

Thank you for the opportunity to comment on the Department of Education’s Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Agency Docket Number: ED-2021-OCR-0166).

For over 25 years, the American Council of Trustees and Alumni (ACTA) has promoted academic freedom, academic excellence, and accountability at America’s colleges and universities. After reviewing the proposed regulations, it is clear that the Office for Civil Rights intends to undo the improvements made to existing Title IX guidance by the 2020 amendments. It is imperative that the Department of Education consider academic freedom and freedom of speech as it continues to formalize new regulations. These principles are the lifeblood of higher education and of a vibrant democracy.

Whereas the 2020 amendments to 34 C.F.R. § 106 properly aligned Title IX’s definition of “sexual harassment” with that used in judicial proceedings, the new standard emboldens campus administrators to adjudicate based on their own subjective definition. In effect, this change would be a return to the era following the 2011 Dear Colleague Letter, whose ambiguity resulted in hundreds of colleges and universities facing lawsuits from accused students whose First Amendment rights were arguably violated.

Another example of backward momentum concerns the Department of Education’s proposal to change the term from “sexual harassment” to “sex-based harassment,” as well as broaden the scope of the definition of “sex-based harassment” to include gender identity. Especially troublesome is the proposed addition related to “policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity” combined with the proposed regulation instructing employees “who have authority to take corrective action” to report any sexual discrimination they are made aware of to their Title IX office. *This effectively means that anyone in the campus community could be reported and investigated for exercising the constitutional right to free speech should that person disagree with someone’s stated gender identity.*

To remind ourselves of the confusion that an overly broad definition can cause, I call to your attention a 2015 investigation at Northwestern University. Professor Laura Kipnis published two essays in *The Chronicle Review* highlighting a sexual harassment case and critiquing the institution’s overreaching sexual misconduct policies. Several students then filed a Title IX complaint against her in retaliation to her critique. After an extensive and exhausting investigation, Northwestern found no evidence of wrongdoing and cleared Professor Kipnis.

In 2014, the University of Mary Washington’s Feminists United organization vented on Yik Yak its opposition to the university’s decision to allow all-male fraternities. When the men’s rugby team recorded an abrasive video insulting the group, Feminists United attempted to file a Title IX complaint. The university declined to investigate. Feminists United then filed a federal complaint that was thrown out by a federal district court. The case is now pending before the Fourth Circuit Court of Appeals.

The important takeaway from these two examples is that an overly broad definition of what does or does not constitute sexual harassment could lead to a chilling effect on free speech and

intellectual diversity. The landscape prior to 2020 left instructors and students apprehensive about teaching or discussing topics that some might perceive as sensitive. This severely limited academic freedom and free speech on college campuses.

One final point I would like to make is that the newest Title IX regulations have been in place only briefly. President Biden issued his executive order mandating Title IX reform in March 2021, seven months after the latest regulations were implemented. This is not enough time to gauge the effectiveness of the 2020 amendments.

Academic freedom, freedom of speech, and intellectual diversity lie at the very heart of a quality education. ACTA urges the Office for Civil Rights to hold these foundational principles in high regard and reconsider the proposed revision of the definition of “sex-based harassment” in Title IX of the Education Amendments of 1972. For your further consideration, enclosed are several articles highlighting the importance of respecting academic freedom in the application of Title IX.