records include materials provided to ED by both private and governmental organizations.[34] 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,[35] ED must conduct a search calculated to find responsive records in ED's control at the time of the request.[36] 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."[37]

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

[31] 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).
[32] *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).
[33] 5 U.S.C. § 552(a)(3)(A).
[34] *Id*. at 144.
[35] 5 U.S.C. § 552(a)(3)(A)(i).
[36] *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).
[37] 5 U.S.C. § 552(a)(3)(B).

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.[38]

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 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).

[38] 5 U.S.C. § 552(a)(6)(A)(i).

- 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"[39] and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.

- 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 the official NPRM comment submission process and recordkeeping on the federal government's rulemaking docket involving important ED policy matters that are highly relevant to the interests of students, families, teachers, and taxpayers. Disclosure of the requested materials will illuminate ED's policies 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).

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

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, a March 2022 analysis of DOJ policies distributed by a leading news magazine, multiple widely-published analyses and news stories involving recent ED policy announcements regarding the student loan repayment program and Title IX proposed rulemaking. DFI personnel also frequently offer commentary and analyses on radio and television 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."[40] 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

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

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 the communications of particular Departmental personnel with the Office of the Federal Register and/or National Archives regarding sizable fluctuations in the official rulemaking docket tally involving the important NPRM which affects policy matters that are highly relevant to the interests of students, families, teachers, and taxpayers. Provision of the requested records will meaningfully inform the general public about significant developments in wide-ranging ED policies and rulemaking, which affect millions of American students, 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.

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 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 to students, families, and taxpayers.

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.