

Congress of the United States
Washington, DC 20515

June 11, 2021

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Dear Secretary Cardona,

Thank you for your leadership in ensuring that all students can pursue an education with safety and dignity. As Members of Congress, we have long voiced our concerns about the final rule issued by the previous Administration prescribing how K-12 schools and postsecondary institutions must respond to sex-based harassment under Title IX of the Education Amendments of 1972 (Title IX). As you work to ensure that schools are providing students with educational environments free from discrimination, we urge you to consider the following concerns about the current regulations and recommendations for restoring and strengthening Title IX protections.

Concerns with 2020 Final Rule Entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”

Unfortunately, the Trump Administration’s Title IX rule that was finalized in 2020 made schools more dangerous, infringed upon survivors’ rights to equal access to an education, and was contrary to the letter and spirit of the landmark civil rights law.

Amid a global pandemic, these regulations overburdened already-strained schools by gutting protections for survivors and limiting the circumstances in which schools can respond to and effectively address sexual violence. Specifically, these changes:

- Subject students in higher education to relive their assault with live hearings and direct cross-examination by a harasser’s advisor of choice;
- Impose bizarre and uniquely burdensome rules around the location where a student must be assaulted and whom they must report to in order to avail themselves of their civil rights. As a result, students sexually assaulted off campus or harassed online may be denied protections, even if students at the same school who suffered from other types of harassment or assaults off campus or online are protected;

- Forbid schools from investigating many complaints of sexual violence, such as if a victim drops out of school and is not planning to re-enroll, or transfers to another school, before filing a complaint. Given that one in three student survivors drops out of college, this restriction may have an outsized impact;
- Allow unnecessary delays on investigations;
- Limit meaningful supportive measures for victims; and,
- Narrow the definition of sexual harassment to impose a more burdensome standard for students who are sexually harassed than for students who experience other types of harassment and for employees who are sexually harassed

Recommendations for a Biden Title IX Rule

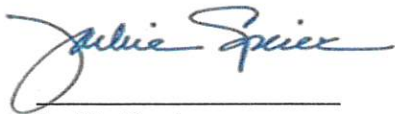
Instead of discouraging survivors from coming forward and enabling a permissive environment for sexual harassment, the Department of Education should pursue regulations that restore longstanding protections and strengthen Title IX. While institutions should have flexibility to design fair and equitable procedures, basic guardrails should be in place to safeguard students' civil rights and promote equality. Specifically, we encourage the Department to promulgate changes that:

- Restore the definition of sexual harassment as unwelcome sexual conduct that includes, but is not limited to, quid pro quo harassment;
- Acknowledge that sex-based harassment includes sexual harassment, dating violence, domestic violence, sex-based stalking, and harassment based on sexual orientation, gender identity, gender expression, parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
- Ensure fair disciplinary proceedings by requiring schools to use the preponderance of the evidence standard consistent with the standard applied in civil rights lawsuits and in the Department of Education's Office for Civil Rights' investigations, and undo the regulation that prohibits schools from considering any oral or written statements by a party or witness who does not submit to direct, live cross-examination;
- Require schools to respond to allegations of sex-based harassment promptly and effectively by clarifying that institutions must:
 - Address sex-based harassment that may create a hostile environment in their program or activity, regardless of where it occurred;
 - Provide supportive services and accommodations to complainants expeditiously;
 - Respond to harassment that they know or should know about, as well as any sex-based harassment by employees that occurred in the context of a school's program or activity;
- Develop robust protections against retaliation by defining prohibited retaliation to include, but not be limited to:
 - Punishment of the complainant for collateral misconduct such as alcohol or drug use or consensual sexual activity that is disclosed during the course of the investigation;
 - Punishment of the complainant for false reports based solely on the school's conclusion that there wasn't sufficient evidence to support a finding of harassment;
 - Punishment of the complainant for discussing the events that gave rise to the sex-based harassment report;

- Allow institutions to dismiss, without a full investigation, complaints that are plainly retaliatory, such as retaliatory counter-complaints.

While this is not an exhaustive list of recommended changes, it is a starting point for advancing student safety and protecting students' right to an education free from sex-based harassment as Title IX requires. Title IX regulations should prohibit sex discrimination, not enable it. As such, we are supportive of your efforts to expeditiously revise the previous Administration's final rule and stand ready to assist your efforts.

Sincerely,



Jackie Speier
Co-Chair
Democratic Women's Caucus



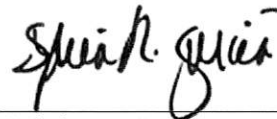
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