



September 12, 2022

Alejandro Reyes
US Department of Education
400 Maryland Ave. SW,
PCP-6125
Washington, DC 20202

RE: Docket ID ED-2021-OCR-0166

Dear Mr. Reyes:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 230 national organizations to promote and protect the civil and human rights of all persons in the United States, and the 43 undersigned organizations, we write in response to the Department of Education's notice of proposed rulemaking published in the Federal Register on July 12, 2022 to amend the regulations implementing Title IX of the Education Amendments of 1972. We urge the department to ensure an educational environment free from discrimination on the basis of sex (including sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics, or pregnancy and related conditions). We are writing to urge the department to effectuate Title IX's broad purpose by restoring and strengthening protections against sex-based harassment (including sexual harassment), develop robust protections against retaliation, ensure fair disciplinary procedures, clarify and strengthen the role of Title IX coordinators, and ensure appropriate implementation of Title IX's religious exemption.

We appreciate President Biden's 2021 executive order affirming the administration's commitment to enforcing Title IX's protections against all forms of sex discrimination,¹ and the department's subsequent efforts to update the Title IX rule. President Biden's executive orders on racial equity and underserved communities, implementing the landmark *Bostock* ruling, and advancing gender equity and equality collectively called for an "ambitious whole-of-government equity agenda," including through enforcing Title IX's protections for all students "to the fullest extent permissible under law."² The executive orders also called

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¹ Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity). Federal Register 86. Mar 11, 2021. 13803. <http://federalregister.gov/d/2021-05200>.

² Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government). Federal Register 86(14). Jan 25, 2021. <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government> ; Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). Federal Register 86(14). Jan 25, 2021. <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf> ; Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination

for including LGBTQ+* students in the department’s efforts to eliminate sex discrimination, consistent with the requirements of Title IX and the *Bostock* ruling. As a civil rights agency responsible for protecting students from discrimination on the basis of race, color, national origin (including language status), sex (including sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics, or pregnancy and related conditions), disability, and age, the department must restore and strengthen civil rights protections under Title IX to make schools safer for all students and vigorously enforce Title IX requirements that the department has relied on for decades. Under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Age Discrimination Act of 1975, the department is responsible for enforcing these laws in response to complaints of discrimination and through proactive compliance reviews, data collection, and technical assistance. The department has an obligation to ensure that all students have equal educational opportunities.

The civil and human rights community provides the following recommendations to restore and strengthen Title IX to ensure an educational environment free from discrimination, protect against sex-based harassment (including sexual harassment), protect against retaliation, ensure fair disciplinary procedures, clarify and strengthen the role of Title IX coordinators, and ensure appropriate implementation of Title IX’s religious exemption.

Ensure an Educational Environment Free From All Forms of Sex Discrimination

The department must make clear that under Title IX, schools are required to provide all students an educational environment that is free from all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics (including intersex traits), and pregnancy and related conditions.

Sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes

We support the department recognizing that prohibitions on sex discrimination necessarily include prohibitions on discrimination based on sexual orientation and gender identity. Compared to LGBTQ students who did not experience LGBTQ-related discrimination at school, those who experienced such discrimination at school are almost three times as likely to have missed school in the past month because they felt unsafe or uncomfortable, report lower grade point averages, lower self-esteem, higher levels of depression, and higher rates of school discipline that are indicative of anti-LGBTQ policies that, intentionally or unintentionally, make it effectively “against the rules” to be themselves.³ Research on adolescent health suggests that the harm of bias-motivated harassment and bullying is especially severe in

on the Basis of Sex, Including Sexual Orientation or Gender Identity). Federal Register 86(46). Mar 11, 2021. <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

* We use the term “LGBTQI+” throughout this comment to be inclusive of intersex people, unless referring to a specific document or study. In such instances, we use the terminology that is used in the referred source. For example, President Biden’s executive orders refer to the “LGBTQ+” community; as such, we used the same term in this sentence.

³ Kosciw, J.G., Clark, C.M., Truong, N.L., & Zongrone, A.D. *The 2019 National School Climate Survey*. 2020. <https://www.glsen.org/research/2019-national-school-climate-survey>.

its effects on student well-being and success.⁴ Anti-LGBTQ harassment is associated with a range of adverse educational outcomes on LGBTQ students, including increased absences, lowered grade point averages, and a decreased likelihood of pursuing post-secondary education.⁵ Anti-LGBTQ discrimination, including harassment and assault, is also associated with lower self-esteem and higher levels of depression,⁶ and The Trevor Project's 2022 national survey found that 45 percent of LGBTQ youth seriously considered attempting suicide in the past year, including more than half (53 percent) of transgender and nonbinary youth.⁷ Students who hold multiple marginalized identities experience starker and often unique disparities. LGBTQ youth who are Asian American or Pacific Islander (AAPI), Black, Latino, or Native and Indigenous experience both race-based and anti-LGBTQ discrimination, and they were most likely to skip school due to feeling unsafe, report the lowest levels of school belonging, and experience the highest levels of depression compared to those who experience one or neither form of marginalization.⁸

In addition to verbal and physical harassment, violence, and excessive discipline, LGBTQI+ students experience intentional misgendering and misnaming, refusal to update names and gender markers on records and school systems, denial of access to single-sex spaces and activities, and penalties under dress and grooming codes for failure to conform to sex stereotypes. All forms of such discrimination both deleteriously impact LGBTQI+ students' well-being and academic success and violate their rights under Title IX.

LGBTQI+ youth of color and LGBTQI+ youth with disabilities may be more likely to be disciplined for reporting discrimination given racial disparities and other disparities in disciplinary action: Black, Native American/Alaska Native, Latino, Arab American/Middle Eastern/North African, and multiracial LGBTQ youth experience more school disciplinary action than white LGBTQ youth,⁹ and LGBTQ youth with

⁴ Russell, S.T., Sinclair, K.O., Poteat, V.P., & Koenig, B.W. "Adolescent health and harassment based on discriminatory bias." *American Journal of Public Health*, 102(3): 493–495. 2012. 493-495. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3487669/>; Birkett, M., Newcomb, M.E., & Mustanski, B. "Does it get better? A longitudinal analysis of psychological distress and victimization in lesbian, gay, bisexual, transgender, and questioning youth." *Journal of Adolescent Health*, 56(3). 2015. 280–285. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4339410/>.

⁵ Kosciw, J.G., et al. *The 2019 National School Climate Survey*. 2020.

⁶ Ibid.

⁷ The Trevor Project. *2022 National Survey on LGBTQ Youth Mental Health*. 2022. <https://www.thetrevorproject.org/survey-2022/>.

⁸ Truong, N.L., Zongrone, A.D., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Asian American and Pacific Islander LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-AAPI-2020.pdf>; Truong, N.L., Zongrone, A.D., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Black LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-ResilienceBlack-2020.pdf>; Zongrone, A.D., Truong, N.L., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Latinx LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-ResilienceLatinx-2020.pdf>; Zongrone, A.D., Truong, N.L., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Native and Indigenous LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-Native-2020.pdf>.

⁹ Kosciw, J.G., et al. *The 2019 National School Climate Survey*. 2020.

disabilities are more likely to experience disciplinary action than LGBTQ youth without disabilities and more likely to be referred to law enforcement as a result.¹⁰

President Biden's executive orders clearly demand the inclusion of LGBTQ students in the department's efforts to eliminate sex discrimination, consistent with the requirements of Title IX, the *Bostock* ruling, and other relevant case law.¹¹ We therefore appreciate that the department proposes to create a new section (§106.10 in the proposed regulations) that clarifies the scope of Title IX to define "on the basis of sex" to include all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. We also support the following changes and recommend that the department preserves them in the final rule:

- Specification of investigation requirements for all forms of sex-based discrimination, including discrimination based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes.
- Application of harassment protections to all forms of sex-based harassment, including harassment based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes.
- Requirement of schools to monitor sex-based discrimination.
- Requirement of schools to publish a nondiscrimination policy and notify students, families, educators, and other school staff of the policy at least annually.

However, we urge the department to require that the forms of sex-based discrimination expressly prohibited under Title IX in proposed §106.10 be fully enumerated in the nondiscrimination policy and required annual notifications thereof.

We further urge the department to use plain language to communicate that preventing a student from accessing or participating in separate gender classes, restrooms, locker rooms, dress or appearance codes, school housing, and overnight accommodations for school trips consistent with their gender identity constitutes prohibited discrimination based on sex. Transgender and nonbinary students commonly face barriers to accessing separate gender programs, activities, and school facilities and recent state actions have exacerbated, encouraged, and even mandated such discrimination. For example, two states have enacted laws barring transgender students from using the bathroom and locker room consistent with their gender identity and others have recently considered legislating discrimination in this area.¹²

Additionally, we were disappointed that the proposed rules were silent on the issue of misgendering and deadnaming transgender and nonbinary students. As explained above, intentional misgendering and/or

¹⁰ Palmer, N.A., Greytak, E.A., Kosciw, J.G. *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth*. 2016. https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.

¹¹ Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). ; Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity).

¹² Alabama (H.B. 322, 2022) and Oklahoma (S.B. 615, 2022) have enacted anti-trans school bathroom laws. Arizona (H.B.2314, 2022), South Dakota (H.B. 1005, 2002), and West Virginia (H.B. 3199, 2021) recently considered similar bills.

deadnaming are common forms of sex-based harassment experienced by transgender and nonbinary students. In a 2019 survey of LGBTQ students, 45 percent of transgender students and 36 percent of nonbinary students reported that they were prevented from using their chosen name and pronouns.¹³ Misgendering and deadnaming of transgender and nonbinary students denies them a safe and supportive learning environment; we therefore urge the department to make explicit in the final rule that the persistent, intentional misuse of a name, personal pronouns, or a gendered title constitutes a form of impermissible sex-based discrimination that can create a hostile environment under Title IX.¹⁴

We are also disappointed that the proposed changes do not address participation in athletics. Furthermore, the language the department uses to explain this decision could be misinterpreted as potentially permitting a categorical ban on the participation of transgender students on separate gender sports teams consistent with their gender identity. State lawmakers have been increasingly emboldened in their violent attacks against LGBTQI+ students. Twenty-nine states as of July 1, 2022 have introduced bills that exclude transgender youth from athletics.¹⁵ Eighteen states have enacted such laws, and many others impose discriminatory barriers to participation in school sports consistent with a student's gender identity.¹⁶ The department must ensure that all students, including transgender, nonbinary, and intersex students, can enjoy the benefits of sports. We urge the department to move forward with urgency on a concurrent rulemaking related to athletics so that a single, consolidated final rule may be published in early 2023. Title IX athletics regulations should include the following:

- Clarification that transgender, nonbinary, and intersex students have rights under Title IX to participate in sports consistent with their gender identity.
- Clarification that state sports bans against transgender, intersex, and non-binary students constitute impermissible sex-based discrimination.
- Clarification that sports bans encourage dangerous and unscientific sex verification practices, which especially harm intersex youth and Black and Brown girls.
- Clarification that Title IX preempts any state law or policy that categorically bans transgender, nonbinary, and intersex students from playing sports or their ability to play sports consistent with their gender identity.

¹³ GLSEN. *Improving School Climate for Transgender and Nonbinary Youth*. 2021.

https://www.glsen.org/sites/default/files/2021-11/GLSEN_Trans%26Nonbinary_ResearchBrief.pdf.

¹⁴ Title VII caselaw indicates that mocking or ridiculing a transgender or nonbinary person by intentionally misgendering or deadnaming can create a hostile environment in violation of Title VII. See *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020) (citing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (applying *Bostock*, the court held that, “in addition to being misgendered,” an employer deadnaming a transgender woman “was sufficiently severe or pervasive to support her [hostile work environment] claim.”).

¹⁵ ACLU. “Legislation Affecting LGBTQ Rights Across The Country.” *ACLU.org*. July 1, 2022.

<https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

¹⁶ GLSEN and TransAthlete.com (2022). Navigator: Trans and Nonbinary Athletic Inclusion Policies.

<https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

With these changes, the department must make it undeniably clear to states that sports bans on the basis of gender identity is a violation of civil rights law, and that there are consequences to such bans, including the loss of federal funding.

Pregnancy and related conditions

We support the department's efforts to ensure that students will not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the basis of current, past, or potential pregnancy or any conditions related to pregnancy. These include pregnancy, childbirth, termination of pregnancy, lactation, recovery from any of these conditions, and any medical condition related to these conditions.

It is important to remove the barriers that make it difficult for pregnant and parenting students to complete their education. Among teens ages 15 to 19, 2.2 percent give birth to a child.¹⁷ Nearly a third of girls who do not complete high school report that becoming pregnant was a primary factor in their decision to leave school.¹⁸ Only half of teenage mothers earn a high school diploma by age 22, compared with 89 percent of girls who do not have a child during their teenage years.¹⁹ One-third of young mothers never obtain a diploma or GED,²⁰ and fewer than 2 percent of teenage mothers graduate from college by age 30.²¹ Systemic barriers and lack of inclusive policies can lead to student parents having lower levels of college enrollment and completion, higher levels of unmet financial need, and higher levels of debt upon graduation.²² However, research shows that parenting college students can thrive when given the support they need to succeed. For example, 22 percent of college students are parents, 44 percent of student parents work full time while enrolled, and 23 percent of student parents are single parents and working full time while enrolled.²³ Despite these additional responsibilities, parenting college students tend to have higher grade point averages than their non-parenting peers.²⁴

These inequities are the result of institutional barriers and a preventable lack of support for pregnant or parenting students that Title IX must amend. Under current regulations, schools can push out pregnant or parenting students if they miss classes for medical appointments, medical recovery, caretaking responsibilities, or to pump breast milk — thus punishing students for the school's actions to deny

¹⁷ Department of Health & Human Services, Centers for Disease Control & Prevention, National Center for Health Statistics. *NCHS Data Brief, Continued Declines in Teen Births in the United States*. 2015. <https://www.cdc.gov/nchs/data/databriefs/db259.pdf>.

¹⁸ Perper, K., Peterson, K., & Manlove, J. *Diploma Attainment Among Teen Mothers*. *Child Trends*. Jan 2010. <https://www.childtrends.org/publications/diplomaattainment-among-teen-mothers>. See also: Tang, E., et al. *Title IX At 50*. June 2022. <https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Costello, C.B. "Pathways to postsecondary education for pregnant and parenting teens." *Institute for Women's Policy Research*. 2017. <https://files.eric.ed.gov/fulltext/ED556724.pdf>.

²² Pillow, W.S. *Unfit Subjects: Educational Policy & the Teen Mother*. 2004 ; Perper, K, et al. *Diploma Attainment Among Teen Mothers*.

²³ U.S. Government Accountability Office. *Higher Education: More Information Could Help Student Parents Access Additional Federal Student Aid*. Aug 2019. <https://www.gao.gov/assets/gao-19-522.pdf>.

²⁴ Institute for Women's Policy Research. *Parents in College: By the Numbers*. Apr. 2019. <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers>.

pregnant or parenting students accommodations.²⁵ We appreciate that the proposed regulations include further protections against discrimination based on “current, potential, or past” pregnancy or related conditions, including termination of pregnancy, childbirth, lactation, or recovery from any of these conditions, and we urge the department to preserve them in the final rule. These changes include:

- Requiring schools to provide students with the option of reasonable modifications to policies, practices, or procedures due to pregnancy or related conditions; to allow voluntary leaves of absence beyond the medically necessary minimum; and to ensure access to a private and sanitary lactation space that is not a bathroom.
- Clarifying that any leave of absence must be voluntary.
- Prohibiting schools from requiring students who are pregnant or have a related condition to provide certification from a healthcare provider about their ability to participate in an educational activity, unless all students must provide such certification.
- Describing specific actions that the Title IX coordinator must take to prevent discrimination upon learning that a student is pregnant or experiencing related conditions. These actions include informing the student of the school’s obligation to prevent sex discrimination, and maintaining grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination.

However, we oppose the department’s proposals that restrict certain rights for pregnant and parenting students and employees, and we urge you to do the following instead:

- Require schools to grant modifications to students and employees who are pregnant or have a related condition if the modification is requested by the individual and is “reasonably available.” The proposed rules do not adequately protect students and employees: They would allow schools to deny a pregnant student’s requested modification if it is deemed to “alter the essential nature” of the school’s program, which is too broad and vague of a standard.²⁶ And the proposed rules would only require schools to grant a pregnant employee’s requested modification if a similar modification is available to employees with temporary disabilities, which improperly makes pregnant employees’ Title IX rights contingent upon other civil rights laws.
- Prohibit discrimination based *solely* on parental, family, or marital status. The proposed rule would not prohibit schools from making a rule based on parental, family, or marital status unless the rule “treats persons differently based on sex.”²⁷ Schools would therefore believe that they could discriminate against parenting students, as long as they do so equally across genders, or that they are barred from offering accommodations to young mothers simply because they do not offer similar accommodations to young fathers and other non-birthing parents.

In addition, we ask the department to strengthen protections for pregnant and parenting students:

²⁵ Tang, E., et al. *Title IX At 50*.

²⁶ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

²⁷ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.21(c)(2)(i), 106.40(a), 41579 (proposed 34 C.F.R. § 106.57(a)(1))).

- Prohibit discrimination based on “perceived” or “expected” pregnancy or related conditions, as well as parental, family, marital, or “caregiver” status.
- Prohibit schools from requiring students who are pregnant or have a related condition to participate separately, given that many of these students are pushed by their schools into inferior alternative programs.
- Make medically necessary “absences” available to pregnant and parenting students. The proposed rule would only require schools to grant “leaves of absence” that are medically necessary (e.g., for recovery from pregnancy) but not shorter absences or breaks that are medically necessary (e.g., for lactation breaks, abortion, or recovery therefrom) — which could be approved or denied subject to a Title IX coordinator’s discretion.²⁸
- Clarify that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy.
- Instruct schools on how to protect student privacy to ensure that, in states where abortion is criminalized, school records, including school health records, are not used to prosecute students who have been documented as being pregnant in the past but are not currently pregnant.

Restore and Strengthen Protections Against Sex-based Harassment, Including Sexual Harassment

Sexual harassment of students is widely prevalent in K-12 schools and higher education, but most students do not report it to their schools. One in five girls ages 14 to 18 have been kissed or touched without their consent,²⁹ 58 percent of LGBTQ youth ages 13 to 21 are sexually harassed,³⁰ and children with disabilities are 2.9 times more likely than their peers to be sexually assaulted.³¹ In college, one in four women; one in 15 men; and one in four transgender, nonbinary, and gender-nonconforming students are sexually assaulted during their time as undergraduates.³² College students with disabilities are also more likely to experience sexual assault, as evidenced by a 2018 study where 31.6 percent of undergraduate women with disabilities reported nonconsensual sexual contact involving physical force or incapacitation, compared to 18.4 percent of undergraduate women without a disability.³³ This means that one of every three undergraduate women with a disability had been sexually assaulted during their time at college. Students with disabilities, however, are less likely to be believed when they report and often have greater difficulty describing the harassment they experience.³⁴ CDC data also suggest that LGBTQI+

²⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)(i), (iii)).

²⁹ National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence*. 2017. <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

³⁰ Kosciw, J.G., et al. *The 2019 National School Climate Survey*.

³¹ National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls With Disabilities*. 2017. <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

³² Association of American Universities. *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*. Oct. 15, 2019. <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

³³ National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. Jan 2018. <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

³⁴ National Institute of Justice. “The Many Challenges Facing Sexual Assault Survivors With Disabilities.” *National Institute of Justice*. July 2017. <https://nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>; National Council on Disability. *Mental Health on College Campuses: Investments, Accommodations Needed to Address Student Needs*. July 21, 2017. https://www.ncd.gov/sites/default/files/NCD_Mental_Health_Report_508.pdf.

people experience elevated rates of sexual violence across their lifespan, including in K-12 and post-secondary educational settings.³⁵

However, few students report these incidents to their schools, often because of shame, fear of retaliation, fear of being ignored or disciplined, and/or fear of police or immigration officials. For instance, only 2 percent of girls ages 14 to 18³⁶ and only 12 percent of college women³⁷ who are sexually assaulted report the incident to their schools. The 2019 National School Climate Survey also found that a majority of LGBTQ students who faced harassment or assault did not report it, most commonly because they feared it would not help.³⁸ When student survivors do come forward, they are often ignored or punished by their schools instead of receiving support.³⁹ This is especially common for women and girls of color (particularly Black women and girls), LGBTQI+ students, pregnant and parenting students, and disabled students due to stereotypes that label them as more “promiscuous,” less credible, and/or less deserving of protection. When schools fail to protect survivors, they suffer in the form of lower grades, lost scholarships, and lost degrees. One in three college survivors end up dropping out altogether.⁴⁰

The Trump administration’s Title IX rule in 2020 aimed to silence sexual assault survivors and deny them educational opportunities, and it has allowed schools to do even less to prevent and respond to sexual violence and harassment.⁴¹ Under the current rule, schools are currently required to ignore many reports of sexual harassment because of the overly restrictive definition of sexual harassment. The 2020 rule requires complainants to show that the harassment they experienced was so “severe, pervasive, and objectively offensive” that it “effectively *denies*” a complainant access to a school program or activity,⁴² where the previous longstanding definition only required a showing that the harassment was “severe or pervasive” that it “effectively denies or *limits*” a complainant from accessing a school program or activity.⁴³ The 2020 rules also require that schools use uniquely burdensome procedures for sexual

³⁵ Chen, J., Walters, M.L., Gilbert, L.K., & Patel, N. “Sexual Violence, Stalking, and Intimate Partner Violence by Sexual Orientation, United States.” *Psychol. Violence*, 10(1). 2020. 110–119. <https://pubmed.ncbi.nlm.nih.gov/32064141/>; Johns, M.M., et al. “Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017.” *MMWR Morb. Mortal Wkly. Rep.*, 68. 2019. 67–71. <https://pubmed.ncbi.nlm.nih.gov/30677012/>; Kann L., et al. “Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12 — United States and Selected Sites, 2015.” *MMWR Surveill. Summ.*, 65(SS-9). 2016. 1–202. <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf>.

³⁶ National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence*.

³⁷ Association of American Universities. *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*.

³⁸ Kosciw, J.G., et al. *The 2019 National School Climate Survey*.

³⁹ Nesbitt, S., & Carson, S. “The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout.” *Know Your IX*. 2021. <https://www.knowyourix.org/thecostofreporting>.

⁴⁰ Mengo, C., & Black, B.M. “Violence Victimization on a College Campus: Impact on GPA and School Dropout.” *Journal of College Student Retention Research Theory and Practice*, 18(2). 2015. 234–244. <https://doi.org/10.1177/1521025115584750>.

⁴¹ See: Civil and Human Rights Community Joint Comment on Title IX NPRM. Jan 2019. <https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm/>.

⁴² 34 C.F.R. § 106.30(a) (defining “sexual harassment”).

⁴³ See, e.g., Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed.

harassment that are not required for any other type of student or staff misconduct, including tilting the process in favor of harassers by requiring schools to presume⁴⁴ that the harassment did not occur.⁴⁵

This rule has reinforced unsafe school environments, made it harder for survivors to report abuse,⁴⁶ deprived students of their right to an education, and denied students equal protection of the law. When the Trump rule was proposed, nearly 125,000 members of the public spoke out through public comments, with the overwhelming majority registering their strong opposition. Nonetheless, the Trump administration finalized its dangerous rule, which has been challenged in multiple lawsuits filed on behalf of individual student survivors, a student organization, survivor advocacy organizations, and 18 states and the District of Columbia.⁴⁷ Students deserve, and the law requires, a department that works to protect all students from discrimination.

The proposed rules do much to restore and strengthen protections for survivors of sexual harassment and violence and ensure fair and equitable processes for all students, employees, and members of campus communities. We support the following changes and recommend that they are retained in the final rule:

- The definition of sexual harassment (proposed §106.2) that includes “quid pro quo” harassment and sexual assault, dating violence, and domestic violence, and aligns “hostile environment” harassment to be consistent with the Title IX standard that existed prior to the 2020 rule. The proposed rule would require that students show that harassment is “sufficiently severe *or* pervasive” both “objectively and subjectively” such that it “denies or *limits* a person’s ability to participate in or benefit from...the education program or activity” (italics added for emphasis). These changes will require schools to respond to all forms of sex-based harassment and help more students affected by sex-based harassment get support, compared to the current 2020 standards that are overly restrictive and force students to endure repeated and escalating levels of abuse before their complaints can be investigated.
- The requirement that schools respond to sex-based hostile environment under its education program or activity, regardless of where sex-based harassment contributing to the hostile environment occurred, including off campus or abroad (proposed §106.11).

Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

⁴⁴ 34 C.F.R. §§ 106.45(b)(1)(iv), (b)(2)(i)(B).

⁴⁵ The Trump Title IX rule included dating violence, domestic violence, and stalking in its definition of “sexual harassment.” 34 C.F.R. § 106.30(a). The Trump rule also purports to allow schools to address sexual harassment that must be dismissed under Title IX using a “non-Title IX” school policy instead. See: 34 C.F.R. § 106.45(b)(3)(i) ; Federal Register 85. May 19, 2020. 30283, 30289, 30037-38. Still, the mandatory dismissal of certain Title IX sexual harassment complaints distorts the purpose and effect of Title IX. The statute does not grant schools authority to address sexual harassment—an authority that schools inherently possess—but rather requires them to do so in certain circumstances. The mandatory dismissal rule also promotes confusion. And as a practical matter, it creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct is challenged by either party.

⁴⁶ The 2020 rules’ unprecedented narrowing of the definition of “sexual harassment” has been especially harmful to students with disabilities by making it harder to report sexual misconduct, as many of these students already experience challenges that make communicating their victimization difficult. Moreover, this compounds the already high risk of sexual misconduct that students with disabilities face.

⁴⁷ Young, E. *The 2020 Title IX Regulations and the Lawsuits Against Them: An Analysis and Comparison*. 2020. <https://feminist.org/wp-content/uploads/2020/08/Title-IX-Lawsuits-Article-1.pdf>.

- The inclusion of complaints by those other than students or employees who were participating or attempting to participate in an education program or activity at the time they experienced sex-based harassment (proposed §106.2).
- The requirement for schools to offer supportive measures to individuals who report sex-based harassment (or other sex discrimination), such as changes to the respondent’s schedule or a “one-way no-contact order” against a respondent — regardless of whether the individual requests an investigation or an informal resolution, and even if their complaint is dismissed (proposed §§ 106.2, 106.44(g)-(g)(1), 106.45(d)(4)(i)).
- The removal of the current provision that prevents schools from complying with a state or local law that conflicts with the Title IX regulations and provides greater protections against sex discrimination, including harassment (§ 106.6(h)).

The proposed changes regarding sex-based harassment will protect students better than current regulations by expanding the scope for what counts as sex-based harassment. Furthermore, we urge the department to go further to strengthen protections against sex-based harassment (and other sex discrimination):

- Require (rather than simply allow) schools to designate some employees as “confidential employees,” who are not obligated to report possible sex-based harassment (or other sex discrimination) to the Title IX coordinator but must offer confidential support to the reporting individual, including telling them how to contact the Title IX coordinator (proposed § 106.2 (“confidential employee”), 106.44(d)).
- Clarify that when a school chooses to dismiss a complaint because the respondent has left the school, it must take “steps” (proposed § 106.44(f)(6), 106.45(d)(4)(iii)) that include determining whether there were other victims and whether school staff knew about the incident(s) but ignored it, or took steps to cover it up.
- Clarify that if a party requests a certain supportive measure and it is “reasonably available,” then the school must provide it (proposed § 106.2 (“supportive measures”); and that if the school is aware that the supportive measure offered are ineffective, then the school must modify it or offer additional supportive measures.⁴⁸

Develop Robust Protections Against Retaliation

Title IX prohibits retaliation against those who complain of sex discrimination, in addition to ensuring that schools respond effectively to sex-based harassment (including sexual harassment), including by having “prompt and equitable” grievance procedures.⁴⁹ Unfortunately, we know too well how student survivors who summon the courage to report — especially survivors of color, survivors with disabilities,

⁴⁸ *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

⁴⁹ 34 C.F.R. § 106.71 (2021); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action.”).

LGBTQI+ survivors, and pregnant or parenting survivors — are often punished when they turn to their schools for help. Students of color, LGBTQI+ students, students with disabilities, and pregnant and parenting students, who face additional discrimination also based on these identities, are most likely to be retaliated against after reporting sexual harassment. Some are disciplined for physically defending themselves against their harassers, acting out in age-appropriate ways in response to trauma, violating nondisclosure agreements imposed by the school by talking to friends about their harassment, and missing school to avoid seeing their harasser.⁵⁰ Others are punished for sexual contact on school grounds, based on administrators' conclusions that the contact was "consensual," premarital, or that the accusations of assault were false — meaning these students are punished for their own sexual assaults.⁵¹ Student survivors in college have also increasingly faced retaliation from their assailants, who seek to weaponize school disciplinary proceedings by filing baseless cross-complaints in an effort to silence and punish victims.⁵²

The changes that the Trump administration made to the Title IX rule in 2020 utterly failed to create safe and supportive school environments. For example, the 2020 rule allows schools to discipline student survivors for making a "materially false statement in bad faith" without it being considered retaliation under Title IX, as long as the decision to discipline is not based solely on the outcome of an investigation. The threat of discipline if a school determines an accusation is "false" deters many student survivors from coming forward to ask for help or initiate an investigation. Like other changes to the rule, this change also especially harms women and girls of color (particularly Black girls who already face disproportionate, discriminatory discipline),⁵³ pregnant and parenting student survivors, LGBTQI+ student survivors, and student survivors with disabilities who are harassed because they are more likely to have their trauma minimized, be disbelieved, and be blamed due to rape myths and stereotypes that label them as more promiscuous, aggressive, and/or less credible. Even before the 2020 rule, student survivors were being discouraged from reporting in the first place, met with unfair skepticism, blamed, and wrongly disciplined. The current regulations only make it harder for people like them to come forward, and it denies them fair treatment under a system that is supposed to protect them. Title IX has long been

⁵⁰ National Women's Law Center. *100 School Districts: A Call to Action for School Districts Across the Country to Address Sexual Harassment Through Inclusive Policies and Practices*. 2021. <https://nwl.org/wp-content/uploads/2021/04/100SD-report-5.3.21-vF.pdf> ; Cauterucci, C. "BYU's Honor Code Sometimes Punishes Survivors Who Report Their Rapes." *Slate*. Apr 15, 2016. <https://slate.com/human-interest/2016/04/byu-s-honor-code-sometimes-punishes-survivors-who-report-their-rapes.html>.

⁵¹ See: *S.M. v. Sealy Ind. Sch. Dist.*, No. CV H-20-705, 2021 WL 1599388, at *2-*3 (S.D. Tex. Apr. 23, 2021) ; National Women's Law Center. *100 School Districts*. ; Entin, B. "Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom." *WSVN-TV*. Feb 8, 2018. <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom> ; Caplan-Bricker, N. "My School Punished Me." *Slate*. Sept 19, 2016. <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html> ; Stahl, A. "'This Is an Epidemic': How NYC Public Schools Punish Girls for Being Raped." *VICE*. June 8, 2016. https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped.

⁵² Nesbitt, S., & Carson, S. "The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout."

⁵³ See: Kingkade, T. "Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It." *The 74 Million*. Aug 6, 2019. <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/> ; Kingkade, T. "NYC Schools Suspended Sexual Assault Victims Because They're Black: Attorney." *The Huffington Post*. Jun 13, 2016. https://www.huffpost.com/entry/nyc-schools-sexual-assault-victims_n_575ebf51e4b00f97fba8d405.

understood to require a wide range of supportive measures to protect complainants from retaliation,⁵⁴ and the department must make clear that complainants are entitled to a wide range of supportive measures, remedies, and protections against retaliation.

We support the department's proposals to strengthen protections against retaliation:

- Prohibiting schools from disciplining someone for non-harassing conduct that “arises out of the same facts and circumstances” as the reported incident (e.g., alcohol or drug use, self-defense) (proposed § 106.71(a)).
- Prohibiting schools from disciplining someone for making a “false” statement or engaging in consensual sexual conduct based solely on the school’s decision of whether sex-based harassment (or other sex discrimination) occurred (proposed § 106.45(h)(5)).
- Requiring schools to offer supportive measures to individuals who report retaliation and, if requested, to investigate complaints of retaliation (proposed § 106.71(a)).

And we urge the department to go further by clarifying in the regulations that retaliation includes:

- Disciplining a complainant for conduct that the school knows or should know “results from” the harassment or other discrimination (e.g., missing school, expressing trauma, telling others about being harassed).
- Disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g., a respondent who has been disciplined for sexual assault or dating violence files a counter-complaint against their victim alleging the victim was the actual harasser).
- Requiring a complainant to leave an education program (e.g., to take leave, transfer, enroll in “alternative school”) after reporting sex-based harassment (or other sex discrimination).
- Requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, an informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations.⁵⁵

Ensure Fair Disciplinary Procedures

As the department's guidance has long made clear, schools must investigate allegations of sexual harassment using disciplinary procedures that are fair to all parties. For example, combined sex and race stereotypes lead school educators and administrators to “adultify” Black girls, seeing them as more

⁵⁴ See: U.S. Department of Education. “Questions and Answers on Title IX and Sexual Violence.” (Rescinded.) Apr 29, 2014. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> ; U.S. Department of Education. “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.” (Rescinded.) Jan 2001. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁵⁵ See Letter from Equal Rights Advocates, L.L. Dunn Law Firm, PLLC, and 35 Other Survivor Advocate Organizations to Catherine Lhamon, Ass’t Sec’y for Civil Rights (June 2, 2022), <https://www.equalrights.org/wp-content/uploads/2022/06/20220602-Letter-to-OCR-Regarding-Title-IX-Unconscionable-Agreements.pdf>.

promiscuous and less deserving of protection and care than their peers.⁵⁶ These stereotypes cause schools to view the sexual harassment reports of Black girls and other girls of color as less serious and to ignore, blame, or punish them instead of launching an investigation. Similarly, schools are less likely to believe LGBTQI+ student survivors due to reliance on stereotypes that they are “hypersexual,” “deviant,” or bring the “attention” upon themselves.⁵⁷ These biases fuel discriminatory responses to reports of harassment or assault and unjust disciplinary practices. For example, a national survey of LGBTQ youth found that 7.3 percent were disciplined after reporting their own victimization to school staff.⁵⁸ Black and Indigenous LGBTQ youth were almost twice as likely to report experiencing out-of-school disciplinary action (suspension or expulsion), compared to their white LGBTQ peers.⁵⁹ When LGBTQ student survivors don’t report being harassed or assaulted — and most don’t because they doubt an effective response — they may nonetheless be disciplined for it.⁶⁰ Student survivors with disabilities also face challenges when reporting sexual harassment based on schools’ reliance on stereotypes that students with disabilities are less credible⁶¹ and because they may have difficulty describing or communicating about the harassment they experienced, especially if they have a developmental or cognitive disability.⁶²

Most fundamentally, and contrary to the claims of the previous administration, there is no conflict between protecting student survivors' educational opportunities and ensuring fair disciplinary procedures. There was simply no reason for the department to provide special protections to people accused of sexual harassment that are unavailable to others who face similar sanctions for analogous forms of misconduct. Furthermore, such exceptional treatment of sexual allegations is both rooted in and reinforces exactly the sort of sex stereotyping Title IX forbids.

We support many of the department’s proposed changes to the Title IX grievance procedures and urge you to go further:

- Provide further guidance as to how institutions of higher education can conduct questioning while minimizing reliance on cross-examination and live hearings (e.g., having a decision-maker ask

⁵⁶ Georgetown Law Center on Poverty and Inequality. *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*. 2017. <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf> ; McClellan, C. *Our Girls, Our Future: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*. 2018. https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf ; Smith-Evans, L., & George, J. *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity*. 2014. https://www.naacpldf.org/wp-content/uploads/Unlocking-Opportunity-for-African-American_Girls_0_Education.pdf.

⁵⁷ See: Chadwick, G.R. “Reorienting the Rules of Evidence.” *Cardozo Law Review*, 39(6). 2018. <http://cardozolawreview.com/heterosexism-rules-evidence> ; Dorwart, L. “The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women.” *Medium*. Dec 3, 2017. <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexualassault-against-bisexual-women-95fe76c3330a>.

⁵⁸ Kosciw, J.G., et al. *The 2019 National School Climate Survey*.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Davis, L.A. *People with Intellectual Disabilities and Sexual Violence*. *The Arc*. Mar 2011. <https://www.thearc.org/document.doc?id=3657>.

⁶² Browne, A., Agha, A., Demyan, A., & Beatriz, E. “Examining Criminal Justice Responses To and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities.” *U.S. Department of Justice*. 2016. <https://www.ojp.gov/pdffiles1/nij/grants/250196.pdf>.

questions of parties and witnesses in individual meetings, including questions submitted by the other party).

- Ensure that students in K-12 schools are afforded the same appeal rights that the department would grant to students at institutions of higher education (proposed § 106.46(i)).

However, we oppose the department’s proposals that would create unfair grievance procedures and urge you to do the following instead:

- Require the preponderance standard in all Title IX investigations, as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation,⁶³ and it is the same standard used by courts in all civil rights and other civil proceedings.⁶⁴ Alternatively, at a minimum, clarify that “comparable” investigations include investigations of non-sexual physical assault, so that schools do not use the clear and convincing evidence standard to investigate *sexual* assault and other sex, race, and disability discrimination while using the preponderance standard to investigate non-sexual *physical* assault.
- Remove the requirement for schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption (proposed §§ 106.45(b)(3), 106.46(c)(2)(i)). This is not required in any other type of school proceeding and exacerbates the harmful and false rape myth that people who report sex-based harassment (or other sex discrimination) — primarily women and girls — tend to be lying.
- Remove the proposed exclusionary rule, which would require that, if a party or witness at an institution of higher education does not respond to a question “related to their credibility,” the school would have to ignore any statement they make that “supports their position” (proposed § 106.46(f)(4)). We are concerned this means that a survivor who refuses to answer a single question related to their credibility would have all of their oral and written statements excluded from the evidence.

Clarify and Strengthen the Role of Title IX Coordinators

We agree that the new Title IX regulation should clarify the role of Title IX coordinators in all recipient organizations responsible for implementing Title IX. The new Section 106.8(a)(2) under “Delegation to designee” proposes that the Title IX coordinator may assign one or more designees to carry out some of the recipient’s responsibilities, but one Title IX coordinator must retain ultimate oversight over those responsibilities. We agree with the department’s reason that this is an effective way for a recipient that enrolls large numbers of students, employs large numbers of employees, provides services in multiple locations, or engages in a large variety of activities to carry out the various Title IX responsibilities. We also encourage the department to affirm that elementary and secondary schools ideally should have their

⁶³ Letter from National Women’s Law Center to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 33 (Jan. 30, 2019), <https://nwlc.org/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

⁶⁴ Letter from Leadership Conference on Civil and Human Rights to Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 7 (Jan. 30, 2019), <https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm>.

own Title IX coordinators and to encourage the appointment of such school-level coordinators. The school district Title IX coordinator could still provide leadership, training, and coordination to the individual P-12 school level Title IX coordinators. We recognize this provides a way for the school district Title IX coordinator to identify trends among the recipients and coordinate training responsive to the trends identified and to efficiently monitor and address barriers.

These and other changes indicate the need to reissue Title IX coordinator guidance (which was rescinded in 2020) to clarify responsibilities reflecting the final Title IX regulations after a full review and consideration of the NPRM comments. This guidance can clarify that the Title IX coordinator does not need to be assigned full time Title IX coordinator responsibilities.

Ensure Appropriate Implementation of Title IX’s Religious Exemption

In order to enforce Title IX’s broad mandate to prevent sex-based discrimination in education, we urge the department to reconsider the two 2020 rules that made it easier for schools to discriminate in the name of religion. Prior to the 2020 rules, to claim a religious exemption to Title IX, the department required that a school be “controlled by” a religious organization; the 2020 rules greatly expanded this already broad requirement, expanding the ability of schools to claim an exemption to Title IX even if they were not “controlled by” a religious organization.⁶⁵ In addition, the 2020 rules explicitly assured schools that they would not have to submit advance notice to the department of their intent to discriminate. This change assured schools that they may opt out of Title IX’s requirements at any time, including during an Office for Civil Rights (OCR) investigation, and without notice or warning to the department, students, their families, or the public of their intent to rely on the religious exemption in advance of discriminating against them.⁶⁶ This rule allows schools to conceal their intent to discriminate against students, exposing them to harm — especially women and girls, LGBTQI+ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion services.⁶⁷ By allowing schools to claim exemptions during investigations, schools may use religion as a pretext for their unlawful discrimination.

Many LGBTQI+ people are people of faith, and many seek out a religiously affiliated education.⁶⁸ All denominations and traditions have internally varied views on gender and sexuality, so knowing a school’s faith tradition is not adequate notice of a school’s intention to discriminate. A notice that the institution intends to engage in a practice that would, but for the conflict with a specific tenet of a religious faith, be otherwise unlawful is essential both as a moral and practical matter for students making decisions about their futures, and as a legal matter to ensure consistency with the requirement that all students, applicants, and employees receive notice of a school’s Title IX obligations and policies.⁶⁹ The department can and

⁶⁵ 34 C.F.R. § 106.12(c).

⁶⁶ 34 C.F.R. § 106.12(b) ; National Women’s Law Center. *DeVos’s New Title IX Sexual Harassment Rule, Explained*. May 2020. <https://nwlc.org/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.28.20-v3.pdf>

⁶⁷ Green, E. “‘Transgender’ Could Be Defined Out of Existence Under Trump Administration.” *The New York Times*. Oct 21, 2018. <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

⁶⁸ Conron, K.J., Goldberg, S.K., & O’Neill, K. “Religiosity Among LGBT Adults.” *UCLA School of Law Williams Institute*. Oct 2020. <https://williamsinstitute.law.ucla.edu/publications/lgbt-religiosity-us/>.

⁶⁹ 34 C.F.R. § 106.8.

should require advance notice as an independent procedural requirement. This notice requirement imposes negligible burdens compared with the potential for fundamentally unfair surprises and harms to students who may be disciplined, expelled, or denied a degree on the basis of sex. Moreover, allowing schools to not disclose their religious exemption is inconsistent with the Title IX rule that requires recipients to provide notice of its nondiscrimination policies.⁷⁰ So too is the addition of sweeping criteria that significantly broadened the “controlled by” a religious institution requirement inconsistent with the text and OCR’s longstanding enforcement of Title IX. Thus, consistent with the purpose of Title IX, the department must give the exemption a narrow interpretation in order to effectuate Title IX’s remedial purpose.⁷¹

By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the department created a system that enables schools to actively mislead students. Women, LGBTQI+ students, married or unmarried pregnant and parenting students, and students who access or attempt to access birth control or abortion services could be subject to discrimination or expulsion from school without any notice, thereby affecting their ability to make an informed decision about where to go to school and ensure that they choose a college that will treat them fairly. Students should not have to avoid attending religious colleges and universities simply because of a lack of transparency regarding the institution’s intentions to protect their civil rights under Title IX.

Students deserve — and the law requires — that the U.S. Department of Education fulfills its responsibility to protect the civil rights of all students to safeguard equal educational opportunities. Ensuring that all our students are safe and welcomed in schools is incredibly important to our organizations, our partners, and the communities we represent. The administration must make clear that the fundamental American values of fairness and equality will not be abandoned and that schools will provide all students an educational environment free from sex discrimination and violence. If you have any questions, please reach out to Anna Byon (they/them), higher education senior program manager at The Leadership Conference on Civil and Human Rights, at byon@civilrights.org.

Sincerely,

National Organizations:

The Leadership Conference on Civil and Human Rights

The Leadership Conference Education Fund

American Association of University Women

American Atheists

American Humanist Association

Asian Americans Advancing Justice | AAJC

⁷⁰ 34 C.F.R. § 106.8(b).

⁷¹ National Women’s Law Center. *Re: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program (RIN 1840-AD45)*. Feb 18, 2020. <https://nwlc.org/wp-content/uploads/2020/03/NWLC-Comment-on-ED-FBO-and-Religious-Exemption-Rule.pdf>.

Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Learner Equity
Clearinghouse on Women's Issues
Committee for Children
Council of Parent Attorneys and Advocates (COPAA)
Disability Rights Education & Defense Fund
Equal Justice Society
Family Equality
Feminist Majority Foundation
Girls Inc.
GLSEN
Hispanic Federation
Japanese American Citizens League
Lawyers' Committee for Civil Rights Under Law
NAACP Legal Defense and Educational Fund, Inc. (LDF)
National Action Network Washington Bureau
National Center for Learning Disabilities
National Council of Asian Pacific Americans (NCAPA)
National Council of Jewish Women
National Disability Rights Network (NDRN)
National Employment Lawyers Association
National Women's Law Center
OCA-Asian Pacific American Advocates
Secular Coalition for America
Sojourners
SOSSI- Saving Our Sons & Sisters International
Southeast Asia Resource Action Center
Speak Up! Special Education Advocacy
The Advocacy Institute
The Education Trust
Union for Reform Judaism
Women of Reform Judaism

State & Local Organizations:

Agency for Humanity
Education Law Center-PA
Michigan Alliance for Special Education
Michigan Developmental Disabilities Council
The Parents' Place of MD
Wyman