



# Sexual Harassment<sup>1</sup>

## **BACKGROUND ON SEXUAL HARASSMENT**

For more than 25 years, the Supreme Court and the Department of Education have recognized that Title IX requires schools to address sexual harassment. Over the years, student survivors and advocates have pushed schools and policymakers to improve school responses to sexual harassment. However, sexual harassment in schools continues to be a serious barrier to equal educational access, and much work remains to be done to strengthen

Title IX enforcement and prevent sexual harassment from occurring in the first place.

Sexual harassment of students is widely prevalent. In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed in a given school year,<sup>2</sup> and one in five girls ages 14–18 have been kissed or touched without their consent.<sup>3</sup> About 10 percent of PK–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.<sup>4</sup> Furthermore, in a given year, one in 11 high school girls and one in 14 high school boys experience

physical dating violence,<sup>5</sup> and more than a quarter of a million people ages 16–19 are victims of stalking.<sup>6</sup> In college, more than 60 percent of women and men experience sexual harassment.<sup>7</sup> One in four women, one in five transgender and gender-nonconforming students, and one in 15 men are sexually assaulted during their time in college.<sup>8</sup> In addition, during their time in college, one in seven women and one in 10 men experience dating violence, and one in 10 women and one in 33 men are victims of stalking.<sup>9</sup> Unfortunately, these statistics are often higher for marginalized students, including Black and brown girls and women, LGBTQI+ students, pregnant and parenting students, and disabled students.<sup>10</sup>

Despite how common these incidents are, few students report to their schools, and those who do ask for help are often ignored or punished instead of receiving the help they need to learn and feel safe in school. For example, only 2 percent of girls ages 14–18<sup>11</sup> and 12 percent of college women who are sexual assaulted contact their schools for help.<sup>12</sup> Too often, victims who do come forward are suspended or expelled because school officials believe the victim engaged in consensual sexual activity in violation of school rules, or believe the incident was consensual and that the victim made a false accusation.<sup>13</sup> Student survivors are also often disciplined because at

the time they were assaulted, they were using drugs or alcohol, or for physically defending themselves against their harassers, for expressing age-appropriate trauma symptoms after the incident, for missing school in order to avoid their harasser, or for merely telling other students about the incident.<sup>14</sup> Sometimes schools force or pressure survivors into enrolling in inferior “alternative” education programs that isolate them from their friends, offer little to no instruction, and deprive them of access to extracurriculars.<sup>15</sup> Unfortunately, schools are more likely to disbelieve and punish girls and women of color (especially Black girls and women), LGBTQI+ students, pregnant and parenting students, and disabled students due to stereotypes that label these students as more “promiscuous,” more “aggressive,” less credible, and/or less deserving of protection.<sup>16</sup>

When schools fail to address sexual harassment, students suffer. Many survivors miss class, receive lower grades, withdraw from extracurricular activities, or leave school altogether because they do not feel safe. Some are even expelled in the wake of their trauma. In college, 34 percent of student survivors of sexual assault end up dropping out.<sup>17</sup>

## Developments Since 1972

Beginning in 1997, the Department of Education issued multiple guidance documents that clarified schools’ Title IX obligations to address sexual harassment, providing robust civil rights protections against sexual harassment in education. This guidance provided that whenever a school employee knew about or “should have known” about “severe or pervasive” sexual harassment, the school was required to take “prompt and effective” action to

address it.<sup>18</sup> This included requirements for schools to address a hostile school environment stemming from off-campus incidents of sexual harassment or assault, to provide supportive measures for complainants, and to use fair investigation procedures.<sup>19</sup> The guidance also encouraged schools to finish sexual harassment investigations within 60 days and discouraged schools from allowing students to directly cross-examine one another as

## DEVELOPMENTS SINCE 1972 *continued*

part of these investigations or from using mediation to resolve complaints of sexual assault.<sup>20</sup>

However, the Trump administration rescinded all of these guidance documents, replacing them in 2020 with Title IX regulations that require schools to ignore many reports of sexual harassment and to apply unfair, burdensome procedures for sexual harassment investigations that do not apply to any other type of school investigation of student or staff misconduct.<sup>21</sup> Schools must now dismiss Title IX complaints of sexual harassment if the harassment described in the complaint is not severe *and* pervasive, if the harassment occurred outside of a school program or outside the United States, or if the harassment complaint is made by a person who is no longer a student at the school.<sup>22</sup> Schools are now allowed to take an undefined amount of time to finish an investigation, to apply a standard of evidence that tilts in favor of reported harassers (“respondents”), to use mediation to resolve complaints of student-on-student sexual harassment, and to respond unreasonably to reported sexual harassment, as long as their response is not “deliberately indifferent.”<sup>23</sup> And schools can no longer provide supportive measures to complainants that are considered disciplinary or unreasonably burdensome on respondents, which might include removing a respondent from an extracurricular activity shared with the complainant.<sup>24</sup> Colleges and universities are also now required to hold live hearings when they investigate sexual harassment and to allow the parties’ advisors to cross-examine parties and witnesses.<sup>25</sup> At the time of writing this issue brief, the Biden administration has made commitments to revise these regulations.<sup>26</sup>

The Supreme Court has long recognized that schools must address sexual harassment. In 1992, it recognized that students could sue their schools

for money under Title IX in cases of teacher-on-student sexual abuse.<sup>27</sup> In 1998 and 1999, it issued a pair of landmark decisions, known as *Gebser* and *Davis*, that established the legal standards for Title IX lawsuits regarding teacher-on-student and student-on-student sexual harassment, respectively.<sup>28</sup> Since then, federal courts have issued a number of decisions both affirming and narrowing Title IX’s protections for student survivors. Some courts have recognized that schools must address off-campus or online sexual harassment if they have control over the incident<sup>29</sup> and must address dating violence against a student by a non-student guest.<sup>30</sup> Courts have also held that schools must do more than the bare minimum, must help victims further if previous measures are ineffective,<sup>31</sup> and must protect student survivors from the “continuing presence” of their harasser on campus.<sup>32</sup> And some courts have recognized that a student who is sexually harassed can sue their school if it has consistently ignored other students’ previous reports of sexual harassment.<sup>33</sup> However, student plaintiffs continue to face far more stringent standards under Title IX than employee plaintiffs do under Title VII (the federal law that protects against workplace sexual harassment).<sup>34</sup> In fact, some lower courts have even held that schools cannot be held liable for their deliberately indifferent responses to a student’s report of sexual harassment or assault unless the student is sexually harassed or assaulted *again* after their report to their school, effectively creating a “one free rape rule” in some jurisdictions.<sup>35</sup> Meanwhile, a growing number of appellate courts have allowed students disciplined for sexual harassment (primarily men and boys) to sue their schools for alleged “reverse” sex discrimination under a far more lenient standard than that available to students who have suffered sexual harassment.<sup>36</sup>

# Recommendations

Policymakers should create comprehensive protections against sexual harassment in schools by strengthening prevention measures, supporting student victims rather than punishing them, and ensuring meaningful accountability of sexual harassers and of schools that fail to protect students' rights. Effective policies must protect all students, including women and girls of color, LGBTQI+ students, pregnant and parenting students, and disabled students, who are often more likely to be sexually harassed *and* more likely to be disbelieved, punished, or criminalized when they come forward.

## Strengthen transparency and prevention measures against sexual harassment:

- Require PK–12 schools to provide developmentally appropriate sex education to all students on a wide range of topics, including consent, healthy relationships, reproductive health, and **LGBTQI+** identity.
- Require schools to train all school staff on how to recognize and respond to sexual harassment, notify the school's Title IX coordinator, and provide effective supportive measures for students who have reported sexual harassment.
- Remove police from schools to protect all students—especially Black and Indigenous students—from **sexual harassment**, discriminatory discipline, and violence at the hands of school police; and invest in school guidance counselors, social workers,

psychologists, nurses, and other **non-police staff** to build positive school climates and support sexual harassment victims.

- **Eliminate school dress code requirements**, as they can promote rape culture, often rely on sex and race stereotypes, and are often discriminatorily enforced; or, at a minimum, require schools to implement a universal, nondiscriminatory dress code (see **Discriminatory Discipline Based on Sex and Race** for more information).
- Ensure transgender and nonbinary students' access to restrooms, locker rooms, sports teams, and other sex-separated programs and facilities consistent with their gender identity.
- Require schools to conduct regular climate surveys on student experiences with sexual harassment and make the survey data publicly available.

## Support student victims instead of punishing them:

- Require schools to provide a wide range of **supportive measures** to students who report sexual harassment, including excused absences, counseling, tutoring, homework/exam adjustments, changes in academic/busing/dining/housing/work schedules, one-way no-contact orders; continued scholarship/honors eligibility, and the option to retake a class without financial penalty.



## RECOMMENDATIONS *continued*

- Prohibit schools from disciplining students who report sexual harassment for misconduct that occurred before or during the reported incident (e.g., drug or alcohol use, consensual sexual activity, self-defense) or that occur after the reported incident because of it (e.g., class absences, age-appropriate expressions of trauma, public discussion of the sexual harassment).

### **Ensure meaningful accountability of sexual harassers and schools:**

- Require schools to have a fair harassment complaint procedure, including by setting reasonable timeframes, applying a preponderance of the evidence standard, prohibiting direct cross-examination by a party or their advisor, and prohibiting the use of mediation to address sexual assault, dating violence, domestic violence, and stalking.
- Provide funding to schools that allow students to voluntarily choose a **restorative process** to address sexual harassment by well-trained facilitators. Unlike a traditional disciplinary process or other informal processes like mediation, a restorative process requires the wrongdoer to admit they caused sexual harm, centers the victim's needs, and allows the wrongdoer to make amends to the victim and change their future behavior.
- Require schools to take prompt and effective action when a school employee knows (or should reasonably know) about sexual harassment that alters a person's ability to participate in or benefit from a school program or activity, regardless of where the incident occurs, and regardless of whether the person is sexually harassed again after the school knows of the first incident. This would be required by the Title IX Take Responsibility Act of 2021 (H.R. 5396).
- Ensure that student survivors do not face more stringent litigation standards than students disciplined for sexual harassment when suing their schools under Title IX.
- Strengthen students' ability to file complaints against their schools with the U.S. Department of Education or a state agency (e.g., state Department of Education, Office of Attorney General), and increase civil penalties against schools for violations of Title IX, the Clery Act, or state anti-sexual harassment laws.

- 1 The American Civil Liberties Union’s (ACLU) position on how schools can best ensure fair, prompt, and equitable resolution of reports of sexual harassment and assault is set forth in its written comments on Title IX dated June 11, 2021, available at <https://www.aclu.org/aclu-written-comment-2021-title-ix-public-hearing>. For that reason, the ACLU does not join in the Sexual Harassment section of the NCWGE report.
- 2 American Association of University Women, *Crossing the Line: Sexual Harassment at School 2* (2011), <https://www.aauw.org/resources/research/crossing-the-line-sexual-harassment-at-school>.
- 3 National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 3* (2017) [hereinafter NWLC Sexual Harassment Report], <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.
- 4 Billie-Jo Grant et al., *A Case Study of K-12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation* (Sep. 15, 2017), <https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf>.
- 5 Centers for Disease Control & Prevention, *Preventing Teen Dating Violence* (last updated Mar. 5, 2021), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/teendatingviolence/fastfact.html>.
- 6 Jennifer L. Truman & Rachel E. Morgan, Dep’t of Justice, Office of Justice Programs, *Stalking Victimization*, 2016 (Apr. 2021), <https://bjs.ojp.gov/content/pub/pdf/sv16.pdf>.
- 7 American Association of University Women, *Drawing the Line: Sexual Harassment on Campus 17, 19* (2005), <https://www.aauw.org/app/uploads/2020/02/AAUW-Drawing-the-line.pdf>.
- 8 Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct ix* (Oct. 15, 2019) [hereinafter AAU Report], <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.
- 9 AAU Report, *supra* note 8, at 52 (dating violence), 55 (stalking).
- 10 See, e.g., AAU Report, *supra* note 8, at 13–14 (transgender and gender-nonconforming college students); GLSEN, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools 30* (2020), <https://www.glsen.org/research/2019-national-school-climate-survey> (LGBTQ youth ages 13–21); NWLC Sexual Harassment Report, *supra* note 3, at 3 (Native, Black, and Latina girls ages 14–18); National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting 12* (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting> (pregnant and parenting girls ages 14–18); National Women’s Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities 7* (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities> (disabled girls ages 14–18).
- 11 NWLC Sexual Harassment Report, *supra* note 3, at 2.
- 12 AAU Report, *supra* note 8, at A7–27.
- 13 See, e.g., Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout 15-16* (Mar. 2021) [hereinafter KYIX Report], <https://www.knowyourix.org/thecostofreporting>; Tyler Kingkade, *Schools Keep Punishing Girls – Especially Girls of Color – Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, *The 74* (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>; Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, *Chronicle of Higher Education* (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>; Aviva Stahl, *‘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](https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped); Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, *N.Y. Times* (June 7, 2016), <https://www.nytimes.com/2016/06/08/nyregion/schools-punished-teenagers-for-being-victims-of-sexual-assault-complaints-say.html>.
- 14 KYIX Report, *supra* note 13, at 15–16; NAACP Legal Defense and Education Fund, Inc. & National Women’s Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity 25* (2014), [https://nwlc.org/wp-content/uploads/2015/08/unlocking\\_opportunity\\_for\\_african\\_american\\_girls\\_report.pdf](https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf).
- 15 E.g., Tyler Kingkade, *A High Schooler Says Her School Called Her A “Drama Queen” When She Reported Harassment, Buzzfeed* (Oct. 13, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/forced-out-of-high-school-for-reporting-harassment-lawsuits>; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, *Atlantic* (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418>.
- 16 Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, 1-6 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3000695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000695); Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, *Medium* (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>; Jennie M. Kuckertz & Kristen M. McCabe, *Factors Affecting Teens’ Attitudes Toward Their Pregnant Peers*, 16 *Y Psi Chi, Int’l Honor Soc’y. Psychol.* 33 (2011), [https://www.psichi.org/resource/resmgr/journal\\_2011/spring11jnkuckertz.pdf](https://www.psichi.org/resource/resmgr/journal_2011/spring11jnkuckertz.pdf); *The Arc, People with*

- Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), <https://www.thearc.org/document.doc?id=3657>.
- 17 Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. Student Retention: Res.Theory & Prac. 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>.
  - 18 Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* vi (severe or pervasive), 10, 12 (prompt and effective) (issued Jan. 19, 2001; rescinded Aug. 14, 2020) [2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>; Dep't of Educ., Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.
  - 19 Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 26 (preponderance), 27–28 (police), 29–30 (off-campus), 33 (interim measures) (issued Apr. 29, 2014; rescinded Sept. 22, 2017) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* 4 (off-campus), 10 (police), 10–11 (preponderance), 15–16 (interim measures) (issued Apr. 4, 2011; rescinded Sept. 22, 2017) [hereinafter 2011 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
  - 20 2014 Guidance, *supra* note 19, at 31 (cross-examination), 31–32 (60 days), 2011 Guidance, *supra* note 19, at 8 (mediation), 12 (60 days, cross-examination). Mediation is appropriate for resolving conflict between two or more parties, but not for addressing harm done by a wrongdoer to a victim.
  - 21 National Women's Law Center, *DeVos's New Title IX Sexual Harassment Rule, Explained* (May 12, 2020), <https://nwlc.org/resource/devos-new-title-ix-sexual-harassment-rule-explained>.
  - 22 34 C.F.R. §§ 106.30 (“formal complaint”, “sexual harassment”), 106.44(a), 106.45(b)(3).
  - 23 34 C.F.R. §§ 105.44(a) (deliberate indifference), 106.45(b)(1)(v) (timeframe), 106.45(b)(1)(vii) (standard of evidence), 106.45(b)(9)-(9)(iii) (mediation).
  - 24 34 C.F.R. § 106.30 (“supportive measures”).
  - 25 34 C.F.R. §106.45(b)(6)(i). See also National Women's Law Center, *Federal Judge Vacates Part Of Trump Administration's Title IX Sexual Harassment Rule* (Aug. 11, 2021), <https://nwlc.org/resource/federal-judge-vacates-part-of-trump-administrations-title-ix-sexual-harassment>.
  - 26 Department of Education, Office for Civil Rights, *An Update on the Rulemaking Process for Title IX* (Feb. 18, 2022), <https://www2.ed.gov/about/offices/list/ocr/blog/20220218.html>.
  - 27 *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992).
  - 28 *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (student-on-student); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (employee-on-student).
  - 29 *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 687–89 (4th Cir. 2018).
  - 30 *Hall v. Millersville Univ.*, 22 F.4th 397 (3d Cir. 2022).
  - 31 *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260–61 (6th Cir. 2000).
  - 32 *Wills v. Brown Univ.*, 184 F.3d 20, 37 (1st Cir. 1999).
  - 33 *Karasek v. Regents of Univ. of California*, 956 F.3d 1093, 1112 (9th Cir. 2020); *Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007).
  - 34 Fatima Goss Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the Gebser and Davis Standards*, Am. Const. Soc'y (2008), <http://perma.cc/74R6-YYZY>.
  - 35 *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613, 623–24 (6th Cir. 2019); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). But see *Davis*, 526 U.S. at 645 (holding school liable if its deliberate indifference to known sexual harassment “cause[s]” harassment or “make[s] [the victim] vulnerable” to harassment).
  - 36 *Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d 230, 236 (4th Cir. 2021); *Rossley v. Drake Univ.*, 979 F.3d 1184, 1192 (8th Cir. 2020), cert. denied, 141 S. Ct. 1692 (2021); *Doe v. Univ. of Denver*, 1 F.4th 822, 830 (10th Cir. 2021); *Schwake v. Arizona Bd. of Regents*, 967 F.3d 940, 947 (9th Cir. 2020); *Doe v. Univ. of Scis.*, 961 F.3d 203, 209 (3d Cir. 2020); *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019).