

June 11, 2021

Submitted via T9PublicHearing@ed.gov

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Re: Written Comment for Title IX Public Hearing (Sexual Harassment and Anti-LGBTQ Discrimination)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

As state legislators, we submit this comment regarding the Title IX regulations addressing sexual harassment and anti-LGBTQ discrimination in education in response to the Department of Education's public hearing.

For many years, students in our states had relied on protections against sexual harassment under Title IX and our states' laws. The longstanding Title IX rules and guidances that were previously in place properly balanced federal interests in regulating civil rights compliance and states' interests in regulating education and public health and safety—areas traditionally reserved to the states.¹ But in at least 10 states, the Trump administration's changes to Title IX now preempt broader state protections for student survivors.² These changes—which rely on and reinforce the toxic myth that women and girls lie often about having been sexually assaulted—make it harder for students to report abuse, require schools to ignore reports when they are made, and apply uniquely burdensome procedures for sexual harassment that are not required for any other type of student or staff misconduct. Schools now have far lower obligations to protect children from sexual harassment than employers have to protect adult employees from harassment. For example:

- Schools are required to ignore Title IX complaints of sexual harassment that occurs outside of a school activity, including many off-campus and online incidents, even if a student must sit in their assailant's classroom each day.
- Schools must dismiss Title IX complaints of sexual harassment that are not "severe," "pervasive" and "objectively offensive" enough, which means many victims must endure repeated and escalating levels of abuse before they can receive any supportive measures.
- Institutions of higher education are only responsible for addressing sexual harassment that is known by a small subset of employees—those with "authority to institute corrective measures"—which at many schools excludes professors, teaching assistants, and residential advisors.
- In the rare cases when schools are required to address sexual harassment, they are allowed—and, in many cases, required—to deny harassment victims a fair process by encouraging use of the improper

¹ See e.g., *United States v. Lopez*, 514 U.S. 549, 580 (1995) ("it is well established the education is a traditional concern of the States"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (explaining that health and safety are traditional state powers).

² See e.g., California (Cal. Educ. Code § 67386, Cal. Educ. Code § 66290.1); Connecticut (Conn. Gen. Stat. Ann. § 10a-55m); Hawaii (Haw. Rev. Stat. Ann. § 304A-120), Illinois (110 Ill. Comp. Stat. Ann. 155); Maryland (Md. Code Ann., Educ. § 11-601); New Jersey (N.J. Stat. Ann. § 18A:61E-2); New York (N.Y. Educ. Law §§ 6439-49); Oregon (Or. Rev. Stat. Ann. § 350.255, Or. Rev. Stat. Ann. § 342.704); Texas (Tex. Educ. Code Ann. § 51.9363); and Virginia (Va. Code Ann. § 23.1-806).

clear and convincing evidence standard, which stacks the deck against complainants, and by requiring schools to presume that no harassment occurred at the outset.

In addition, we support strong protections for LGBTQ students against harassment or other discrimination in schools, consistent with President Biden's recent Executive Orders and the *Bostock* ruling.³ LGBTQ students face unique challenges, including higher rates of harassment and violence, unfair discipline (e.g., for public displays of affection), intentional misgendering and misnaming, refusal to update names and gender markers on records and school systems, denial of access to single-sex spaces and activities, and penalties under dress and grooming codes for failure to conform to sex stereotypes.

We recommend the following provisions regarding sexual harassment and anti-LGBTQ discrimination be included in the forthcoming Title IX rule:

- **Restore and strengthen protections against sexual harassment and anti-LGBTQ discrimination by, for example:**
 - Defining sexual harassment as unwelcome sexual conduct, including quid pro quo harassment;
 - Affirming that sex-based harassment includes sexual harassment, sexual assault, dating violence, domestic violence, and sex-based stalking, and harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
 - Requiring schools to respond to sex-based harassment regardless of where it occurs (including off campus or abroad), that interferes with or limits an individual's ability to participate in or benefit from an education program or activity;
 - Requiring schools to address sex-based harassment that they know or should know about, as well as all harassment by school employees that occurs in the context of their job duties, regardless of whether the complainant faces further actionable harassment post-notice;
 - Requiring schools to provide a prompt, effective, and reasonable response to sex-based harassment, including by providing supportive measures to complainants no later than five school days after receiving notice, and prohibit schools from conditioning a complainant's access to supportive measures on their agreement to a nondisclosure agreement or waiver of legal claims against the school;
 - Allowing schools to use non-investigative processes (such as a restorative justice process) to resolve complaints of sex-based harassment as long as participation is truly voluntary, the parties are able to withdraw at any time before the process concludes, and the facilitators are adequately trained;
 - Clarifying that Title IX protects all persons, including those who are neither students nor employees, who seek to access or benefit from an education program or activity;
 - Narrowly construing the Title IX statute's religious exemption in order to effectuate Title IX's remedial purpose;

³ Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). 86 Fed. Reg. §14 (January 25, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>; Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity). 86 Fed. Reg. §46 (March 11, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

- Requiring schools to provide advance notice to the Department—and thereby, to students, families, and the public—of their intention to rely on a religious exemption from Title IX;
 - Clarifying that provisions permitting single-sex programs or activities are not a safe harbor for anti-LGBTQ discrimination; and
 - Allowing states and schools to provide additional protections beyond those in the Title IX rule.
- **Develop robust protections against retaliation:**
 - Explicitly prohibit these and other common forms of retaliation:
 - Disciplining a complainant for collateral conduct that is disclosed in a complaint or investigation (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, presence in restricted parts of campus) or that occurs as a result of the reported harassment (e.g., nonattendance);
 - Disciplining a complainant for a “false report” or for prohibited sexual conduct solely because the school has decided there is insufficient evidence for a finding of responsibility or because the respondent is found not responsible;
 - Disciplining a complainant for discussing the allegations that gave raise to their complaint; and
 - Disciplining a victim of sex-based harassment for misconduct charges the school knew or should have known were brought by a third party for the purpose of retaliation; and
 - Allow schools to dismiss, without a full investigation, a complaint of sex-based harassment that is patently retaliatory (e.g., a disciplined harasser a files countercomplaint against their victim).
- **Ensure fair disciplinary procedures:**
 - Require schools to resolve complaints using grievance procedures that are fair and afford both parties the same procedural rights, including by applying a preponderance of evidence standard;
 - Otherwise allow schools flexibility in implementing grievance procedures, particularly when addressing complaints that, if substantiated, would not result in serious sanctions;
 - Do not foreclose schools from forgoing live hearings attended jointly by the parties or from forgoing direct cross-examination, where not otherwise required by law; and
 - For schools that rely on direct cross-examination, do not foreclose schools from considering past statements by parties or witnesses who are not available for direct cross-examination.

To ensure that no type of harassment is singled out for uniquely burdensome standards or labeled as uniquely suspect, we also ask the Department to apply uniform standards for other forms of sex-based harassment, including harassment based on sexual orientation, gender identity, gender expression, parental status, pregnancy, childbirth, termination of pregnancy, or related conditions; as well as harassment based on other protected traits, including race, color, national origin, and disability.

Thank you for your consideration of our recommendations. If you have any questions, please reach out to Maggie O’Neil, State Representative, Maine, at Margaret.ONeil@legislature.maine.gov.

Sincerely,

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