LEGAL MOMENTUM®
The Women's Legal Defense and Education Fund

September 12, 2022

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
Washington DC 20202

Catherine E. Lhamon
Assistant Secretary,
Office for Civil Rights
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Re: Docket ID ED—2021—OCR—0166, RIN 1870—AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Submitted via www.regulations.gov

Dear Secretary Cardona and Assistant Secretary Lhamon,

Legal Momentum, the Women's Legal Defense and Education Fund is pleased to have the opportunity to provide this comment in response to the Department of Education's (ED) Notice of Proposed Rulemaking (NPRM or proposed rules).

Legal Momentum, originally founded as the NOW Legal Defense and Education Fund in 1970, is the nation's oldest civil rights organization dedicated to advancing the rights of women and girls. For more than 50 years Legal Momentum has worked to advance equal opportunities for women and girls in education and to guard against discrimination and harassment.

When Title IX was first enacted in 1972, Legal Momentum (then NOW Legal Defense and Education Fund) recognized the need for robust advocacy and awareness efforts in order for Title IX's promise to be fulfilled. Established in 1974, Legal Momentum's Project on Equal Education Rights (PEER) urged the Department of Health, Education and Welfare (HEW) to carry out its charge to enforcement Title IX's protections, published an array of educational materials about Title IX for parents, teachers, and school administrators creating widespread understanding of Title IX's protections, and created to National Coalition for Women and Girls in Education (NCWGE), which to this day continues this advocacy and awareness building.

Legal Momentum continues today to build upon our decades of experience harnessing the law to advance equity for women and girls. Legal Momentum, with our colleague organizations, advanced the foundational Title IX cases that recognized the scope of Title IX's protections, including those cases which recognized that sexual harassment in schools is a form of sex discrimination.[1]

[1] These cases include *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

As we commemorated Title IX's 50th anniversary just a few months ago we celebrated the many incredible gains that have been made thus far as a result of Title IX's protections. Yet we also reflected on the substantial effort left to see Title IX's full promises fulfilled. In many ways the Departments proposed rules would help achieve that promise. But, as detailed herein, some considerations for improvements to the proposed rule can move the needle even further to ensure that every student and school worker enjoys the protections that Title IX promises.

From our depth of expertise on sex discrimination and harassment in education and the protections of Title IX, we offer the following comments on the proposed rules for consideration.

WHO IS PROTECTED BY TITLE IX

We urge the Department to use language in both the final rule and its preamble that recognizes Title IX protects all "person[s]" within an "education program or activity." At times, the proposed rule and its preamble suggest that schools only have obligations to only students and employees. While students and employees may be the most common beneficiaries of Title IX's protections, the statute's text uses the word "person," which does not limit Title IX's protections to those with a particular relationship to the school. For example, Title IX protects independent contractors, campus visitors, and other "[m]embers of the public" who "are either taking part or trying to take part of a funding recipient." For these reasons, we ask that, wherever possible, the Department to use inclusive language such as "persons," or, when necessary, "workers" rather than "employees."

PROTECTIONS AGAINST SEX-BASED HARASSMENT

Definition of sex-based harassment

We support the proposed rule's definition of sex-based harassment including sexual harassment and other harassment on the basis of sex (including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity) when this harassment takes the form of "quid pro quo harassment," "hostile environment harassment," sexual assault, dating violence, domestic violence, or stalking.[2] We also support the proposed rules more broadly—and appropriately—defining "hostile environment harassment" as sufficiently "severe *or* pervasive" sex-based harassment that "denies or limits" a person's ability to participate in or benefit from an education program or activity.[3] This would be a return to the Department's longstanding standard applied from 1997-2020[4] and a marked improvement over the current standard, which requires schools to ignore sexual harassment unless it is "severe *and* pervasive" harassment that "effectively denies" equal access to education.[5] We

[2] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2), 41571 (proposed 34 C.F.R. § 106.10).
[3] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2(2)).
[4] *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) [hereinafter 2014 Guidance], 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. Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020) [hereinafter 2001 Guidance], 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), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.
[5] 34 C.F.R. § 106.30(2). While we support a return to the broader standard, it still may create burdens for survivors by requiring an inquiry into how a student's education is limited or impacted by harassment. For example, a school might interpret this to require a student to make a showing of lower grades, which would ultimately create a barrier to reporting, because without such a showing, the harassment might not rise to the level of "severe or pervasive" such that it "denies or limits" their ability to participate in or benefit from the education program or activity.

also urge the Department to define sex-based harassment to include harassment on the basis of parental, family, caregiver, or marital status, as further discussed below.

When Schools Must Address Sex-Based Harassment

Where harassment is perpetrated

We support the proposed rules requiring schools to respond to all sex-based harassment (or other sex discrimination) "occurring under [their] education program or activity," which includes conduct that a school has disciplinary control over or that occurs in a building owned or controlled by an officially recognized student organization at a college or university.[6] The preamble states that this means schools would be responsible for addressing incidents that occur off-campus or in a study abroad program, so long as it contributes to a hostile environment in school (*e.g.*, due to the harasser's continued presence on campus or their additional harassment of the complainant), and we urge the Department to expressly state in the regulations that Title IX covers off-campus school-sponsored activities.[7] This would be consistent with recent court decisions recognizing the requirement for schools to respond to sex-based harassment in off-campus settings[8] and would reflect the real-world experiences of students given that research indicates harassment and violence is more commonly perpetrated in off-campus locations than on campus.[9]

Notice of harassment

We appreciate that the proposed rules would *allow* schools to designate some employees as "confidential employees" (and would require those schools to notify students of the confidential employees' identities).[10] However, we urge the Department to instead *require* that schools designate one or more confidential employees,[11] who, upon learning of possible sex-based harassment (or other sex discrimination), must tell that person how to report it to the Title IX coordinator and how the Title IX coordinator can help them—*e.g.*, offer supportive measures (even without an investigation), open an investigation, or facilitate an informal resolution. These employees' status as confidential should be clearly indicated on their office doors, in their email signatures, on their website profiles, in employee directories, and in other relevant locations. This would protect victims' autonomy and privacy if they want to speak with a confidential resource for support and to understand their options before deciding whether to formally make a complaint.[12] We urge the Department to encourage schools to enter into memoranda of understanding with local community-based organizations that serve survivors of gender-based violence and harassment in order to provide more confidential options for students. In that vein,

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[6] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).
[7] *Id. See also id.* at 41403.
[8] *See Crandell v. N.Y. Coll Osteopathic Med.*, 87 F.Supp. 2d 304 (S.D.N.Y. 2000); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008); *L.E. v. Lakeland Join Sch. Dist. 272*, 403 F. Supp. 3d 888 (D. Idaho 2019); *DeGroote v. Arizona Bd. Of Regents*, 2020 WL 10357074 (D. Arizona 2020).
[9] Eryn Nicole O'Neal, Brittany E. Hayes & Andia M. Azima, "Distinguishing Between On-Campus and Off-Campus Sexual Victimization: A Brief Report," VIOLENCE AND GENDER 2021 8:1, 53-57 (2021).
[10] 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2 ("confidential employee"), 41573 (proposed 34 C.F.R. § 106.44(d)).
[11] We also encourage the Department to clarify that confidential employees may not serve as advisors in investigations.
[12] In K-12 schools, however, schools may be limited in keeping some reports of sex-based harassment confidential because of obligations imposed by state mandatory reporting laws requiring many school employees to report possible child abuse to law enforcement.

we urge the Department to encourage schools to designate a diverse set of confidential employees and to make an effort to enter into memoranda of understanding, or at least provide students with information about, local culturally-specific victim services.

For K-12 schools, the proposed rules would require all non-confidential employees to report possible sex-based harassment (or other sex discrimination) to the Title IX coordinator. We support this requirement when the alleged victim is a minor student (as typically is the case in the K-12 context), but we ask the Department to use a different approach when the alleged victim is an adult employee—for example, see our below recommendation for responding to alleged victims who are employees in institutions of higher education.

For institutions of higher education, the proposed rules would create different reporting obligations for three categories of non-confidential employees: (i) those with "administrative leadership, teaching, or advising roles"; (ii) those with the authority to institute corrective measures; and (iii) all other employees, as well as different reporting obligations for some of these categories depending on whether the alleged victim is a student or employee.[13] We urge the Department to simplify reporting obligations and to acknowledge the privacy and autonomy rights of students and employees in higher education, who are typically adults.[14] First, employees with the "authority to institute corrective measures" should still be required to report all possible sex-based harassment (or other sex discrimination) to the Title IX coordinator, except when they learn of an incident from a public awareness event like Take Back The Night.[15] These employees' reporting obligations should be clearly indicated, for example on their office doors, in their email signatures, on their website profiles, in employee directories, and in other relevant locations and we urge that the rules makes clear that these employees have an obligation to inform a person disclosing sex discrimination or harassment of the employee's non-confidential status and the implications thereof.[16] Second, all other non-confidential employees should be required to tell the person disclosing harassment or discrimination: (i) how to report to the Title IX coordinator, who can offer supportive measures and, if requested, an investigation or informal resolution; and (ii) how to reach a confidential employee, who can provide confidential supports and services.[17] These employees should also be required to ask if the person would like them to report the incident to the Title IX coordinator, and if so, to report it as requested.[18] This approach would ensure victims can choose to speak with a confidential employee, learn about their reporting options, and can ask any non-confidential employee to report an incident to the Title IX coordinator.

[13] 87 Fed. Reg. at 41572-73 (proposed 34 C.F.R. § 106.44(c)(2)).
[14] While some students at institutions of higher education are minors, education laws like Federal Educational Rights and Privacy Act (FERPA) give them their own privacy rights, unlike minors in K-12 schools, whose privacy rights belong to their parents. *See* 20 U.S. Code § 1232g(d).
[15] While the proposed rules do not obligate the Title IX coordinator to do anything in response to possible sex-based harassment disclosed at public awareness events, the proposed requirement for employees to report such information to the Title IX coordinator could nevertheless chill student participation in classes and at public awareness events. 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(e)).
[16] Merle H. Weiner, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166, at 13-14 (Aug. 14, 2022).
[17] Kathryn J. Holland, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166, at 6-7 (submitted on or before Sept. 12, 2022).
[18] Weiner, *supra* note 16, at 10, 12-14; Holland, *supra* note 17, at 6-7.

Finally, given the complexities with requiring employees to report harassment or other discrimination to the Title IX coordinator, the Department should issue supplemental guidance instructing schools on how to respond to possible harassment or other discrimination while protecting the privacy and safety of LGBTQI+ students and employees (who may not wish to be outed to their parents or the school) and of pregnant students and employees (who may be at risk of criminalization if they seek an abortion or have a miscarriage).

Dismissal of complaints

We support the proposed rules removing the 2020 rules' mandatory dismissal provisions, which, among other things, currently require schools to dismiss Title IX complaints of sexual harassment by individuals who were not participating in or attempting to participate in" a school program or activity at the time they filed their complaint.[19] Under the proposed rules, schools would be required to address complaints by all individuals, even if they are not current students or employees of the school (*e.g.*, applicants, visitors, graduates, former students, former employees), so long as the individual was participating or trying to participate in the school's program or activity at the time they *experienced the harassment (or discrimination)*.[20] The proposed rules would allow schools to dismiss a complaint where a respondent has transferred, graduated, or retired, as long as they provide supportive measures and take other "prompt and effective steps" to ensure the harassment or discrimination does not continue or recur.[21] We urge the Department to clarify that such "steps" may include, but are not limited to, providing training, investigating to determine whether there have been other victims and whether other school staff knew about the incident(s) but ignored it, or took steps to cover it up.

How Schools are Required to Respond to Sex-Based Harassment

Standard of Care

We support the proposed rule requiring schools to take "prompt and effective action" to end sex-based harassment (or other sex discrimination), prevent it from recurring, and remedy its effects on all people harmed.[22] This would be a welcome return to the standard of care previously required by the Department from 2001 until 2020 and a much-needed change from the current rules' harsh "deliberate indifference" standard, which allows schools to act less reasonably in response to sex-based harassment.[23]

[19] 34 C.F.R. § 106.30(a) (defining "formal complaint"); 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2). While the 2020 rules make an exception if an individual filing a complaint was an applicant who intended to enroll in the school, and for an alumnus who intended to stay involved in alumni programs, this mandatory dismissal provision still currently leaves scores of individuals without protections under Title IX in the wake of sex-based harassment.
[20] 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2).
[21] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)-(iii)). *See also id.* at 41573 (proposed 34 C.F.R. § 106.44(f)(6)). These measures could range from the Title IX coordinator barring a third party (*e.g.*, former student or employee) from the school's campus if the coordinator discovers that they are attending school events and committing further harassment, to leading staff trainings on how to monitor for risks of sex discrimination in a specific class, department, athletic team, or program where discrimination has been previously reported. *See id.* at 41446-47.
[22] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).
[23] 34 C.F.R. § 106.44(a); 2001 Guidance, *supra* note 4, at 10-12, 14-15, 23.

Supportive measures

We support the proposed requirement for schools to offer supportive measures at no cost to individuals who report sex-based harassment (or other sex discrimination), regardless of whether they request an investigation or an informal resolution,[24] and even if their complaint is dismissed.[25] We also support the proposed rules allowing schools to change a respondent's schedule in order to protect a complainant's safety or the school environment or to prevent further incidents.[26] While we appreciate the preamble's explanation that schools would be allowed to impose a "one-way no-contact order" against a respondent,[27] we ask the Department to clarify this in the regulations themselves, as it is a common point of confusion among schools and students. We also urge the Department to explicitly clarify in the regulations that if a party requests a certain supportive measure and it is "reasonably available,"[28] then the school must provide it; 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.[29] Finally, we ask the Department to expand the list of examples of supportive measures—with a particular emphasis that the examples constitute a non-exhaustive list—to note the availability of academic, financial aid, healthcare and mental health care access so that students and employees are aware of what specific types of help their school can offer to ensure they keep up their grades and stay physically and mentally safe.[30]

Informal resolutions

In general, we support the proposed rules allowing schools to use an informal resolution to resolve student-on-student sex-based harassment (or other sex discrimination), subject to certain safeguards,[31] including a ban on using any information obtained solely through an informal resolution in an investigation.[32] However, we urge the Department to require all parties to give "written consent" to an informal resolution (not simply "consent"). Furthermore, we recommend that the Department expressly clarify that schools may use a restorative process as a type of informal resolution to resolve sex-based harassment (or other discrimination) but that they may not use mediation or other conflict resolution processes. Conflict resolution, including mediation, is inappropriate for resolving sex-based harassment, because such processes assume both the victim and harasser share responsibility for the harassment, can allow harassers to pressure survivors into inappropriate resolutions, and often require direct interaction between the parties, which can be retraumatizing. In contrast, a restorative process

[24] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.44(g)).
[25] 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)).
[26] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 ("supportive measures")); *id.* at 41573 (proposed 34 C.F.R. § 106.44(g)(1)).
[27] 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(1)); *id.* at 41450 ("one-way no-contact orders").
[28] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 ("supportive measures")).
[29] *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)).
[30] For example, we recommend adding at proposed § 106.44(g)(1): allowing a complainant to resubmit an assignment or retake an exam; adjusting a complainant's grades or transcript; if the instructor is the harasser, independently re-grading the complainant's work; preserving a complainant's eligibility for a scholarship, honor, extracurricular, or leadership position, even if they no longer meet a GPA, attendance, or credit requirement; and reimbursing tuition or providing a tuition credit to a complainant who does not complete a course due to harassment.
[31] The proposed rules would allow schools to use an informal process as long as all parties receive written notice of their rights and obligations, give consent to the process, can withdraw at any time before the end to do a traditional investigation, and are not required to participate in an informal resolution or to waive their right to an investigation in order to continue accessing any educational benefit; and as long as the school believes an informal resolution is appropriate (*e.g.*, the alleged conduct would not pose a future risk of harm to others). 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(1)-(2)).
[32] 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(3)(vii)).

requires the harasser to admit that they harmed the victim, center the victim's needs, repair the harm they caused, and change their future behavior. We urge the Department to include in the final rule a requirement that any school choosing to implement an informal resolution be required to provide formal training to all individual who will be involved in carrying out the process.[33] We also encourage the Department to issue supplemental guidance detailing best practices for carrying out informal resolutions and restorative justice processes which, in part, clarifies what it means to "voluntarily" participate in such a process to resolve sex-based harassment or discrimination.[34]

Retaliation

We support the proposed rules prohibiting any school or person from retaliating against anyone because they reported sex-based harassment (or other sex discrimination) or participated or refused to participate in an investigation or informal resolution of such incidents.[35] Given the high prevalence of schools punishing student survivors,[36] we support the clarifications that schools may not discipline someone for: non-harassing conduct that "arises out of the same facts and circumstances" as the reported incident[37] (*e.g.*, alcohol or drug use, self-defense); or 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.[38] Furthermore, we support the proposed rules requiring schools to offer supportive measures to individuals who report retaliation and to investigate complaints of retaliation, including peer retaliation.[39] Finally, we ask that the Department clarify in the final regulations that retaliation includes: (i) 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); (ii) disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (*e.g.*, a disciplined respondent files a counter-complaint against their victim alleging the victim was the actual harasser); (iii) requiring a complainant to leave an education program (*e.g.*, to take leave, transfer, enroll in "alternative school"); and (iv)

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[33] *See* Know Your IX, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166, at 9-10 (to be submitted to Regulations.gov on or before Sept. 12, 2022).

[34] Know Your IX, *supra* note 33.

[35] 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2 ("retaliation").

[36] *See*, *e.g.*, Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 13-16 (Mar. 2021), https://www.knowyourix.org/thecostofreporting; Zachary Hansen, *Fayette teen sues school district, says she was expelled for reporting sexual assault*, Atlanta Journal-Constitution (Aug. 27, 2019), https://www.ajc.com/news/crime--law/fayette-teen-sues-school-district-says-she-was-expelled-for-reporting-sexual-assault/wiSFAISBcgNzQ0YT2oKTbO; 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; Brian Entin, *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; 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; 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.

[37] 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.71(a)).

[38] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(5)). The proposed rules would prohibit this type of discipline but would not define it as retaliation; we urge the Department to expressly state that it is prohibited retaliation.

[39] 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71).

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.[40]

How Schools Must Investigate Sex-Based Harassment

Presumption of non-responsibility

We oppose the Department retaining the harmful rule from the previous administration that currently requires 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.[41] This formal presumption and notice of such a presumption is not required in any other type of school proceeding. In that way it exceptionalizes sex-based harassment 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. Starting from the premise they are not to be believed, complainants are deterred from initiating or continuing with an investigation. While we appreciate—and support—the Department's efforts to ensure that schools do not presume one way or the other at the start of an investigation, the Department should simply require schools to notify parties that a determination about responsibility will not be made until the end of an investigation and that neither party is presumed to be telling the truth or lying at the outset.

Obtaining and consideration of evidence offered by parties and witnesses

Under the proposed rules K-12 schools would be required to allow all parties to present their witnesses and evidence and, if credibility is at issue, to use a process that enables the decision-maker to assess the credibility of the parties and witnesses.[42] We support the proposed rules giving the needed flexibility to K-12 schools to address sex-based harassment (and other sex discrimination) promptly and appropriately.

For institutions of higher education, the proposed rules would remove the harmful requirement from the 2020 rules that mandate direct, live cross-examination, and instead allow more flexibility for questioning to be conducted either: (i) by a decision-maker at a live hearing or in individual meetings, with suggested questions from the parties; or (ii) by the parties' advisors via cross-examination at a live hearing, as is already required in some jurisdictions because of federal court decisions.[43] We support the additional flexibility that the proposed rules would provide for institutions of higher education and encourage the Department to provide further guidance as to how schools can conduct such processes while minimizing reliance on cross-examination given the retraumatization that cross-examination inflicts.[44]

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[40] *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.
[41] 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(3), 106.46(c)(2)(i)). *See also* 34 C.F.R. §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B).
[42] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(f)(2), 106.45(g)).
[43] 87 Fed. Reg. at 41577, 41577-78 (proposed 34 C.F.R. §§ 106.46(e)(6)(ii), 106.46(f)(1)(i)).
[44] *See* Know Your IX, *supra* note 33.

We do, however, oppose 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."[45] We are concerned this means that a survivor who refuses to answer a single question related to their credibility—even if they answer many others—would have all of their oral and written statements excluded from the evidence, and that this rule could be broadly applied given the Department has not explained how schools would determine whether question is "related to" a person's credibility.[46] While the proposed rules instruct decision-makers not to draw any inferences about whether sex-based harassment was perpetrated based "solely" on a person's refusal to respond to questions related to their credibility,[47] this will insufficiently cure the problem given that a complainant in such a situation will be forced to rely exclusively on other witnesses' statements—if there are any witnesses to the harassment--in order to meet the standard of proof.

Standard of proof

The proposed rule would require schools to use the preponderance of the evidence standard to investigate sex-based harassment (or other sex discrimination), unless the school uses the clear and convincing evidence standard in all other "comparable" investigations, including for all other types of harassment and discrimination.[48] We urge the Department to 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,[49] and it is the same standard used by courts in all civil rights and other civil proceedings.[50] Unlike the preponderance of the evidence standard's structural equity, the clear and convincing evidence standard injects skepticism only of the complainant and thus calls for structural inequity in the process despite Title IX's mandate for equal protections.[51] Indeed, the preamble identifies that

> "[u]se of a preponderance standard also equally balances the interests of the parties in the outcome of the proceedings by giving equal weight to the evidence of each party, and it begins proceedings without favoring the version of facts presented by either side. The Department understands that there can be serious consequences for a respondent who is found to be responsible for sex-based harassment, including sexual assault, and for complainants who have been subjected to sex-based harassment. The Department further understands that all parties have an equal interest in the outcome of the proceedings."[52]

This recognition must be reflected in the final rules by permitting use solely of the preponderance of the evidence standard of proof. Additionally—unlike the easily understood and applied preponderance of

[45] 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(4)).
[46] *Id.*
[47] *Id.*
[48] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).
[49] 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.
[50] 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.
[51] *See* Nancy Chi Cantalupo et al., Letter to Dep't of Educ., RE: D RE: Docket ID ED-2021-OCR-0166 (to be submitted to Regulations.gov on or before Sept. 12, 2022).
[52] 87 Fed. Reg. at 41485.

the evidence standard—the clear and convincing evidence standard has no generally agreed upon or consistent explanation. With disagreement among courts across the country about how to apply the C&CE standard, it is not realistic to expect schools to fairly and consistently apply such a standard.[53]

If the Department chooses not to require the preponderance standard, it should, at a minimum, clarify what is meant by "comparable" investigations and we urge the Department to clarify "comparable" would include investigations of "non-sexual assault" (*e.g.*, non-sexual physical assault). Otherwise, schools could believe that they can use the preponderance standard to investigate *physical* assault and the clear and convincing evidence standard to investigate *sexual* assault, other sex-based harassment or discrimination, and all other harassment and discrimination based on race, disability, etc.

Appeals

We support the proposed rule requiring institutions of higher education to offer appeals to both parties based on a procedural irregularity, new evidence, or a Title IX official's bias or conflict of interest that affected the outcome, and allowing them to offer additional bases to both parties equally.[54] However, we urge the Department to ensure that parties are afforded the same appeal rights in K-12 schools as they would be at institutions of higher education.

Time frame

We support the proposed rule requiring schools to conduct "prompt" investigations and set "reasonably prompt timeframes" for all major stages of an investigation of sex-based harassment (or other sex discrimination).[55] However, we encourage the Department to provide more clarity for what will generally be considered "prompt". In 2011, the Department adopted the position that Title IX grievance procedures should last "approximately 60 calendar days following receipt of the complaint."[56] This 2011 guidance also recognized that, owed to complexity or severity, investigation timelines may deviate from that 60-day timeline. Taking into account the nature of the educational—particularly higher education—environment, 60 days is nearly half a semester and not an unreasonable benchmark to strive towards. In absence of a clear benchmark, lengthy investigations are commonplace and these delays often result in harm to the educational prospects of complainants and respondents.[57] While we understand that schools may sometimes need to impose a "reasonable" delay for "good cause,"[58] we urge the Department to clarify in the regulations what situations constitute "good cause," and to explicitly prohibit schools from imposing more than a "temporary" delay due to a concurrent law enforcement investigation.

PROTECTIONS FOR PREGNANT AND PARENTING STUDENTS

Many students will become pregnant or will parent during their education. While being pregnant or parenting should not derail a student's educational trajectory, it unfortunately often does due to lack of

[53] *See* Nancy Chi Cantalupo, *supra* note 51.
[54] 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)(1)-(2)).
[55] 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(4), 106.46(e)(5)).
[56] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Sexual Violence (2011) (rescinded by the Trump Administration), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[57] *See* Know Your IX, *supra* note 33.
[58] *Id.*

support or outright discrimination from their schools.[59] Among teens ages 15-19, 2.2 percent give birth to a child.[60] 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—and one third of young mothers never obtain a diploma or GED at all.[61] And less than 2 percent of teenage mothers graduate from college by age 30.[62] Additionally, lesbian and bisexual teen girls are more likely than straight teens to become pregnant, and transgender youth are just as likely to become pregnant as cisgender youth.[63] Despite this trend, LGBTQI+ pregnant and parenting students' experiences of intersectional discrimination and their unique needs are largely ignored by educational institutions.[64]

In higher education, 22% of college students are parents.[65] 44%percent of college student-parents work full time while enrolled and 23% are single parents and working full time while enrolled.[66] Yet with all of these demanding responsibilities in addition to the demands of their educational programs, parenting college students tend to have higher GPAs than their non-parenting peers.[67]

Institutional barriers persist for student-parents. For example, punitive attendance policies can push pregnant or parenting students out of school is they are not accommodated when they must miss class for medical appointments, childbirth and recovery therefrom, when their children are ill or if their childcare arrangements fall through, or when they need to pump break milk.[68] It is clear that when schools remove barriers and prevent discrimination against pregnant and parenting students they are likely to succeed. Robust protections of pregnant and parenting students' Title IX rights is essential.

Scope of Protections

Pregnancy or related conditions

We strongly support the inclusion of a definition for "pregnancy or related condition" in the proposed rules, applied to any "person" (including students, employees, and candidates for admission) based on "current, potential, or past" pregnancy or related conditions".[69] This clarification of Title IX's longstanding prohibition of discrimination on the basis of pregnancy and related conditions is essential. We especially appreciate the inclusion of "lactation" and "termination of pregnancy" as a pregnancy-

[59] See National Coalition for Women and Girls in Education, *Title IX at 50* (June 2022), https://www.ncwge.org/TitleIX50/NCWGE%20Title%20IX%20At%2050%20-%206.2.22%20vF.pdf [hereinafter NCWGE report]

[60] 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) 1, https://www.cdc. gov/nchs/data/databriefs/db259.pdf

[61] Kate Perper et al., Diploma Attainment Among Teen Mothers, Child Trends 1 (2010), https:// www.childtrends.org/publications/diplomaattainment-among-teen-mothers.

[62] Cynthia B. Costello, Pathways to postsecondary education for pregnant and parenting teens, Institute for Women's Policy Research v (2017), https://files.eric.ed.gov/ fulltext/ED556724.pdf.

[63] Nat'l Women's Law Ctr., *A Call to Action to Support LGBTQI Pregnant, Expectant, and Parenting Students* (March 2022), https://nwlc.org/resource/a-call-to-action-to-support-lgbtqi-pregnant-expectant-and-parenting-students/

[64] *Id.*

[65] Government Accountability Office, Higher Education: More Information Could Help Student Parents Access Additional Federal Student Aid 9 (Aug. 2019), https://www.gao. gov/assets/gao-19-522.pdf

[66] *Id*.

[67] Institute for Women's Policy Research, Parents in College: By the Numbers 1 (Apr. 2019), https://iwpr.org/iwpr-issues/studentparent-success-initiative/parents-in-collegeby-the-numbers.

[68] *See* NCWGE report, *supra* note 59 at 28.

[69] 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) ("pregnancy or related conditions"), 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(ii), 106.40(b)(1)), 41579 (proposed 34 C.F.R. § 106.57(b)).

related conditions. We urge inclusion in the final rule "perceived" and "expected" pregnancy and related conditions to the definition. This would ensure that students, workers and candidates for admission are not denied equal educational opportunities as a result of rumors or perceptions; for example, individuals seeking fertility care or otherwise indicating their intention to become pregnant being denied opportunities because they may become pregnant and require accommodation.

We also urge the Department to express in the final rules that the conditions included in the definition form a *non-exhaustive* list of "pregnancy or related conditions" and can also include mental and physical conditions including, but not limited to gestational diabetes, preeclampsia, mastitis, hyperemesis gravidarum, "morning sickness," fatigue, dehydration, and postpartum depression and anxiety. The final rules should make clear that a pregnancy related condition does not need to qualify as a disability under the Americans with Disabilities Act in order to fit the definition of a protected pregnancy related condition under Title IX.

Response to notice of pregnancy or related condition

The proposed rules would require employees who become aware of a student's pregnancy or related condition to give them the Title IX Coordinator's contact information and would require Title IX coordinators to notify the student of their rights.[70] While we appreciate the intent behind these requirements we urge the Department to provide clear instruction to schools in the final rules and in supplemental guidance on how to carry out these requirements while protecting student privacy. It is critical, particularly in states where abortion is criminalized, to ensure that school records (including school health records) are not used to prosecute students whose school records indicate they have been pregnant in the past but are not currently pregnant. We strongly urge the Department to make clear that it is a violation of Title IX to discipline students or refer students to law enforcement or other governmental authorities based on contraceptive use, termination of pregnancy, or other pregnancy outcomes or reproductive health choices.

Parental, family, or marital status

The proposed rules, like the current rules, would not include discrimination based *solely* on parental, family, or marital status as a type of sex discrimination.[71] Rather, schools would be prohibited from adopting a policy, practice, or procedure for students, employees, or applicants concerning their current, potential, or past parental, family, or marital status—but only if the school does so in a way that "treats persons differently on the basis of sex."[72] This unnecessarily narrow prohibition means that, for example, school administrators believe that they can discriminate against parenting students (versus non-parenting students), as long as they do so equally across genders, despite the fact that such discrimination is likely to have a disparate impact on the basis of sex and will often be based on sex stereotypes. In addition, under the current rules, which are very similar, we understand that in some instances school staff are sometimes deterred from supporting young mothers because they fear that accommodating birthing mothers without similarly accommodating fathers and other non-birthing parents violates Title IX and, consequently, decide to not accommodate any student parents at all. The

[70] 87 Fed. Reg. at 41571-72 (proposed 34 C.F.R. § 106.40(b)(2); 34 C.F.R. § 106.40(b)(3)(i)).
[71] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).
[72] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(i), 106.40(a), 41579 (proposed 34 C.F.R. § 106.57(a)(1)).

proposal would also exclude from protection other students who may be harmed by gender norms related to caregiving, including expectant non-birthing parents, students who are perceived to be parents, and caregivers who are not parents. Therefore, because such discrimination consistently has discriminatory impacts based on sex and is deeply bound up in sex stereotypes. we urge the Department to expressly state that schools may not discriminate based on a person's "current, potential, *perceived, expected,* or past parental, family, marital, or *caregiver* status." We also ask the Department to clarify what "family status" means, as existing regulations and guidances do not provide any details.

Protections to ensure access to education programs and activities

Participation

We support the proposed rule prohibiting educational institutions from requiring students who are pregnant or have a related condition to provide certification from a healthcare provide indicating they can physically participate in a program or activity, unless *all* students are required to provide such certification.[73] We also support the inclusion in the proposed rule permitting, in instances where seeking a certification is permissible, that it be allowed from any healthcare provider and not exclusively a physician.[74] These provisions are important because schools tend to make assumptions about what abilities pregnant students have during pregnancy and while experiencing pregnancy related conditions and impose restrictions based on assumptions about what is "safe" or "appropriate" during pregnancy. This deprives students of their autonomy and denies equal access to educational programs and activities. For example, students who engage in physically intensive extracurricular activities; or students engaged in an education program that includes participation in laboratories or medical facilities.

Separate educational programs or activities

We support that the proposed rule maintains the requirement that pregnant students may only be placed in separate educational programs or activities if their participation in such programs or activities is "voluntary".[75] However, despite that this has been a longstanding requirement in the Title IX regulations, students are routinely forced, coerced or pressured into inferior alternative education programs. We strongly urge the Department to make clear that, even where a pregnant student voluntarily engages in a separate program, such separate programs must be *substantially equal* in purpose, scope and quality to those offered to students who are not pregnant or parenting or experiencing a pregnancy related condition.

Absences/Leave

We strongly support the proposed rule requiring that a pregnant student be permitted to take a *voluntary* leave of absence from the school's education program or activity for a period of time that is deemed necessary by the student's healthcare provider or the period provided by the school's leave policy, whichever is greater.[76] We support that the proposed rules allow the determination of medical

[73] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(6)).
[74] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(6)).
[75] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(1)).
[76] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).

necessity for such leave may come from any licensed healthcare provider, as not all students have access to prenatal healthcare provided by a physician.[77] We strongly support that the proposed rule would require that, upon the student's return from such voluntary leave, the student must be reinstated to the academic status, and as practicable, extracurricular status the student held when the period of leave began.[78] These provisions are critical to ensuring that pregnant students are not regularly faced with choosing between following medical advice and maintaining their educational path. However, the proposed rule, as written, will not sufficiently protect pregnant students who take voluntary leave. Many of these students, as a result of the timing or length of the leave, will be forced to withdraw or deregister. This can affect eligibility for benefits or necessities such as financial aid, scholarships, and housing. In order to ensure pregnant students who take voluntary leave can be truly restored to their pre-leave status, we urge the Department to clarify in the final rule that recipients must ensure continuity of the student's status and benefits including financial aid, merit- or need-based scholarships, housing, healthcare, during and following their period of voluntary leave.

We are concerned about the proposed rule's creation of an arbitrary and harmful distinction between medically necessary "leave"—which would have to be granted if requested—and short "breaks during class" or "intermittent absences"—which would be considered "reasonable modifications" that could be approved or denied subject to the Title IX Coordinator's discretionary determination that providing such breaks amounts to a "fundamental alteration" of the educational program. We strongly urge the Department to require schools to presume that medically necessary absences for any purpose (e.g., prenatal care, lactation breaks, abortion care) are inherently "reasonable" modifications and must be granted.

Accommodations/Modifications

The proposed rules would require schools to "promptly" make "voluntary and reasonable modifications"[79] to their policies, practices, or procedures because of a student's pregnancy or related condition, unless a modification is "so significant" that it "alters the essential nature" of the school's program or activity.[80] The proposed "essential nature" qualifier is vague and would permit schools to deny students who are pregnant, lactating, or accessing abortions of necessary accommodations. We urge the Department to require schools to presume that medically necessary absences are inherently "reasonable" modifications and thus must be granted. Likewise, we urge the Department to clarify in the final rule that medical documentation is very frequently—indeed, typically—unnecessary to support a request for reasonable modifications. For example, a requested modification for bathroom breaks is routine and obvious and requiring medical documentation would be unduly burdensome.

While we strongly support that the proposed rules require that modifications be voluntary, we strongly encourage the Department to clarify in the final regulations that a school shall not force or coerce a student to accept a modification that the student does not want or need. Additionally, we urge the Department to clarify that if a modification turns out to be ineffective or "fundamentally alters" the

[77] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).
[78] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).
[79] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).
[80] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

program or activity then the school must engage in a good faith, interactive dialogue to identify other modifications that would meet the student's needs.

Finally, we strongly encourage the Department to include in the final regulations a non-exhaustive list of specific examples of accommodations or modifications.

Lactation

We strongly support the proposed rule requiring schools to give lactating students and employees reasonable breaks and a clean, private space *that is not a bathroom* to pump breastmilk or breastfeed.[81] However, we urge the Department to clarify that lactation spaces must be equipped with a chair, flat surface, and access to an electrical outlet. There should also be nearby access to running water and a refrigerator to store expressed milk. The Department should also explicitly state that lactation spaces must be in reasonable proximity to the student's specific place of study or worker's specific place of work. These are the bare minimum features of a lactation space for it to be functional. What's more, nearly all recipients under Title IX are already required to provide a lactation space to certain employees under the Fair Labor Standards Act. As such, the cost of implementing these spaces is minimal.[82] We urge the Department to include in the final regulations that lactating students and workers maintain the right to express breastmilk and/or breastfeed in places other than the designated lactation spaces, whether public or private, if they so choose. Such a regulation would align with laws in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands that allow lactating people to breastfeed in any public or private place they are otherwise allowed to be.[83]

Extend absences and accommodations protections to parenting and caregiving students and employees

We strongly urge the Department not to exclude workers who are pregnant or experiencing a related condition or parenting and caregiving students in the protections regarding absences and modifications for as long as they are caring for a minor child or disabled adult who is sick. Discrimination based on pregnancy or a related condition is a form of sex discrimination under Title IX and affected students and employees alike should have affirmative rights under Title IX that are independent of other civil rights laws.

Responsibility to provide absences and modifications

The proposed regulations would make the protections regarding reasonable modifications, voluntary leaves of absence and lactation spaces the personal obligation of the school's Title IX coordinator.[84] This will lead schools to assert that no other agent or employee has a responsibility to comply with these provisions and, practically, this means that pregnant students will be denied legally obligated absences and modifications because they speak to the "wrong" person. We urge the Department to include in the final regulations that the protections related to reasonable modifications, voluntary leave of absence, and lactation spaces are the responsibility of the recipient.

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[81] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. §§ 106.40(b)(3)(iv), 106.40(b)(4)(iii)), 41579 (proposed 34 C.F.R. § 106.57(e)).
[82] 29 U.S.C. 207(r)(1).
[83] National Conference of State Legislatures, *State Breastfeeding Laws, https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx.*
[84] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)).

Privacy

We urge the Department to instruct educational institutions in the final regulations and in supplemental guidance on how to protect student privacy to ensure that school records regarding harassment based on pregnancy or related conditions (including termination of pregnancy) are not used to support abortion-related prosecutions in states where abortion and other reproductive healthcare is criminalized. In doing so, we ask the Department to clarify how the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[85] interacts with other privacy laws affecting students, like the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) and clarify that a student is protected by FERPA if they disclose an abortion to an academic counselor or mental health care provider. Given the growing number of state laws criminalizing and targeting abortion, the Department should clarify that Title IX's preemption[86] extends to these state laws, and as such, even in states where abortion is criminalized, recipients must prohibit abortion related discrimination and cannot be subjected to criminalization for doing so.

PROTECTIONS FOR LGBTQI+ STUDENTS

Scope of Protections

We strongly support the proposed rule's explicit inclusion of discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits) and sex stereotypes within the definition of sex discrimination.[87] LGBTQI+ students face discrimination in schools at alarming rates. Indeed, GLSEN's national School Climate Survey found that nearly three in five LGBTQ+ students and more than three in four transgender students report being subjected to anti-LGBTQ+ discrimination at school.[88] This clear expression that LGBTQI+ students are protected under existing law is essential to fulfilling Title IX's promise of equal access to education for all students and to implement the U.S. Supreme Court's decision in *Bostock v. Clayton County*.[89]

Participation Consistent with Gender Identity

We strongly support the proposed rule clarifying that preventing a student form participating in an education program or activity consistent with their gender identity is a *per se* a form of sex-based harm and generally violates Title IX because it causes more than "de minimis" harm.[90] We urge the Department to include in the final regulations a non-exhaustive list of common examples. Additionally, we urge the Department to clarify that the de minimis harm standard applies to **all** sex-separated programs and activities—including, but not limited to, restrooms, locker rooms, overnight accommodations, etc.—unless Congress or the Department has expressly stated otherwise.

Anti-LGBTQI+ Harassment

We support the proposed rule requiring schools to address harassment based on sexual orientation,

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[85] 597 U.S. __ (2022).
[86] Proposed 34 C.F.R. § 106.6(b)
[87] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).
[88] Joseph G. Kosciw, Caitlin M. Clark, Nhan L. Truong & Adrian D. Zongrone, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf. *See* also GLSEN, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166 (Sept. 12, 2022).
[89] 140 S. Ct. 1731 (2020).
[90] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

gender identity, sex characteristics (including intersex traits) or sex stereotypes as a form of sex-based harassment subject to the recommendations made above. Indeed, the overwhelming majority of LGBTQ+ students report being subjected to harassment or assault based on their sexual orientation, gender identity and/or gender expression.[91] . In addition, we urge the Department to clarify that, consistent with recent Department of Education enforcement actions,[92] harassment based on a student's gender identity clearly includes mocking or publicly ridiculing a student using terms of address that are known to be offensive and harmful to the student.[93] The Department should also clarify the important distinction between a simple mistake, such as a teacher inadvertently using the wrong pronoun for a student but then *correcting the error*, and intentional harassment of students through public ridicule and repeated misgendering that causes distress and reduced ability to learn.

Athletics

The Department has indicated its intention to issue a separate proposed rule regarding athletics participation.[94] We urge the Department to do so imminently. School athletics is an area critically in need of clear Title IX regulation and guidance. Discriminatory policies targeting transgender students—particularly transgender women and girls—have proliferated in the past couple years.[95] These policies, which bar or impose barriers to student participation in separate gender sports consistent with a student's gender identity rely on harmful and prohibited sex stereotypes and sanction inappropriate scrutiny of students' bodies, including invasive medical examinations that are not scientifically or medically supported. These stereotypes disproportionately harm transgender, nonbinary, and intersex

[91] 81.0% of LGBTQ+ youth reported being verbally harassed because of their sexual orientation, gender identity, or gender expression; 35.1% reported they were verbally harassed often or frequently. Additionally, 34.2% of LGBTQ+ students reported being physically harassed (e.g., shoved or pushed), and 14.8% reported being physically assaulted, in the past year based on their sexual orientation, gender expression, and/or gender identity. Kosciw, et al., *The 2019 National School Climate Survey*, 28.

[92] The Department has recently investigated schools for failing to address intentional, months-long harassment against transgender students that harmed both mental health and grades. *E.g.*, Dep't of Educ., Office for Civil Rights, *Office for Civil Rights Announces Resolution of Sex-Based Harassment Investigation of Tamalpais Union High School District* (June 24, 2022), https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-sex-based-harassment-investigation-tamalpais-union-high-school-district; *Willits Unified School District Resolution Agreement*, Case No. No. 09-16-1384 (2017) (district will ensure "referring to the Student by other than her female name and by other than female pronouns is considered harassing conduct"); *City College of San Francisco*, Resolution Agreement, Case No. 09-16-2123 (2017) (school policy should reflect that harassment "can include refusing to use a student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes").

[93] This is also consistent with Title VII caselaw, which instructs that mocking or ridiculing a transgender person by intentionally misgendering (i.e., using the wrong pronouns to harass a transgender person) or deadnaming (i.e., using a transgender person's legal name to harass them) creates 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," this mistreatment "was sufficiently severe or pervasive to support her [hostile work environment] claim.").

[94] Press Release, U.S. Dep't of Education, "The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment," (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.

[95] Eighteen states have passed laws barring transgender students from participating in school sports teams in correspondence with their gender identities. Many others impose burdensome and discriminatory barriers to participation. GLSEN and TransAthlete.com, "Navigator: Trans and Nonbinary Athletic Inclusion Policies, 2022, https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/; GLSEN, "Gender Affirming and Inclusive Athletics Participation," 2022, https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation.

people and have also been disproportionately used to target Black girls and others perceived not to conform to traditional standards of white femininity. Sports participation has been shown to have positive effects on youth development, physical health, social skills and psychological well-being.[96] Yet just 12 percent of transgender girls report playing sports[97] and many report having been discouraged from participating and/or preventing from accessing facilities that align with their gender.[98] Consistent with the proposed rulemaking explicit that discrimination on the basis of sexual orientation, gender identity, sex characteristics or sex stereotypes is sex discrimination, the Title IX regulations must ensure that all students have equal access and opportunities to participate in separate gender school athletics in accord with their gender identity.

NOTICE, TRAINING AND MONITORING OF TITLE IX REGULATIONS

Notice to Protected Persons

We support the proposed rule requiring schools to adopt and publish a policy against sex discrimination and procedures to address complaints of sex discrimination.[99] We also ask the Department to require schools to notify students and families that the policy and procedures apply to sexual harassment, sexual assault, dating violence, domestic violence, stalking, and other harassment or discrimination based on sexual orientation, gender identity, sex characteristics (including intersex traits), sex stereotypes, and pregnancy or related conditions (and, as urged herein, parental, family, caregiver or marital status), so that they know which types of conduct constitute sex discrimination and when they can ask their schools for help.[100]

Monitoring

We support the proposed rules requiring schools' Title IX coordinators to address barriers to reporting sex discrimination. We also appreciate the preamble encouraging schools to conduct surveys on how often students experience sex discrimination without reporting it and to take additional measures to eliminate barriers to reporting for students from marginalized communities. We urge the Department to issue supplemental guidance giving more specific examples of such measures and encouraging schools to include a diverse representation of the student body in examining and addressing such barriers.

Training

We support the proposed requirement for all employees to be trained on their own obligations and their school's obligations to address sex discrimination and for all employees involved in Title IX investigations and informal resolutions to be properly trained as well. In too many instances, students fail to be afforded the protections owed to them under Title IX simply because recipient employees are unaware of their obligations. We urge the Department to clarify that such training should be mandatory for all employees, should be a live and/or interactive format, and conducted annually.

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[96] *See* NCWGE report, *supra* note 59 at 34.
[97] *Id.*
[98] *Id*.
[99] 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)).
[100] *See* 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).

TITLE IX'S INTERACTION WITH STATE LAWS

We strongly support the proposed rules' explicit allowance that schools comply with a state or local law that provides greater protections against sex discrimination, including harassment, than the Title IX regulations. We support the NPRM's necessary proposal to remove the 2020 provision that prevents schools from complying with a state or local law that conflicts with the 2020 regulations. This proposed change would return Title IX to its proper role as a floor—not a ceiling—for civil rights protections.

OTHER PROTECTIONS AGAINST SEX DISCRIMINATION

Dress and Appearance Codes

Dress and appearance codes often reflect and perpetuate gender stereotypes. Girls and women of color, especially Black girls and women, and LGBTQI+ students are more likely to be targeted and disciplined for violating dress and appearance codes. These codes also often reinforce rape culture by suggesting that boys and men cannot control their sexual impulses and that girls and women must dress a certain way to avoid sexual harassment.[101] In addition, these codes often force transgender, nonbinary, and gender-nonconforming students to conform narrowly to traditional gender norms and often prohibit Black and Indigenous[102] students from wearing protective and traditional hairstyles and head coverings.[103] Unfortunately, the proposed rules do not address dress and appearance codes. We urge the Department to initiate rulemaking under Title IX to explicitly prohibit dress and appearance codes in schools based on sex (including sexual orientation and gender identity), including by restoring and updating the Title IX dress code regulations that were rescinded in 1982 to make clear that sex-separated dress and appearance codes are discriminatory.[104]

Single-Sex Regulations

In 2006, the Department issued Title IX regulations on single-sex education that resulted in a proliferation of sex-segregated classes and schools, even though sex-segregated education does not provide benefits over coeducational schooling and often relies on debunked sex-based stereotypes regarding "innate" neurological and developmental differences between girls and boys.[105] However, the proposed rules do not address these regulations. We urge the Department to initiate rulemaking to rescind the 2006 single-sex regulations and ensure that any programs addressing the racial opportunity gap benefit students of all genders equally.

Religious Exemptions

In 2020, the previous administration made two changes to the Title IX regulations that allow more schools to discriminate based on sex by claiming a religious exemption, which disproportionately harms women and girls, pregnant and parenting students, students who access or seek access to abortion or

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[101] National Women's Law Center, *Dress Coded: Black Girls, Bodies, and Bias in DC Schools* (2018), https://nwlc.org/resource/dresscoded.

[102] ACLU of Texas, *Complaints Filed Urging Federal Civil Rights Agencies to Investigate Texas School District's Discriminatory Dress Code* (Mar. 4, 2021), https://www.aclutx.org/en/press-releases/complaints-filed-urging-federal-civil-rights-agencies-investigate-texas-school.

[103] NCWGE Report, *supra* note 59.

[104] Prior to amendments made in 1982, 34 C.F.R. § 106.31 stated, ". . . in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . . Discriminate against any person in the application of any rules of appearance . . . ."

[105] NCWGE Report, *supra* note 59 at 6, 43-47.

birth control, and LGBTQI+ students. First, although the Title IX statute only allows religious exemptions for schools that are "controlled by a religious organization,[106] the 2020 regulations allow schools that are not actually controlled by a religious organization to claim a religious exemption from Title IX if, for example, they are a divinity school, they require students to follow certain religious practices, or their mission statement refers to religious beliefs.[107] Second, the 2020 regulations assures schools that they may assert a religious exemption *after* they are already under investigation by the Department for violating Title IX.[108] This means students and employees are not entitled to any prior notice of a school's intent to discriminate based on sex despite the Title IX regulations requiring schools to notify students, their families, employees, and applicants of schools' anti-sex discrimination policies.[109] Unfortunately, the proposed rules do not address these changes. We urge the Department to swiftly issue proposed Title IX regulations that (i) rescind the rule inappropriately expanding eligibility for religious exemptions and (ii) require schools to notify the Department of any religious exemption claims and to publicize any exemptions in their required nondiscrimination notices.

Thank you for your consideration of these comments. Please contact Jennifer Becker (jbecker@legalmomentum.org) with any questions.

Respectfully submitted,

Legal Momentum, the Women's Legal Defense and Education Fund
by Jennifer M. Becker, Legal Director

[106] 20 U.S.C. § 1681(a)(3).
[107] 34 C.F.R. § 106.12(c).
[108] 34 C.F.R. § 106.12(b).
[109] 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).