American Council on Education®
One Dupont Circle NW
Washington, DC 20036
(202) 939-9300
acenet.edu

October 8, 2024

The Honorable Mike Rogers
U.S. House of Representatives,
Armed Services Committee
2216 Rayburn House Office Building
Washington DC 20515

The Honorable Adam Smith
U.S. House of Representatives,
Armed Services Committee
2264 Rayburn House Office Building
Washington DC 20515

The Honorable Jack Reed
United States Senate
Armed Services Committee
228 Russell Senate Office Building
Washington DC 20510

The Honorable Roger Wicker
United States Senate
Armed Services Committee
425 Russell Senate Office Building
Washington DC 20510

Dear Chairman Rogers, Ranking Member Smith, Chairman Reed, and Ranking Member Wicker,

On behalf of the undersigned higher education associations, representing the full spectrum of American postsecondary education, we write to offer comments on provisions being considered as you conference the Fiscal Year (FY) 2025 National Defense Authorization Act (NDAA) (H.R.8070, S.4638). We wish to express concerns specifically with Section 220 "Prohibition on Award of Research or Development Contracts or Grants to Educational Institutions that Have Violated Certain Civil Rights" in S.4638. We also wish to emphasize the priorities and concerns shared by the Association of American Universities and the Association of Public and Land-grant Universities in their Sept. 25, 2024, letter[i] highlighting provisions, including those that have a broad impact on institutions receiving Department of Defense (DOD) funded research.

In the final, conferenced NDAA, we ask the conferees not include certain provisions in the House-passed H.R. 8070, including Section 225 "Prohibition on Contracts between Certain Foreign Entities and Institutions of Higher Education Conducting Department of Defense-Funded Research;" Section 226 "Limitation on Availability of Funds for Fundamental Research Collaboration with Certain Institutions;" and Section 1077 "Post-employment Restrictions for Participants in Certain Research Funded by the Department of Defense."

As we have written previously, U.S. colleges and universities acknowledge the threats posed by foreign malign actors and governments that seek to undermine U.S. national security through economic espionage and malign influence activities. Our community has worked closely for the past several years with various federal agencies to address these threats, including addressing and improving research security; raising awareness of foreign malign influence and transnational repression of students and faculty; and implementing new policies around graduate student visas. All of these efforts seek to address bipartisan national security concerns.

House Sec. 225 and Sec. 226 would create new restrictions on U.S. institutions and researchers from working with institutions and researchers in covered nations (China, North Korea, Iran, and Russia). Unfortunately, these proposed restrictions would likely capture not only all research agreements, but also student exchange programs and other joint cultural and education programs with Chinese institutions that help to advance understanding and American values overseas and promote peaceful interactions.

Sec. 1077 would create a new condition requiring individual researchers performing DOD funded research to agree not to seek or accept employment or conduct any activity for which a foreign entity of concern provides financial compensation or in-kind benefits for ten years following the completion of a project. Given that geopolitics can change often, asking globally competitive civilian researchers to accept a ten-year employment restriction is likely to have a chilling impact on researchers' willingness to conduct important national security research on behalf of the Department of Defense.

Sec. 225, 226, and 1077 all include a provision that would allow the Secretary of Defense to issue a "waiver" for the sake of national security. However, while such waivers have previously been created at DOD for other programs to enable partnerships between American and Chinese institutions of higher education viewed by DOD as being in the national interest, no waivers have ever been granted. We also believe this waiver process would overwhelm the DOD R&D enterprise, as well as institutions that would likely have to submit numerous waiver requests for various purposes in response to these new sections.

Regarding Senate Section 220, we share Congress' deep concern with recent incidents of hatred and discrimination, including disturbing increases in those directed at Jewish students and staff, that have occurred on some campuses over the last year. Since the summer, institutions across the country have revised their policies, amended their training and orientation processes, and enhanced their campus security operations to prevent any future recurrence of these incidents and appropriately respond if incidents do occur. This is done not only to protect students and staff but also in preparation for what we know will be deliberate attempts by provocateurs to incite or provoke responses by protestors both on and off campus.

In such a difficult climate, efforts by Congress to support students and institutions are appreciated, and we understand Section 220 of S.4638 is intended to ensure that institutions take their civil rights obligations seriously. However, the manner in which the provision would do so is concerning and fraught with likely unintended consequences. Section 220 would prohibit the Secretary of Defense from entering into "any contract with, or award any grant to, any covered educational institution to carry out any research or development program of activity," and would define a covered educational institution as "an institution of higher education that, in carrying out a program or activity covered under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), is in violation of that title." In addition, Section 220 would also allow for the Secretary of Defense to issue a "waiver" of this restriction on a case-by-case basis.

While we understand and appreciate the intent, we believe that Section 220 is both potentially redundant and counterproductive to your committees' goals. Federal law already subjects institutions not only to the sanctions Section 220 would impose, but also with the loss of all

federal funding, including Title IV financial aid under the Higher Education Act (HEA). Loss of Title IV aid is widely referred to as a "death blow" for colleges and universities as it would immediately destroy the viability of the institution. In general, each federal agency enforces Title VI violations with respect to its own funding and recipients. However, because the consequences of losing access to HEA Title IV assistance are so significant for colleges and universities, federal agencies generally refer Title VI complaints to the Department of Education (ED) and the Justice Department (Justice), the two federal agencies with the experience, expertise, and authority to oversee Title VI compliance by colleges and universities.

ED's Office for Civil Rights (OCR) enforces Title VI as it applies to programs or activities at education institutions that receive financial assistance from ED.[ii] OCR has nearly 100 open or on-going investigations of institutions of higher education that are detailed and publicly available on the Department's website.[iii] The overwhelming majority of the cases related to shared ancestry were opened in 2024. It is important to note that being named on this list means that OCR has initiated an investigation but does not necessarily mean that ED has made a determination or found a violation. Following receipt of a complaint, OCR undertakes an investigation. In many cases, ED and the institution enter into a resolution agreement to address potential concerns, regardless of whether or not a violation is found. In circumstances in which a resolution cannot be reached, the case is referred to Justice to initiate action against the institution. Such action could result in the loss of access to all federal funds. As a result, the sanction proposed in Sec. 220 is both duplicative and of negligible value as a deterrent.

In addition, Section 220 simply restates existing requirements on institutions. Like all other federal agencies, DOD maintains regulations that prohibit discrimination under federal civil rights laws, including Title VI.[iv] DOD's Title VI regulations specifically state: "…no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving federal financial assistance from any component of the Department of Defense." DOD has long delegated oversight and enforcement of institutions' Title VI obligations to ED, as the agency is best suited to perform this work. Section 220, however, would disrupt this long-standing relationship, potentially jeopardizing effective Title VI enforcement efforts in the process.

As noted in the Sept. 26 letter from Defense Secretary Austin to members of House and Senate Armed Services, the Department of Defense "strongly opposes" Section 220, including because of "the lack of clarity around the process by which DoD would determine that an organization is 'in violation' of Title VI and qualifies for a waiver could increase the risk of inconsistency in implementation. The Department urges Congress to remove this provision and allow the Department of Education to continue to serve as the agency that enforces Title VI with respect to educational institutions."[v]

Section 220 would also set a historic, problematic precedent that would allow a federal agency to offer a "waiver" to an institution that has violated its Title VI obligations, in this case for the purpose of awarding a DOD grant. For good reason, such authority is not currently granted to any other federal agency as it could potentially gut enforcement of Title VI and weaken agencies' abilities to negotiate immediate corrective action via the voluntary complaint resolution process. It could also chill the current resolution process that leads to substantive

changes to address problems where they may occur. Providing a waiver against punishment for discrimination would upend the existing process administered by ED and Justice in a way that was never intended under Title VI of the Civil Rights Act of 1964.

Colleges and universities are strongly committed to creating campus environments that foster and promote open, intellectually engaging debate informed by a diverse set of voices and perspectives. Institutions must also provide safe learning environments that are free from discrimination and harassment and in compliance with applicable federal and state laws, including Title VI of the Civil Rights Act. Any proposed federal legislation in this area should reflect these twin institutional obligations. Section 220 does not strengthen, but rather undercuts and harms, this historic and successful civil rights statute. We oppose this dangerous change to the Title VI process.

We urge you to strike this language from consideration during the FY 2025 NDAA process. We thank you for your time and attention to our request.

Sincerely,

Ted Mitchell, President

On behalf of:

ACPA - College Student Educators International
American Association of Colleges and Universities
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
APPA: Leadership in Educational Facilities
Association of American Universities
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Research Libraries
Career Education Colleges and Universities
Council for Advancement and Support of Education
Council for Christian Colleges & Universities
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities
National Association of College and University Business Officers
National Association of Independent Colleges and Universities

[i] September 25, 2024 AAU-APLU Joint Letter on FY25 NDAA: https://www.aau.edu/key-issues/aau-submits-joint-letter-fy25-ndaa

[ii] U.S. Department of Education webpage "Education and Title VI": https://www.ed.gov/laws-and-policy/civil-rights-laws/civil-rights-act-of-1964/education-and-title-vi#:~:text=Title%20VI%20prohibits%20a%20recipient,unlawful%20educational%20practice%20or%20policy.

[iii] List of Open Title VI Shared Ancestry Investigations: https://www.ed.gov/about/offices/list/ocr/sharedancestry-list

[iv] 32 CFR Part 195: https://www.ecfr.gov/current/title-32/subtitle-A/chapter-I/subchapter-M/part-195

[v] September 26, 2024 Letter to SASC and HASC leadership from Defense Secretary Lloyd Austin: https://static.politico.com/7b/8e/058641bd4d1bb1eb8ae1b53f914a/secdef-fy25-ndaa-heartburn-letter-to-hasc-and-sasc.pdf