



September 12, 2022

VIA ELECTRONIC SUBMISSION

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

Re: Comments on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Proposed Rule; 87 *Fed. Reg.* 41390 (July 12, 2022)

Dear Secretary Cardona:

On July 12, 2022, the Department of Education (Department) published a proposed rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.”<sup>1</sup> This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule. Advocacy is concerned that the Department has understated the costs to small educational institutions and has failed to analyze costs to other small entities that will be subject to Title IX such as libraries, museums, and nonprofits. Advocacy recommends that the Department reconsider this rulemaking and apply the SBA size standards to analyze all small entity impacts or provide additional detailed analysis supporting the use of an enrollment-based standard for small educational institutions.

## **I. Background**

### **A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility

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<sup>1</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 *Fed. Reg.* 41390 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106).

Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>6</sup>

## **B. The Proposed Rule**

The Department proposes to amend the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance regulations to ban all forms of sex discrimination. It would expand the definition of sex discrimination to encompass discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity.<sup>7</sup> The proposal will no longer require live hearings for Title IX investigations and reverts the definition of sexual harassment back to "unwelcome sex-based conduct that creates a hostile environment by denying or limiting" a person's ability to participate in a school's education program or activity.<sup>8</sup> The current rule prohibits unwelcome sex-based misconduct only if it is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."<sup>9</sup>

## **II. Advocacy's Small Business Concerns**

Advocacy is concerned that the Department has excluded several types of small entities from its analysis. The Department's analysis uses an alternative size standard that does not accurately capture small educational institutions and does not adequately assess the impacts on small entities.

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<sup>2</sup> 5 U.S.C. §601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106).

<sup>8</sup> *Id.* at 41410.

<sup>9</sup> See 34 C.F.R. § 106.30(a).

### **A. The Department Has Excluded from Its Analysis Several Types of Small Entities That Will Be Subject to The Rule**

Section 603(a) of the RFA states that “whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule or publishes a notice of proposed rulemaking for an interpretive rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis (IRFA). Such analysis shall describe the impact of the proposed rule on small entities.”<sup>10</sup>

Section 603(b) requires that analysis to contain the following:

- 1) The reasons why the rule is being considered,
- 2) The objectives and legal basis for the rule,
- 3) A description and estimate of the numbers of small entities subject to the rule,
- 4) A description of the recordkeeping required by the rule and the type of professional skill required,
- 5) A description of all federal rules that duplicate, overlap, or conflict with the rule, and
- 6) A description of any significant alternative that would accomplish the stated objectives and that minimize any significant impact on small entities.

As required by Sec. 603(b)(3) above, the Department is required to provide a description and estimate of the numbers of small entities subject to the rule. The Department focuses only on educational institutions and omits from their analysis small entities like libraries, museums, and nonprofits.<sup>11</sup>

### **B. The Department Uses an Alternative Size Standard That May Not Accurately Capture Small Educational Institutions**

Advocacy is concerned with the Department’s description and estimate of the numbers of small entities subject to the rule. The Department uses an alternative size standard for educational institutions, specifically, Local Educational Agencies (LEAs) and Institutions of Higher Education (IHEs). The Department believes the alternative definition serves their RFA analysis better than SBA size standards. However, more justification and detail are needed in support of an alternative size standard in this case. For example, the use of enrollment data as the primary distinguishing factor results in the Department’s impact assessments being averaged across small educational institutions of various sizes, lacking analysis of how the economic impact will differ across various subsets of small entities.

Divergence from the size standards published by the SBA should cover all small entities not dominant in their industry as demonstrated by rigorous and transparent analysis. Any alternative

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<sup>10</sup> 5 U.S.C. § 603(a).

<sup>11</sup> The Maryland and California federal court rulings that tax exempt status constitutes “federal financial assistance” for purposes of the Title IX Education Amendments of 1972 will subject Title IX requirements to thousands of schools and nonprofits not previously subject to Title IX if upheld. *See E.H. v. Valley Christian Academy and Buettner-Hartsoe v. Baltimore Lutheran High School Association.*

size standard should allow for improved analysis of small business impacts compared to analysis using the SBA size standards.

Advocacy has concerns about the continued use of alternative size standards in this rule in the absence of reference to the methodology and justification for selecting an alternative standard. It appears that the standard the Department uses may be less inclusive of small businesses than the SBA size standard. In Table 1, the Department classifies 44% of four-year institutions and 42% of two-year institutions as small.<sup>12</sup> Using SBA size standards and 2017 Statistics of U.S. Businesses data, Advocacy finds that at least 61% of Colleges, Universities, and Professional Schools and 81% of Junior Colleges had revenues below the SBA standard.

NAICS	Size standard (millions)	Percent small*
Colleges, Universities, and Professional Schools	\$30.50	61%
Junior Colleges	\$28.50	81%

\*Includes entities up to \$25 million in revenue for Junior Colleges and up to \$30 million in revenue for Colleges, Universities, and Professional Schools.

The use of the enrollment-based size standard may omit a number of small entities from the Department’s consideration. The Department states that SBA size standards define proprietary institutions of higher education as small businesses if they are independently owned and operated, are not dominant in their field of operation, and have total annual revenue below \$7,000,000.<sup>13</sup> Nonprofit institutions are defined as small entities if they are independently owned and operated and not dominant in their field of operation. Public institutions and local educational agencies are defined as small organizations if they are operated by a government overseeing a population 50,000 or less.<sup>14</sup>

The Department does properly characterize SBA size standards for nonprofits and public institutions. However, there is no SBA size standard of \$7,000,000 in the Educational Services sector. In fact, the size standard revenues for Educational Services range from \$8,000,000 to \$30,500,000.<sup>15</sup>

The Department does consider 175 IHEs with “reported annual revenues of less than \$900,000.” Given the number of very small entities with revenues far below \$900,000, the Department should take a closer look at the impacts on the smallest entities. About 23% of Junior Colleges have revenues below \$500,000 and about 20% of Colleges, Universities, and Professional Schools have revenues below \$500,000. The 168 Colleges, Universities, and Professional Schools with less than \$100,000 in revenue have average revenues of less than \$50,000. For any

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<sup>12</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106) at 41564.

<sup>13</sup> *Id.* at 41563.

<sup>14</sup> *Id.*

<sup>15</sup> 13 C.F.R. § 121.201.

of the smallest entities subject to the rule, the cost of the rule would be a significant portion of their revenue.

Advocacy understands that the Department does not collect revenue data comprehensively from affected small entities. To analyze impacts, there are other ways that the Department could consider. First, the Department could use the distribution of entities by size in the Statistics of U.S. Businesses data in the analysis of small entities. Alternatively, the Department could use the sum of federal funding that each entity receives as a point of comparison when assessing the costs of a rule. If enrollment data is used as an alternative size standard for these industries for RFA analysis, more detail is needed on the methodology and justification as to why the alternative standard is more appropriate in this particular case. Information should be provided on how this size threshold compares to the SBA standard to ensure coverage of affected small entities.

### **C. The Proposed Rule Does Not Adequately Assess the Impacts on Small Entities**

Small entity stakeholders are concerned about the costs of complying with the proposed rule. The requirements in the proposed rule are a dramatic shift from the requirements of the 2020 rule. The swinging pendulum of Title IX compliance requires small entities to be constantly evaluating availability of resources, both in the time it takes for a Title IX coordinator to be brought up to speed on the new guidelines, but also the important aspects of implementation required by the proposed rule. The Title IX coordinator, in addition to their investigatory role, will have a vastly expanded responsibility to train all employees that will become mandatory reporters of Title IX violations. Actionable conduct will also now extend to off campus activities, such as study abroad programs.

Most small entities are not able to develop their own Title IX training materials, and acquiring those materials is another cost. The Title IX Coordinator will also have a new obligation to conduct a barrier analysis to discover and address barriers to reporting information about conduct that may constitute sex discrimination under Title IX. Small entities are pleased about some of the proposed changes to the current regime. Namely, investigations will be returning to a single investigator model, where the coordinator will be able to conduct the investigation and render the decision.

On balance, small entities are concerned that the expanded definition of what will constitute Title IX sex discrimination will ultimately lead to an 800 to 1000 percent increase in Title IX investigations from the previous schoolyear. With this exponentially increasing caseload and requirements for training staff, it is not surprising that small educational institutions believe the net increase of \$3,090 - \$8,986 a year is an inaccurate assessment of the impacts of the rule.<sup>16</sup>

Title IX coordinators at smaller entities are thinly staffed and usually have several other responsibilities. The positions are hard to fill and harder yet to keep filled. Small entities support keeping their students and employees safe, but Title IX compliance, especially for smaller

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<sup>16</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106) at 41564-5.

entities, should not be a one size fits all proposition. Advocacy acknowledges that the Department did not adopt any of the approaches discussed in the IRFA because adoption would potentially frustrate the purpose of the proposed regulations. Although labeled as such, these are not alternatives within the meaning of that term in the RFA.<sup>17</sup> Advocacy encourages the Department to consider significant alternatives that it receives in public comment.

### III. Conclusion

The Department should use the SBA size standards to analyze small entity impacts or provide additional detailed analysis supporting continuing the use of an enrollment-based standard. Advocacy recommends that the Department publish for public comment an IRFA that considers significant alternatives and includes sufficient analyses to measure and consider the regulatory impacts of the proposed rule on all affected small entities, that will give interested parties enough information to file meaningful comments.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Rosalyn Steward at (202) 205-7013 or by email at [rosalyn.steward@sba.gov](mailto:rosalyn.steward@sba.gov).

Sincerely,

/s/

Major L. Clark, III  
Deputy Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

/s/

Rosalyn Steward  
Assistant Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

Copy to: Dominic Mancini  
Deputy Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget

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<sup>17</sup> “Each initial regulatory flexibility analysis shall also contain a description of any *significant* alternatives to the proposed rule *which accomplish the stated objectives of the applicable statutes* and which minimize any significant economic impact of the proposed rule on small entities.” 5 U.S.C. Sec. 603(c). (emphasis added)