

The Women's Legal Defense and Education Fund

Carol A. Baldwin Moody, *President and CEO*

BOARD OF DIRECTORS

Chair: Eileen Simon
Mastercard

First Vice Chair: Meena Elliott
Kverdi, Inc.

Vice Chair: Robert M. Kaufman
Proskauer Rose LLP

Vice Chair: Amy Dorn Kopelan
Bedlam Productions, Inc.

Vice Chair: Jay W. Waks
Retired Partner, Arnold & Porter Kaye Scholer LLP
Retired Senior Executive Vice President and
General Counsel, American Kennel Club

Vice Chair: Laura A. Wilkinson
PayPal Inc.

Secretary: Amy S. Leder
Holland & Knight LLP

Treasurer: Susan B. Lindenauer
Retired Counsel to the President and
Attorney-in-Chief
The Legal Aid Society

General Counsel: G. Elaine Wood
Charles River Associates

Esha Bandyopadhyay
Fish & Richardson PC

Jessica S. Carey
Paul, Weiss, Rifkind, Wharton & Garrison LLP

Glynnna Christian
Holland & Knight LLP

Kim Gandy
Past President and CEO
National Network to End Domestic Violence
Past President, National Organization for Women

Sheryl Koval Garko
Orrick, Herrington & Sutcliffe LLP

Mary Gail Gearns
Retired Partner, Morgan, Lewis & Bockius LLP

Vilia B. Hayes
Hughes Hubbard & Reed LLP

Lori B. Leskin
Arnold & Porter Kaye Scholer LLP

Meredith Moore
Weil, Gotshal & Manges LLP

Carolyn D. Richmond
Fox Rothschild LLP

Nancy B. Saltzman
Logicalis, Inc.

Stephanie A. Sheridan
Benesch, Friedlander, Coplan & Aronoff LLP

Karen E. Silverman
The Cantellus Group
Retired Partner, Latham & Watkins LLP

Yvette D. Valdez
Latham & Watkins LLP

Catherine Zinn
Baker Botts LLP

HONORARY DIRECTORS

Chair: Muriel Fox
Co-Founder Legal Momentum and the
National Organization for Women

Betty Friedan
Past Legal Momentum Board Director and Co-
Founder the National Organization for Women
Author, The Feminine Mystique

Etta Froio
Retired Contributing Senior Executive Editor
Women's Wear Daily

Stephanie George
Vice Chairman, Fairchild Fashion Media Inc.

Michele Coleman Mayes
Vice President, General Counsel & Secretary
New York Public Library

**Organizational affiliations for*
purposes of identification only.

March 11, 2024

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

Nasser Paydar
Assistant Secretary, OPE
Department of Education
400 Maryland Ave SW
Washington, DC 20202

Adam Schott
Deputy Assistant Secretary, OSES
Department of Education
400 Maryland Ave SW
Washington, DC 20202

Re: Docket ID ED-2023-OPE-0207, Request for Information on Sexual Violence at Educational Institutions

Submitted via www.regulations.gov

Dear Secretary Cardona, Assistant Secretary Paydar, and Deputy Assistant Secretary Schott:

Legal Momentum, the Women's Legal Defense and Education Fund ("Legal Momentum") welcomes the opportunity to comment on the Department of Education's ("the Department") request for information on sexual violence at educational institutions.

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 enforcement of 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 formed the National Coalition for Women and Girls in Education (NCWGE), which to this day continues this advocacy and awareness building. Legal Momentum continues 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

Below are Legal Momentum's comments in response to Questions 2, 3, 5, and 7 of the request for information, which are applicable to elementary, secondary, and postsecondary educational settings.

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).

Q2. How can educational institutions best provide survivor resources, including health care, sexual assault kits, sexual assault nurse examiners, culturally responsive and linguistically inclusive standards of care, trauma-informed services, academic supports, and access to confidential advocacy and support services?

1. Supportive measures

Sex-based harassment (including sexual violence) can seriously affect students' education. Supportive measures protect students' learning environment and ability to feel safe in school if they have experienced sex-based harassment. With the complainant's consent, all school employees who provide and enforce a supportive measure should be informed in writing of these measures in order for employees to proactively implement them. For example, if a one-way no-contact order is in place, the school should provide written copies to both of the parties' instructors, deans, counselors, athletic coaches, and other appropriate employees, so it can be enforced properly. Moreover, if a student requests certain supportive measures, the school should provide those particular measures. If the supportive measure requests are not "reasonably available," then the school must modify it or offer additional supportive measures. Schools can offer the following non-exhaustive list of supportive measures:

One-Way No-Contact Order:

- Issue a one-way no-contact order that prohibits the respondent from directly communicating with the complainant, both in person and online.

Location-based measures:

- Transfer the complainant to another classroom or laboratory.
- Allow the complainant to change in campus housing and/or dining locations.
- Provide assistance in finding alternative housing.
- Provide an escort to ensure that the student can move safely between school programs and activities.
- Provide assistance in arranging for alternative University employment arrangements and/or changing work schedules.
- Provide transportation and parking accommodations.

Academic Assistance:

- Reschedule an academic assignment or test.
- Allow the complainant to attend classes online by joining the physical classroom via Zoom or record lectures and provide additional office hours to ensure they still have the opportunity to ask questions.
- Provide academic support (e.g., tutoring).
- Arrange for excused late arrivals, absences, a leave of absence, incompletes, or withdraw from a class (without putting a "W" on their transcript), or retake a class (without charging them for tuition again).
- Allow the complainant to preserve eligibility for academic, athletic, or other scholarships, financial aid, internships, study abroad, or international student visas.

Health measures:

- Provide and assist scheduling visits for medical and mental health services, including counseling.
- Help the complainant find other local health and other services, such as a local hospital, rape crisis center, victim advocate, housing advocate, or lawyer.

2. Confidential advocacy and support services

Schools should designate one or more confidential employees, who upon learning of possible sex-based harassment (including sexual violence), 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 survivors' 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. Further, schools should designate a diverse set of confidential employees and to make an effort to enter into a memorandum of understanding, or at least provide students with information about local culturally-specific survivor services.

K12 schools. For disclosures of sex-based harassment that do not rise to the level of possible child abuse that may trigger state mandatory reporting laws, confidential employees in K-12 schools should serve as a fully confidential resource for children, without reporting to either the Title IX coordinator or law enforcement. They should also offer to help the student report the harassment to the Title IX coordinator (while making clear that they would not do so without the student's consent).

Higher education. When a non-confidential employee at an institution of higher education receives a disclosure in the following situations, they should treat it as confidential, and the school should respond by creating school-wide training and prevention programs and ensuring that students are aware of their reporting options and resources for survivors:

- At a public awareness event (*e.g.*, Take Back the Night)
- In an application (*e.g.*, personal statement or interview)
- In an anonymous school climate survey

Q3. What best practices should educational institutions consider for responding to and preventing sexual violence and dating violence on their campuses, including the online environment, and which may take into consideration an institution's educational level, size, and resources?

The following are policy recommendations for responding to and preventing sex-based harassment (including sexual violence and dating violence):

1. Provide supportive measures to complainants

See Q2.1 above.

2. Adequately train all staff on sex-based harassment

Training and ongoing communication are key to not only help prevent sex-based harassment in schools, but also help schools appropriately respond to a complaint of sex-based harassment and maneuver through a Title IX investigation. Schools should provide ongoing training to all staff on sex-based harassment, including custodial, dining, transportation, and clerical staff; school police and security guards; contractors; and administrators. Effective Title IX training should:

- Focus on what to do when a Title IX issue is reported, not just what Title IX and sex-based harassment are. Specifically, instead of only focusing on facts, figures, and definitions, train school staff on procedures and what to do once sex-based harassment is reported.
- Notify school staff on Title IX changes and updates and make it easy for staff to find Title IX information.

- Ensure “responsible employees” know that they are deemed as such and understand their responsibilities.

3. Ensure prompt and equitable investigations

In addition to what is explicitly required by the Title IX regulations, schools should take the following steps to ensure a prompt and equitable Title IX investigation:

- Apply a preponderance of the evidence standard to determine whether the harassment occurred, as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation.
- Give both parties equal rights to be interviewed, identify witnesses, submit and review evidence, be assisted by an advisor or support person, and appeal the school’s decision.
- Minimize reliance on cross-examination given the re-traumatization that cross-examination inflicts by allowing the parties to submit written questions.
- Complete investigations within 60 days following the receipt of the complaint as delays often result in harm to the educational prospects of complainants.
- Require the parties to keep confidential any information they learn about each other during an investigation, without restricting their ability to discuss the allegations with others when seeking legal advice, counseling or other emotional support, or witnesses and other evidence.
- Provide written notice to all parties about the investigation at each stage and at the conclusion of the investigation also provide the decision and rationale.
- Continue to provide supportive measures to the complainant even if there is insufficient evidence to conclude that sex-based harassment occurred.

4. Protect complainants against retaliation

Though many students experience sex-based harassment in schools, they are often reluctant to notify officials because they worry they won’t be believed or might face retaliation.² Schools should respond by protecting, not punishing, complainants. Retaliation is prohibited against anyone that has reported sex-based harassment (or other sex discrimination) or participated or refused to participate in an investigation, proceeding, or hearing of such incidents.³ Given the high prevalence of schools punishing student survivors,⁴ supportive measures should also be provided to individuals who report retaliation and to investigate complaints of retaliation, including peer retaliation. Schools should refrain from:

- Disciplining a complainant for conduct that the school knows or should know “results from” the harassment or other discrimination (e.g., missing school, expressing trauma, telling others about being harassed).
- Disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g., a disciplined respondent files a countercomplaint against their victim alleging the victim was the actual harasser).
- Requiring a complainant to leave an education program (e.g., to take leave, transfer, enroll in “alternative school”).
- 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.

² AAUW, *An Underreported Problem: Campus Sexual Misconduct*, <https://www.aauw.org/resources/article/underreported-sexual-misconduct/>.

³ 34 CFR § 106.71.

⁴ See, e.g., Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 15–16, <https://www.knowyourix.org/thecostofreporting>; Aviva Stahl, ‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped, *Vice* (June 8, 2016, 12:10 PM), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-beingraped; 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>.

5. Offer restorative justice as an informal resolution

Schools should offer—but not require or insist—parties to address sex-based harassment using a restorative process. A restorative process 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. While schools may use a restorative process as a type of informal resolution to resolve sex-based harassment, schools should 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 survivor 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. The following requirements should be met before conducting a restorative process:

- All parties must give voluntary, informed, and written consent.
- The respondent must admit they caused sex-based harm to the complainant.
- Require formal training to all individuals who will be involved in carrying out the restorative process.
- The parties must agree to keep any information they learn about each other confidential during the restorative process, although they may discuss the allegations with others when seeking legal advice, counseling, or other emotional support, or with the participants in their restorative process.
- The parties must be allowed to withdraw from a restorative process to begin a traditional disciplinary process or vice-versa at any time before the end of the process.

Q5. What are culturally responsive and linguistically inclusive approaches to supporting survivors, which include consideration of race; ethnicity; national origin; limited English proficiency; religion; immigration status; lesbian, gay, bisexual, transgender; queer or intersex (LGBTQI+) status; ability; disability; socio-economic status; exposure to trauma, and other compounding factors?

Schools must use culturally responsive and linguistically inclusive approaches when addressing sex-based harassment to ensure that all students receive the support they need when they disclose or report harassment. Marginalized students face sex-based harassment at disproportionately high rates, and some marginalized students were less confident their reports would be taken seriously.⁵ The impact of these stereotypes on the support survivors receive—or do not receive—is compounded when survivors are part of multiple marginalized identities.⁶ School officials should receive training on the following information:

- **Pregnant and parenting students** are often labeled as “promiscuous” because their pregnancy or child is evidence that they have previously engaged in sexual intercourse—regardless of whether it was consensual. As a result, they are often more vulnerable to harassment and more likely to be blamed for it.⁷ For example, being pregnant or a parent, can make girls a target for unwanted sexual attention and harassment.⁸ Girls who are pregnant or parenting (64%) were more likely than girls overall (32%) to report that not feeling safe at school is a barrier to attending school and these concerns about safety affected their school attendance.⁹ Not surprisingly, girls who are pregnant or parenting ranked protection from harassment among the most important things that schools could do to help them.¹⁰

⁵ Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 Harv. J. L. Gender 1, 79 (2019).

⁶ *Id.* at 80–81.

⁷ Jennie M. Kuckertz & Kristen M. McCabe, *Factors Affecting Teens’ Attitudes Toward Their Pregnant Peers*, 16 Psi Chi J. Undergraduate Rsch. 32, 34 (2011), https://www.psichi.org/resource/resmgr/journal_2011/spring11jnkuckertz.pdf.

⁸ Kelli Garcia & Neena Chaudhry, National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), <https://nwlrc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting>.

⁹ *Id.*

¹⁰ *Id.*

- **LGBTQI+ students** are often perceived as “promiscuous,” “hypersexual,” “deviant,” or “attention-seeking” and therefore blamed for their own harassment.¹¹ Seventy-three percent of college students who identify as LGBTQI+ experience sex-based harassment, as compared to 61% of students who identify as heterosexual and cisgender.¹² This harassment is perpetrated not only by other students, but also by faculty and campus employees.¹³ An estimated six percent of all college students who identify as LGBTQI+ either change their school or their major as a result of sex-based harassment.¹⁴ When compared to their peers, LGBTQI+ students are five times more likely to have missed school because of feeling unsafe, with sex-based harassment being a factor.¹⁵
- **Women of color** are labeled as “promiscuous,” less deserving of protection and care than white girls and women, or simply unable to be sexually harassed.¹⁶ Latina girls and women are stereotyped as “hot-blooded,” Indigenous girls and women as “sexually violable” conquests, Black girls and women as “angry” or “aggressive,” and Asian American and Pacific Islander girls and women as “submissive.”¹⁷ School is where Black girls experience gender-based violence—eight out of ten students report having been sexually harassed at school at least once.¹⁸ Sixty-seven percent of Black girls report having been “touched, grabbed, or pinched in a sexual way” by someone in school.¹⁹

Also, training materials for school staff should reflect the diverse identities of complainants and respondents:

- Use gender-neutral pronouns or alternate gender-specific pronouns for complainants and respondents in examples and case studies.
- Use names and descriptions that reflect the diversity of complainants and respondents across race, ethnicity, sexual orientation, transgender status, and other protected classes.

Q7. In what ways can the Federal Government support educational institutions in improving the prevention of, and response to, sexual violence and dating violence, including online threats, harassment and intimidation, and other forms of technological abuse?

The Office of Civil Rights can support schools in improving the prevention of, and response to sex-based harassment (including sexual violence and dating violence) by ensuring that schools know they must respond to off-campus and online harassment that impacts a student’s education, when the forthcoming Title IX regulations are finalized. Eighty-seven percent of college students live off campus²⁰ and only eight percent of sexual assaults are perpetrated on school property.²¹ For example, Greek life housing is usually located off campus, and women in sororities were almost twice more likely to have experienced some form of nonconsensual sexual contact and over three times more likely to have experienced rape or attempted rape than women not in sororities.²² Moreover, a large number of sex-

¹¹ See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 Cardozo L. Rev. 2115, 2118 (2018); 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>.

¹² National Sexual Violence Resource Center and Pennsylvania Coalition Against Rape, *Sexual Harassment & Bullying of Youth: Sexual Violence & Individuals Who Identify as LGBTQ 2* (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Guides_Sexual-Harassment-Bullying-Youth.pdf.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 3.

¹⁶ Cantalupo, *supra* note 5, at 16, 17, 24–29.

¹⁷ *Id.* at 25.

¹⁸ National Black Women’s Justice Institute, *For Many Black Girls, School Elicits Fear & Anxiety about Gender-Based Violence & Criminalization* (2022), <https://www.nbwji.org/post/for-many-black-girls-school-elicits-fear-anxiety-about-gender-based-violence-criminalization>.

¹⁹ *Id.*

²⁰ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. Times (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html>.

²¹ Rape, Abuse & Incest National Network, *Scope of the Problem: Statistics*, <https://www.rainn.org/statistics/scope-problem>.

²² Melissa Barnes et al., *Pledged into Harm: Sorority and Fraternity Members Face Increased Risk of Sexual Assault and Sexual Harassment*, 6 Dignity: A Journal of Analysis of Exploitation and Violence 1, 8–10 (2021), <https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1251&context=dignity>.

based harassment occurs at college parties off campus,²³ not to mention other school-related activities that occur off campus, such as school-sponsored events or study abroad programs.

As for online harassment, the perpetration of sexual harassment and violence most often includes, or takes part exclusively on, social media and internet-based applications. In an online setting, 16% of young adults in the U.S. experience at least one type of sexual abuse online before age 18, with a majority of online harassers being current or former intimate partners.²⁴ Rates of online childhood sexual abuse were particularly high for girls (23%) and transgender or gender fluid children (20%).²⁵ When schools fail to provide effective responses to off-campus and online harassment, the impact on students' education can be devastating and nothing exists to suggest that the perpetration of sex-based harassment off-campus or online has any less impact on survivors' educations.

* * * * *

Legal Momentum appreciates your consideration of these comments. For any additional questions or guidance, please contact Kyra Batté, Staff Attorney, (kbatte@legalmomentum.org) with any questions.

Respectfully submitted,

Legal Momentum, The Women's Legal Defense and Education Fund

²³ See Jason M. Lindo et al., *College Party Culture and Sexual Assault*, 10 Am. Econ. J.: Applied Econ. 236, 236 (2018).

²⁴ David Finkelhor et al., JAMA Network, *Prevalence of Online Sexual Offenses Against Children in the US* 7 (2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2797339?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=101422.

²⁵ *Id.* at 8.