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400 Maryland Ave SW  
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Catherine E. Lhamon  
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400 Maryland Ave SW  
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**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**

Dear Secretary Cardona and Assistant Secretary Lhamon:

The 189 undersigned survivor advocate, gender justice, and other civil rights organizations are pleased to submit this comment in response to the Department of Education’s proposed regulations under Title IX of the Education Amendments of 1972 (“Title IX”).<sup>1</sup>

As we celebrate the 50<sup>th</sup> anniversary of Title IX this year, we recognize that much progress has been made to address sex discrimination in education, but that many inequities and challenges remain. Sex-based harassment, including sexual harassment, is both widely prevalent and underreported at all levels of education, and student survivors are often ignored, punished, or otherwise pushed out of school when they ask for help. In addition, LGBTQI+ students face high rates of harassment, assault, and other discrimination based on their sexual orientation and/or gender identity, including an unprecedented wave of attacks on their rights through state policies that especially target transgender students. Furthermore, pregnant and parenting students of all ages face many barriers to completing their education, including inflexible attendance policies; lack of child care, transportation, and lactation spaces; and outright discrimination, all of which make it harder for them to graduate from high school and college.

We appreciate that the Department of Education (“the Department”) is taking steps to undo the previous administration’s harmful changes to the Title IX regulations by proposing new regulations to effectuate the law’s broad and remedial purpose, as Congress intended when it passed Title IX in 1972. At the same time, we note that the Department’s proposed regulations do not reach far enough in protecting against sex discrimination in education. To that end, we offer the following comments regarding the Department’s proposed regulations in Part I (protections against sex-based harassment), Part II (protections for LGBTQI+ students), Part III (protections for pregnant and parenting students), and Part IV (other protections against sex discrimination):

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<sup>1</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), *available* at <https://federalregister.gov/d/2022-13734>.

## **I. Protections Against Sex-Based Harassment**

### **A. When Schools Must Address Sex-Based Harassment**

**Definition of sex-based harassment.** We support the proposed rules defining sex-based harassment to include 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.<sup>2</sup> 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.<sup>3</sup> This would be a return to the Department’s longstanding standard applied from 1997-2020<sup>4</sup> 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.<sup>5</sup> We also urge the Department to define sex-based harassment to include harassment on the basis of parental, family, caregiver, or marital status (see **Part III.A: Parental, family, or marital status** below).

**Location of harassment.** 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.<sup>6</sup> 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.<sup>7</sup>

**Dismissals.** 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.<sup>8</sup> Under the proposed rules, schools would be required to address complaints by individuals who are not current students or employees of the school (e.g., applicants, visitors, graduates, 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)*.<sup>9</sup> The proposed rules would allow schools to dismiss a complaint

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<sup>2</sup> 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2), 41571 (proposed 34 C.F.R. § 106.10).

<sup>3</sup> 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2(2)).

<sup>4</sup> 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>.

<sup>5</sup> 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.

<sup>6</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).

<sup>7</sup> *Id.* See also *id.* at 41403.

<sup>8</sup> 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.

<sup>9</sup> 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2).

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.<sup>10</sup> 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.

**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).<sup>11</sup> However, we urge the Department to instead *require* that schools designate one or more confidential employees,<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Second, all other non-confidential employees should be required to tell the person: (i) how to report to the Title IX coordinator, who can offer supportive measures and, if requested, an investigation or informal

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<sup>10</sup> 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.

<sup>11</sup> 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2 (“confidential employee”), 41573 (proposed 34 C.F.R. § 106.44(d)).

<sup>12</sup> We also encourage the Department clarify that confidential employees may not serve as advisors in investigations and that schools may enter into memoranda of understanding with local community-based organizations that serve survivors to provide confidential employees.

<sup>13</sup> We also urge the Department to encourage schools to designate a diverse set of confidential employees.

<sup>14</sup> 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.

<sup>15</sup> 87 Fed. Reg. at 41572-73 (proposed 34 C.F.R. § 106.44(c)(2)).

<sup>16</sup> While some students at institutions of higher education are minors, education laws like 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).

<sup>17</sup> 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)).

<sup>18</sup> Merle H. Weiner, Letter to Dep’t of Educ., RE: Docket ID ED-2021-OCR-0166, at 13-14 (to be submitted to Regulations.gov on or before Sept. 12, 2022).

resolution; and (ii) how to reach a confidential employee, who can provide confidential supports and services.<sup>19</sup> 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.<sup>20</sup> 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.

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).

**Persons.** 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.”<sup>21</sup> At times, the proposed rule and its preamble suggest that schools only have obligations to only students and employees.<sup>22</sup> 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.<sup>23</sup> For example, Title IX protects independent contractors,<sup>24</sup> campus visitors, and other “[m]embers of the public” who “are either taking part or trying to take part of a funding recipient.”<sup>25</sup> For these reasons, we ask that, wherever possible, the Department to use inclusive language such as “persons,” or, when necessary, “workers” rather than “employees.”

## B. How Schools Must Address 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.<sup>26</sup> 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.<sup>27</sup>

**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,<sup>28</sup> and even if their complaint is dismissed.<sup>29</sup> 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.<sup>30</sup> While we appreciate the preamble’s explanation that

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<sup>19</sup> Kathryn J. Holland, Letter to Dep’t of Educ., RE: Docket ID ED-2021-OCR-0166, at 6-7 (to be submitted to Regulations.gov on or before Sept. 12, 2022).

<sup>20</sup> Weiner, *supra* note 18, at 10, 12-14; Holland, *supra* note 19, at 6-7.

<sup>21</sup> 20 U.S.C. § 1681(a).

<sup>22</sup> *E.g.*, 87 Fed. Reg. at 41,391, 41,396, 41,415, 41,431, 41,515, 41,558, 41,571.

<sup>23</sup> 20 U.S.C. § 1681(a); *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 19 n.33 (2005) (“Title IX’s beneficiaries plainly include all those who are subjected to ‘discrimination’ ‘on the basis of sex.’” (emphasis added)); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (explaining that “Congress easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person’ if it had wished to restrict the scope of” the statute, but it had not done so); *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1311 (10th Cir. 2012) (Gorsuch, J.) (“Title IX does not limit its coverage at all, outlawing discrimination against any ‘person’”); 1 U.S.C. § 1 (defining “person”).

<sup>24</sup> For further discussion of Title IX’s protections for independent contractors, see Plaintiffs’ Brief in Opposition to Motion to Dismiss at 10-22, *Conviser v. DePaul University*, No. 1:20-cv-03-095 (N.D. Ill. July 14, 2021), <https://www.publicjustice.net/wp-content/uploads/2021/07/54-Opposition-to-MTD.pdf>.

<sup>25</sup> *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018).

<sup>26</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

<sup>27</sup> 34 C.F.R. § 106.44(a); 2001 Guidance, *supra* note 4, at 10-12, 14-15, 23.

<sup>28</sup> 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.44(g)).

<sup>29</sup> 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)).

<sup>30</sup> 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)).

schools would be allowed to impose a “one-way no-contact order” against a respondent,<sup>31</sup> 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,”<sup>32</sup> 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.<sup>33</sup> Finally, we ask the Department to expand the list of examples of supportive measures to note the availability of academic supportive measures, 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.<sup>34</sup>

**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,<sup>35</sup> including a ban on using any information obtained solely through an informal resolution in an investigation.<sup>36</sup> 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, as harassment (or other discrimination) is not a “conflict” where the victim and harasser share blame.<sup>37</sup>

**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.<sup>38</sup> Given the high prevalence of schools punishing student survivors,<sup>39</sup> 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<sup>40</sup> (e.g., alcohol or drug use, self-defense); or for making a false statement or engaging in consensual sexual conduct based solely on the

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<sup>31</sup> 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(1)); *id.* at 41450 (“one-way no-contact orders”).

<sup>32</sup> 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 (“supportive measures”).

<sup>33</sup> *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)).

<sup>34</sup> 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.

<sup>35</sup> 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)).

<sup>36</sup> 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(3)(vii)).

<sup>37</sup> 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 re-traumatizing. In contrast, 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.

<sup>38</sup> 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2 (“retaliation”).

<sup>39</sup> 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](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>.

<sup>40</sup> 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.71(a)).

school's decision of whether sex-based harassment (or other sex discrimination) occurred.<sup>41</sup> 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.<sup>42</sup> Finally, we ask that the Department clarify in the 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) 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.<sup>43</sup>

**Preemption.** We strongly support the proposed removal of the current provision that prevents schools from complying with a state or local law that conflicts with the 2020 regulations and the proposed change to expressly allow schools to comply with a state or local law that provides greater protections against sex discrimination, including harassment.<sup>44</sup> These proposed changes would return Title IX to its proper role as a floor—not a ceiling—for civil rights protections.

**Monitoring and training.** We support the proposed rules requiring schools' Title IX coordinators to address barriers to reporting sex discrimination.<sup>45</sup> 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,<sup>46</sup> and we ask that the Department give more specific examples of such measures in supplemental guidance after the regulations are finalized. In addition, we support the proposed requirement for all employees to be trained on their own obligations and their school's obligations to address sex discrimination<sup>47</sup> and for all employees involved in Title IX investigations and informal resolutions to be properly trained as well.<sup>48</sup>

### C. How Schools Must Investigate Sex-Based Harassment

**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).<sup>49</sup> While we understand that schools may sometimes need to impose a "reasonable" delay for "good cause,"<sup>50</sup> 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.

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<sup>41</sup> 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.

<sup>42</sup> 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71).

<sup>43</sup> 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>.

<sup>44</sup> 87 Fed. Reg. at 41404; see also 34 C.F.R. § 106.6(h).

<sup>45</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(b)).

<sup>46</sup> 87 Fed. Reg. at 41436. The preamble also stipulates that, to minimize barriers to reporting, a Title IX coordinator could participate in public awareness events to obtain feedback from students and employees about sex discrimination, or regularly solicit anonymous feedback via email from students and employees about barriers they have encountered to reporting sex discrimination. *Id.*

<sup>47</sup> 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(d)(1)). See also *id.* at 41575 (proposed 34 C.F.R. § 106.45(b)(1)(iii)).

<sup>48</sup> 87 Fed. Reg. at 41570 (proposed 34 C.F.R. §§ 106.8(d)(2)-(3)). See also *id.* at 41429.

<sup>49</sup> 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(4), 106.46(e)(5)).

<sup>50</sup> *Id.*

**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.<sup>51</sup> This formal presumption and notice of such a presumption is not required in any other type of school proceeding and exacerbates the harmful and false rape myth that people who report sex-based harassment (or other sex discrimination)—primarily women and girls—tend to be lying, which also deters complainants from initiating or continuing with an investigation. While we appreciate 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.

**Questioning parties and witnesses.** We support the proposed rules addressing K-12 investigations as they allow K12 schools the flexibility needed to address sex-based harassment (and other sex discrimination) promptly and appropriately.<sup>52</sup> 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.<sup>53</sup> 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. However, we 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.”<sup>54</sup> We are concerned this means that a survivor who refuses to answer a single question related to their credibility would have all of their oral and written statements excluded from the evidence, 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.<sup>55</sup>

**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.<sup>56</sup> 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,<sup>57</sup> and it is the same standard used by courts in all civil rights and other civil proceedings.<sup>58</sup> If the Department chooses not to require the preponderance standard, it should, at a minimum, clarify that “comparable” investigations 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

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<sup>51</sup> 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).

<sup>52</sup> Under the proposed rules, K12 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. 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(f)(2), 106.45(g)).

<sup>53</sup> 87 Fed. Reg. at 41577, 41577-78 (proposed 34 C.F.R. §§ 106.46(e)(6)(ii), 106.46(f)(1)(i)).

<sup>54</sup> 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(4)).

<sup>55</sup> While the proposed rules instruct decision-makers not to draw any inferences about whether sex-based harassment occurred based “solely” on a person’s refusal to respond to questions related to their credibility, a complainant whose statements are excluded would have to rely solely on their witnesses’ statements in order to prove their case. *Id.*

<sup>56</sup> 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).

<sup>57</sup> 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>.

<sup>58</sup> 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>.

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.<sup>59</sup> 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.

## **II. Protections for LGBTQI+ Students**

### **A. Scope of Protections**

We support the proposed rule's explicit listing of anti-LGBTQI+ discrimination as a form of sex discrimination, including discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes.<sup>60</sup> The clear explanation that LGBTQI+ students are protected under existing law is essential to achieving Title IX's promise of equal access to education for all students, and to implement the Supreme Court's decision in *Bostock v. Clayton County*.<sup>61</sup> In light of increasingly pervasive anti-LGBTQI+ violence, anti-LGBTQI+ state legislation, and the current preliminary injunction of the Department's 2021 notice on LGBTQI+ students' Title IX rights, all of which especially target transgender students, it is all the more urgent that the Title IX regulations codify explicit protections for LGBTQI+ students.<sup>62</sup>

### **B. Participation Consistent with Gender Identity**

We support the proposed rule clarifying that preventing a student from participating in an education program or activity consistent with their gender identity is *per se* a form of sex-based harm and generally violates Title IX because it causes more than "de minimis" harm.<sup>63</sup> 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 (see also **Part IV.B** below).

### **C. Athletics**

We urge the Department to issue its forthcoming rule addressing athletics participation as quickly as possible, by the end of 2022, so that it may be finalized together with this set of proposed rules by spring 2023, with sufficient time for schools to update their policies prior to the start of the 2023-2024 school year. We are concerned that these proposed rules decline to address exclusion from school sports as an increasingly common form of sex discrimination, faced particularly by transgender, non-binary, and intersex students. Additionally, all girls and women—whether transgender or cisgender, intersex or not—face harassment, invasions of privacy, and exclusion from opportunities from due to discriminatory bans and archaic "sex testing" requirements just to play school sports. Such policies, which often include inappropriate and invasive medical requirements, are unscientific and target students entirely based on sex stereotypes. These stereotypes disproportionately harm

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<sup>59</sup> 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)(1)-(2)).

<sup>60</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

<sup>61</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

<sup>62</sup> The preliminary injunction of the Department's 2021 guidance was based on reasoning that Title VII and Title IX standards are not comparable (although courts have recognized for decades that they broadly overlap) and that the guidance lacked required notice and comment opportunities (which this proposed rulemaking provides.) *Tennessee et al. V. U.S. Dept. of Education*, No. 3:21-cv-308, 2022 WL 2791450 (E.D.T.N., Ju. 15, 2022) (memorandum granting preliminary injunction of guidance interpreting *Bostock*).

<sup>63</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).



transgender, nonbinary, and intersex people and have also been disproportionately used to target Black girls and others not conforming to traditional standards of white femininity. As transgender girls and women continue to be targeted by school administrators and politicians, and kicked off of their school sports teams in record numbers, it is deeply disappointing that the Department passed up an opportunity to say clearly: all LGBTQI+ students have a right to play school sports without heightened surveillance, reduced privacy, or policies premising that LGBTQI+ students pose a threat to anyone simply by existing (they do not) or that there is something inherently “unfeminine” about success in school sports (a sex stereotype Title IX was enacted to address).

#### D. Anti-LGBTQI+ Harassment

We support the proposed rules requiring schools to address harassment based on sexual orientation, gender identity, sex characteristics (including intersex traits), or sex stereotypes as a form of sex-based harassment,<sup>64</sup> and we refer to our comments above in **Part I**, which apply equally here. In addition, we urge the Department to clarify that, consistent with recent Department of Education enforcement actions,<sup>65</sup> 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.<sup>66</sup> 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.

### III. Protections for Pregnant and Parenting Students

#### A. Scope of Protections.

***Pregnancy or related conditions.*** We support the proposed rules prohibiting schools from discriminating against any “person” (including students and employees) based on “current, potential, or past” pregnancy or related conditions<sup>67</sup> and urge the Department to include “perceived” and “expected” pregnancy or related conditions to the list. In addition, we support the proposed rule explicitly adding “lactation” as a related condition alongside childbirth and termination of pregnancy<sup>68</sup> and ask the Department to clarify that these items form a non-exhaustive list of “pregnancy or related conditions.” The proposed rules would also require employees who know of a student’s pregnancy or related condition to give them the Title IX coordinator’s contact information<sup>69</sup> and would require Title IX coordinators to then notify the student of their rights.<sup>70</sup> We appreciate the intent behind these requirements but ask the Department to instruct schools in the final regulations and in supplemental guidance on how to protect student privacy to ensure that, in states where abortion is criminalized, school

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<sup>64</sup> 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 (“sex-based harassment”)), 41571 (proposed 34 C.F.R. § 106.10).

<sup>65</sup> 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-education-office-civil-rights-announces-resolution-sex-based-harassment-investigation-tamalpais-union-high-school-district>; *Willits Unified School District Resolution Agreement*, Case 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”).

<sup>66</sup> 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.”).

<sup>67</sup> 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)).

<sup>68</sup> 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”).

<sup>69</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(2)).

<sup>70</sup> 87 Fed. Reg. at 41571-72 (proposed 34 C.F.R. § 106.40(b)(3)(i)).

records, including school health records, are not used to prosecute students who have been documented as being pregnant in the past but are not currently pregnant. Finally, we urge the Department to clarify that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy.

**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.<sup>71</sup> 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.”<sup>72</sup> 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 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.

## B. Access to Education Programs and Activities

**Participation.** We support the proposed rule permitting, as the current rules do, students who are pregnant or have a related condition to participate “voluntarily” in a separate portion of their school’s program or activity, “comparable” to the portion offered to their peers.<sup>73</sup> We urge the Department to also explicitly prohibit schools from requiring these students to participate separately, given that many pregnant students have been pushed into inferior alternative programs. We also support the proposed rule prohibiting schools from requiring students who are pregnant or have a related condition to provide a certification from their healthcare provider that they can physically participate in a program or activity, except in cases where *all* students are required to provide such certification.<sup>74</sup>

**Absences.** We support the proposed rule requiring schools to allow students who are pregnant or have a related condition to take a voluntary leave of absence for as long as deemed medically necessary by their healthcare provider or for as long as the school’s policy allows—whichever is longer—and to reinstate students when they return to their prior academic status and, as practicable, extracurricular status.<sup>75</sup> In particular, we support the proposed change allowing any healthcare provider (not just a physician) to determine how much leave is medically necessary, as this recognizes that not all students have easy access to a physician. However, the proposed rule would create an arbitrary and harmful distinction between medically necessary “leave” (e.g., for recovery from pregnancy)—which would have to be granted if requested—and short “breaks during class” (e.g., for lactation breaks) or “intermittent absences” (e.g. for abortion or recovery therefrom)—which would be classified as “reasonable modifications” and could be approved or denied subject to a Title IX coordinator’s

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<sup>71</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

<sup>72</sup> 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)).

<sup>73</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(1)).

<sup>74</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(6)).

<sup>75</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).

discretion.<sup>76</sup> The proposal would also exclude from protection non-birthing parents and caregivers who are not parents but who may need to provide medically necessary care for a child or other dependent. Therefore, we urge the Department to make medically necessary “absences” (not merely a “leave of absence”) available to *parenting and caregiving* students (not just to students who are pregnant or have a related condition) for as long as they need to care for a minor child or disabled adult who is sick.<sup>77</sup> If the Department does not adopt our recommendation, it should, at a minimum, require schools to presume that medically necessary absences (e.g., prenatal care, lactation breaks, abortion care) are “reasonable modifications” and must be granted.

**Accommodations (modifications).** The proposed rules would require schools to “promptly” make “voluntary and reasonable modifications”<sup>78</sup> 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.<sup>79</sup> The proposed “essential nature” qualifier is vague and could encourage schools to deny students who are pregnant, lactating, or accessing abortions of necessary accommodations. Therefore, as stated above, we urge the Department to require schools to presume that medically necessary absences (e.g. for prenatal care, lactation breaks, abortion care) are inherently “reasonable” modifications and must be granted. We also appreciate the requirement that the modifications must be voluntary and encourage the Department to explicitly state in the regulations that a school shall not force a student to accept a modification that the student does not want or need. Additionally, the Department should clarify that if a modification turns out to be ineffective or “fundamentally alters” the 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.

The Department should extend the same affirmative rights to modifications to *employees* who are pregnant or have a related condition (not just students), instead of making such employees’ rights dependent on what modifications are provided to employees with temporary disabilities.<sup>80</sup> After all, 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. Furthermore, the Department should make similar modifications available to all *parenting and caregiving* students and employees (not just those who are pregnant or have a related condition) for as long as they are caring for a minor child or disabled adult.<sup>81</sup> We also ask the Department to add more specific examples of modifications (e.g., accessible parking, referral to child care or preschool options)<sup>82</sup> and, where the need for a modification is obvious (e.g., more frequent bathroom or lactation breaks, larger desk), to prohibit schools from requiring students or employees to obtain a certification from their healthcare provider in order to receive that modification.

Finally, we support the proposed rules requiring schools to give lactating students and employees reasonable breaks and a clean, private non-bathroom space to pump breastmilk or breastfeed.<sup>83</sup> We request the Department clarify that lactation spaces must include a flat surface and a chair,<sup>84</sup> and that students and employees still have a right to pump or breastfeed in non-designated lactation spaces if they wish.

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<sup>76</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)(i), (iii)). Under the proposed rule, students in higher education who take a medically necessary “leave” because a request for a shorter “absence” is denied may have to un-register during the leave, which may result in ineligibility for critical benefits like housing and healthcare.

<sup>77</sup> Under the proposed rules, the only parents entitled to absences would be those who are pregnant, lactating, or recovering from childbirth. Our recommendation is consistent with the proposed rules’ definition of “parental status,” which applies to all parents of minor children and disabled adults. See 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2).

<sup>78</sup> 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)).

<sup>79</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

<sup>80</sup> See 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.57(c)).

<sup>81</sup> Under the proposed rules, the only parents entitled to modifications would be those who are pregnant, lactating, or recovering from childbirth. Our recommendation is consistent with the proposed rules’ definition of “parental status,” which applies to all parents of minor children and disabled adults. See 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2).

<sup>82</sup> The Department can add additional examples of modifications for parenting students at proposed 34 C.F.R. § 106.40(b)(4)(iii).

<sup>83</sup> 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)).

<sup>84</sup> See, e.g., N.Y.C. Human Rights, Frequently Asked Questions: Lactation Accommodation and Model Policy N.Y.C. Admin. Code s8-107(22), <https://www1.nyc.gov/site/cchr/law/lactation-faqs.page>.

### C. Harassment of Pregnant and Parenting Students

We support the proposed rules stating that schools must address harassment based on pregnancy or related conditions as a form of sex-based harassment,<sup>85</sup> and we offer the same comments here as for sex-based harassment detailed above in **Part I**. In addition, we ask the Department to instruct schools 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 are not used to prosecute complainants in states where abortion and other reproductive healthcare is criminalized. Furthermore, as explained above in **Part III.A**, we urge the Department to include harassment based on parental, family, caregiver, or marital status as a type of sex-based harassment and to require schools to address it as such.

## IV. Other Protections Against Sex Discrimination

### A. Other Forms of Sex Discrimination

The proposed rules would, for the first time, impose more detailed requirements for addressing sex discrimination that is not sexual harassment or other harassment based on sex, including LGBTQI+ status, sex stereotypes, or pregnancy/parenting status). In response to the proposed rules on these other forms of sex discrimination, we offer the same comments here as for sex-based harassment detailed above in **Part I**.<sup>86</sup>

### B. Sex-Based Treatment or Separation

**De minimis harm.** We support the proposed rule stating that when schools treat individuals differently or separate them on the basis of sex, they cannot do so in a way that subjects a person to “more than de minimis harm,” unless otherwise expressly permitted by the Title IX regulations.<sup>87</sup> However, the only specific example in the proposed rules of what causes “more than de minimis harm” is preventing someone from participating in an education program or activity consistently with their gender identity.<sup>88</sup> We urge the Department to clarify that the de minimis harm standard applies to all sex-based treatment or separation in any education program or activity—including but not limited to school restrooms, locker rooms, and overnight accommodations for school trips,<sup>89</sup> except to the extent that Congress or the Department has expressly provided that Title IX does not apply in a particular context.<sup>90</sup>

**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.<sup>91</sup> In addition, these codes often force transgender, nonbinary, and gender-

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<sup>85</sup> 87 Fed. Reg. at 41572 (proposed 34 C.F.R. §§ 106.40(b)(3)(i)(F)).

<sup>86</sup> With the exception of **Part I.A: Definition of sex-based harassment** and **Part I.C: Questioning parties and witnesses** (which discusses our recommended changes for institutions of higher education).

<sup>87</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.31(a)(2)).

<sup>88</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.31(a)(2)).

<sup>89</sup> For example, courts have repeatedly held that providing separate restrooms for girls and boys does *not* inherently violate Title IX, but that excluding transgender girls from the girls' restroom or transgender boys from the boys' restroom does violate Title IX. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Doe v. Boyertown Area School District*, 897 F.3d 518, 530 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 2636 (2019); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017). The Fourth Circuit also confirmed these policies violate the Equal Protection Clause of the Fourteenth Amendment. *Grimm*, 972 F.3d at 608-10; *see also Whitaker v. Kenosha*, 858 F.3d at 1051.

<sup>90</sup> *See, e.g.*, 20 U.S.C. § 1681(a) *et seq.* (Congress enumerating specific situations where Title IX “shall not apply”); 34 C.F.R. § 106.33 (the Department noting that schools “may provide separate toilet, locker room, and shower facilities on the basis of sex”).

<sup>91</sup> National Women's Law Center, *Dress Coded: Black Girls, Bodies, and Bias in DC Schools* (2018), <https://nwlc.org/resource/dresscoded>.

nonconforming students to conform narrowly to traditional gender norms and often prohibit Black and Indigenous<sup>92</sup> students from wearing protective and traditional hairstyles and head coverings.<sup>93</sup> 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.<sup>94</sup>

**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.<sup>95</sup> 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.

### C. Notice of Nondiscrimination

**Enumeration of protected classes.** We support the proposed rule requiring schools to adopt and publish a policy against sex discrimination and procedures to address complaints of sex discrimination.<sup>96</sup> 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, so that they know which types of conduct constitute sex discrimination and when they can ask their schools for help.<sup>97</sup>

**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 birth control, and LGBTQI+ students. First, although the Title IX statute only allows religious exemptions for schools that are “controlled by a religious organization,”<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup> 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

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<sup>92</sup> 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>.

<sup>93</sup> National Coalition for Women and Girls in Education, *Title IX At 50: A Report by the National Coalition for Women and Girls in Education 17* (2022) [hereinafter NCWGE Report], <https://nwlc.org/resource/ncwge-title-ix-at-50>.

<sup>94</sup> 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 . . . .”

<sup>95</sup> NCWGE Report, *supra* note 93, at 6, 43-47.

<sup>96</sup> 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)).

<sup>97</sup> See 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)). We also urge the Department to prohibit harassment on the basis of parental, family, caregiver, or marital status under Title IX (see **Part III.A: Parental, family, or marital status** above).

<sup>98</sup> 20 U.S.C. § 1681(a)(3).

<sup>99</sup> 34 C.F.R. § 106.12(c).

<sup>100</sup> 34 C.F.R. § 106.12(b).

<sup>101</sup> 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).

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 our recommendations. If you have any questions, please contact Elizabeth Tang ([etang@nwlc.org](mailto:etang@nwlc.org)) and Shiwali Patel ([spatel@nwlc.org](mailto:spatel@nwlc.org)).

Thank you,  
National Women's Law Center

Joined by:

**National Organizations & Coalitions:**

ADL (Anti-Defamation League)  
African American Juvenile Justice Project  
Alianza Nacional de Campesinas, inc.  
All4Ed  
American Association of University Women  
American Atheists  
AnitaB.org  
Association for Women in Science  
Athlete Ally  
Autistic Self Advocacy Network  
Campus Pride  
Center for American Progress  
CenterLink: The Community of LGBT Centers  
Clearinghouse on Women's Issues  
Committee for Children  
Council of Parent Attorneys and Advocates  
Council on Social Work Education  
Education Law Center  
EduColor  
End Rape On Campus  
Enough is Enough Voter Project  
Equal Rights Advocates  
Esperanza United (formerly Casa de Esperanza: National Latin@ Network)  
Family Equality  
Feminist Majority Foundation  
Futures Without Violence  
Girls Inc.  
GLAAD  
GLSEN  
Harvard Law School Gender Violence Program  
Healthy Teen Network  
Human Rights Campaign  
Institute for Women's Policy Research  
It's On Us

Just Solutions  
Know Your IX, Advocates for Youth  
Lawyers' Committee for Civil Rights Under Law  
Legal Momentum, the Women's Legal Defense and Education Fund  
Minority Veterans of America  
NASPA - Student Affairs Administrators in Higher Education  
National Association of Councils on Developmental Disabilities  
National Association of Social Workers  
National Black Justice Coalition  
National Center for Learning Disabilities  
National Center for Lesbian Rights  
National Coalition Against Domestic Violence  
National Coalition for Women and Girls in Education<sup>102</sup>  
National Council of Jewish Women  
National Network to End Domestic Violence  
National Organization for Women  
National Partnership for Women & Families  
National Women's Political Caucus  
Planned Parenthood Federation of America  
Public Advocacy for Kids (PAK)  
Public Justice  
Right To Be (formerly Hollaback!)  
Shriver Center on Poverty Law  
Society of Women Engineers (SWE)  
Stop Educator Sexual Abuse, Misconduct & Exploitation (S.E.S.A.M.E.)  
Stop Sexual Assault In Schools  
The Advocacy Institute  
The Education Trust  
The Inclusion Playbook  
The National Domestic Violence Hotline  
Transgender Advocates Knowledgeable Empowering (TAKE)  
Transgender Law Center  
UAW (International Union, United Automobile, Aerospace and Agricultural Implement Workers of America  
UltraViolet  
Union for Reform Judaism  
URGE: Unite for Reproductive & Gender Equity  
ValorUS  
Victim Rights Law Center  
Women of Reform Judaism  
Women's Sports Foundation  
Xinachtli Rites of Passage

**State/Local Organizations:**

Ace and Aro Alliance of Central Ohio

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<sup>102</sup> NCWGE joins these comments based on a majority vote of its membership. Many member organizations have submitted their own comments in response to the July 12, 2022, Federal Register notice. Their individual submissions may take different positions regarding items discussed herein, and thus these comments should not be attributed to each of NCWGE's members.

Alliance for Girls  
Arizona Coalition to End Sexual and Domestic Violence  
Atlanta Pride Committee  
Attic Youth Center  
AWAKE TN  
Borderland Rainbow Center  
CA LGBTQ Health and Human Services Network  
Equality California  
Center for Psychological Growth  
Center on Halsted  
Chicago Alliance Against Sexual Exploitation (CAASE)  
Colors+  
Educate to Eliminate  
Empower Yolo  
Equality Nevada  
Equitas Health  
ERC and LC (Eric Rickloff Center, and Learning Center).  
Family Health Services of East Central Ohio  
Family Violence Appellate Project  
Florida Council Against Sexual Violence  
Garden State Equality  
Gender Justice  
GenderNexus  
Girls Inc. of the Pacific Northwest  
Henderson Equality Center  
House of Tulip  
Hugh Lane Wellness Foundation  
Illinois Coalition Against Sexual Assault  
Illinois National Organization for Women NOW  
Inside Out Youth Services  
Institute for LGBT Health & Wellbeing  
Kaleidoscope Youth Center  
KWH Law Center for Social Justice and Change  
Lassen Family Services  
LGBT Center of Greater Reading  
LGBTQ Center OC  
LGBTQ Center of the Cape Fear Coast  
LGBTQ Community Center of the Desert  
LGBTQ+ Allies Lake County  
LGBTQ+ Spectrum of Findlay  
Los Angeles LGBT Center  
Louisiana Chapter - National Association of Social Workers  
Lumina Alliance  
Maine Women's Lobby  
Marsh Law Firm PLLC  
Maryland Network Against Domestic Violence  
Maryland Coalition Against Sexual Assault  
Men Stopping Violence, Inc.  
Michigan Organization on Adolescent Sexual Health (MOASH)



Missouri Coalition Against Domestic & Sexual Violence  
Monarch Services  
Montgomery Pride United/ The Bayard Rustin Community Center  
My Life My Choice  
Naples Pride  
NASW Maine Chapter  
National Association of Social Workers - California Chapter  
National Association of Social Workers - Michigan Chapter  
National Association of Social Workers - New Hampshire Chapter  
National Association of Social Workers - Vermont Chapter  
National Association of Social Workers - Texas Chapter  
National Association of Social Workers - Maryland Chapter  
National Association of Social Workers - New York State Chapter  
National Association of Social Workers - Wisconsin Chapter  
New Haven Pride Center  
Newark Ohio Pride Coalition  
North Carolina Coalition Against Sexual Assault  
North Shore Alliance of GLBTQ+ Youth, Inc.  
Oakland LGBTQ Community Center  
One In Long Beach, Inc. dba The LGBTQ Center Long Beach  
one-n-ten  
Onslow County LGBTQ community center  
OutCenter Southwest Michigan  
OutFront Kalamazoo  
Pacific Pride Foundation  
Partners Against Violence. Inc.  
Peace Over Violence  
Pittsburgh Equality Center  
Pride Center of Staten Island  
Pride Center of Terre Haute Inc.  
Pride Community Center of North Central Florida  
Pride Community Center of the Tricities  
Pride Community Center, Inc  
PRISM FL  
Rainbow Center  
Rape Trauma Services: A Center for Healing and Violence Prevention  
REACH  
Resilience  
Rockland County Pride Center  
Rocky Mountain Victim Law Center  
San Diego Pride  
SOJOURN: Southern Jewish Resource Network for Gender and Sexual Diversity  
Spencer Pride, Inc.  
Standpoint  
Student Advocacy Center of Michigan  
Sussex Pride  
Texas Association Against Sexual Assault (TAASA)  
The Center of Wichita  
The Equality Crew

The GA Coalition Against Domestic Violence  
The Justice for Girls Coalition of WA State  
The LGBTQ Center (South Bend, IN)  
The Montrose Center  
Transgender Michigan  
Transinclusive Group  
Transliance  
Unity House at Kenyon College  
Uptown Gay & Lesbian Alliance (UGLA)  
Virginia Council on LGBTQ+  
Voices for Vermont's Children  
Women's Law Project  
Youth OUTright WNC  
YWCA Greater Los Angeles