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U.S. Department of Education  
400 Maryland Ave SW  
Washington, DC 20202

Catherine E. Lhamon  
Assistant Secretary, Office for Civil Rights  
U.S. Department of Education  
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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 National Women’s Law Center (“NWLC”) is pleased to submit this comment in response to proposed regulations from the Department of Education (“the Department”) under Title IX of the Education Amendments of 1972 (“Title IX”).<sup>1</sup>

NWLC is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972 was enacted, NWLC has participated in all major Title IX cases before the Supreme Court as counsel<sup>2</sup> or amicus. NWLC is committed to eradicating all forms of sex discrimination in school, including sex-based harassment, discrimination against LGBTQI+ students, discrimination against pregnant and parenting students, and sex discrimination against students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities. We equip students with the tools to advocate for their own Title IX rights at school, assist policymakers in enforcing Title IX and strengthening protections against sex discrimination, and litigate on behalf of students whose schools fail to adequately address their reports of sex discrimination in violation of Title IX.

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,

<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>.

<sup>2</sup> E.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

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 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: **Part I** discusses protections against sex-based harassment, including how it harms students (p.2-6) and our recommendations on when schools should be required to respond to sex-based harassment (p.6-22), how they should be required to respond (p.22-33), and how they should be required to investigate (p.33-44). **Part II** discusses protections for LGBTQI+ students, including how anti-LGBTQI+ discrimination harms students (p.45) and our recommendations regarding Title IX's scope of protections (p.45-47), participation consistent with gender identity (p.47-49), athletics (p.49-51), and anti-LGBTQI+ harassment (p.51-52). **Part III** discusses protections for pregnant and parenting students, including how discrimination against pregnant and parenting students is harmful (p.52-53) and our recommendations regarding Title IX's scope of protections (p.53-56), access to education programs and activities (p.56-60), and harassment of pregnant and parenting students (p.60-61). **Part IV** discusses other protections against sex discrimination, including our recommendations regarding schools' obligations to address other sex discrimination (p.61), sex-based treatment and separation (p.61-63), and notice of nondiscrimination (p.63-64). **Part V** addresses the Department's Directed Questions (p.64-66).

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

### **A. Sex-Based Harassment Harms Students' Access to Education.**

#### ***Sexual harassment, sexual assault, dating/domestic violence, and stalking***

Sexual harassment, sexual assault, dating violence, domestic violence, and stalking are prevalent at all levels of education. In grades 7–12, 56 percent of girls and 40 percent of boys are sexually harassed in a given school year,<sup>3</sup> and one in five girls ages 14–18 have been kissed or touched without their consent.<sup>4</sup> About 10 percent of PK–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.<sup>5</sup> Furthermore, in a given year, one in 11 high school girls and one in 14 high school boys experience physical dating violence,<sup>6</sup> and more than a quarter of a million people ages 16–19 are victims of stalking.<sup>7</sup> About 10 percent of PK–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.<sup>8</sup> In college, more than 60 percent of

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<sup>3</sup> Catherine Hill & Holly Kearl, American Association of University Women, *Crossing the Line: Sexual Harassment at School 2* (2011), <https://www.aauw.org/resources/research/crossing-the-line-sexual-harassment-at-school>.

<sup>4</sup> Kayla Patrick & Neena Chaudhry, National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 3* (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence> [hereinafter NWLC Sexual Harassment Report].

<sup>5</sup> Billie-Jo Grant *et al.*, *A Case Study of K–12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation* (Sep. 15, 2017), <https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf>.

<sup>6</sup> Centers for Disease Control & Prevention, *Preventing Teen Dating Violence* (last updated Mar. 5, 2021), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/teendatingviolence/fastfact.html>.

<sup>7</sup> Jennifer L. Truman & Rachel E. Morgan, Dep't of Justice, Office of Justice Programs, *Stalking Victimization, 2016* (Apr. 2021), <https://bjs.ojp.gov/content/pub/pdf/sv16.pdf>.

<sup>8</sup> Grant *et al.*, *supra* note 5.

women and men experience sexual harassment.<sup>9</sup> One in four women, one in five transgender and gender-nonconforming students, and one in 15 men are sexually assaulted during their time in college.<sup>10</sup> In addition, during their time in college, one in seven women and one in 10 men experience dating violence, and one in 10 women and one in 33 men are victims of stalking.<sup>11</sup> Unfortunately, these statistics are often higher for marginalized students, including Black and brown girls and women, LGBTQI+ students, pregnant and parenting students, and disabled students.<sup>12</sup>

Despite these high rates of sex-based harassment, few students report it to their schools. Many victims do not report because they believe the incident is “not serious enough” to report because it began consensually, because alcohol and drugs were present, because such incidents seem common, because others’ reactions suggest that it is not serious, or because they believe they can handle it themselves.<sup>13</sup> Other common reasons for not reporting include shame and embarrassment, fear of not being believed, fear that no one would do anything to help, and doubt that school resources and responses would actually be helpful if they were provided.<sup>14</sup> Many survivors fear reporting would only make the situation worse: they fear being labeled a “snitch”; facing retaliation from the harasser; suffering negative academic, social, or professional consequences; and being blamed or disciplined by their school.<sup>15</sup> And many survivors simply do not want their harasser to get into trouble, particularly if their harasser is an intimate partner, romantic interest, friend, or someone who is well-liked in their community.<sup>16</sup>

The relatively few students who do ask for help are often ignored or punished instead of receiving the help they need to learn and feel safe in school. Too often, victims who come forward are suspended, expelled, or otherwise disciplined because school officials believe the victim engaged in consensual sexual activity in violation of school rules, or believe the incident was consensual and that the victim made a false accusation.<sup>17</sup> Student survivors are also often disciplined because at the time they were

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<sup>9</sup> Catherine Hill & Elena Silva, American Association of University Women, *Drawing the Line: Sexual Harassment on Campus* 17, 19 (2005), <https://www.aauw.org/app/uploads/2020/02/AAUW-Drawing-the-line.pdf>.

<sup>10</sup> David Cantor *et al.*, Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct* ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aa-u-campus-climate-survey-2019> [hereinafter AAU Report].

<sup>11</sup> AAU Report, *supra* note 10, at 52 (dating violence), 55 (stalking).

<sup>12</sup> See, e.g., AAU Report, *supra* note 10, at 13–14 (transgender and gender-nonconforming college students); Joseph G. Kosciw *et al.*, GLSEN, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools* 30 (2020), <https://www.glsen.org/research/2019-national-school-climate-survey> [hereinafter GLSEN Survey] (LGBTQ youth ages 13–21); NWLC Sexual Harassment Report, *supra* note 4, at 3 (Native, Black, and Latina girls ages 14–18); 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://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting> [hereinafter NWLC Pregnant or Parenting Students Report] (pregnant and parenting girls ages 14–18); Karen Schulman *et al.*, National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls With Disabilities* 7 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities> [hereinafter NWLC Girls With Disabilities Report] (disabled girls ages 14–18).

<sup>13</sup> AAU Report, *supra* note 10, at A7-27–A7-33, A7-92–A7-93; GLSEN Survey, *supra* note 12, at 32-34.

<sup>14</sup> AAU Report, *supra* note 10, at A7-27–A7-33, A7-92–A7-93; GLSEN Survey, *supra* note 12, at 32-34; RAINN, *Campus Sexual Violence: Statistics* (last visited Sept. 9, 2022), <https://www.rainn.org/statistics/campus-sexual-violence> [hereinafter RAINN Statistics].

<sup>15</sup> AAU Report, *supra* note 10, at A7-27–A7-33, A7-92–A7-93; GLSEN Survey, *supra* note 12, at 32-33.

<sup>16</sup> AAU Report, *supra* note 10, at A7-27, A7-30; RAINN Statistics, *supra* note 14.

<sup>17</sup> See, e.g., Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 15-16 (Mar. 2021)], <https://www.knowyourix.org/thecostofreporting> [hereinafter KYIX Report]; Tyler Kingkade, *Schools Keep Punishing Girls – Especially Girls of Color – Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, *The 74* (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it>; Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, *Chronicle of Higher Education* (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>; Aviva Stahl, *This Is an Epidemic: How NYC Public Schools Punish Girls for Being Raped*, *Vice* (June 8, 2016), [https://broadly.vice.com/en\\_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped](https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped); Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, *N.Y. Times* (June 7, 2016), <https://www.nytimes.com/2016/06/08/nyregion/schools-punished-teenagers-for-being-victims-of-sexual-assault-complaints-say.html>.

assaulted, they were using drugs or alcohol, or for physically defending themselves against their harassers, for expressing age-appropriate trauma symptoms after the incident, for missing school in order to avoid their harasser, or for merely telling other students about the incident.<sup>18</sup> Sometimes schools force or pressure survivors into enrolling in inferior “alternative” education programs that isolate them from their friends, offer little to no instruction, and deprive them of access to extracurriculars.<sup>19</sup> Unfortunately, schools are more likely to disbelieve and punish girls and women of color (especially Black girls and women), LGBTQI+ students, pregnant and parenting students, and disabled students due to stereotypes that label these students as more “promiscuous,” more “aggressive,” less credible, and/or less deserving of protection.<sup>20</sup> When schools fail to address sexual harassment, students suffer. Many survivors miss class, receive lower grades, withdraw from extracurricular activities, or leave school altogether because they do not feel safe. Some are even expelled in the wake of their trauma. In college, 34 percent of student survivors of sexual assault end up dropping out.<sup>21</sup>

### **Harassment of LGBTQI+ students**

LGBTQI+ students are at especially high risk of experiencing harassment in school—the reality is the majority of LGBTQI+ students can expect to be harassed and assaulted at school because of who they are. Almost 60% of PK-12 LGBTQ students experience sexual harassment in a given school year, such as unwanted touching.<sup>22</sup> Over 25% of PK-12 LGBQ students report being pushed or shoved based on their sexual orientation, with over 20% of LGBTQ students reporting similar instances based on gender or gender expression. About 9-11% of PK-12 LGBTQ students experience more serious assaults based on their identities, such as being injured with a weapon.<sup>23</sup> Over half of LGBTQ girls (52%) report surviving sexual or other violence.<sup>24</sup> At the university level, LGBT students continue to report mistreatment more frequently than their peers, reporting experiences of sexual assault about 5 times more frequently and in-person bullying or harassment about 4 times more frequently than non-LGBT university students.<sup>25</sup>

Even this data likely underrepresents the scope of harassment LGBTQI+ youth encounter when attempting to access an education—these youth are strongly disincentivized from reporting violence and discrimination due to a lack of meaningful support, plus the very real threat of being punished for their own victimization. When LGBTQ students report harassment or assault in PK-12 settings, over 60%

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<sup>18</sup> KYIX Report, *supra* note 17, at 15–16; NAACP Legal Defense and Education Fund, Inc. & National Women’s Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014), [https://nwl.org/wp-content/uploads/2015/08/unlocking\\_opportunity\\_for\\_african\\_american\\_girls\\_report.pdf](https://nwl.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf).

<sup>19</sup> E.g., Tyler Kingkade, *A High Schooler Says Her School Called Her A “Drama Queen” When She Reported Harassment*, Buzzfeed (Oct. 13, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/forced-out-of-high-school-for-reporting-harassment-lawsuits>; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, Atlantic (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418>.

<sup>20</sup> Rebecca Epstein *et al.*, Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, 1-6 (2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3000695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000695) [hereinafter Georgetown Law Report]; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, Medium (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>; Jennie M. Kuckertz & Kristen M. McCabe, *Factors Affecting Teens’ Attitudes Toward Their Pregnant Peers*, 16 *Y Psi Chi, Int’l Honor Soc’y. Psychol.* 33 (2011), [https://www.psichi.org/resource/resmgr/journal\\_2011/spring11jnkuckertz.pdf](https://www.psichi.org/resource/resmgr/journal_2011/spring11jnkuckertz.pdf); Leigh Ann Davis, *The Arc, People with Intellectual Disabilities and Sexual Violence 2* (Mar. 2011), <https://www.thearc.org/document.doc?id=3657> [hereinafter The Arc Brief].

<sup>21</sup> Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) *J.C. Student Retention: Res., Theory & Prac.* 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>.

<sup>22</sup> GLSEN Survey, *supra* note 12, at 28.

<sup>23</sup> *Id.* at 29.

<sup>24</sup> Jasmine Tucker & Neena Chaudhry, National Women’s Law Center, *Let Her Learn: Stopping School Pushout for LGBTQ Girls 3* (2017), <https://nwl.org/resource/stopping-school-pushout-for-lgbtq-girls> [hereinafter NWLC LGBTQ Girls Report].

<sup>25</sup> Kerith J. Conron *et al.*, UCLA School of Law Williams Institute, *Experiences of LGBTQ People in Four-Year Colleges and Graduate Programs 16* (May 2022), <https://williamsinstitute.law.ucla.edu/publications/lgbtq-colleges-grad-school> [hereinafter Williams Institute Report].

report that school staff either tell them to ignore it or do nothing at all; and, nearly one-tenth of LGBTQ students who report are subsequently disciplined.<sup>26</sup> And LGBTQI+ students face similar harassment without support from faculty in the context of higher education. In one survey, in response to bullying, harassment, assault, or other discrimination they experienced, 73 percent of undergraduate LGBTQ respondents reported that faculty did not know the discrimination was happening; over 7 percent reported faculty knew and did nothing; over 5 percent reported they were disciplined instead of the aggressor.<sup>27</sup> In the same survey, in response to bullying, harassment, assault, or other discrimination they experienced, over 34 percent of LGBTQ graduate students reported that faculty did not know the discrimination was happening; over 25 percent reported that faculty knew and did nothing; and almost 3 percent reported that they were disciplined instead of the aggressor.<sup>28</sup>

These forms of violence against LGBTQI+ youth have far-reaching consequences in education and many other aspects of life. Educational consequences include problems staying focused at school and forced absences, due to a student feeling unsafe. Among LGBTQI+ students at the PK-12 level, those who experience more anti-gay and anti-trans harassment and assault report having lower grades than their LGBTQI+ peers, and are roughly half as likely to be seeking post-secondary education at a university or trade/vocational school. One survey showed that over 39 percent of LGBTQ students overall reported absences from school in the past year, with survey respondents being almost three times as likely to report absences if they experienced harassment or discrimination on the basis of their sexual orientation or gender identity.<sup>29</sup> In another report, over 40 percent of LGBTQ girls reported absences from school due to feeling unsafe or uncomfortable.<sup>30</sup> Because of discrimination and harassment, LGBTQI+ students are pushed out of school at alarming rates. As of 2019, almost a fifth of LGBTQI+ students across the U.S. (17%) report being forced to change schools due to feeling unsafe or uncomfortable.<sup>31</sup>

### ***Harassment of pregnant and parenting students***

Becoming pregnant or a parent can subject students, particularly girls and women, to sexual harassment and unwanted sexual attention, as well as other sex-based harassment based on their pregnancy or related conditions or on their status as parent. Girls who are pregnant or parenting report feeling stigmatized and treated like an outcast in both school and society at large. For example, one young girl in a 2017 focus group explained that her classmates think that “just because you [have] a baby that you are going to sleep with them.”<sup>32</sup> In a different study, a pregnant student reported administrators forced her to stand up in front of her entire school during an assembly and announce that she was pregnant. This led to incessant taunts, unwanted touching, and invasive comments by her classmates.<sup>33</sup> Not surprisingly, girls who are pregnant or parenting ranked protection from bullying and harassment among the most important things that schools could do to help them.<sup>34</sup>

Students are caught in a double bind: on the one hand, in a growing number of states, legislators are determined to deny them access to reproductive healthcare. On the other hand, if they become pregnant

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<sup>26</sup> GLSEN Survey, *supra* note 12, at 34.

<sup>27</sup> Williams Institute Report, *supra* note 25, at 41-42.

<sup>28</sup> *Id.* at 55-56.

<sup>29</sup> GLSEN Survey, *supra* note 12, at 47-48.

<sup>30</sup> NWLC LGBTQ Girls Report, *supra* note 24, at 2.

<sup>31</sup> GLSEN Survey, *supra* note 12, at xvii.

<sup>32</sup> NWLC Pregnant or Parenting Students Report, *supra* note 12, at 11.

<sup>33</sup> Angélica Salceda & Phyllida Burlingame, ACLU of California, *Breaking Down Educational Barriers for California's Pregnant and Parenting Students* (Jan. 2015), <https://s3.documentcloud.org/documents/3873022/PPSReport-ACLUNC-1.pdf>.

<sup>34</sup> NWLC Pregnant or Parenting Students Report, *supra* note 12, at 4.

and decide to parent, they are ostracized, harassed, and pushed out of the classroom by an unsupportive school community. Unfortunately, because schools are not required to report instances of pregnancy-related harassment, data of these experiences are lacking. As various jurisdictions restrict students access to reproductive healthcare, however, it is logical to anticipate more students experiencing harassment because of their reproductive decisions.<sup>35</sup>

**B. The Proposed Rules Provide Important Clarity Regarding the Scope of Title IX’s Protections Against Sex-Based Harassment and the Initiation of Recipients’ Obligation to Respond to Sex-Based Harassment, but Should Better Protect Survivor Autonomy.**

***Definition of sex-based harassment***

We support that the rules’ proposed definition of sex-based harassment in § 106.10 would include sexual harassment and other harassment on the basis of sex—which includes harassment on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity<sup>36</sup>—when, as explained in proposed § 106.2, this harassment takes the form of (i) “quid pro quo harassment;” (ii) “hostile environment harassment;” or (iii) sexual assault, dating violence, domestic violence, or stalking.

(i) Quid Pro Quo Harassment

We support the proposed rules’ expansion of the scope of quid pro quo harassment. Where § 106.30(a)(1) currently defines sexual harassment to include an “employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct,” proposed § 106.2’s definition of sex-based harassment would reach such behavior when undertaken by any “agent[] or other person authorized by the recipient to provide an aid, benefit, or service under the recipient’s education program or activity.” We also appreciate the preamble’s examples of what persons are considered to have “been authorized to provide aid, benefits, or services as part of a recipient’s education program,” including volunteer coaches; graduate students who teach their own classes or serve as teaching assistants and have teaching roles or are responsible for grading coursework (even if they are not directly employed by a school); independent contractors with whom a school contracts to provide benefits or services to students; people who oversee internships or clinical programs; and members of a school’s board of trustees, even if they serve as unpaid volunteers.<sup>37</sup> Expanding the list of persons considered capable of engaging in quid pro quo harassment would help ensure schools respond to a broader array of sexual misconduct, enabling many students to get relief under Title IX where they cannot under the current rules. However, we strongly urge a removal of “unwelcome” from the definition, as quid pro quo harassment should be understood to occur whenever an education aid, benefit, or service is conditioned on sexual activity, without the necessity of determining whether the sexual activity is unwelcome. Conditioning education on sexual activity is necessarily a discriminatory act.

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<sup>35</sup> See, e.g. Kavitha Cardoza, *If More Students Become Pregnant Post-Roe, are we Prepared to Support Them?*, Hechinger Report (July 24, 2022), <https://hechingerreport.org/if-more-students-become-pregnant-post-roe-are-we-prepared-to-support-them>.

<sup>36</sup> We also urge the Department to go further and include within this definition harassment on the basis of parental, family, caregiver, or marital status (see **Part III.B, Parental, family, or marital status** below).

<sup>37</sup> 87 Fed. Reg. at 41412-13. The preamble explains that the question of whether a person is considered having “been authorized to provide aid, benefits, or services as part of a recipient’s education program” for purposes of asserting a claim of quid pro quo harassment is a “fact-specific” inquiry. As such, the examples provided by the Department represents a non-exhaustive list. *Id.*

Finally, we support the Department making clear at proposed § 106.2(1) that quid pro quo harassment would encompass both a situation where a person “explicitly or impliedly” conditions a benefit on sexual conduct. While the preamble to the current regulations stated quid pro quo harassment “could” encompass “explicit and implicit conduct,” this was not included in the text of the current regulations.<sup>38</sup>

#### (ii) Hostile Environment Harassment

We also support proposed § 106.2(2) more broadly—and appropriately—defining “hostile environment harassment” as “unwelcome” sex-based conduct that is sufficiently “severe or pervasive” that it “denies or limits” a person’s ability to participate in or benefit from an education program or activity. This would be a marked improvement over current § 106.30(2), which only reaches sexual harassment that is “severe and pervasive” such that it “*effectively denies* a person” equal access to education. In combination with the current rule’s mandatory dismissal requirement,<sup>39</sup> this narrow definition prohibits schools from addressing a range of Title IX complaints and harms students in multiple ways.

First, the current rule’s “severe and pervasive” standard marked an unprecedented departure from the Department’s longstanding standard for hostile environment applied from 1997-2020.<sup>40</sup> The current standard creates barriers to reporting by requiring students to endure repeated and escalating levels of harassment before their complaint can even be investigated. In contrast, the proposed rules would require schools to address harassment before it becomes so severe that a student’s education has been derailed.

Second, by requiring individuals to establish that harassment was “severe and pervasive,” the current rules also unjustifiably create a higher standard for establishing unlawful sexual harassment than other kinds of harassment and misconduct prohibited under civil rights laws implemented and enforced by the Department; for example, harassment on the basis of race is governed by the severe or pervasive standard, as is harassment on the basis of disability.<sup>41</sup> By imposing this uniquely burdensome standard in sexual harassment matters only, the current rules promote the message that sexual harassment does not warrant the same kind of response as does other forms of harassment, that sexual harassment is less serious than other forms of harassment, and that victims of sexual harassment are less deserving of support than are victims of other forms of harassment. The current rules also force schools to slice and dice complaints from students who experience multiple and intersecting forms of harassment. For example, under the current rules, if a Black girl is harassed based both on her race and sex, and the

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<sup>38</sup> See *id.* at 41413.

<sup>39</sup> 34 C.F.R. § 106.45(b)(3)(i).

<sup>40</sup> See generally Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter 2014 Guidance]; Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Sexual Violence* (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Guidance]; Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>; Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; Dep’t of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance*, 66 Fed. Reg. 5,512 (issued Jan. 19, 2001; rescinded Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter 2001 Guidance]; Dep’t of Educ., Office for Civil Rights, *Dear Colleague Letter on Prohibited Disability Harassment* (July 25, 2000), <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> [hereinafter 2000 Disability Harassment Guidance]; Dep’t of Educ., 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>; Dep’t of Educ., Office for Civil Rights, *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448 (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html> [hereinafter 1994 Racial Harassment Guidance].

<sup>41</sup> See e.g., 2000 Disability Harassment Guidance, *supra* note 40 (applying “severe or pervasive” standard to harassment on the basis of disability); 1994 Racial Harassment Guidance, *supra* note 40 (applying “severe or pervasive” standard to harassment on the basis of race).

harassment is only severe *or* pervasive (not severe *and* pervasive), her school apparently must ignore the sex-based taunts and only address the race-based slurs.<sup>42</sup> Or under the current rules, if the harassment she faces is intersectional—*i.e.*, is inextricably based on both her race and sex at the same time, arguably her school must dismiss the entire complaint.

Third, the current rules defining hostile environment harassment provides lesser protections for students than for employees. The standard for workplace hostile environment claims under Title VII, which prohibits workplace sex-based harassment, is whether the harassment is “sufficiently severe *or* pervasive to *alter* the conditions of the victim’s employment.”<sup>43</sup> However, under the current Title IX rules, a school is only held responsible for hostile environment harassment against a student or other individual if the harassment they experience is “so severe, pervasive, *and* objectively offensive” that it “denies” the student equal access to the school’s program or activity. In short, the current rules hold schools to a far lesser standard in addressing the harassment of students—including the sexual harassment and abuse of children under its care—than schools are held to in addressing the same harassment of adult employees. In contrast, the proposed rules, which would require schools to address sex-based harassment if it is so “severe or pervasive” that it “limits” a person’s equal access to education, would be much more aligned with the Title VII standards.

However, while we recognize that proposed § 106.2’s reinstatement of the Department’s longstanding hostile environment standard is a significant improvement over the current rule’s standard, we also acknowledge that this standard could still create burdens for survivors, if the required showing that harassment “denies or limits” an individual’s ability to participate in or benefit from the education program or activity were interpreted as requiring a showing of a specific educational injury, such as lower grades, as a result of the harassment. While the preamble indicates that making a showing of lower grades is not required, it contemplates that some proof of educational injury is required. Harassment that is severe or pervasive in an educational program or activity can be assumed to have such impact. Therefore, we encourage the Department to make clear in the final rule itself that no such additional educational injury need be shown.

### (iii) Specific Offenses: Sexual Assault, Domestic Violence, Dating Violence, and Stalking

The definitions of “domestic violence,” “dating violence,” and “sexual assault” should be stronger than the definitions in proposed § 106.2’s definition of sex-based harassment.<sup>44</sup> Specifically, to better capture the wide array of abuse and control tactics employed by abusers, and consistent with the definition of “domestic violence” in the 2022 reauthorization of the Violence Against Woman Act’s (VAWA 2022),<sup>45</sup> the Department’s proposed definition at § 106.2(3)(iii) should include the following from VAWA 2022’s definition in defining “domestic violence”:

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<sup>42</sup> See Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence>.

<sup>43</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (emphasis added).

<sup>44</sup> We note that the proposed rules do not include in the definition of the specific offenses an indication of when these offenses will be considered to have occurred under a recipient’s education program or activity or when the specific offenses, if occurring outside the recipient’s program or activity, will be considered to contribute to a sex-based hostile environment under the recipient’s education program or activity. As such, we encourage the Department to clarify these points, so that schools, students, and other individuals protected by Title IX understand what circumstances would trigger a school’s obligation to respond under Title IX to these offenses.

<sup>45</sup> 87 Fed. Reg. at 41418.



“the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, *including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior.*”<sup>46</sup>

In contrast, proposed (3)(iii) of the sex-based harassment definition in § 106.2 would limit the definition of “domestic violence” to “felony or misdemeanor crimes of violence,” which is too limited.

First, while VAWA 2022’s definition of “domestic violence” includes conduct that “may or may not constitute criminal behavior,” proposed § 106.2 would limit “domestic violence” to only criminally illegal behavior. This ignores the reality that domestic violence often takes the form of repeated patterns of coercive or controlling behavior, which, viewed in isolation or outside the context of power dynamics between an abuser and their victim, may not constitute criminal conduct. As such, we urge the Department to reconsider this limitation and instead adopt a definition of “domestic violence” that includes “abuse that may or may not constitute criminal behavior.”

Second, with its limitation to “crimes of violence,” the definition of “domestic violence” in proposed (3)(iii) of the sex-based harassment definition would completely ignore the various, common forms of abuse separate from physical violence that survivors of domestic violence face, which are highlighted by the VAWA 2022 definition—including verbal, psychological, economic, and technological abuse. The Department in the preamble justifies its decision not to adopt VAWA 2022’s definition of “domestic violence” by explaining that some portions of the definition are “not applicable to Title IX.”<sup>47</sup> However, this is untrue. First, research shows that it is common for students to experience domestic violence in ways other than sexual or physical abuse. In one study surveying college students about their experiences with various types of intimate partner violence, over 79 percent of respondents reported experiencing at least one incident of psychological abuse in their relationships.<sup>48</sup> Another survey of college and university women’s experiences with intimate partner cyber aggression showed that 73 percent of respondents reported experiencing some type of cyber aggression, including experiencing use of social media platforms to taunt them or sending others a “private, intimate picture or video” of them without their permission.<sup>49</sup> Finally, in another study that surveyed college students about the kinds of control tactics used by their abusers, economic abuse—including stealing money or interfering with scholarship or financial aid disbursements<sup>50</sup>—was reported as a common control tactic.<sup>51</sup> Accordingly, to account for the

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<sup>46</sup> 34 U.S.C. 1221(a)(12) (emphasis added).

<sup>47</sup> 87 Fed. Reg. at 41418.

<sup>48</sup> Elizabeth M. Avant *et al.*, *Psychological Abuse and Posttraumatic Stress Symptoms in College Students*, 26 *J. of Interpersonal Violence* 3080, 3088 (2011).

<sup>49</sup> Alison Marganski & Lisa Melander, *Intimate Partner Violence Victimization in the Cyber and Real World: Examining the Extent of Cyber Aggression Experiences and its Association with In-Person Dating*, 33 *J. of Interpersonal Violence* 1071, 1080-82 (2015). The Department also acknowledges in the preamble that hostile environment harassment includes online harassment, explaining that harassers are making “increasing use of social media and other online platforms...as a form of sex-based harassment,” and that “the Department recognizes that online harassment...targeted at students and employees on these media platforms may impact a recipient’s education program or activity.” The Department goes on to explain that “when an employee has information about sex-based harassment among its students that took place on social media or other online platforms and created a hostile environment in the recipient’s education program or activity, the recipient would have an obligation to address that conduct.” If the Department recognizes and endorses online harassment as a common form of sex-based harassment, it stands to reason that similar online abuse could constitute a form of domestic violence barred by Title IX. 87 Fed. Reg. at 41440.

<sup>50</sup> Michelle L. Munro-Kramer *et al.*, *The Dynamics of Interpersonal Relationships: Understanding Power and Control Tactics Among College Students*, *J. of Interpersonal Violence*, at 15 (Sept. 4, 2021), <https://journals.sagepub.com/doi/abs/10.1177/08862605211042816>.

<sup>51</sup> It should also be noted that economic abuse presents unique risks to LGBTQI+ survivors, where abusers may use exploit their gender identity, sexual orientation, and/or sex characteristics in conjunction with financial control. For example, an abuser, knowing that doing so may pose a risk to the survivor being fired or their safety, may threaten to out the survivor at work; it may also be easier for a same-sex partner to commit or attempt to commit identity theft.

reality that domestic abusers rely both on physical or sexual violence and various other control tactics to hurt their partners, we urge the Department to incorporate the references to “verbal, psychological, economic, or technological abuse” in VAWA 2022’s definition of “domestic violence.” Finally, we urge the Department to provide examples in the preamble to the final rules and in supplemental guidance clarifying that this definition of “domestic violence” includes common forms of abuse, including: violence or threats of violence toward the complainant’s family members, friends, pets, or property; threats by the respondent to kill themselves; and threats by the respondent to report the victim or the victim’s family members to police, immigration officials, child protective services, or a mental health institution.

Regarding the proposed rules’ definition of “dating violence,” our concerns are similar, as the definition in proposed (3)(ii) of the sex-based harassment definition in § 106.2 would be limited to “violence” committed by a person’s romantic or intimate partner—which, like the definition of “domestic violence” in proposed § 106.2(3)(iii), obscures the variety of abuse in addition to physical violence that dating violence can take. As such, we urge the Department to clarify that dating violence includes, but is not limited to, physical, sexual, emotional, verbal, psychological, economic, and technological abuse, which includes violence or threats of violence toward the complainant’s family members, friends, pets, or property; threats by the respondent to kill themselves; and threats by the respondent to report the victim or the victim’s family members to police, immigration officials, child protective services, or a mental health institution. Also, similar to our recommendations regarding the proposed rules’ definition of “domestic violence,” we urge the Department to clarify that “dating violence” includes abuse that “may or may not constitute criminal behavior.”<sup>52</sup>

Finally, we urge the Department to adopt a more appropriate and broader definition of “sexual assault.” The definition at proposed (3)(i) of the sex-based harassment definition in § 106.2 only defines sexual assault as “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.” This definition, however, relies on a cross reference which could leave individuals and recipients confused about which offenses are covered. We recommend incorporating the following definition of sexual assault (and recommended the same definition in our February 2022 comment on changes to the Civil Rights Data Collection<sup>53</sup>):

“The intentional touching, over or under clothing, of:

- (i) a private body part (which includes the breast, vagina, vulva, penis, testicle, anus, buttock, or inner thigh) of another person, with any body part or object; or
- (ii) any part of another person’s body with a private body part;

without the consent of one of the people, including instances where the victim is incapable of giving consent, including, for example, because of the victim’s temporary or permanent mental or physical incapacity. Classification of these incidents should take into consideration the age of the victim and the age and developmentally appropriate behavior of the respondent.”

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<sup>52</sup> In supplemental guidance regarding domestic violence and dating violence, the Department should also make it clear to schools that “mutual violence” is a myth and cannot exist in instances of intimate partner violence, because one party is consistently exercising power and control over the other. See Jessica R., *The Myth of Mutual Abuse*, National Domestic Violence Hotline (last visited Sept. 2, 2022), <https://www.thehotline.org/resources/the-myth-of-mutual-abuse>. As such, the Department should also make it clear that self-defense by a survivor against any form of intimate partner violence perpetuated by their abuser does not constitute a form of prohibited violence. We also urge the Department to encourage schools to review complaints of intimate partner violence with a lens towards larger patterns of power and control, instead of viewing complaints as single instances of abuse.

<sup>53</sup> National Women’s Law Center, *Letter to Dep’t of Educ., Re: Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection (Docket No. ED–2021–SCC–0158, at 86 Fed. Reg. 70831) at 7-8* (Feb. 11, 2022) <https://nwlrc.org/resource/nwlc-comments-regarding-department-of-education-data-collection> [hereinafter NWLC CRDC Comment].

A definition like this would help students and schools understand, without having to look up other legal authorities, what sort of contact is prohibited, including by explaining which body parts are considered “private” body parts, as required in the FBI uniform crime reporting system’s definition of “fondling,” which is one of its categories of “sex offenses.”<sup>54</sup> It would also include a wider range of incidents, including where the victim is made to touch the assailant’s private body parts, and would explicitly clarify, as was recognized in the preamble to the 2020 Title IX regulations, that the touching of private body parts “over clothing” can constitute sexual assault.<sup>55</sup> Furthermore, by focusing on “intentional” touching, this definition would exclude situations such as those where an individual accidentally bumps against another person in a crowded place. At the same time, “intentional” touching would ensure that incidents like hazing or hate incidents against LGBTQI+ students are included as “sexual assault,” even though the incident may not have been done for the purpose of sexual gratification, but rather to assert dominance over the victim, or to express hatred against the victim.

Finally, our recommended definition would properly instruct schools to take into consideration the age of the victim when classifying incidents of sexual assault, consistent with two decades of Department Title IX policy recognizing that, for example, “in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.”<sup>56</sup> Importantly, we have *not* recommended considering the “developmentally appropriate behavior” of the *victim*, because a victim’s “behavior” is never relevant in incidents of sexual assault, as the victim is never responsible for being sexually assaulted. Accordingly, an inquiry into what is “developmentally appropriate” for a victim may open the door to victim-blaming or relying on stereotypes based on the victim’s sex (including sexual orientation, gender identity, transgender, nonbinary, or intersex status, pregnancy or parenting status), race, disability, etc. However, it is important to consider the respondent’s “developmentally appropriate behavior” when classifying an incident of sexual assault, given that very young respondents and some disabled respondents may engage in sexually harassing behavior without being aware of the nature or implications of their actions.

### ***Scope of recipients’ obligation to address sex-based harassment and other sex discrimination***

We support the requirement in proposed § 106.11 that schools respond to all sex discrimination, including sex-based harassment, “occurring under [their] education program or activity,” which includes conduct that a school has disciplinary control over and conduct that occurs in a building owned or controlled by an officially recognized student organization at a college or university. While we appreciate that proposed § 106.11 clarifies that this would mean schools would be responsible for addressing incidents that occur outside the school’s education program or outside the United States, so long as they contribute to a hostile environment in an education program or activity,<sup>57</sup> we urge the Department to expressly state in the final regulations that this includes “off-campus” incidents, as this has been a common source of confusion among students and school officials (including under the current regulations, which also require schools to address some off-campus incidents). The preamble also explains that if a complainant experiences harassment off campus and can show that, due to the harasser’s continued presence on

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<sup>54</sup> Dep’t of Justice, Federal Bureau of Investigation, *2021.1 National Incident-Based Reporting System User Manual* (last updated Apr. 15, 2021), available at <https://www.asucrp.net/uniform-crime-reporting-program/national-incident-based-reporting-system-nibrs/nibrs-manuals>.

<sup>55</sup> Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30176 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

<sup>56</sup> 2001 Guidance, *supra* note 40, at 7 (instructing schools to consider the “age . . . of the alleged harasser *and the subject or subjects of the harassment*”) (emphasis added).

<sup>57</sup> See also 87 Fed. Reg. at 41403-04.

campus or their additional on-campus harassment, the complainant is experiencing a hostile educational environment, the school would have to address this harassment.<sup>58</sup> This would be a marked improvement over current §§ 106.44(a) and 106.45(b)(3)(i), which require schools to dismiss all Title IX complaints of off-campus sexual harassment occurring outside of a school-sponsored program or where the respondent or context of the harassment is not under the school's "substantial control."<sup>59</sup> The Department's proposed change would permit schools to address many Title IX complaints by students who are sexually harassed while studying abroad, at a fraternity that isn't officially recognized by their school or in off-campus housing, or who are harassed or stalked online outside of a school-sponsored program. This change would ensure schools could address more incidents of sex-based harassment, which occurs not only on campus, but also frequently off campus: almost nine in ten college students live off campus,<sup>60</sup> and 41 percent of college sexual assaults involve off-campus parties.<sup>61</sup>

We also appreciate the proposed rules outlining a school's obligations to address off-campus harassment that occurs *outside* of a school-sponsored program so long as it occurs under a school's "program or activity," which includes conduct that "is under the school's disciplinary authority."<sup>62</sup> To illustrate which conduct schools would have to address under this standard, the preamble describes an example in which a teacher sexually harasses a student off campus, stating that such conduct would "likely" be considered sexual harassment "in the program of the school even if the harassment occurs off campus or off school grounds and outside a school-sponsored activity," because the school has disciplinary authority over the teacher in this example.<sup>63</sup> While we appreciate the preamble stating that this example would "likely" create an obligation for a school to respond to this conduct, we ask the Department to clarify that this example would *definitely* require a school to respond under Title IX, since the teacher is clearly under the school's disciplinary authority.

To illustrate a circumstance in which a school would *not* have an obligation to respond to off-campus harassment occurring outside a school's program or activity, the preamble offers an example in which a student is sexually assaulted by a third party while at a nightclub off campus; the student is now experiencing emotional distress due to the assault, and as a result, cannot go to class.<sup>64</sup> The preamble explains that this assault would not be considered to have occurred in the school's program or activity, because the assault happened off campus, and "the respondent is not a representative of the recipient or otherwise a person over whom the recipient exercises disciplinary authority."<sup>65</sup> Thus, the school in the second example would not have to respond under Title IX, and would only be "encouraged" to provide the student supportive measures.<sup>66</sup> We urge the Department to reconsider its conclusion in this second example, and ask that it *requires* rather than encourages schools to provide supportive measures to survivors experiencing off-campus harassment outside a school-sponsored program. Though a school in the second example would not have disciplinary authority over a third-party assailant in the same way it does over a student or school employee, the Department acknowledges in the preamble that schools

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<sup>58</sup> 87 Fed. Reg. at 41403-04.

<sup>59</sup> See also Dep't of Educ., Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment 8-10* (July 2021; updated June 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> [hereinafter 2021 Guidance].

<sup>60</sup> 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> (87 percent).

<sup>61</sup> United Educators, *Facts From United Educators' Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), [https://www.ue.org/sexual\\_assault\\_claims\\_study](https://www.ue.org/sexual_assault_claims_study).

<sup>62</sup> 87 Fed. Reg. at 41402. See also *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645-46, 647 (1999).

<sup>63</sup> 87 Fed. Reg. at 41402.

<sup>64</sup> 87 Fed. Reg. at 41403.

<sup>65</sup> 87 Fed. Reg. at 41403.

<sup>66</sup> 87 Fed. Reg. at 41403.

nevertheless have “disciplinary authority” to issue a no-trespass order against a non-affiliated third party who assaults a student, “even if the recipient otherwise lacks control over the person.”<sup>67</sup> Thus, consistent with this position, we ask that the Department “require” schools to provide supportive measures to individuals who report off-campus sex-based harassment, even if the school is not required to respond otherwise by initiating its grievance procedure because the conduct occurs outside a school’s program or activity.

### ***When recipients may dismiss complaints of sex-based harassment and other sex discrimination***

We strongly support the removal of the current requirement, set out in the definition of “formal complaint” at § 106.30, that individuals must be “participating or attempting to participate” in a school program or activity at the time they file their complaint. This means that schools are currently forced to dismiss Title IX sexual harassment complaints brought by prospective students who decide not to enroll at the school; former students after they drop out, transfer, or graduate; or former employees after they leave their jobs. While the current rules make an exception if an individual filing a complaint intends to enroll in a different program of the school, and for an alumnus who intends to stay involved in alumni programs, current § 106.30 still leaves many who experience sexual harassment without recourse under Title IX, including those prospective students, students, and employees who end their connection with a school specifically because of the harassment they experienced there. We support proposed § 106.2 undoing this harmful mandatory dismissal provision by defining “complainant” to include individuals who are not current students or employees, as long as they were “participating or attempting to participate” in the school’s program or activity *at the time they experienced sex-based harassment or other sex discrimination*.

Proposed § 106.45(d)(1)(ii) echoes current § 106.45(b)(3)(ii), which allows schools to dismiss a Title IX complaint when the respondent has transferred, graduated, quit, retired, or otherwise left the school. However, proposed § 106.45(d)(4) would ensure that when schools do dismiss a complaint because the respondent is not participating in a school program or activity or is not employed by the school, the school must offer supportive measures to the complainant and take other “prompt and effective steps” to ensure the harassment or discrimination does not continue or recur. As set out in the preamble, these supportive measures and steps could range from barring a respondent who is a former student or employee from the school’s campus if 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.<sup>68</sup> We urge the Department to outline further examples of what “other appropriate prompt and effective steps” could be in the preamble to the final rules and in supplemental guidance.<sup>69</sup> For example, the Department should explain that these steps may also include, but are not limited to: investigating to determine whether there have been other victims of the respondent and whether other school staff knew about the incident(s) but ignored it or took steps to cover it up; and, after this investigation, scheduling a follow-up interview with the complainant to determine if the supportive measures offered by the Title IX coordinator have been helpful or effective, and whether the complainant experienced ongoing harassment by the respondent.

We also note and support the important distinction the preamble makes between the current and proposed rules. That is, the preamble emphasizes that current § 104.65(b)(3)(ii) permits schools to dismiss complaints if the respondent is “no longer *enrolled*” at the school, whereas the proposed rules

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<sup>67</sup> 87 Fed. Reg. at 41417-18.

<sup>68</sup> 87 Fed. Reg. at 41446-47.

<sup>69</sup> 87 Fed. Reg. at 41447.

would only permit schools to dismiss a complaint if the respondent is “not *participating in*” the school’s program or activity.<sup>70</sup> As the preamble points out, some student respondents may continue to participate in a school’s program or activity, even if they are no longer enrolled in the school, and further, that this participation may impact the complainant’s access to the school’s program or activity. Under this proposed standard, continued participation might include membership in an alumni organization, volunteering at the school, or attending school events, as well as reaching student respondents at colleges or universities on a school-approved leave intending to return.<sup>71</sup> This broader “not participating in” standard would allow more complainants to get relief under Title IX where they could not under the current rules.

### ***What employees must do when they know of possible sex-based harassment or other sex discrimination***

Under the current rules, a higher education institution is only obligated to respond to sexual harassment when employees with the “authority to institute corrective measures” have “actual knowledge” of the harassment. In order to rectify the incentive and opportunities the current rule creates for institutions to sweep harassment under the rug, the proposed rules put forth a reporting scheme that requires certain classes of employees to report sex discrimination, including sex-based harassment, to the Title IX coordinator. The preamble explains that these proposed reporting obligations attempt to strike a balance between protecting survivor autonomy—especially in the context of higher education, where most individuals experiencing sex-based harassment and other forms of sex discrimination are adults—and “ensuring that all recipients provide a nondiscriminatory educational environment” by ensuring robust institutional obligations to respond to sex discrimination.<sup>72</sup> We agree that protecting survivor autonomy and privacy is essential, as is the goal of ensuring schools are taking measures to address and prevent sex discrimination in their programs rather than grasping incentives to ignore it. The following outlines our recommendations on how best to strike the balance between these two goals.

Preserving a survivor’s choice and sense of control in the wake of sexual assault or other traumatizing harassment is critical in allowing them to heal; the preamble acknowledges this and also notes that safeguarding survivor autonomy is especially important in the context of higher education, where most survivors are adults.<sup>73</sup> The importance of preserving survivor autonomy following an incident of sexual misconduct or violence is widely endorsed by mental health professionals: Professor of Psychology Ellen Zurbriggen explains that “rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over [their] own body. A clearly established principle for recovery from these traumatic experiences is to...reestablish a sense of control over one’s own fate and future.”<sup>74</sup> Similarly, renowned trauma expert, Dr. Judith Herman, has acknowledged: “trauma robs the victim of a sense of power and control over [their] own life; therefore, the guiding principle of recovery is to restore power and control to the survivor...No intervention that takes power away from the survivor can possibly foster [their] recovery, no matter how much it appears to be in [their] immediate best interest.”<sup>75</sup> Moreover, preserving survivor

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<sup>70</sup> 87 Fed. Reg. at 41476.

<sup>71</sup> 87 Fed. Reg. at 41476.

<sup>72</sup> 87 Fed. Reg. at 41432, 41437-38.

<sup>73</sup> 87 Fed. Reg. at 41432, 41437-38.

<sup>74</sup> Letter from Eileen Zurbriggen, Professor of Psychology, *et al.*, to Daniel Hare, Chair, Academic Senate of the University of California System (Oct. 26, 2015), <http://ucscfa.org/wp-content/uploads/2015/10/UCSC-faculty-comments-on-SVSHpolicy-10.26.15.pdf> (discussing reporting against the survivor’s wishes).

<sup>75</sup> Judith L. Herman, *Recovery from Psychological Trauma*, 52 *Psychiatry & Clinical Neurosciences* 98 (1998).

autonomy is also essential in supporting a survivor in their ability to continue their education.<sup>76</sup> Research suggests that schools acting against survivors' wishes can lead to educational disengagement, including withdrawal from extracurricular activities, campus life, and academic and honor societies.<sup>77</sup> As such, while we appreciate that proposed §§ 106.2 and 106.44(d) would *allow* schools to designate some employees as “confidential employees” who would not be required to report possible sex-based harassment and other sex discrimination<sup>78</sup> to the Title IX coordinator (and would require those schools to notify students of the confidential employees' identities), we urge the Department to go further to protect survivors' autonomy by instead *requiring* that schools designate one or more confidential employees, with whom survivors can privately discuss their victimization with, without fear that an unwanted report might be made to the Title IX coordinator. We also urge the Department to specify that certain types of employees—most critically, those who work in victims services or advocacy offices, mental health services, and campus resource centers or offices for women, LGBTQI+ students, disability services, and other minority students who are particularly vulnerable to sexual misconduct—must be categorically designated as confidential employees.

We encourage the Department to clarify that confidential employees' responsibilities must include, upon learning of possible sex discrimination, including sex-based harassment, telling the person confiding in them: (i) how to report it to the Title IX coordinator, and (ii) how the Title IX coordinator can help them—by offering supportive measures (even without an investigation), opening an investigation, and/or facilitating an informal resolution. We also ask that the Department require all confidential employees to reduce all of this information to writing and give it to the disclosing individual,<sup>79</sup> for example, in the form of a brief brochure of resources survivors can take with them. The confidential employee must also make clear to the disclosing individual, including in writing, that the confidential employee will not make any report of the alleged discrimination to the recipient institution, to minimize any misunderstanding of the confidential employee's role.

We acknowledge that in PK-12 schools, 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. However, for disclosures of sex-based harassment that do not rise to the level of possible child abuse, our recommendation would allow confidential employees in PK-12 schools to serve as a fully confidential resources for children, without reporting to either the Title IX coordinator or to law enforcement. And, to ensure that children in PK-12 schools are fully aware of their options for requesting help, we ask the Department to require confidential employees in PK-12 schools to offer to help a disclosing individual report the harassment or discrimination to the Title IX coordinator (while making clear that they would not do so without the individual's consent).

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<sup>76</sup> See e.g., Merle H. Weiner, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166, at 5 (to be submitted to Regulations.gov on or before Sept. 12, 2022) [hereinafter Weiner Comment]; Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 Tenn. L. Rev. 71, 94-95 (2017) [hereinafter Weiner Article].

<sup>77</sup> Weiner Article, at 76; Carly P. Smith, Marina N. Rosenthal, & Jennifer J. Freyd, *The UO Sexual Violence and Institutional Betrayal Campus Survey* 34-36 (Oct. 24, 2014), <https://dynamic.uoregon.edu/jjf/campus/SmithRosenthalFreydGSU22-24October2014.pdf>.

<sup>78</sup> In addition to the importance of ensuring survivors of sex-based harassment can access confidential resources, we also note the importance of preserving an individual's right to access confidential resources when they have experienced other forms of sex discrimination. For example, LGBTQI+ students and pregnant students experiencing related discrimination may be vulnerable to heightened safety risks in disclosing their LGBTQI+ status or pregnancy status (see below in **Part II.B.**, **Part III.D.**, and **Part V.A.**). As such, it is essential that these students have access to confidential employees with whom they can privately discuss their experiences before deciding whether to report.

<sup>79</sup> This paper trail requirement could also be satisfied by the employee sending this information to the survivor electronically along with their email signature.

We also urge the Department to provide examples of how schools should inform students of the identities of these confidential employees, including but not limited to: requiring these employees to clearly indicate their confidential status on their office doors, in their email signatures, on their website profiles, in employee directories, and in other relevant locations. In addition, we urge the Department to encourage schools to designate confidential employees proportionally to the number of enrolled students, to clarify that confidential employees may not serve as advisors in Title IX investigations, to encourage schools to enter into memoranda of understanding with local community-based organizations that serve survivors to provide confidential employees, and to encourage schools to designate a diverse set of confidential employees. We make these recommendations after careful consideration and consultation with various stakeholders and experts, and in light of the importance of ensuring that all students have the opportunity to speak with a confidential resource for support and to understand the options available to them before deciding whether to formally make a complaint.

In the PK-12 context, we support proposed § 106.44(c)(1) requiring all non-confidential employees to report possible sex discrimination harming students, including sex-based harassment, to the Title IX coordinator. Our support for this requirement is informed by the fact that students experiencing sex discrimination in the PK-12 context will typically be minors, which affects both the power dynamics present in these situations and considerations regarding student autonomy. Our support for this requirement recognizes, as does the preamble, that PK-12 schools “generally operate under the doctrine of *in loco parentis*.”<sup>80</sup> However, we ask the Department to use a different approach when the alleged victim is an adult employee (or non-employee worker, see p.21-22) in a PK-12 institution, consistent with our below recommendation for responding to adult alleged victims in institutions of higher education.

For institutions of higher education (and other recipients other than elementary and secondary schools), proposed § 106.44(c)(2) 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. Further, proposed § 106.44(c)(2) would assign different obligations to these employees based on whether they learn of sex discrimination, including sex-based harassment, against a student or employee, giving employees with administrative leadership, teaching, or advising roles who learn of discrimination *against an employee* the flexibility either to report it to the Title IX coordinator or simply inform the disclosing employee of how to report it themselves, while requiring employees learning of discrimination against a *student* to report it to the Title IX coordinator. While acknowledging the sometimes competing interests at stake in holding institutions responsible for addressing discrimination and protecting the autonomy of those harmed by discrimination, we come down on urging the Department to acknowledge the privacy and autonomy rights of both students in higher education—who are typically adults—and these institutions’ employees (and non-employee workers), and accordingly ask the Department to amend its proposed reporting obligations in light of this reality.<sup>81</sup>

First, we agree that employees with the “authority to institute corrective measures” should be required to report all possible sex discrimination, including sex-based harassment, to the Title IX coordinator. We also urge the Department to clarify that these employees’ reporting obligations should be clearly communicated to students, so that survivors never find themselves in the devastating position of choosing

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<sup>80</sup> 87 Fed. Reg. at 41437. Relatedly, we recognize that PK-12 employees are typically also designated as mandatory reporters of child abuse under state laws.

<sup>81</sup> While some students at institutions of higher education are minors, education laws like FERPA give them their own privacy rights, unlike minors in PK-12 schools, whose privacy rights belong to their parents. See 20 U.S.C. § 1232g(d).



to confide in an employee, only to be surprised that the employee must report their victimization to the Title IX coordinator.<sup>82</sup> As such, we ask the Department to require employees with the “authority to institute corrective measures” to post notice of their reporting obligations, for example, on their office doors, in their email signatures, on their website profiles, in employee directories, and in other relevant locations.<sup>83</sup> (This will also help those individuals who do want an institutional response to the discrimination they have experienced better identify those employees empowered to assist them.)

Second, rather than applying a separate set of requirements to employees “with administrative leadership, teaching, or advising roles,” and all other non-confidential employees, we ask that the Department simply distinguish between employees with the “authority to institute corrective measures” and all other non-confidential employees. We recommend that, as to this (now larger) category of other non-confidential employees, rather than requiring these employees to report possible sex discrimination, including sex-based harassment, to the Title IX coordinator, the Department instead require them to connect individuals with resources when an individual discloses sex discrimination. Specifically, we recommend that all other non-confidential employees should be required to tell the person disclosing to them: (i) how to report to the Title IX coordinator, and how the Title IX coordinator can help them by offering supportive measures, and, if requested, an investigation or informal resolution; and (ii) how to reach a confidential employee, who can provide confidential supports and services.<sup>84</sup> Additionally, 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>85</sup> Finally, we urge the Department to require that all non-confidential employees provide this information in writing to the individual. Not only would documenting this information essentially create a brief brochure of resources survivors can take with them, but the presence or absence of such documentation would also be helpful in demonstrating whether a recipient adequately responded to sex discrimination in a later OCR investigation or lawsuit (see our recommendations below regarding when a school must respond to possible sex discrimination).

By requiring all other non-confidential employees to obtain an individual’s consent before reporting the possible sex discrimination to the Title IX coordinator, our recommended approach would prioritize the goal of preserving the autonomy, privacy, and choice of those experiencing sex-based harassment and other forms of sex discrimination, which, as explained above, is crucial in the wake of victimization.<sup>86</sup> The alternative approach proposed by the Department of requiring all higher education employees with “administrative leadership, teaching, or advising roles” to report possible sex-based harassment and other sex discrimination would sweep in an incredibly broad swath of school employees. Not only would this

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<sup>82</sup> Weiner Comment, *supra* note 76, at 14.

<sup>83</sup> *Id.* at 13-14.

<sup>84</sup> Kathryn J. Holland, Letter to Dep’t of Educ., *RE: Docket ID ED-2021-OCR-0166*, at 6-7 (to be submitted on or before Sept. 12, 2022).

<sup>85</sup> Weiner Comment, *supra* note 76, at 10, 12-14; Holland, *supra* note 84, at 6-7.

<sup>86</sup> We acknowledge the complexity inherent in obtaining the consent of multiple victims in a situation wherein they all have been subjected to the same harassment or discrimination by the same respondent, where one or more of the victims do not want to report. For example, Student A might disclose to an employee with the authority to institute corrective measures that they have been sexually harassed by a professor, and that this professor has similarly harassed other students. In doing so, Student A unintentionally discloses the identities of Students B and C as other victims of this professor’s harassment, while noting that Students B and C do not want to come forward. The employee reports the incident to the Title IX coordinator and mentions in passing that Students B and C have also experienced the same harassment—despite Students B and C not wanting to report their victimization. Or, say a harasser non-consensually exposes themselves to Students A, B, and C at the same time. Student A discloses to a non-confidential employee and asks the employee to report; however, Students B and C do not want to report or disclose their identities. Upon receiving the employee’s report on Student A’s behalf, the Title IX coordinator decides to open an investigation into the harassment Student A experienced but needs to interview Students B and C as the only other witnesses to the incident. We ask the Department to issue supplemental guidance to instruct schools on what they can do in these types of situations to protect the privacy of the victims whose identities may be exposed in a report of sex-based harassment or discrimination but who do not want to come forward, while still fully addressing the complaints of those individuals who do wish to proceed.

category include professors, coaches, and academic advisors, but it would apply to graduate students serving as teaching assistants<sup>87</sup> and other student-employees,<sup>88</sup> all of whom students are likely to identify as “safe” resources to discuss their victimization with—leading to the unfortunate surprise that many survivors will be faced with once they realize the person they chose to confide in regarding a sexual assault, for example, is obligated to report their disclosure to the Title IX coordinator. In addition to minimizing a disclosing individual’s surprise as to what an employee’s reporting obligations are, this approach would protect the autonomy of those experiencing discrimination. It would also forward the Department’s goal of “ensuring that all recipients provide a nondiscriminatory educational environment”<sup>89</sup> by enabling individuals to learn about their reporting options and their ability to get support from the Title IX coordinator. Finally, in the case of a student-employee reporting harassment, our recommendation would eliminate the need for an employee to determine whether the person reporting the harassment should be considered a student or an employee for purposes of their reporting obligations under proposed § 106.44(c)(3).

Finally, we also ask that three exceptions be made to employees’ obligation to report disclosures of harassment or discrimination when a college or graduate student makes a disclosure: (i) at a public awareness event (e.g., Take Back the Night), (ii) in an application (e.g., disclosure made in a personal statement or interview), or (iii) in an anonymous school climate survey, as students are unlikely to expect that such disclosures would trigger mandatory reporting obligations.<sup>90</sup> However, when Title IX Coordinators or other employees in higher education with the authority to institute corrective measures know of such disclosures, the school could still respond by creating school-wide training and prevention programs and ensuring that students are aware of their reporting options and resources for survivors, as the Department noted in its (now rescinded) 2014 Title IX guidance.<sup>91</sup> Finally, we put forth these exceptions while acknowledging the complexity inherent in balancing students’ privacy (and expectations about what might trigger a report) with a recipient’s ability to prevent and address sex-based harassment and discrimination in its program or activity.

### ***When a recipient has an obligation to respond to sex-based harassment or other sex discrimination***

The current rules do not consider institutions of higher education to have an obligation to respond to sexual harassment unless an employee with the “authority to institute corrective measures” has “actual

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<sup>87</sup> The preamble provides further clarification on which employees would fall in each category. It explains that: employees with administrative leadership roles “would include deans, coaches, public safety supervisors, and other employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans and directors of programs or activities;” employees with teaching responsibilities “would include any employee with ultimate responsibility for a course, which could include full-time, part-time, and adjunct faculty members as well as graduate students who have full responsibility for teaching and grading students in a course;” and employees with advising roles “would include academic advisors, as well as employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient.” 87 Fed. Reg. at 41439.

<sup>88</sup> The preamble explains that, in the case of a person being both a student and an employee, “the Department expects that the person would be required to notify the Title IX Coordinator only of information that may constitute sex discrimination under Title IX that was shared with the person while they were fulfilling their employment responsibilities (e.g., receiving information about sex discrimination from a student during class or office hours).” However, cabinining the reporting obligations of, for example, a graduate student working as a teaching assistant, to “class or office hours” does not counter the expectation by a student that a fellow student, albeit one with a teaching role, would have reporting obligations. Also, it is entirely foreseeable that a student would choose to discuss their victimization with a graduate teaching assistant during their office hours, likely so they could do so privately.

<sup>89</sup> 87 Fed. Reg. at 41432, 41437-38.

<sup>90</sup> While the proposed rules do not obligate the Title IX coordinator to do anything in response to possible sex-based harassment disclosed in assignments or 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>91</sup> See, e.g., 2014 Guidance, *supra* note 40, at 24.

knowledge” of the harassment. Furthermore, the current rules do not consider imputation of knowledge based only on constructive notice to be “actual knowledge” on the part of a PK-12 school or an institution of higher education.<sup>92</sup> This poses significant problems for survivors seeking to file OCR complaints against their school for a failure to respond appropriately to their victimization, as schools are only considered to be on notice and thus required to respond when sexual harassment is reported to an extremely narrow set of employees.

While the proposed rules would set out when *employees* must report possible sex discrimination to the Title IX coordinator, they do not explicitly specify when a *recipient* would have a legal obligation to address possible sex discrimination. In contrast, earlier (now rescinded) guidance clarified the circumstances in which schools were considered to have notice, including constructive notice, of sex-based harassment and other sex discrimination obligating a response.<sup>93</sup> Accordingly, we ask the Department to expressly affirm that recipients will be responsible for addressing possible sex discrimination, including sex-based harassment, when the recipient knew or should have known about the discrimination, which at minimum includes situations in which:

- (i) the Title IX coordinator and/or their designee has notice of possible sex discrimination;
- (ii) any employee at a PK-12 school has notice of possible sex discrimination;
- (iii) an employee at an institution of higher education with the “authority to institute corrective measures” has notice of possible sex discrimination; or
- (iv) any other non-confidential employee at an institution of higher education has notice of possible sex discrimination, *and*
  - (A) is asked by the individual disclosing the discrimination to report the incident to the Title IX coordinator, or
  - (B) fails to tell the individual disclosing the discrimination how to contact the Title IX coordinator, how to contact a confidential employee, and what the Title IX coordinator can do in response to a report.

Like our recommendations regarding the Department’s reporting scheme, these recommendations attempt to balance the autonomy and privacy of those experiencing sex discrimination with the goal of ensuring schools are taking steps to prevent sex-based discrimination in their programs. Specifically, our recommendations seek to prevent the situation of an individual employee’s failure to comply with their reporting obligations having the effect of insulating the recipient from any responsibility to address sex discrimination.

Also, similar to now rescinded 2001, 2011, and 2014 guidance and employer liability standards for harassment under Title VII, we ask the Department to clarify that schools are responsible for employee-on-student harassment, regardless of whether or not they have notice of the harassment, if the harassment is enabled or assisted by the authority exercised as an employee or agent of such covered entity.<sup>94</sup> If the Department does not adopt this recommendation, we at least ask the Department to revert

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<sup>92</sup> 87 Fed. Reg. at 41436.

<sup>93</sup> 2001 Guidance, *supra* note 40, at 10, 12-13, 18.

<sup>94</sup> 2014 Guidance, *supra* note 40, at 4 (“indeed, even if a school was not on notice [of employee-on-student harassment], the school is nonetheless responsible for remedying any effects of the sexual harassment on the student, as well as for ending the sexual harassment and preventing its recurrence, when [an] employee engaged in the sexual activity in the context of the employee’s provision of aid, benefits, or services to students (e.g., teaching, counseling, supervising, advising, or transporting students”); We also urge the Department to revive earlier notice standards for employee-on-student harassment to ensure consistency with the

to the standard in prior guidance, which is that a school is responsible for employee-on-student harassment, regardless of whether or not it has notice of the harassment, when an employee harasses the student “in the context of the employee’s provision of aid, benefits, or services to students (e.g., teaching, counseling, supervising, advising, or transporting students.”<sup>95</sup>

To reiterate, we recommend this particular notice structure because of our concerns around protecting the autonomy, choice, and privacy of survivors in the wake of sex-based harassment (see above on p.14-18), so that schools can respect and preserve a survivor’s decision whether to report sexual misconduct. We also recommend this notice structure for other sex discrimination matters for similar reasons; for example, this structure would better protect the privacy of LGBTQI+ students and pregnant students, who may not wish for employees to report sex discrimination to the Title IX coordinator without their consent because, as explained below in **Part V.A.** (p.64-65), doing so puts them at risk of being outed as LGBTQI+ or pregnant by creating a written record of their LGBTQI+ or pregnancy status—which is especially dangerous in states that criminalize abortion or force school employees to out LGBTQI+ students to their families. We also acknowledge that just as it is important to preserve the autonomy, choice, and privacy of individuals experiencing sex-based harassment and sex discrimination, it is similarly important to do so for individuals experiencing race or disability discrimination—who may also experience trauma associated with this discrimination and need to retain control over the ensuing process to recover from this trauma. And, like individuals experiencing sex-based harassment or sex discrimination, individuals experiencing race or disability discrimination need to be presented with the same opportunity to access confidential resources with whom they can privately discuss their victimization before deciding whether to make a formal report or complaint. As such, we urge the Department to consider, in consultation with other civil rights advocates focusing on racial and disability justice, how our proposed notice structure might be valuable in the context of race and disability discrimination.<sup>96</sup>

### ***Who can file a complaint and how they can do so***

We support the proposed rules’ expansion of what will be considered a complaint of sex discrimination, as reflected in the replacement of the current rules’ definition of “formal complaint” with a new definition of “complaint.” Specifically, while the current definition of “formal complaint” at § 106.30 only includes written complaints, proposed § 106.2 would include oral complaints as well in the definition of “complaint.” In addition, proposed § 106.2 would omit the physical or electronic signature requirement in current §106.30.<sup>97</sup> We support removing the requirement that individuals sign their complaints to facilitate the

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notice standard employed by Title VII in the context of a supervisor harassing an employee so that students are not required to satisfy a higher burden than employees are in the workplace—that is, if an employee is sexually harassed by their supervisor, the employer is usually strictly liable for the harassment, regardless of whether it otherwise had any notice of the harassment. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). In the Title VII context, it make sense to impose strict liability on an when a supervisor harasses an employee because the supervisor is a representative of the employee; similarly, in the Title IX context, a school should be deemed to have notice and thus required to address employee-on-student harassment, even if the employee-respondent is the only one with knowledge of the harassment, because the employee-respondent is a representative of the school.

<sup>95</sup> 2014 Guidance, *supra* note 40, at 4.

<sup>96</sup> We also note that the 2020 rules implemented uniquely burdensome procedures for sexual harassment—one of which was an untenable notice scheme that required schools to ignore many incidents of sexual harassment—primarily to reinforce the sexist myth that survivors should not be believed when coming forward about victimization. We reject this myth, which is reflected by our request for the Department to restore longstanding policy prior to the 2020 rules regarding sex-based harassment and sex discrimination, in addition to our recommendations that urge the Department to go further than previous policy to strengthen protections for individuals experiencing sex-based harassment and sex discrimination. Our recommended notice structure, while different from the notice structure for race or disability discrimination, is different only to achieve the goals of protecting the autonomy, choice, and privacy of individuals experiencing sex-based harassment or sex discrimination and could potentially forward the same goals in those contexts.

<sup>97</sup> See 87 Fed. Reg. at 41408.

filing of complaints—particularly for disabled victims who may face challenges that make communication difficult, especially young victims, and survivors whose first language is not English.

We also acknowledge the complexities around proposed § 106.44(f)(5), which would allow a Title IX coordinator to file a complaint of sex-based harassment or discrimination “if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient’s education program or activity”—even without the consent of the individual or individuals who experienced sex-based harassment or other sex discrimination.<sup>98</sup> We appreciate the Department’s acknowledgement that balancing the important interest of preserving a survivor’s autonomy by honoring their wishes not to proceed with a complaint with a school’s duties to ensure it is taking steps to prevent and address sex discrimination in its program is complex.<sup>99</sup> We also appreciate the Department’s clarification in the preamble of what factors a Title IX coordinator should assess when deciding to file a complaint against the wishes of a survivor of sexual violence or other individual who has experienced sex discrimination, and we ask the Department to reiterate these factors the preamble to the final rule, as well as in supplemental guidance.<sup>100</sup> This represents a marked improvement over what was stated in the preamble to the current rules, which only say that a Title IX coordinator has “flexibility” in making this determination, so long as proceeding with the grievance process “is not clearly unreasonable in light of the known circumstances.”<sup>101</sup>

Finally, we recognize that if the Department were to adopt our recommended reporting and notice scheme for institutions of higher education—where only employees with the “authority to institute corrective measures” would be required to report to the Title IX coordinator when they learn of possible sex-based harassment or other sex discrimination (see above)—it would reduce the number of scenarios wherein the Title IX coordinator would be notified of such harassment or discrimination and have to decide whether to override an individual’s wishes not to file a complaint. Our goal is not to limit the number of incidents in which a school is required to respond to sex-based harassment; but rather, to balance these two interests by only requiring one class of employees to report to the Title IX coordinator, while requiring all other non-confidential employees to respond when possible sex-based harassment or discrimination is disclosed to them by informing the person of how to contact and report the incident to the Title IX coordinator, giving them the tools to determine whether and how to move forward.

### ***Who is protected by Title IX***

We ask the Department to review both the final rule and its preamble to ensure that all language recognizes that Title IX protects all “person[s]” within an “education program or activity.”<sup>102</sup> At times, the proposed rule and its preamble suggest that schools only have obligations to students and employees.<sup>103</sup> However, as the Department recognized in the preamble,<sup>104</sup> the Title IX statute uses the word “person,” which does not limit Title IX’s protections to those with a particular relationship to the school.<sup>105</sup> For

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<sup>98</sup> See 87 Fed. Reg. at 41445.

<sup>99</sup> 87 Fed. Reg. at 41445.

<sup>100</sup> *Id.*

<sup>101</sup> 85 Fed. Reg. at 30131.

<sup>102</sup> 20 U.S.C. § 1681(a).

<sup>103</sup> *E.g.*, 87 Fed. Reg. at 41391, 41396, 41415, 41431, 41515, 41558, 41571.

<sup>104</sup> 87 Fed. Reg. at 41540.

<sup>105</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

example, Title IX protects independent contractors,<sup>106</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>107</sup> For these reasons, we ask that, wherever possible and appropriate, the Department to use inclusive language such as “persons,” or, when necessary, “workers” rather than “employees.”

### **C. The Proposed Rules Would Help Ensure that Schools’ Response to Sex-Based Harassment and Other Sex Discrimination Is Prompt and Effective, and These Provisions Should Provide Even More Robust Protections.**

#### ***Standard of care***

We support proposed § 106.44(a) requiring schools to take “prompt and effective action” to end sex discrimination (including sex-based harassment), prevent it from recurring, and remedy its effects on all people harmed. This would be a welcome return to the standard of care previously required by the Department from 2001 until 2020 for schools’ responses to sexual harassment<sup>108</sup> and a much-needed change from the harsh “deliberate indifference” standard at current § 106.44(a), which permits any recipient response to sexual harassment that is not *clearly* unreasonable. The proposed “prompt and effective action” standard would also align with the Department’s current standards for harassment based on race, color, national origin, and disability.<sup>109</sup> This is especially important, as the preamble noted,<sup>110</sup> for ensuring consistency when schools respond to intersectional claims of harassment or other discrimination. For example, if a Black girl reports that she is being harassed because of her race and sex, it is illogical to require a school to provide a “prompt and effective action” in response to the race-based harassment and merely a response that is not “deliberately indifferent” to the sex-based harassment, when the harassment at issue is inextricably linked to both her race and sex and cannot be separated. Finally, as the preamble noted,<sup>111</sup> the proposed “prompt and effective action” standard would create a single uniform standard for responding to all types of sex discrimination, instead of maintaining a less stringent standard specifically for sexual harassment than other non-sexual sex discrimination. This is especially important as a tiered standard sends the message that somehow sexual harassment is of less concern than other forms of discrimination.

#### ***Supportive measures***

We support the definition of supportive measures at proposed § 106.2 and the requirement at proposed 106.44(g) for schools to offer supportive measures at no cost to individuals who report sex discrimination, including sex-based harassment, regardless of whether they request an investigation or an informal resolution, and, per proposed § 106.45(d)(4)(i), even if their complaint is dismissed. Supportive measures are one of the most critical ways schools can ensure an individual’s equal access to education programs

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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>106</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>107</sup> *Doe v. Brown Univ.*, 896 F.3d 127, 132 n.6 (1st Cir. 2018).

<sup>108</sup> 2001 Guidance, *supra* note 40, at 10-12, 14-15, 23.

<sup>109</sup> Dep’t of Educ., Office for Civil Rights, *Race and National Origin Discrimination* (last visited Sept. 9, 2022), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html>; 2010 Guidance, *supra* note 40, at 2, 6; 2000 Disability Harassment Guidance, *supra* note 40.

<sup>110</sup> 87 Fed. Reg. at 41433.

<sup>111</sup> *Id.*

and activities in the face of sex-based harassment, and it is critically important that their availability does not turn on whether or not an investigation is under way. This is especially so because many victims do not want to go through an investigation, whether it is because they are afraid to face their harasser in an adversarial setting, they do not have spare time or energy to prove their victimization while fighting to overcome the detrimental effects of the harassment, they fear retaliation from the harasser or others in the school community, or for a variety of other reasons.<sup>112</sup> Furthermore, even if a victim requests an investigation, they may not be able to prove they were harassed, including because there were few or no other witnesses besides their harasser and a lack of physical evidence. Therefore, supportive measures must be available to a complainant even in the absence of a pending investigation, favorable determination, or informal resolution.

We also appreciate proposed § 106.44(g)(1)-(2), which allows schools to temporarily burden a respondent during an investigation in order to protect a complainant's safety or the school environment or to prevent further incidents, including by making "involuntary" changes to a respondent's schedule, "regardless of whether there is or is not a comparable alternative." However, we ask the Department to amend proposed § 106.44(g)(1) to clarify that schools may not make "involuntary" changes to a *complainant's* schedule, as the proposed text currently suggests schools can make "involuntary" changes to any party's schedule. While victims should be free to make voluntary changes to their own schedule, they should not be forced to change their classes, extracurriculars, lunch period or dining hall, dorm, work assignment, etc. in the aftermath of sex-based harassment, as that is when they most urgently need to stay connected to their support network rather than being isolated from people whom they can turn to for help. Allowing schools to temporarily make involuntary changes to a respondent's schedule but not to a complainant's schedule is also consistent with the Department's longstanding policy that supportive measures should "minimize the burden" on the complainant.<sup>113</sup>

We also appreciate the elimination of a reference to "mutual" no-contact orders at proposed § 106.44(g)(1) and the preamble's explanation that schools would be allowed to impose a "one-way no-contact order" (or "non-mutual no-contact order") against a respondent during an investigation.<sup>114</sup> However, we ask the Department to clarify in the regulations themselves that "one-way no-contact orders" would be allowed, as the Department itself recognized that this has been a common point of confusion among schools and students under the current regulations (which also permit one-way no-contact orders).<sup>115</sup> In addition, we urge the Department to direct that one-way no-contact orders are to be the default type of no-contact order when an investigation is pending and to prohibit schools from issuing a mutual no-contact order unless the respondent has filed a cross-complaint filed against the complainant.<sup>116</sup> This would be consistent with decades of expert consensus that mutual no-contact orders are harmful to victims, as the preamble acknowledged,<sup>117</sup> because abusers often manipulate their victims into violating the mutual order,<sup>118</sup> allowing abusers to turn what was intended to be a protective measure for the survivor into a punitive measure against the survivor. This default requirement to issue one-way no-contact orders would also be consistent with the Violence Against Women Act's (VAWA) requirement

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<sup>112</sup> See **Part I.A** above for a discussion on why sex-based harassment is underreported.

<sup>113</sup> 2014 Guidance, *supra* note 40, at 33; 2011 Guidance, *supra* note 40, at 15-16;

<sup>114</sup> 87 Fed. Reg. at 41450.

<sup>115</sup> 87 Fed. Reg. at 41449, 41450.

<sup>116</sup> This would be subject to our recommended clarification in the text of the regulations that schools may not discipline a complainant for a counter-complaint that the school should have known was filed for the purpose of retaliation—see **Part I.C: Retaliation** below.

<sup>117</sup> 87 Fed. Reg. at 41450.

<sup>118</sup> *E.g.*, Joan Zorza, *What Is Wrong with Mutual Orders of Protection?* 4(5) DOMESTIC VIOLENCE REP. 67 (1999), <https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005>.

that states receiving VAWA funding must “prohibit issuance of mutual restraining orders of protection except in cases where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense.”<sup>119</sup>

In addition, we urge the Department to clarify in proposed § 106.44(g) that if a party requests a certain supportive measure and it is “reasonably available,” then the school must provide it. Unfortunately, we have often heard from students and families that their schools provide supportive measures that do not actually help them. Our recommended clarification would ensure that individuals who experience sex-based harassment (or other sex discrimination) receive the specific supportive measures they need to restore and preserve their equal access to education. At the same time, our recommendation would not unreasonably burden schools, as they would not be required to provide a requested supportive measure if it is not “reasonably available.”

Furthermore, we ask the Department to state in the regulations that if a school is aware that the supportive measure(s) currently offered are ineffective, then the school must modify them or offer additional supportive measures. This is consistent with decisions by a number of federal appellate courts, which require schools to reevaluate their responses if they are shown to be ineffective.<sup>120</sup> It would also be consistent with the Department’s approach toward remedies, as explained in the preamble: “if the recipient’s initial steps to address the sex-based harassment were insufficient, then it would be required to take additional steps and provide additional remedies to the student to fulfill its obligation under proposed § 106.44.”<sup>121</sup>

We also ask the Department to expand the list of examples of supportive measures at § 106.44(g)(1) to include at least some of the following *academic* supportive measures: 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. We ask this because the list of examples of supportive measures in proposed § 106.44(g)(1) is almost entirely focused on mental and physical safety, and the only example of an academic supportive measure is “extensions of deadlines and other course-related adjustments.” We have found from our conversations with students and from partner organizations that work directly with students that the vast majority of students simply do not know what “other course-related adjustments” they can request.

In addition to these changes to the regulatory text, we ask that the Department, upon finalizing the rule, issue supplemental guidance explaining in more detail what other academic, safety, and financial

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<sup>119</sup> 34 U.S.C. § 10461(c)(1)(C).

<sup>120</sup> See, e.g., *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 449 (6th Cir. 2009) (“Given that [the school district] knew that its methods were ineffective, but did not change those methods, ‘a reasonable jury certainly could conclude that at some point during the . . . period of harassment[,] the school district’s standard and ineffective response to the known harassment became clearly unreasonable.’”), *abrogated on other grounds*, *Foster v. Bd. of Regents of Univ. of Mich.*, 982 F.3d 960 (6th Cir. 2020); *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (“where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior”) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260-61 (6th Cir. 2000)); see also, e.g., *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669–71 n.12 (2d Cir. 2012) (applying *Davis v. Monroe* in Title VI claim).

<sup>121</sup> 87 Fed. Reg. at 41423.



supportive measures complainants can request and schools can offer.<sup>122</sup> This guidance should encourage institutions that provide student housing to offer a range of housing supportive measures to complainants, such as provision of accessible emergency housing (including gender-inclusive housing for transgender and gender-nonconforming students), assistance with breaking off-campus leases to access school-provided emergency housing (e.g., obtaining any necessary certifications, paying lease-breaking fees), waiver of lease breakage fees for school-owned housing, and assistance with reasonable moving expenses when moving to emergency housing.<sup>123</sup>

Finally, we support proposed § 106.44(g)(5), which would prohibit schools from disclosing information about any supportive measure to any person other than the party to whom it was provided to or imposed on unless disclosure is necessary to provide that supportive measure or to restore or preserve the person's access to the education program or activity. For example, school staff who are responsible for implementing supportive measures must be informed of them in order to carry them out effectively—e.g., enforcing a one-way no-contact order in the lunchroom or dining hall, or providing excused absences in excess of a professor's standard policy. It could be necessary to inform a complainant about a supportive measure imposed upon a respondent so that the complainant feels safe returning to school or attending classes and activities—e.g., a no contact order, no-trespass order, or campus escort. However, a respondent should never be informed of any supportive measure provided to the complainant that does not affect the respondent—e.g., extra time on assignments/exams, counseling, or a new campus work assignment (unless the respondent has a no-contact order requiring them to stay away from the complainant's frequent locations).

### ***Informal resolution***

In general, we support proposed § 106.44(k) allowing schools to use an informal resolution to resolve reports of sex discrimination, including sex-based harassment, subject to certain safeguards.<sup>124</sup> After all, not all victims of sex-based harassment or other sex discrimination want to go through a formal investigation, and schools should be permitted to use a wide range of solutions to address discrimination, especially in cases where the respondent would like to address and repair the harm they caused. In addition, we support proposed § 106.44(k)(1) prohibiting schools from using informal resolutions to address employee-on-student incidents, as the power differential between students and employees can make it nearly impossible for informal resolutions in such cases to be truly voluntary, authentic, and effective. And we support proposed § 106.44(j) prohibiting schools from disclosing the identity of any

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<sup>122</sup> In December 2020, we and our partners organizations asked the Department to issue guidance clarifying the current Title IX regulations, including by providing a more detailed list of available supportive measures, especially academic supportive measures. Letter from Allied Advocates for Student Sexual Harassment Victims to Biden-Harris Transition Team, *Recommended clarifications from the Department of Education regarding the new Title IX sexual harassment rule 8-9* (Dec. 22, 2020), on file with Dep't of Educ. and available upon request. While we were glad to see the Department's 2021 Title IX guidance provided numerous helpful clarifications and illustrative examples regarding the current Title IX regulations, we were disappointed that it did not include more illustrative examples of supportive measures. 2021 Guidance, *supra* note 59, at 18-19.

<sup>123</sup> Know Your IX, Advocates for Youth, The Every Voice Coalition, SafeBAE, and Students and Survivors, *Comment to the Dep't of Educ.*, 12-14 (submitted to Regulations.gov on or before Sept. 12, 2022) [hereinafter Student Advocates Comment].

<sup>124</sup> Proposed § 106.44(k)(1)-(2) would allow schools to use an informal process to resolve a report of sex discrimination as long as: (i) all parties receive 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; (ii) the facilitator is trained, does not have a conflict of interest or bias; and is not the same person as the investigator or decision-maker; and (iii) the school believes an informal resolution is appropriate (e.g., the alleged conduct would not pose a future risk of harm to others). Proposed § 106.46(j) would allow institutions of higher education to use an informal process to resolve a report of sex-based harassment as long as the parties receive written notice of their rights and obligations.

participant in an informal resolution, except in limited circumstances, as unauthorized disclosures could chill reporting of sex-based harassment and participation in informal resolutions.

However, we are concerned that the proposed rules could allow some schools to coerce complainants into informal resolutions. For example, PK-12 students are more likely to feel they have no choice other than to consent to an informal resolution if adult school officials are encouraging them to participate in the process and are especially vulnerable to being pressured into whatever resolution is favored by the adult facilitator, whether or not they believe such a resolution to be adequate or responsive to their needs. At some religious schools, informal resolution facilitators may also pressure complainants into informal resolutions by relying on harmful rape myths, like “good girls forgive.”<sup>125</sup> Therefore, we urge the Department to strengthen protections against coercion with respect to informal resolutions. First, we ask you to change proposed § 106.44(k)(3) to require all schools in all cases to give “written” notice to the parties of their rights and obligations in an informal resolution. (Proposed § 106.46(j) would only require written notice of rights and obligations in informal resolutions of sex-based harassment at institutions of higher education involving one or more students.) Second, we ask the Department to change proposed § 106.44(k)(2) to require all parties to give “written, informed” consent to an informal resolution (not simply “consent”). Third, we ask the Department to require schools to offer a respondent the option to participate in an informal resolution only after the complainant has agreed, so that the complainant does not feel coerced based on the respondent’s consent.<sup>126</sup> This would be consistent with VAWA’s definition of “restorative practice,” which states that it is “initiated by a victim of the harm.”<sup>127</sup>

We support proposed § 106.44(k)(3)(vii)’s prohibition on the parties and the school from using any “information, including records, obtained solely through an informal resolution process” as part of a future Title IX investigation. After all, informal resolutions are most effective for a survivor when the respondent is able to understand and admit they caused sex-based harm, but respondents will be very reluctant to participate in an informal resolution and admit responsibility if they know their admissions could result in future discipline. However, this proposal would not protect respondents’ statements from being used in a future civil or criminal legal proceeding. Therefore, we ask the Department to issue supplemental guidance instructing schools on how to create agreements with the parties and with local prosecutors on not using information, including records, obtained solely through an informal resolution process in a civil or criminal legal proceeding.<sup>128</sup>

Furthermore, we recommend that the Department expressly clarify that schools may use a “restorative process” as a type of informal resolution process to resolve sex-based harassment, but that they may not use “mediation” or other “conflict resolution processes.” This is because harassment is not a “conflict,” where the victim and harasser share blame. Rather, harassment is a type of harm, where there is a victim and a harmer. Conflict resolution processes, including mediation, are inappropriate for resolving sex-based harassment, because such processes assume both the victim and harasser share responsibility for the harassment, can allow harassers to pressure survivors into inappropriate resolutions, and often require direct interaction between the parties, which can be retraumatizing. In contrast, a restorative

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<sup>125</sup> E.g., Grace Watkins, *Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution*, TIME (Oct. 2, 2017), <http://time.com/4957837/campus-sexual-assault-mediation>.

<sup>126</sup> Mary Koss & Mary Achilles, *Restorative Justice Responses to Sexual Assault*, National Online Resource Center on Violence Against Women 8 (Feb. 2008), [https://vawnet.org/sites/default/files/materials/files/2016-09/AR\\_RestorativeJustice.pdf](https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJustice.pdf).

<sup>127</sup> 34 U.S.C. § 12291(a)(31)(B).

<sup>128</sup> For sample agreements for parties and prosecutors, see Madison Orcutt *et al.*, *Restorative Justice Approaches to the Informal Resolution of Student Sexual Misconduct*, 45 J. COLL. & UNIV. L. 1, 67-69 (June 10, 2020), <https://digital.sandiego.edu/soles-faculty/15>.

process can be appropriate for addressing harm, as it 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. If the Department does not adopt our recommendation, we strongly urge that the Department, at a minimum, prohibit mediation from being used to address situations involving sexual assault, where all of these concerns are significantly magnified.

We also ask the Department to issue supplemental guidance upon finalizing the rule, describing various types of informal resolution processes that would be appropriate under the Title IX regulations. As the preamble noted, for example, PK-12 schools could have the respondent write an apology letter or draw an apology for the complainant.<sup>129</sup> It would also be helpful to give schools more information about restorative practices, including where to request funding for restorative practices (e.g., under VAWA,<sup>130</sup> the Department of Justice's National Center on Restorative Justice,<sup>131</sup> state and private grantors).

Finally, we ask the Department to add the following clarifying language in proposed § 106.44(k)(3)(iii): "That, prior to agreeing to a resolution at the conclusion of the informal resolution process, any party has the right to withdraw from the informal resolution process and to initiate or resume the recipient's grievance procedures." This would ensure there is no confusion about the use of the word "resolution" to refer to the outcome of an "informal resolution process" and would be consistent with the existing language in proposed § 106.44(k)(3)(iv): "That the parties' agreement to a resolution *at the conclusion of the informal resolution process* would preclude the parties from initiating or resuming grievance procedures arising from the same allegations."

### **Retaliation**

We support proposed § 106.2's definition of "retaliation" to reach retaliation against anyone because they reported sex discrimination (including sex-based harassment) or participated or refused to participate in an investigation or informal resolution of such incidents. We also support proposed § 106.71's requirement that recipients prohibit retaliation in its education program or activity and requiring schools to offer supportive measures to individuals who report retaliation (pursuant to proposed § 106.44) and to investigate complaints of retaliation, including peer retaliation (pursuant to proposed § 106.45 or, if applicable, proposed § 106.46).

Given the high prevalence of schools punishing student survivors when they report sex-based harassment (see **Part I.A** above at p.3-4), we also support proposed § 106.71(a)'s express prohibition of schools disciplining complainants for collateral conduct—*i.e.*, non-harassing conduct that "arises out of the same facts and circumstances" as the reported discrimination—(e.g., alcohol or drug use, self-defense, unauthorized access to facilities).<sup>132</sup> This would eliminate the "zero-tolerance" loophole from the 2020 rules' preamble, which currently allows schools to punish students who report sexual harassment for collateral conduct, as long as the school has a policy of always punishing all students for such conduct, regardless of the circumstances.<sup>133</sup> As the preamble to the proposed rules acknowledges, students "will not typically have access to information" about how their school enforces its code of

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<sup>129</sup> 87 Fed. Reg. at 41454.

<sup>130</sup> 34 U.S.C. § 12291(a)(31)(B), (b).

<sup>131</sup> David Carle, *Leahy Announces \$3 Million Grant to Establish National Center On Restorative Justice At Vermont Law School* (Mar. 24, 2020), [www.leahy.senate.gov/press/leahy-announces-3-million-grant-to-establish-national-center-on-restorative-justice-at-vermont-law-school](http://www.leahy.senate.gov/press/leahy-announces-3-million-grant-to-establish-national-center-on-restorative-justice-at-vermont-law-school).

<sup>132</sup> 87 Fed. Reg. at 41436.

<sup>133</sup> 85 Fed. Reg. at 30536.

conduct to know whether they are being punished as part of a zero-tolerance policy or experiencing unlawful retaliation.<sup>134</sup> In addition, whether or not a school has a zero-tolerance policy, punishment imposed on a complainant as a result of reporting sex-based harassment or other sex discrimination can be expected to have a harmful chilling effect on such reports.

By the same logic, we urge the Department to remove from proposed § 106.71(a) the provision stating that discipline for collateral conduct is only prohibited retaliation if it is done “for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part.” If the Department retains this requirement in the final rule, it will be very difficult, if not impossible, for any students who are disciplined for collateral conduct to demonstrate retaliation, because students will not typically have access to the information regarding decisionmakers’ state of mind to prove that they were disciplined “for the purpose of interfering with” their rights. Moreover, school officials who punish survivors often are not doing it specifically for the purpose of interfering with the student’s Title IX rights, but because they are relying on rape myths and sex-based stereotypes to justify discrediting, blaming, and punishing the survivor. Removing this requirement would also make § 106.71(a) more consistent with proposed § 106.2, which defines retaliation to refer to conduct that is done “[i] for the purpose of interfering with any right or privilege secured by Title IX or this part, or [ii] because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [the Title IX rules]” (emphasis added). In other words, the “for the purpose” requirement does not apply when a person experiences retaliation because of participating or refusing to participate in a Title IX process. Title IX’s promise in ensuring schools treat sex discrimination seriously rings hollow if schools are allowed to punish students reporting sex discrimination.

Additionally, while we appreciate proposed § 106.45(h)(5) prohibiting schools from disciplining someone for making a false statement or engaging in consensual sexual conduct based solely on the school’s decision of whether sex-based harassment (or other sex discrimination) occurred, we ask the Department to specify such discipline is prohibited retaliation.<sup>135</sup> The preamble states that while such discipline would be prohibited, the Department would not consider it to be retaliation unless the school intended to use the disciplinary process “for the purpose of retaliating” against a person.<sup>136</sup> We urge the Department to expressly state that such discipline would be prohibited retaliation regardless of the school’s internal motivations. Again, students will typically not have access to the information necessary to know whether their school is disciplining them after reporting sex discrimination “for the purpose” of retaliation. The Department’s reasons for defining retaliation at proposed § 106.71(a) to include any discipline for collateral conduct, regardless of the school’s internal enforcement protocols, should apply here too, regardless of the school’s internal motivations.

Finally, we ask that the Department clarify in the regulations that retaliation includes:

- Disciplining a complainant for conduct that the school knows or should know “results from” the harassment or other sex discrimination (e.g., missing school, expressing trauma). This would be consistent with the Department’s note that schools should “review any disciplinary actions taken against the complainant to determine whether there is a causal connection between the sex-based harassment and the misconduct.”<sup>137</sup>

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<sup>134</sup> 87 Fed. Reg. at 41542.

<sup>135</sup> NWLC has represented multiple sexual assault survivors bringing Title IX retaliation claims because they were disciplined by their schools for allegedly making a “false” statement and/or engaging in “consensual” sexual activity based on their schools’ belief that they were not sexually assaulted.

<sup>136</sup> 87 Fed. Reg. at 41490.

<sup>137</sup> 87 Fed. Reg. at 41423.

- 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). This would be consistent with the Department’s note that “[i]f a complainant alleges that another person made a complaint in retaliation for their original complaint, the recipient would be required to determine whether that other person’s complaint constituted prohibited retaliation under proposed § 106.71.”<sup>138</sup>
- Requiring a complainant to leave an education program (e.g., to take leave, transfer, enroll in “alternative school”) after reporting sex discrimination, including sex-based harassment.
- 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; or disciplining a complainant for violating an impermissible confidentiality agreement; unless otherwise permitted by the Title IX regulations.<sup>139</sup> (For example, the Department would allow schools to take reasonable steps to protect the privacy of parties, witnesses, and others while an investigation is pending.<sup>140</sup>)

### ***Preemption***

We strongly support the proposed removal of current § 106.6(h), which prevents schools from complying with a state or local law that provides stronger protections against sex discrimination than the Title IX regulations. Accordingly, we strongly support proposed § 106.6(b), which would restore the longstanding civil rights principle that federal antidiscrimination law does not preempt stronger state and local protections and accordingly would ensure schools comply with state or local laws that do not conflict with the Title IX regulations and that provide greater protections against sex discrimination, including sex-based harassment.<sup>141</sup> These proposed changes would return Title IX to its proper role as a floor—not a ceiling—for civil rights protections.

### ***Removal of respondents***

We support proposed § 106.44(h), which would allow schools to remove a respondent from an education program or activity, subject to an individualized risk and safety analysis, if they present an “immediate and serious” threat to the physical or mental “health or safety” of any person. This would be an improvement from current § 106.44(c), which requires the threat to be “physical” and does not consider how a respondent may pose a serious threat to a complainant’s mental health. We also support proposed § 106.44(i), which would allow schools to place any employee respondent (including a student employee) on administrative leave from their employment responsibilities during the pendency of an investigation, subject to federal disability civil rights laws. This would be an improvement from current § 106.44(d), which only allows schools to place “non-student” employee respondents on administrative leave.

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<sup>138</sup> 87 Fed. Reg. at 41453.

<sup>139</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>140</sup> 87 Fed. Reg. at 41453.

<sup>141</sup> 87 Fed. Reg. at 41404.

## ***Disabled students***

We support proposed § 106.2 defining “student with a disability” consistent with definitions in the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act. We also appreciate and support proposed § 106.8(e) and § 106.44(g)(7), which would require Title IX coordinators in PK-12 schools to consult with a disabled complainant or respondent’s IEP team or Section 504 team and would allow Title IX coordinators at institutions of higher education to consult with their school’s disability office, if requested by a disabled complainant or respondent, to ensure compliance with federal disability civil rights laws, including in the implementation of supportive measures.

In addition, we encourage the Department to issue supplemental guidance on ensuring equal access to education for students with disabilities in schools’ Title IX responses. The guidance should remind Title IX coordinators to ensure that their Title IX office is accessible to disabled students and that they are coordinating with the Section 504 office.<sup>142</sup> In addition, schools should make disability accommodations available to all individuals, including complainants with preexisting disabilities or who develop new disabilities or exacerbate existing disabilities because of the discrimination they faced.<sup>143</sup> For example, all Title IX materials should be accessible in Plain Language,<sup>144</sup> via augmentative and alternative communication (AAC) devices (e.g., if sex-based harassment causes mutism), and other formats. Furthermore, the guidance should further explain how schools can impose fair and proportionate discipline for sex-based harassment (and other sex discrimination), particularly for respondents who are younger and have developmental disabilities.

## ***Monitoring and training***

We support proposed § 106.44(b)’s requirement that schools must monitor their programs for barriers to reporting information about sex-based harassment and other sex discrimination and take steps to address any such barriers. We also appreciate the preamble providing examples of how the Title IX coordinator could undertake such efforts, which include: conducting surveys on how often students experience sex discrimination without reporting it; participating in public awareness events to obtain feedback from students and employees about sex discrimination; regularly soliciting anonymous feedback via email from students and employees about barriers they have encountered to reporting sex discrimination; and taking additional measures to eliminate specific barriers to reporting experienced by marginalized student communities, with particular emphasis on the barriers encountered by disabled students or students whose first language is not English.<sup>145</sup> We also ask that the Department provide these examples with additional specific examples of such measures in supplemental guidance after the regulations are finalized.

In addition, we support the training requirement at proposed § 106.8(d)(1) for all employees to be trained on the definitions of and the conduct that would constitute sex discrimination and sex-based harassment, as well as their own obligations and their school’s obligations to address such discrimination. We also support the training requirement at proposed § 106.8(d)(2)-(3) for all employees involved in Title IX

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<sup>142</sup> National Women’s Law Center, National Ass’n of Councils on Developmental Disabilities, Association of University Centers on Disabilities & National Disability Rights Network, *Survivor Justice Is Disability Justice* 3 (June 2019), <https://nwc.org/resource/survivor-justice-is-disability-justice>.

<sup>143</sup> *Id.* at 2-3.

<sup>144</sup> See examples of policy materials in Plain Language here: Autistic Self-Advocacy Network, *Policy Advocacy Toolkits* (last visited Sept. 9, 2022), <https://autisticadvocacy.org/policy/toolkits>.

<sup>145</sup> 87 Fed. Reg. at 41436.

investigations and informal resolutions to be properly trained on their school's obligations to address sex discrimination, the school's grievance procedures, how to serve impartially, and the meaning of relevance in relation to evidence.<sup>146</sup> However, we urge the Department to issue supplemental guidance encouraging schools to provide additional training for all employees, especially confidential employees and Title IX coordinators, on how to serve as resources for survivors in the wake of their victimization. This additional training should emphasize trauma-informed, survivor-centered practices to address the emotional and mental health needs of survivors disclosing sex-based harassment to employees, and should be informed by evidence-based research on the neurobiology of trauma.<sup>147</sup> Training should also address the experiences and needs of survivors from historically marginalized backgrounds, including Black and brown girls and women, LGBTQI+ students, pregnant and parenting students, and disabled students, who are especially vulnerable to all forms of sexual misconduct.<sup>148</sup> This is especially important to prevent schools from relying on negative stereotypes and implicit bias that cast Black and brown girls and women,<sup>149</sup> LGBTQI+ survivors,<sup>150</sup> pregnant and parenting survivors,<sup>151</sup> and disabled survivors<sup>152</sup> as inherently less credible when reporting sexual misconduct. We also recommend that PK-12 employees receive training on how to recognize certain forms of sexual harassment younger victims are especially vulnerable to, including indicators of grooming. In addition, we urge the Department to recommend that schools provide employees involved in the investigation of Title IX complaints (who must assess whether consent was given) with training on consent; we recommend that this training include how the existence of power dynamics and the influence of drugs or alcohol may impact whether consent is freely and voluntarily given.

Finally, we ask that the Department further clarify the scope of this training in supplemental guidance; this guidance should also provide examples of how schools can provide this training, such as by entering into memoranda of understanding with local community-based organizations that serve survivors. We also ask

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<sup>146</sup> See also 87 Fed. Reg. at 41429.

<sup>147</sup> There is considerable research that outlines the neurobiology of trauma—that is, the way trauma impacts and changes a person's brain chemistry. One study focusing on the impact of childhood trauma explains that, "at any age, experiencing a traumatic event causes activation of the sympathetic nervous system and elevated levels of cortisol. The result of this activation is increased activity of the amygdala, which is responsible for fear and anxiety, and decreased activity in the hippocampus and prefrontal cortex, which are responsible for memory, attention, and executive control." The study goes on to explain that, "because children's brains are not yet fully developed, prolonged or chronic increases in cortisol levels may have negative impacts on normal psychological, cognitive, and socioemotional development," which can result in deficits in processing social stimuli, responding to emotional cues, and regulating stress." As a result, in addition to experiencing "behavioral challenges in school," their academic performance might also suffer. See Christopher T. H. Liang et al., *Trauma-Informed Care Training for Educators: Some Preliminary Evidence*, 1 J. of Prevention and Health Promotion 240, 242 (2020). Another study examining the neurobiology of trauma describes that "trauma's impact reaches virtually all body systems," creating "persistent biological alterations" in brain chemistry and brain areas "associated with mood regulation." These changes cause "psychiatric and medical vulnerability," and, in the long term, "essentially leav[e] functional 'scars' in emotional control, learning, and memory." See Linda Grabbe & Elaine Miller-Karas, *The Trauma Resiliency Model: A "Bottom-Up" Intervention for Trauma Psychotherapy*, 24 J. of the Am. Psychiatric Nurses Ass'n 76, 77 (2018).

<sup>148</sup> See, e.g., AAU Report, *supra* note 10, at 13–14 (transgender and gender-nonconforming college students); GLSEN Survey, *supra* note 12 (LGBTQ youth ages 13–21); NWLC Sexual Harassment Report, *supra* note 4, at 3 (Native, Black, and Latina girls ages 14–18); NWLC Pregnant or Parenting Students Report, *supra* note 12 (pregnant and parenting girls ages 14–18); NWLC Girls With Disabilities Report, *supra* note 12 (disabled girls ages 14–18).

<sup>149</sup> See, e.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 16, 24–29 (2018); Georgetown Law Report, *supra* note 20, at 1 (outlining how girls of color are often stereotyped as "promiscuous" and thus less deserving of protection from sexual harassment—resulting in their reports of sexual misconduct being dismissed or disbelieved).

<sup>150</sup> See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Dorwart, *supra* note 20 (describing that, because LGBTQI+ individuals are often stereotyped as "hypersexual," "immoral," "deviant," and "attention-seeking," they are frequently disbelieved or blamed for their own victimization when reporting sexual misconduct).

<sup>151</sup> See generally NWLC Pregnant or Parenting Students Report, *supra* note 12, at 11 (explaining the stereotypes that pregnant and parenting students must contend with, such as being viewed as promiscuous or deserving of sexual harassment).

<sup>152</sup> See, e.g., The Arc Brief, *supra* note 20, at 2; Nat'l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14–15 (2016), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx> (explaining that disabled survivors are often cast as less credible, especially if they struggle to communicate sexual misconduct due to a cognitive or development disability).

that supplemental guidance clarify how the training requirements in proposed § 106.8(d) would apply to non-employee agents, and, where possible, how schools could provide training to non-employee agents.<sup>153</sup>

We also urge the Department to mandate trainings for students offered by the Title IX coordinator, or the coordinator's designee, conducted at least once a year. These trainings should be age-appropriate and center on healthy relationships, in addition to the importance of consent and, similar to our above recommendations regarding the training employees must receive, how the existence of power dynamics may impact consent. This training should be accessible and communicated in a way that can be understood and learned by all students, including students with intellectual disabilities and disabilities that limit their verbal and hearing abilities; it should also be culturally competent and designed to meet the needs of marginalized students, including Black and brown girls and women, LGBTQI+ students, pregnant and parenting students, and disabled students, who are at a disproportionate risk of sexual misconduct. Finally, we ask that the Department issue supplemental guidance outlining the goals of this training, which should include ensuring that students come away with an accurate and complete understanding of: (i) how to reach confidential employees, (ii) how to reach and make a report to the Title IX coordinator, (iii) how the Title IX coordinator can help them, including by offering supportive measures and initiating the informal resolution process, and (iv) the resources available to them and the kinds of supportive measures the Title IX coordinator can offer them, including academic support and counseling. We make this recommendation to the Department to ensure that all students are empowered to make informed choices about reporting in the wake of experiencing sex-based harassment or other forms of sex discrimination, in addition to being aware of the resources their schools are obligated to provide them under Title IX.

### ***Designation of coordinator and recordkeeping***

We appreciate that proposed § 106.8(a)(2) would encourage schools to appoint at least one or more designees to fulfill some of the school's responsibilities for recordkeeping, training, and adoption and publication of the school's nondiscrimination policy and grievance procedures. For example, this means, in the PK-12 context, that a Title IX coordinator could oversee the district while appointing designees to manage and carry out responsibilities at each school building in the district—allowing, as the preamble acknowledges, schools that with large numbers of students and employees, to more efficiently and effectively fulfill its obligations under Title IX.<sup>154</sup>

We note proposed § 106.8(f) would maintain the same timeframe as current § 106.45(b)(10)(i)(C) for recordkeeping. Students are often vulnerable to school employees who are repeat offenders, and unlike students, school employees have the ability to harass numerous victims (such as students and fellow employees) during many years or decades at a school. But, like the current rule, proposed § 106.8(f) would permit schools to destroy records involving employee-respondents after seven years, allowing

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<sup>153</sup> We recognize the difficulty in recommending training for non-employee agents (for example, volunteers and independent contractors) who may work with a school on a very limited basis, or otherwise have varied relationships with a school. As such, we recommend the Department issue supplemental guidance on how schools may provide training for non-employee agents where reasonable based on their relationship with the school.

<sup>154</sup> This is also consistent with the now rescinded 2015 Title IX guidance on the appointment and responsibilities of Title IX Coordinators at all levels, which encouraged school districts to have a Title IX Coordinator at each school (rather than only at the school district level) and required school district Title IX Coordinators to train and assist any local school-based Title IX Coordinators. See Dear Colleague Letter on Title IX Coordinators (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> [hereinafter 2015 Guidance].



repeat employee offenders to escape accountability despite multiple complaints, investigations, or findings against them that may span over seven years. While we appreciate the Department’s statement in the preamble to the 2020 regulations (which would continue to apply in the proposed regulations) that “nothing in the final regulations prevents recipients from keeping their records for a longer period of time if the recipient wishes or due to other legal obligations,”<sup>155</sup> and while we acknowledge the administrative burdens on schools to maintain records for longer periods of time, we urge the Department to consider extending this period in light of the following concerns. First, while we appreciate that this seven-year period is longer than many state laws for personal injury suits (which range from one to six years),<sup>156</sup> we urge the Department to consider the benefits of encouraging schools to keep records for as long as the student attends the school—which, in the case of a PK-12 student, could be 14 years. Second, we ask the Department to consider extending the period during which schools are encouraged to keep records in line with the approach taken by some state laws that permit children who experience sex-based harassment to bring legal claims for up to decades after they turn 18.<sup>157</sup>

#### **D. The Proposed Rules on Process for Recipient Investigations of Sex-Based Harassment and Other Sex Discrimination Restore Important Protections and Should Be Further Improved to Ensure Equitable Proceedings.**

##### ***Applicability of § 106.46***

Proposed § 106.46 would impose additional requirements to investigations of sex-based harassment at institutions of higher education involving one or more students. In explaining why it would apply additional provisions to this subset of Title IX investigations, the Department notes that “[t]hese additional provisions would not be necessary for other complaints of sex discrimination that often would not involve a *student respondent* facing similar consequences.”<sup>158</sup> Consistent with the Department’s own rationale, we urge the Department to state in the final regulations that § 106.46 is applicable only to investigations of sex-based harassment at institutions of higher education involving one or more *student respondent(s)*. Narrowing the set of circumstances that require the additional provisions in § 106.46 would give institutions of higher education greater flexibility in creating and implementing grievance procedures involving employee respondents and would avoid unnecessary conflict with requirements regarding discipline of employees set forth in collective bargaining agreements and state and local laws. It would also be consistent with the fact that two of the most significant additional provisions permitted in proposed § 106.46—live hearings and adversarial cross-examination—are only required by binding federal or state court decisions in Title IX proceedings involving student respondents, not employee respondents.<sup>159</sup>

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<sup>155</sup> 87 Fed. Reg. at 41431; 85 Fed. Reg. at 30411.

<sup>156</sup> Statutes of Limitations, *Negligence / Personal Injury* (last visited Sept. 9, 2022), [https://www.statutes-of-limitations.com/case\\_type/negligence-personal-injury](https://www.statutes-of-limitations.com/case_type/negligence-personal-injury).

<sup>157</sup> See, e.g., Mont. Code § 27-2-216(3)(a) (allowing minor victims of sexual abuse to bring suit for up to 9 years after they turn 18); N.Y. Civ. Prac. L. R. § 208(b) (allowing minor victims of certain forms of sex-based misconduct to bring suit before the age of 55); Va. Code § 8.01-243(D) (allowing minor victims of sexual assault to bring suit for up to 20 years after the cause of action accrues); W. Va. Code § 55-2-15(a) (allowing minor victims of sexual assault to bring suit for up to 18 years after turning 18 or 4 years from discovery of the abuse, whichever is later).

<sup>158</sup> 87 Fed. Reg. at 41462 (emphasis added).

<sup>159</sup> E.g., *Doe v. Univ. of Scis.*, 961 F.3d 203, 215 (3d Cir. 2020); *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018); *Doe v. Allee*, 30 Cal. App. 5th 1036, 1039 (Ct. App. 2019). Cf. 87 Fed. Reg. 41506-07 (noting that federal district courts in the Sixth Circuit have extended the holding in *Baum* to the employment context).

## ***Equitableness***

We support the proposed removal of current 106.44(a), which states, among other things: “A recipient’s response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.” As the preamble to the proposed rules notes,<sup>160</sup> this provision improperly suggests that these are the only two actions schools must take in order to provide an equitable response to sexual harassment. Rather, as the titles of proposed §§ 106.45 and 106.46 indicate, schools must comply with all of the provisions in those regulations to meet Title IX’s “equitable” requirement.

## ***Notification of allegations***

Proposed § 106.46(c)(2)(iv) would require institutions of higher education investigating sex-based harassment involving one or more students to inform the parties of any code of conduct that prohibits false statements. The preamble acknowledges that this notification “risks creating the misimpression” that the school believes in the harmful and false rape myth that individuals—primarily women and girls—are especially likely to knowingly make false statements in sex-based harassment matters.<sup>161</sup> We note that this is especially the case given that proposed § 106.45(c), which sets out notice of allegation requirements for other sex discrimination grievances, includes no parallel requirement that the parties be warned of any prohibition on false statements. The preamble assures the reader that the Department does not mean to imply this or that a person’s statement is knowingly false merely because the school makes a decision in the other party’s favor or because the statement contains unintentional inaccuracies.<sup>162</sup> However, § 106.46 does not require schools to make any of these assurances to complainants, many of whom are already afraid they will not be believed and will likely be deterred from initiating or continuing with an investigation after receiving such a warning. If this requirement is retained in the final rules, we ask the Department to require schools that give this notification to also inform the parties of the prohibition at proposed § 106.45(h)(5), which is that schools may not discipline anyone making a false statement based solely on their determination of whether sex discrimination occurred. We also urge a consistency of approach in § 106.45 and § 106.46 as to any such notice, so as to avoid any implication that false statements are uniquely at issue in sex-based harassment investigations.

We support proposed § 106.46(c)(3), which would, for investigations of sex-based harassment involving one or more students, allow an institution of higher education to delay written notice of the allegations to the parties if it has “legitimate concerns for the safety of any person as a result of providing this notice.” As the preamble notes,<sup>163</sup> dating and domestic violence victims are often most vulnerable to violence, including lethal violence, when they attempt to leave their abusers,<sup>164</sup> and notice of a Title IX complaint certainly signals an attempt to leave. Therefore, it is important to allow schools to provide written notice of allegations to the respondent after they have taken sufficient steps to ensure the complainant’s safety and the safety of any family or household members, close friends, pets, etc.

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<sup>160</sup> 87 Fed. Reg. at 41466.

<sup>161</sup> 87 Fed. Reg. at 41494.

<sup>162</sup> *Id.*

<sup>163</sup> 87 Fed. Reg. at 41493.

<sup>164</sup> National Coalition Against Domestic Violence, *Why Do Victims Stay* (last visited Sept. 9, 2022), <https://ncadv.org/why-do-victims-stay>.

### ***Presumption of respondent non-responsibility***

We oppose proposed § 106.45(b)(3), which retains the current rules' requirement for schools to presume that "the respondent is not responsible" for sex-based harassment (or other sex discrimination) until a determination is made at the end of the investigation. Likewise, we oppose proposed § 106.46(c)(2)(i), which would, in investigations of sex-based harassment involving a student at an institution of higher education, require the school to inform both parties of this presumption at the start of an investigation.

This presumption is clearly intended to echo the presumption of innocence in criminal proceedings and is squarely out of place in this context. While no decisionmaker in a school investigative process should presume any result before the investigation is concluded, requiring neutrality, impartiality, and fairness in decision-making is far different from, and indeed contrary to, a mandated presumption of non-responsibility. It is disappointing that rather than addressing any of the numerous concerns raised during the 2020 rulemaking about the current presumption's application to sexual harassment, the Department simply expanded the presumption to apply to all forms of sex discrimination.<sup>165</sup> As we and many stakeholders have pointed out over the last three years, this presumption (and mandated notice of it) 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.

Moreover, the presumption requirement is incompatible with the permissible standards of proof under both the current and proposed rules--*i.e.*, the preponderance of the evidence standard and the clear and convincing evidence standard—and with the non-criminal nature of Title IX investigations. The Supreme Court has repeatedly explained over the last several decades that the presumption of innocence in criminal proceedings is synonymous with the "beyond a reasonable doubt" standard applicable in those proceedings. For example, in 1970, it explained that "[t]he [beyond a reasonable doubt] standard provides concrete substance for the presumption of innocence."<sup>166</sup> In 2006, the Court reasoned that "the force of the presumption of innocence is measured by the force of the showing needed to overcome it, which is proof beyond a reasonable doubt."<sup>167</sup> In 2016, it noted that "if the jury instruction requires the jury to find those elements 'beyond a reasonable doubt,' the defendant has been accorded the procedure that this Court has required to protect the presumption of innocence."<sup>168</sup> American Jurisprudence agrees, explaining that the presumption of innocence "describes the burden of proof. Thus, in that sense, a defendant is presumed innocent unless and until the government proves beyond a reasonable doubt each element of the offense charged."<sup>169</sup> In other words, the presumption of innocence is a component of the "beyond a reasonable doubt" standard.

Since the Department has clearly stated that the "beyond a reasonable doubt" standard is "never appropriate" in Title IX investigations,<sup>170</sup> it should also remove the corresponding presumption requirement from the Title IX regulations. If the Department wishes to ensure that decisionmakers are impartial and the parties feel assured of their school's impartiality, it should simply require schools to notify the 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.

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<sup>165</sup> 87 Fed. Reg. at 41467-68.

<sup>166</sup> *In re Winship*, 397 U.S. 358, 363 (1970).

<sup>167</sup> *Clark v. Arizona*, 548 U.S. 735, 738 (2006).

<sup>168</sup> *Musacchio v. U.S.*, 577 U.S. 237, 244 (2016) (quoting *Jackson v. Virginia*, 443 U.S. 307 (1979)).

<sup>169</sup> 29 Am. Jur. 2D *Evidence* § 246 (2022) (citing *Holt v. United States*, 218 U.S. 245 (1910))

<sup>170</sup> 87 Fed. Reg. at 41486.

### ***Time frame***

We support proposed § 106.45(b)(4)'s requirement that schools set "reasonably prompt timeframes" for all major stages of an investigation of sex discrimination. This would be an improvement over current § 106.45(b)(5)(vi)-(vii), which require investigations to be at least 20 days long and are particularly unworkable for PK-12 schools, as they often need to respond immediately to address and stop harassment, such as by quickly separating children.<sup>171</sup> The Department should also issue supplemental guidance encouraging schools to finish their investigations and make a determination within 60 calendar days (acknowledging that sometimes this will not be possible), consistent with prior (now rescinded) guidance.<sup>172</sup>

We also understand that schools may sometimes need to impose a "reasonable" delay for "good cause." However, we urge the Department to clarify in the regulations what types of situations may constitute "good cause" and to explicitly prohibit schools from imposing more than a "temporary" delay due to a concurrent law enforcement investigation, consistent with the Department's longstanding policy from 2001 to 2020 that "police investigations or reports ... do not relieve the school of its duty to respond promptly and effectively."<sup>173</sup>

### ***Conflicts of interest***

We support proposed §§ 106.45(b)(2) and 106.44(k)(4) requiring Title IX coordinators, investigators, decisionmakers, and informal resolution facilitators not to have a conflict of interest. Many students have reported that, since the 2020 regulations took effect, their schools have designated their general counsel as their Title IX coordinator, making their Title IX responses focused on minimizing the school's liability rather than protecting access to education.<sup>174</sup> We ask the Department to issue supplemental guidance clarifying which roles constitute or may constitute a conflict of interest, consistent with prior, now-rescinded, Department guidance (e.g., general counsel, disciplinary board member, athletics director, dean of students, superintendent, principal).<sup>175</sup>

### ***Advisors & support persons***

We support proposed §§ 106.46(c)(2)(ii) and 106.46(e)(2), which would, in investigations of sex-based harassment involving one or more students at institutions of higher education, require schools to allow parties to have an advisor of their choice accompany them to any meeting or grievance proceeding and to give advisors equal rights to participate in meetings and proceedings. However, we ask the Department to amend § 106.45 to require institutions of higher education to allow parties to have an advisor of choice in any type of Title IX investigation (not just in investigations of sex-based harassment involving one or more students, per proposed § 106.46). In explaining why investigations under § 106.46 necessitate advisors, the Department notes that complaints of sex-based harassment are different from complaints of other sex discrimination because they involve multiple parties whose conduct and credibility are subjected to scrutiny, are more likely to involve sensitive material and to engender disputes over what evidence is

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<sup>171</sup> 87 Fed. Reg. at 41457.

<sup>172</sup> 2014 Guidance, *supra* note 40, at 32; 2011 Guidance, *supra* note 40, at 12.

<sup>173</sup> 2001 Guidance, *supra* note 40, at 21.

<sup>174</sup> Student Advocates Comment, *supra* note 123, at 25.

<sup>175</sup> 2015 Guidance, *supra* note 154, at 3; 2014 Guidance, *supra* note 40, at 11-12; 2011 Guidance, *supra* note 40, at 7.

relevant and what evidence is impermissible, and often involve a student respondent who faces potential disciplinary sanction.<sup>176</sup> We agree that these are strong reasons to require institutions to allow advisors in such cases. We also note that complaints of non-harassing sex discrimination often pit a student complainant against their institution rather than another individual, which means there is an even greater mismatch of power between the complainant and the opposing party. Therefore, it is critical that the Department allow the parties in such cases to have an advisor.

We also support proposed § 106.46(e)(3) permitting schools in investigations of sex-based harassment in higher education involving one or more students to allow the parties to have a support person other than an advisor present during any meeting or proceeding. We ask the Department to include this provision in the final regulations in § 106.45 as well (not just § 106.46). This would be beneficial to many PK-12 students, especially those who are LGBTQI+ or pregnant, who may need a trusted and supportive adult other than a parent, guardian, or authorized legal representative to accompany them to meetings and proceedings to protect their privacy from an unsupportive parent, guardian, or other legal representative. It would also be beneficial to many higher education students. Navigating an investigation of sex discrimination is difficult for people of all ages, and it is even harder for victims who do not have anyone to turn to for emotional support. This is especially true given that in most investigations of sex discrimination other than sex-based harassment at institutions of higher education, students are challenging the decisions of their institution and its officials—a fundamentally intimidating context. Furthermore, higher education students often retain attorneys to serve as their advisors, which means that without a support person, they would be forced to go through an entire investigation with only a relative stranger in the room with them. While these advisors can be very helpful in navigating the legal and technical challenges of a Title IX investigation, we urge the Department to recognize that young adults would greatly benefit from having a family member or close friend to lean on for support and should not be forced to choose between having a skilled advocate and a supportive person help them through an investigation.

### ***Sexual history evidence***

We support proposed 106.45(b)(7)(iii) stating that consent is not implied by consensual “prior sexual conduct” between the parties and urge the Department to strengthen this provision. First, we ask the Department to add that consent is also not implied by a “social” or “romantic” relationship between the parties. This would close the loophole in the current regulations that allows a respondent to introduce evidence of a complainant’s “dating or romantic” history, as long as it is not “sexual” history.<sup>177</sup> Second, we ask you to clarify that, consistent with the preamble to the current regulations, “prior” includes any conduct that occurred after the alleged incident but prior to the school’s determination.<sup>178</sup> This would recognize that it is not uncommon for victims of sexual assault, dating violence, and other sex-based harassment to continue a sexual, social, and/or romantic relationship with their harasser or abuser for a variety of reasons. For example, the victim may not immediately recognize the conduct as assault; may initiate post-assault as a way to seek closure, regain control, or normalize the assault; may struggle initially to understand how someone whom they thought was a friend or trusted romantic partner could have harmed them; or may continue a social relationship due to fear of ostracization from their common social circle or retaliation from their harasser.<sup>179</sup> Third, we ask the Department to add that consent is not

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<sup>176</sup> 87 Fed. Reg. at 41496-97.

<sup>177</sup> 85 Fed. Reg. at 30351.

<sup>178</sup> See 85 Fed. Reg. at 30350 n.1343, 30354 n.1355 (scope of “prior”).

<sup>179</sup> See Lynn Hecht Schafran & Claudia Bayliff, Legal Momentum, Nat’l Judicial Educ. Program, *Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case 8* (Oct. 30, 2017), <https://www.legalmomentum.org/library/judges-tell-what-i-wish-i-had-known-i-presided-adult-victim-sexual-assault-case>.

implied by “evidence of” the complainant’s prior sexual conduct (e.g., pregnancy, birth control, sexually transmitted infection), again consistent with the preamble to the current regulations.<sup>180</sup>

We also ask the Department to narrow the prohibition on sexual history evidence in proposed § 106.45(b)(7)(iii), which would prohibit schools from asking questions or using evidence about a complainant’s “sexual interests” or “prior sexual conduct” unless the prior sexual conduct: (i) is offered to prove someone other than the respondent was the harasser; or (ii) involves “specific incidents” between the parties and is offered to “prove consent.” The second proposed exception is too broad and would encourage schools to make inappropriate inferences about “implied” consent, in violation of the prohibition in both proposed § 106.45(b)(7)(iii) and current § 106.45(b)(6)(vi)-(vii) against using prior sexual conduct as evidence of consent to the alleged incident. Therefore, we urge the Department to narrow the second exception, for example, by allowing “specific incidents” of prior sexual conduct between the parties only if they are used to “prove how the parties *communicated* consent,” but not if the incidents are used to prove consent itself.<sup>181</sup>

### ***Respondent’s prior sex-based misconduct***

Research has repeatedly shown that students who engage in sex-based harm are often repeat harassers. For example, a 2002 study of 1,882 men found that 63 percent of those who admitted to behaviors constituting rape said they had engaged in those behaviors more than once, either against multiple victims or more than once against the same victim, with an average of 5.8 rapes per harmer.<sup>182</sup> A recent survey published in 2019 of more than 12,000 college men across 49 community and four-year colleges found that repeat harmers are responsible for more than 87 percent of alcohol-involved sexual assaults and engage in an average of at least five instances of sexual misconduct.<sup>183</sup> Callisto, a mobile application that allows college student survivors to find out whether their assailant has assaulted other people before choosing whether to report, estimates based on its data that repeat harmers are responsible for over 90 percent of college sexual assaults and engage in an average of 6 assaults before they graduate.<sup>184</sup> Schools recognize the risks created by serial sex-based harmers creates, yet many either have no procedure in place to decide whether to consider evidence of a respondent’s prior sex-based misconduct or flatly refuse to consider such evidence in the absence of a complaint from those other victims.

Therefore, we ask the Department to state in the final regulations that evidence of the respondent’s prior sex-based misconduct (often referred to as “pattern evidence”) may be relevant. This would be consistent with Rule 415 of the Federal Rules of Evidence, which allows plaintiffs in civil proceedings alleging sexual assault, including child sexual abuse, to introduce evidence of the defendant’s prior sexual assaults (and with Rules 413 and 414, which apply to criminal proceedings).<sup>185</sup> Courts have upheld these rules<sup>186</sup> and

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<sup>180</sup> 85 Fed. Reg. at 30350 n.1343.

<sup>181</sup> If the Department does not adopt our recommendation, we urge you to, at the minimum, revise the last sentence of 106.45(b)(7)(iii) to indicate that the mere fact “that there are similarities in the types of communications related to consent” does not itself demonstrate or imply the complainant’s consent and does not preclude a determination that sex-based harassment occurred; this would be consistent with the Department’s position in the preamble on this matter. See 87 Fed. Reg. at 41472.

<sup>182</sup> David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 78 (2002).

<sup>183</sup> John D. Foubert *et al.*, *Is Campus Rape Primarily a Serial or One-Time Problem? Evidence from a Multicampus Study*, Violence Against Women 26(3-4) (Mar. 18, 2019), <http://dx.doi.org/10.1177/1077801219833820>.

<sup>184</sup> Callisto, *Mission and Vision* (last visited Sept. 9, 2022), <https://www.projectcallisto.org/about>.

<sup>185</sup> Fed. R. Evid. 415.

<sup>186</sup> Susan Webber Wright, *Emroch Lecture: Uncertainties in the Law of Sexual Harassment*, 33 U. RICH. L. REV. 11, 28 (1998).

broadly interpreted them, admitting pattern evidence even when past sexual misconduct was never charged or when past charges were dismissed.<sup>187</sup>

### ***Other evidentiary rules***

We appreciate that proposed § 106.2 would define “relevant” as follows: “Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.” This would greatly aid school officials in understanding what evidence they can rely upon and share with the parties.

We also support the proposed removal of current § 106.45(b)(5)(vi), which allows the parties to review any evidence “directly related to the allegations... , including the evidence upon which the recipient does not intend to rely in reaching a determination.” And we support proposed § 106.45(f)(4), which would require schools to give the parties a description of relevant (and not otherwise impermissible) evidence, as well as proposed § 106.46(e)(6), which would require institutions of higher education investigating sex-based harassment involving one or more students to give the parties either access to relevant (and not otherwise impermissible) evidence or a written report summarizing this evidence. These proposed changes would eliminate the current confusion among parties and schools regarding the difference between “directly related” evidence and “relevant” evidence and would prevent parties from accessing evidence that their schools will not or cannot rely upon in reaching a determination, such as privileged evidence, treatment records, and prohibited sexual history evidence.<sup>188</sup>

We also ask the Department to strengthen the prohibition on impermissible evidence in proposed § 106.45(b)(7). As currently written, § 106.45(b)(7)(i)-(iii) would prohibit schools from using privileged evidence (unless the holder waives the privilege), health records (unless the patient consents to its use), and sexual history evidence (unless it falls into certain narrow exceptions). However, proposed § 106.45(b)(7) does not contain a prohibition on the use of evidence disclosed to a confidential employee. To ensure that individuals who experience sex discrimination can properly turn to confidential employees for help, consistent with the Department’s intent in proposing § 106.44(d) regarding confidential employees, we ask the Department to revise proposed § 106.45(b)(7) to prohibit the use of “evidence disclosed to a confidential employee” unless the school obtains the disclosing person’s voluntary, written consent for use in the school’s investigation.

### ***Questioning parties and witnesses***

We support proposed §§ 106.45(f)(2) and 106.45(g), which would require PK-12 schools to allow all parties to present their witnesses and evidence and, if credibility is at issue, to use a process that enables the decisionmaker to assess the credibility of the parties and witnesses. This would provide PK-12 schools the flexibility needed to address sex discrimination, including sex-based harassment, promptly and appropriately.

We also support the proposed removal of the harmful requirement in current § 106.45(b)(6)(i) that requires institutions of higher education to permit the parties’ advisors to conduct direct, live cross-

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<sup>187</sup> Leslie Berkseth, Kelsey Meany & Marie Zisa, *Rape and Sexual Assault*, 18 GEO. J. GENDER & L. 743, 791 (2017).

<sup>188</sup> 87 Fed. Reg. at 41419, 41499.

examination of the other party and witnesses. Proposed § 106.46(f)(1) would take a more appropriate approach, requiring, where credibility is at issue in investigations of sex-based harassment involving one or more students, questioning to be conducted either: (i) by a decisionmaker 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 required in some jurisdictions by court decisions.<sup>189</sup> We agree with the Department that cross-examination is not required to satisfy either Title IX, constitutional due process requirements, or fundamental fairness,<sup>190</sup> and we echo the concern of many stakeholders that direct live cross-examination of the parties is not necessary for reliable determinations of fact, often traumatizing, and often duplicative, as hearing questions tend to elicit information that was already provided during the investigation.<sup>191</sup> Therefore, we support the increased 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 when they are not required by the courts to utilize such processes.

In addition, we support proposed § 106.46(f)(1) stating that live questioning (whether through an advisor or a decisionmaker) is not required at all if the credibility of all parties and witnesses is not in dispute or is not relevant to evaluating the allegations. We urge the Department to emphasize this again in supplemental guidance to ensure that institutions of higher education and their students fully understand this beneficial departure from the current regulations.

We oppose the exclusionary rule in proposed § 106.46(f)(4), 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 or have made that "supports their position." 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>192</sup> The Department could simply direct the decisionmaker to take refusal to answer relevant questions into account in determining what weight to assign to a party's statements, rather than this blanket exclusion of any statement that "supports their position." This solution would address the Department's concern that a party could send an email or voicemail to a friend and then submit those statements without submitting to a credibility assessment.<sup>193</sup> Decisionmakers at institutions of higher education regularly weigh the credibility of statements in other types of student and staff misconduct proceedings based on a totality of the evidence. The Department states in proposed § 106.47 that it intends to respect schools' ability to weigh the evidence in investigations of sex-based harassment, and that the Department would not deem a school to have violated Title IX solely because the Assistant Secretary would have reached a different determination "based on an independent weighing of the evidence." Yet the exclusionary rule in proposed § 106.46(f)(4) would plainly intrude on schools' ability to weigh the evidence and inappropriately deprive decisionmakers of discretion. Furthermore, the Department's proposal to prohibit decisionmakers from making their own

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<sup>189</sup> *E.g., Doe v. Univ. of Scis.*, 961 F.3d 203 (3d Cir. 2020) (requiring private universities in Pennsylvania investigating sexual misconduct to allow respondents or their advisors to conduct cross-examination at a live hearing); *Doe v. Baum*, 903 F.3d 575, 578, 581 (6th Cir. 2018) (requiring public universities to hold "some sort of" hearing before suspending or expelling a student, and to allow respondents or their advisors to conduct cross-examination if the decision turns on the credibility of any party or witness).

<sup>190</sup> 87 Fed. Reg. at 41505.

<sup>191</sup> 87 Fed. Reg. at 41458.

<sup>192</sup> While proposed § 106.46(f)(4) would 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.

<sup>193</sup> 87 Fed. Reg. at 41509.



credibility determinations—but only in investigations of sex-based harassment involving one or more students—would arbitrarily exceptionalize statements about alleged sex-based harassment involving a student as inherently less credible than statements about other alleged misconduct (e.g., sex-based harassment involving only employees, other types of sex discrimination, race or disability discrimination). We urge the Department to revise proposed § 106.46(f)(4) to direct decisionmakers to consider any refusal to answer relevant questions in determining the weight to assign a party’s statements.

Finally, we support proposed § 106.46(f)(3) prohibiting unclear and harassing questions and allowing schools to apply other rules of decorum equally to the parties. We also support proposed § 106.46(g) requiring hearings to be conducted virtually if any party requests it, although we ask the Department to change “will” to “must” to make the provision clearer.

### ***Investigative model***

Given that institutions need flexibility in the types of grievance procedures they apply for student misconduct proceedings, we support proposed § 106.45(b)(2) allowing (but not requiring) the decisionmaker to be the same person as the investigator or Title IX coordinator. We have heard from a number of coalition partners who work closely with students in Title IX investigations that using a single investigator is more effective and produces more accurate outcomes than using separate investigator(s) and decisionmaker(s). A key reason is because investigators tend to reach people when their memories are fresher, which elicits more accurate statements from the parties and witnesses. In addition, given how long investigations can take, many witnesses are no longer available by the time a hearing is scheduled. For example, one partner shared an example where a hearing was delayed so many times that their client’s primary witnesses had not only graduated but moved out of the country. Notably, the witnesses’ evidence was already shared with the investigator and included in the investigative report, but the hearing officer chose not to defer to the report because the witnesses could not be questioned at the hearing, even though they had already been questioned by the investigator. As a result, relevant and credible evidence was not relied upon in the school’s decision.

In addition, the investigators tend to be more highly trained. As the Department noted, investigators—whether in-house or external—tend to be more highly skilled experts than decisionmakers, who are often drawn from a wider pool of school employees.<sup>194</sup> They are often better trained at conducting trauma-informed questioning, which can make survivors more likely to make complaints and choose to go through an investigation. In contrast, as the Department also noted, decisionmakers often ask duplicative questions that were already answered and documented in the report (and often with greater accuracy while the witness’s memory was fresher), which can force survivors to relive painful memories again without any evidentiary benefit to the school.<sup>195</sup> As one advocate shared with us, “It’s not unusual for hearing officers to almost completely ignore a very illuminating investigation report and decide everything based on the hearing . . . , which begs the question of how having a separate fact-finding investigation actually made the process more fair instead of just more traumatic.”

Furthermore, some schools may choose to use a single-investigator model in order to better protect the parties’ privacy. As the Department noted, having more employees involved in an investigation as decisionmakers increases the likelihood that parties and witnesses are forced to interact with those same

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<sup>194</sup> 87 Fed. Reg. 41467.

<sup>195</sup> 87 Fed. Reg. at 41458.

employees again in their classes and activities.<sup>196</sup> This has resulted in students avoiding classes, activities, and athletics opportunities and even changing majors altogether to avoid interacting with employees who now know very painful and traumatic details about their personal lives.<sup>197</sup>

Our position that this model should be permitted in Title IX proceedings is consistent with a recent report by the American Bar Association's Commission on Domestic & Sexual Violence, which recommends that institutions of higher education use investigators to review evidence, interview parties and witnesses in individual meetings, write an investigative report, and make a determination ("Investigative Model").<sup>198</sup> This recommendation was made after conducting extensive research and speaking with advocates for complainants and respondents, Title IX coordinators and investigators, civil and criminal law attorneys, law professors, university counsel, and deans at institutions of higher education, including Historically Black Colleges and Universities (HBCUs) and Tribal Colleges and Universities (TCUs). Notably, the ABA did not recommend using a model where hearing testimony from the parties and witnesses is required.

### ***Standard of proof***

We oppose proposed § 106.45(h)(1), which 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. We urge the Department to require a single standard of proof—the preponderance of the evidence 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>199</sup> (as the Department itself recognizes<sup>200</sup>), and it is the same standard used by courts in all civil rights and other civil proceedings.<sup>201</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 physical assault. Otherwise, schools could believe that they can use the preponderance standard to investigate *physical* assault and the clear and convincing evidence standard to investigate *sexual* assault, other sex-based harassment or discrimination, and all other harassment and discrimination based on race, disability, etc.

### ***Notice of determination***

We support proposed § 106.46(h)(1)(iv), which would, in investigations of sex-based harassment involving one or more students at an institution of higher education where the school decides that sex-based harassment has occurred, require the school to provide written notice to the parties of "any" disciplinary sanctions on the respondent and "whether" any remedies will be provided to the complainant and other students. It is important that both the complainant and respondent are notified of "any"

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<sup>196</sup> 87 Fed. Reg. at 41467.

<sup>197</sup> *Id.*

<sup>198</sup> American Bar Association, Commission on Domestic & Sexual Violence, *Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence* 8, 30, 62-63 (Dec. 10, 2019), <https://www.americanbar.org/content/dam/aba/publications/domestic-violence/campus.pdf>. Alternatively, the ABA recommends that institutions of higher education use investigators to write an investigative report and use a deliberative panel review the investigative report and ask questions of the investigators and make a determination, with statements from the parties as optional but not required ("Investigation + Deliberative Panel Hybrid Model").

<sup>199</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>200</sup> 87 Fed. Reg. at 41485.

<sup>201</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>.

sanctions on the respondent (e.g., no-contact order, suspension), as this information is “directly related” to all parties per the Family Educational Rights and Privacy Act,<sup>202</sup> and is necessary information for the complainant to feel safe returning to school or attending classes and activities. At the same time, we agree that the respondent should only be informed of “whether” the complainant received any remedies, as this best protects the complainant’s privacy. We ask the Department to clarify in the regulations that schools must separately inform the complainant of “any” remedies they will receive, not merely “whether” they will receive remedies.

By the same logic, we ask the Department to add to proposed § 106.45(h)(2) that schools must follow the same requirements for investigations under § 106.45—i.e., inform the parties of “any” sanctions and “whether” there are remedies, and separately inform the complainant (and others) of “any” remedies they will receive. And we ask the Department to require “written” notice of determinations in investigations under § 106.45 as well. We note that proposed § 106.45 would not require written notice of any information at any stage of any investigation. Even if the Department chooses not to add “written” notice requirements to any other portion of § 106.45, we urge you to require notice of determinations to be written. Too often, we hear from PK-12 students they reported sex-based harassment to their schools and who have not heard back about whether an investigation was initiated or concluded. When they ask for follow-up information weeks or months later, they may be verbally informed of many things—e.g., that an investigation was completed but the complaint was determined to be “unsubstantiated” or “unfounded” so no further action was taken; that the school determined the respondent was not responsible based on a conversation with the respondent and so nothing further can be done; that the school determined the harassment did occur and the school has disciplined the respondent, but the school cannot disclose the sanctions to the complainant “because of FERPA.” These are just a few examples from our experience working with student survivors. When PK-12 students do not receive a written determination notifying them with certainty that their complaint has been investigated and a decision has been made, they lose trust in their schools’ ability to protect them from sex discrimination and they lack the documentation needed to file a complaint with the Department or with a state or local agency. Requiring all schools to provide written notice under § 106.45 at least once—at the end of an investigation—would not create an unreasonable administrative burden on schools and would ensure that all parties know with certainty what the result of the complaint was.

### **Appeals**

We support proposed § 106.46(i)(1)(i)-(iii), which would, in investigations of sex-based harassment involving a student at institutions of higher education, require the school 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. We also support proposed § 106.46(i)(2), which would allow schools in such investigations to offer additional bases to both parties equally. In addition, we support proposed § 106.46(i)(1) allowing complainants in such investigations to appeal a dismissal of their complaint or of allegations in their complaint.

However, we strongly oppose that portion of proposed § 106.46(i)(1), which would only allow parties in such investigations to “appeal from a determination that sex-based harassment occurred.” In practice, this means only respondents (but not complainants) would be permitted to appeal a school’s determination.

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<sup>202</sup> 20 U.S.C. § 1323g(a)(4)(A)(i); see also 20 U.S.C. § 1221(d) (“[n]othing in this chapter,” including FERPA, “shall be construed to affect the applicability of ... [T]itle IX”).

This would be inconsistent with the requirement of “equitable” procedures in both current § 106.8(c) and proposed § 106.8(b)(2), as well as the principle in proposed § 106.46(i)(2) that the bases for appeal be made equally available to all parties. Furthermore, this proposal would be less equitable than current § 106.45(b)(8)(i), which requires schools to allow the parties to “appeal from a determination *regarding* responsibility,” meaning that complainants are currently permitted to appeal a finding of non-responsibility. We urge you to ensure the parties’ equal rights to appeal in the final rules by permitting appeals from a determination *whether* sex-based harassment occurred.

Furthermore, we urge the Department to ensure that parties at institutions of higher education are afforded the same appeal rights under § 106.45 as they would be under § 106.46. After all, most complaints of non-harassing sex discrimination in higher education do not involve individual respondents as such complaints are typically against the institution, which creates a significant power imbalance between the parties. This necessitates additional procedural safeguards, including the right to appeal based on a procedural irregularity, new evidence, or a conflict of interest or bias, consistent with proposed § 106.46(i)(1)(i)-(iii).

We also ask the Department to require PK-12 schools to provide parties the same appeal rights in investigations of sex-based harassment and other sex discrimination under § 106.45 as they would receive in all other “comparable” investigations, including for all other types of harassment and discrimination, as well as non-sexual physical assault. This would ensure that schools give parties neither fewer nor greater appeal rights in sex discrimination investigations versus other types of investigations, as the former could, in itself, constitute sex discrimination, and the latter could reinforce an exceptionalist approach to addressing sex-based harassment. While the Department states that “the delay associated with an appeal could impair [PK-12 schools’] ability to manage the school environment while sex-based harassment may be ongoing,”<sup>203</sup> nothing would prevent PK-12 schools from continuing to provide supportive measures to the complainant (and the greater school community) while an appeal is ongoing, even if the school’s policies do not allow it to impose a sanction until after the appeal is concluded. Moreover, the Department can choose not to require a specific timeframe for appeals under § 106.45 (as is the case in proposed § 106.46 (i)). This would give PK-12 schools the discretion to set their own timeframes for appeals, allowing them to address any concerns about delayed appeals impairing their ability to manage the school environment.

The Department also states that schools need not provide appeals for investigations involving only employees, given some employees are “temporary or at-will employees.”<sup>204</sup> We ask the Department to reconsider its proposal to deny employees the right to appeal merely because some states have laws that are hostile to workers’ rights.

Finally, we ask the Department to add “the appropriateness of the remedy or sanction” to proposed § 106.46(i)(1)’s list of determinations and decisions for which appeals must be available on the bases set out in § 106.46(i)(1)(i)-(iii). If a procedural irregularity, new evidence, or a conflict of interest or bias led to an inappropriately light or heavy sanction or an inadequate remedy, or if new evidence not reasonably available at the time of the decision would meaningfully impact the remedy or sanction, parties should have an opportunity to appeal.

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<sup>203</sup> 87 Fed. Reg. at 41489.

<sup>204</sup> *Id.*

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

### **A. Anti-LGBTQI+ Discrimination Harms Students' Access to Education.**

In addition to the pervasive harassment described earlier in our comment, LGBTQI+ students struggle to access education due to discriminatory discipline and biased school policies; indeed, over half of PK-12 LGBTQ+ student reported experiencing such disciplinary practices in a 2019 national survey.<sup>205</sup> Many reported the discipline was related to LGBTQI-related expression in schools, which both silences and stigmatizes LGBTQI+ students. This included being disciplined for public displays of affection that are permitted for non-LGBTQ+ students, for speaking about or presenting on LGBTQ-related topics in class or coursework, and for engaging in pro-LGBTQ+ speech, like wearing a t-shirt supporting LGBTQI+ issues.<sup>206</sup>

LGBTQI+ students also often targeted by their schools under codes of conduct that pressure students to comply with cissexist and heteronormative gender roles: in the same 2019 survey, over a quarter of LGBTQ+ students reported being prevented from using bathrooms that matched their gender identity; over a quarter reported being denied the ability to use their chosen names and/or pronouns; nearly a quarter reported experiencing discriminatory dress code enforcement, including being targeted for wearing clothing deemed “inappropriate” based on sex stereotypes and (specifically) cis-centric gender norms; and almost one-tenth reported being prevented from bringing a same-gender date to a school dance.<sup>207</sup>

Finally, LGBTQI+ students are frequently barred or deterred from participating in extracurricular activities, including participating on sports teams consistent with their gender identity, which, as explained further below in **Part II.C.** (p.47-49), prevents them from being able to fully access the benefits of an education: in the same study, over a quarter of respondents were barred from using locker rooms matching their gender identity; over one-tenth reported being barred or discouraged from playing school sports because they were transgender, non-binary, or intersex;<sup>208</sup> and almost a quarter were prevented from starting or promoting participation in a gay-straight alliance club.<sup>209</sup>

The net effect of this institutional discrimination is an increase in stigma, which signals to the student community as a whole that LGBTQI+ students are lesser—and fair targets for harassment and violence.

### **B. The Proposed Rules on the Scope of Protections for LGBTQI+ Students Come at a Crucial Moment and Must Meet the Current Threats.**

We strongly support the proposed rule's explicit clarification that sex discrimination includes discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes.<sup>210</sup> As the Department has recognized in its recent publications,<sup>211</sup> this is crucial to fully

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<sup>205</sup> GLSEN Survey, *supra* note 12, at 41.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> It is also important to note that these figures have likely increased since 2019 due to the high numbers of sports bans introduced to prevent LGBTQI+ students from participating on teams matching their gender identity.

<sup>209</sup> GLSEN Survey, *supra* note 12, at 41.

<sup>210</sup> 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

<sup>211</sup> A recent preliminary injunction of the Department's 2021 *Bostock* implementation guidance was based on reasoning that Title VII and Title IX standards are not comparable (though courts in all circuits have recognized for decades they broadly overlap) and that

implementing the Supreme Court’s holding in *Bostock v. Clayton County*.<sup>212</sup> *Bostock* recognized how sex plays a “necessary and undisguisable role in the decision” to discriminate against an LGBTQI+ individual for “traits or actions [that would not be] questioned in members of a different sex.”<sup>213</sup> While the *Bostock* case involved employment discrimination claims under Title VII, multiple appellate courts have already acknowledged its applicability in the Title IX context, in part because the statutes have functionally identical language and decades of overlapping interpretive canon.<sup>214</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>215</sup>

These proposed rules were published at the end of many states’ 2022 legislative sessions, in which over 300 bills sought to strip away essential rights from LGBTQI+ people, especially rights of transgender and nonbinary students. Fearmongering from state legislators who chose to demonize some of the LGBTQI+ community’s most vulnerable members in hopes of campaign victories must be understood as one point on a spectrum of increasingly pervasive anti-LGBTQI+ violence. In light of these connected threats, 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>115</sup>

The Department has an opportunity to strongly enforce Title IX to its full scope and prevent a status quo where a student can safely access school *only if they happen to live in the right place*: 19 percent of the U.S.’s LGBTQ population live in states that censor classroom discussions of LGBTQ people or issues (commonly referred to as “don’t say gay or trans” policies);<sup>216</sup> 46 percent of the LGBTQ population reside in states with no law protecting LGBTQ students (including 2% in states that prohibit any local protections against bullying based on LGBTQI+ status);<sup>217</sup> 42 percent of the LGBTQ population reside in states with no laws protecting students’ rights to access school facilities, sports teams, or extracurricular clubs without discrimination on the basis of LGBTQI+ status;<sup>218</sup> and 30 percent of the LGBTQ population now live in states with laws that ban transgender and nonbinary students from participating in school sports.<sup>219</sup> All LGBTQI+ people deserve equal protection of the laws and should not have to contend with discrimination simply because they live in a hostile state.

One way the Department can fully meet this crisis moment is by ensuring proposed § 106.10’s definition of “sex” accurately captures the full scope of discrimination LGBTQI+ students experience. Specifically, we urge the Department to prohibit discrimination on the basis of “actual or perceived” protected classes, add “transgender or nonbinary status” to the definition of “sex,” and clarify that discrimination based on

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the guidance lacked required notice and comment opportunities (which this proposed rulemaking provides.) *Tenn. v. U.S. Dep’t of Educ.*, No. 3:21-cv-308, 2022 WL 2791450 (E.D.T.N., Ju. 15, 2022) (memorandum granting preliminary injunction of guidance interpreting *Bostock*).

<sup>212</sup> *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020).

<sup>213</sup> *Id.* at 1737.

<sup>214</sup> See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), as amended (Aug. 28, 2020), cert denied, 141 S.Ct. 2878 (2021); see also *Doe v. Univ. of Scranton*, No. 3:19-CV01486, 2020 WL 5993766, at \*5 (M.D. Pa. Oct. 9, 2020).

<sup>215</sup> *Bostock*, 140 S.Ct. at 1747.

<sup>216</sup> These are also known as “don’t say gay” or “trans” policies. Movement Advancement Project, *LGBTQ Curricular Laws* (last visited Sept. 9, 2022), [https://www.lgbtmap.org/equality\\_maps/curricular\\_laws](https://www.lgbtmap.org/equality_maps/curricular_laws). Although this comment uses the acronym LGBTQI+ throughout, where citing data that does not explicitly study intersex populations, we use more granular labels.

<sup>217</sup> Movement Advancement Project, *Safe School Laws: Anti-Bullying*, [https://www.lgbtmap.org/equality-maps/safe\\_school\\_laws](https://www.lgbtmap.org/equality-maps/safe_school_laws) (last visited Sept. 9, 2022).

<sup>218</sup> Movement Advancement Project, *Safe School Laws: Nondiscrimination*, [https://www.lgbtmap.org/equality-maps/safe\\_school\\_laws/discrimination](https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination) (last visited Sept. 9, 2022).

<sup>219</sup> Movement Advancement Project, *Safe School Laws: Bans on Transgender Youth Participation in Sports*, [https://www.lgbtmap.org/equality-maps/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/sports_participation_bans) (last visited Sept. 9, 2022).

“gender expression” is prohibited as a form of discrimination based on gender identity and sex stereotyping. The Department should clarify that Title IX prohibits discrimination based on both “actual” transgender or nonbinary status to reach discriminatory treatment where a student is being treated worse on account of simply being transgender. In other words, the discrimination arises not because a student is girl, but because she is a *transgender* girl. For example, a school that requires all transgender students to use a single-person restroom in the school nurse’s office may claim it is not discriminating against any transgender student based on gender identity because it applies this policy to students of various genders. The common thread is discrimination based on transgender status, itself, which echoes the majority framing of but-for sex discrimination in the *Bostock* decision.

In addition to actual status, perceived status is an important category for two reasons. Adding “perceived” would protect students who experience sex discrimination yet might be denied relief under Title IX if a harasser happens to be *mistaken* when targeting them based on their perceived sexual orientation or transgender or nonbinary status. Additionally, it would prevent a student from being denied remedies by their school for discrimination because their school does not believe that they are “really” LGBTQI+ and thus concludes they are not protected from harassment or discrimination on the basis of sexual orientation or transgender status.

Moreover, we recommend that the Department clarify at § 106.10 that students are also protected from discrimination based on their actual or perceived gender expression, which is an aspect of discrimination based on gender identity and sex stereotypes. Gender expression refers to a person’s appearance, mannerisms, dress, and other characteristics—importantly, this is not always aligned with a person’s gender, or perception of one’s core identity. For example, a transgender boy does not stop being a boy if he is coerced into wearing a “girl’s uniform” to comply with biased school dress code enforcement.

Finally, we urge the Department to enforce Title IX in a manner that considers the delicate balance in protecting LGBTQI+ students from discrimination with respecting their privacy rights—for instance, avoiding the far-reaching harms of “outing” a student who knows their family is not ready to affirm and support them—while also encouraging students to seek support and involve families who have shown themselves to be energetic allies in supporting LGBTQI+ students. Accordingly, we invite the Department to consider expanding the range of adults who may accompany PK-12 students in proposed § 106.8(c)’s process for prompt and equitable resolutions of complaints and proposed § 106.6(g). LGBTQI+ students would especially benefit from an option to designate a trusted adult other than a parent—such as an adult sibling, aunt or uncle, or mental health counselor—if they do not feel safe and comfortable including a parent in these sensitive proceedings (see **Part I.D: Advisors and support persons** above at p.36-37).

### **C. The Proposed Rules on Participation Consistent with Gender Identity Should Provide Greater Clarity on the Application of the *De Minimis* Harm Standard.**

We support the § 106.31(a)(2)’s clarification that it would be a *per se* sex-based harm to prevent a student from participating in an education program or activity consistent with their gender, and this will generally violate Title IX because it causes “more than *de minimis* harm.” We urge the Department to further clarify that the *de minimis* harm standard applies to all sex-separated programs and activities, unless Congress or the Department has expressly stated otherwise.

We are concerned about the Department’s conclusion that Title IX allows greater than *de minimis* harm

from sex segregation in living facilities in the absence of a clear Congressional statement on this issue.<sup>220</sup> LGBTQI+ students, especially students who are transgender, nonbinary, intersex, or gender nonconforming, are frequently informed by schools that all manner of facilities (essential to accessing school programming and educational opportunities) are considered “living facilities.” For example, in cases of schools seeking to discriminate against LGBTQI+ students, courts have characterized restrooms and locker rooms as “living facilities” where schools may tolerate significant sex discrimination, especially against transgender and nonbinary students.<sup>221</sup> These harms may be exacerbated for students with disabilities. For example, a student who has difficulty walking may be denied access to a single-student dorm room in the same building as the school cafeteria on account of sex if that dorm has been designated as a single-sex dorm. Yet that disabled student will be strongly discouraged from seeking Title IX relief given the Department’s unnecessarily permissive view that living facilities are held to a separate standard of equal access. (There is significant overlap between sex discrimination against LGBTQI+ students and disabled students, in part because LGBTQI+ people are more likely to be disabled than non-LGBTQI+ people.<sup>222</sup>) All students would benefit from clarifying that all school programming and activities are subject to the *de minimis* harm standard, except for those few, narrow settings in which Congress has stated in unambiguous terms that Title IX “shall not apply” at all.

Correcting this confusion is essential to implementing the proposed rules’ promise that students will not be barred from educational opportunities based on sexual orientation or gender identity. As it stands, locations such as locker rooms, restrooms, and overnight accommodations are sites of intense pain and harm for LGBTQI+ students who are subjected to high rates of sex discrimination. Transgender and nonbinary students are singled out and shamed when attempting to access school restrooms at alarming rates.<sup>223</sup> Cisgender LGBQ students may also be prevented from accessing these spaces based on their sexual orientation, such as if school staff prevent a lesbian girl from using the girl’s locker room because she is a lesbian.<sup>224</sup> To communicate that schools may not claim impunity from accountability, the Department should clarify that the *de minimis* harm standard applies to living facilities and the other locations discussed above.

It is also a source of confusion for the Department to say in one breath in proposed § 106.31(a) that *all* school programs and activities would be subjected to the *de minimis* harm standard, but also that a separate rulemaking process is required to clarify “eligibility to participate on male and female athletics teams.”<sup>225</sup> This approach can only reduce the confidence of school districts wishing to support LGBTQI+ student athletes, who are facing threats and litigation from emboldened transphobic activists and politicians regarding supportive policies *allowing* transgender and nonbinary students to play sports alongside their peers. On the other hand, it signals to districts that are undecided or leaning in favor of exclusionary, anti-LGBTQI+ policies that there genuinely is something different and troublesome about transgender, nonbinary, and intersex student athletes that requires special attention from the federal

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<sup>220</sup> 87 Fed. Reg. at 41536.

<sup>221</sup> *Grimm*, 972 F.3d at 628.

<sup>222</sup> Movement Advancement Project, *LGBT People With Disabilities* (July 2019), <https://www.lgbtmap.org/file/LGBT-People-With-Disabilities.pdf>.

<sup>223</sup> See e.g., GLSEN Survey, *supra* note 12, at 41 (28.4 percent of LGBTQ+ youth respondents aged 13-21 reported being prevented from using the bathroom that matched their gender identity at school); Myeshia Price-Feeney *et al.*, *Impact of Bathroom Discrimination on Mental Health Among Transgender and Nonbinary Youth*, 68 J. of Adolescent Health 1142 (2021) (in a study examining the connection between discrimination and poor mental health outcomes in transgender and nonbinary youth from ages 13-24, 58 percent of transgender and nonbinary respondents reported being barred or discouraged from bathrooms aligning with their gender identity, and of those 58 percent, 85 percent reported depressive mood, and 60% seriously considered suicide).

<sup>224</sup> GLSEN Survey, *supra* note 12, at 40.

<sup>225</sup> 87 Fed. Reg. at 41538.



government. A second rulemaking focused on athletics (clearly undertaken in response to intensely targeted hate against LGBTQI+ student athletes) inherently undercuts the statement that school programs and activities are overall properly subject to Title IX's *de minimis* harm standard. We discuss below some steps that would mitigate the harm that has already occurred in this area.

#### **D. The Department Must Act with Urgency in Proposing Rules on Athletics Participation.**

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 the current 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 gender policing based on sex stereotypes, discriminatory bans, and invasive and inappropriate “sex testing” requirements just to play school sports. Indeed, allowing transgender athletes to participate in school sports correlates in at least two states with increased participation by all girls.<sup>226</sup> CDC data shows that where states adopted transgender-inclusive policies, from 2011-2019 there was no change in girls’ participation in high school sports.<sup>227</sup> On the other hand, girls’ participation decreased in states with trans-exclusive policies.<sup>228</sup> Such policies, which often include humiliating, and invasive medical requirements, are unscientific and target students entirely based on sex stereotypes. These in turn create new risks of sexual abuse of young student athletes, and disproportionately harm transgender, nonbinary, and intersex people, while also sweeping up cisgender girls and women who do not conform to stereotyped views of femininity. In particular, as a historical matter, there is no disentangling “sex testing” of athletes from a long legacy of racist and sexist abuses used to target Black girls and women and other athletes who do not conform to traditional standards of white femininity.<sup>229</sup>

The forthcoming rule should implement a legal presumption that every student has the right to participate in all school sports, consistent with the student’s gender, ideally at all levels of education. We urge the Department to bear in mind that, in practice, any policy seeking to limit sports participation by transgender, nonbinary, and intersex students—at any level of play—will amount in some form or fashion to scrutiny of students’ medical history or bodily characteristics and reliance on sex stereotypes. Such restrictions raise grave questions of administrability, equity, and constitutionality, as well as compliance with Title IX’s text. As advocates for gender justice, we recognize these ongoing challenges to equity in school sports:

1. There are real and persistent failures to provide equal athletic opportunities for girls and women today—including unequal playing opportunities, unequal investment of institutional resources at every level of competition, and long-running issues of sexual abuse and sex harassment by

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<sup>226</sup> See Shoshana K. Goldberg, Center for American Progress, *Fair Play: The Importance of Sports Participation for Transgender Youth 14-17* (2021), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Human Rights Watch, “*They’re Chasing Us Away from Sport*”: *Human Rights Violations in Sex Testing of Elite Woman Athletes* (Dec. 4, 2020), <https://www.hrw.org/report/2020/12/04/theyre-chasing-us-away-sport/human-rights-violations-sex-testing-elite-women>.

coaches and doctors. None of these issues are related in any way to the participation of transgender and nonbinary student athletes.

2. Although the mere participation of transgender and nonbinary students poses no threat to any other student's rights or opportunities, LGBTQI+ students, their families, educators, and communities advocating for crucial rights have collectively been forced to devote tremendous resources to proving the negative and debating, essentially, these young people's right to exist. This important context, including the real and increasing threats to basic safety that trans students are facing, is critically important context for any action the Department takes.
3. Any contemplation of policies that allow participation of certain transgender and nonbinary students in athletics to be made contingent on undergoing medical procedures must account for the undue pressure such requirements may place on highly personal medical decisions about the course and timing of medical care, as well as the ways in which access to gender-affirming medical care for transgender youth is being increasingly restricted and criminalized in many jurisdictions. Until transgender youth are no longer systematically forced through incorrect, often traumatic, puberties, there remains a deep injustice in the concept of scrutinizing individual students' medical records and histories for the purposes of determining which LGBTQI+ students should be excluded from school sports, or of making educational opportunities contingent on a course of medical treatment that may not reflect an individual's needs or wishes.

The forthcoming rule should set out an inclusive approach based on data that show the primary educational benefit of sport flows directly from the student's participation. Specifically, the justification for an inclusive rule should recognize that students who play sports are more likely to graduate from high school, go to college, and achieve higher grades and scores on standardized tests.<sup>230</sup> In addition to these academic benefits, sports participation also engenders increased psychological well-being and greater self-confidence in youth, as well as a sense of community amongst their teammates and peers, and teaches students important and unquantifiable lessons about leadership, discipline, and teamwork.<sup>231</sup> The Department should also emphasize that these benefits are especially crucial for transgender, non-binary, and intersex students, as the community and positive self-image associated with sports participation can offer a respite from the stigma and isolation they often face at school and help alleviate the resulting high risk of depression or suicidality they experience.<sup>232</sup> Promoting transgender, nonbinary, and intersex students' participation in sports can also increase the number of safe school spaces available to them; for example, playing sports will give LGBTQI+ students the opportunity to develop a relationship with

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<sup>230</sup> Elizabeth Tang *et al.*, National Coalition for Women and Girls in Education, *Title IX at 50: A Report by the National Coalition for Women and Girls in Education* 34 (June 2022), <https://nwc.org/resource/ncwge-title-ix-at-50> [hereinafter NCWGE Report].

<sup>231</sup> See, e.g., *id.* at 42; Stacy M. Warner *et al.*, *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 *J. of Sport Management* 349, 349-50 (2013). Richard Bailey, *Physical Education and Sport in Schools: A Review of Benefits and Outcomes*, 76 *J. of Sch. Health* 397-401 (2006); Rochelle M. Eime *et al.*, *A Systematic Review of the Psychological and Social Benefits of Participation in Sport for Children and Adolescents: Informing Development of A Conceptual Model of Health through Sport*, 10 *Int'l J. of Behavioral Nutrition & Physical Activity* 98 (2013).

<sup>232</sup> The Trevor Project, *The Trevor Project Research Brief: LGBTQ & Gender-Affirming Spaces* 3 (2020), [https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Affirming-Spaces\\_-December-2020.pdf](https://www.thetrevorproject.org/wp-content/uploads/2021/07/LGBTQ-Affirming-Spaces_-December-2020.pdf). LGBTQI+ youth report high rates of poor mental health and suicidality compared to their cisgender and heterosexual peers, which is linked to a failure by schools to affirm their sexual orientation and/or gender identity. In other words, LGBTQI+ youth attending schools that discriminated against them by preventing them from accessing spaces and facilities matching their gender identities—such as sports teams—were more likely to report attempting suicide than LGBTQI+ youth attending schools that allowed them to access these affirming spaces.

coaches and other school faculty, who can act as a safe adult to advocate for their protection at school, which is especially crucial if their families are not supportive.

Finally, we stress that it is inappropriate to justify cutting transgender, non-binary, and intersex students off from these crucial benefits of school sports participation by giving disproportionate focus to elite or professional levels of competition. The vast majority of PK-12 athletes do not become intercollegiate athletes, and 98 percent of NCAA student athletes do not continue to the Olympic level.<sup>233</sup>

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 premised on the notion 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). We urge the Department to use the forthcoming rule as a chance to tell LGBTQI+ students that they belong in school and have the same rights as their peers and reverse the deeply troubling trend of state lawmakers attempting to rob LGBTQI+ students—many of them young children—of the chance to play alongside their peers.

#### **E. The Proposed Rules Should Clarify that Intentional Misgendering Can Constitute Sex-Based Harassment.**

We support the provisions in proposed §§ 106.2 and 106.10 that would require 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. As stated above in **Part II.B** (p.45-47), we urge the Department to also prohibit harassment (and other discrimination) based on “actual or perceived” protected classes, to include “transgender or nonbinary status” in the definition of “sex”, and clarify that discrimination based on “gender expression” is prohibited as a form of discrimination based on gender identity and sex stereotyping. And we ask the Department to refer to our other comments above regarding sex-based harassment in **Part I** (p.2-44), which apply equally here to anti-LGBTQI+ harassment.

Often throughout the proposed rule, the Department provides summaries of relevant case law and illustrative examples to explain what constitutes prohibited sex-based harassment. We urge the Department to include similar language and examples to clarify that harassment based on a student’s actual or perceived gender identity includes mocking or publicly ridiculing a student using terms of address that are known to be offensive and harmful to the student, which includes misgendering a student by intentionally misusing their pronouns, or title, and/or by deadnaming them by intentionally ignoring their chosen name. Clarifying that intentionally misgendering or deadnaming a student is considered sex-based harassment is not only consistent with recent Department of Education enforcement actions,<sup>234</sup> but is also with Title VII caselaw recognizing that misgendering and/or

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<sup>233</sup> Joanna Hoffman, Athlete Ally, *Athlete Ally and Chris Mosier Respond to New NCAA Trans Inclusion Policy* (Jan. 20, 2022), <https://www.athleteally.org/athlete-ally-mosier-respond-ncaa-new-trans-policy>.

<sup>234</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-educations-office-civil-rights-announces-resolution-sex-based-harassment->

deadnaming a transgender or nonbinary person can contribute to a hostile workplace environment, thus constituting impermissible sex-based discrimination.<sup>235</sup> Finally, we stress the importance of the Department clarifying the crucial 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, persistent misgendering and/or deadnaming that causes distress and reduced ability to learn.<sup>236</sup>

### **III. Protections for Pregnant and Parenting Students**

#### **A. Discrimination Against Pregnant and Parenting Students Harms Their Access to Education.**

Becoming pregnant or a parent should not derail a student's education. Unfortunately, pregnant and parenting students are routinely stigmatized, discriminated against, and denied the resources and support they need to thrive in their educational institutions. As a result, only 51 percent of teenage mothers earn a high school diploma by age 22, compared to 89 percent of girls who do not have a child as a teen.<sup>237</sup> In addition, 33 percent of Black teen mothers and 54 percent of Latina teen mothers never obtain a diploma or GED,<sup>238</sup> and fewer than 2% of all teen mothers graduate college by age 30 leading to decreased opportunities for continuing education and employment.<sup>239</sup> Furthermore, lesbian and bisexual teen girls are more likely than straight teens to become pregnant, and transgender youth are just as likely to become pregnant as cisgender youth.<sup>240</sup> Despite this trend, LGBTQI+ pregnant and parenting students' experiences of intersectional discrimination and their unique needs are largely ignored by educational institutions.<sup>241</sup>

At the college level, almost one quarter of all undergraduate students are parents.<sup>242</sup> Among college student parents, 44 percent work full time while enrolled, and 23 percent are single parents and working

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investigation-tamalpais-union-high-school-district; *Willits Unified School District Resolution Agreement*, Case No. No. 09-16-1384 (2017) (district will ensure "referring to the Student by other than her female name and by other than female pronouns is considered harassing conduct"); Dep't of Educ., Office for Civil Rights, *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>235</sup> See *Doe v. Triangle Doughnuts, LLC.*, 472 F. Supp. 3d 115 (E.D. Pa. 2020) (citing *Bostock*, 140 S. Ct. 1731 (applying *Bostock*, the court held that the plaintiff's claims of a hostile work environment based on sex stereotypes could proceed because she was misgendered, prevented from using the women's restroom, asked probing questions about her gender identity, and ultimately terminated).

<sup>236</sup> Many educational and mental health organizations, such as the National Association for Secondary School Principals, National Association of School Psychologists, American School Counselors Associations, and National Education Association, recognize the importance of using a student's pronouns and chosen name. See National Association for Secondary School Principals, *Position Statement: LGBTQ+ Students and Educators* (last visited Sept. 9, 2022), <https://www.nassp.org/top-issues-in-education/position-statements/lgbtq-students-and-educators>; National Education Association, *Bostock and Students Rights* (last visited Sept. 9, 2022), [https://neaedjustice.org/wp-content/uploads/2020/10/27418-Bostock-and-Student-Rights-Doc2\\_Final.pdf](https://neaedjustice.org/wp-content/uploads/2020/10/27418-Bostock-and-Student-Rights-Doc2_Final.pdf); National Association of School Psychologists, *Safe and Supportive Schools for Transgender and Gender Diverse Students* (last visited Sept. 9, 2022), <https://www.nasponline.org/resources-and-publications/resources-and-podcasts/diversity-and-social-justice/lgbtq-youth/transgender-youth>; American School Counselors Association, *Position Statement: The School Counselor and Transgender and Nonbinary Youth* (last visited Sept. 9, 2022), <https://www.schoolcounselor.org/Standards-Positions/Position-Statements/ASCA-Position-Statements/The-School-Counselor-and-Transgender-Noncon>.

<sup>237</sup> Kate Perper, Kristen Peterson & Jennifer Manlove, *Diploma Attainment Among Teen Mothers*. Child Trends (Jan. 2010), [https://www.childtrends.org/wp-content/uploads/2010/01/child\\_trends-2010\\_01\\_22\\_FS\\_diplomaattainment.pdf](https://www.childtrends.org/wp-content/uploads/2010/01/child_trends-2010_01_22_FS_diplomaattainment.pdf).

<sup>238</sup> *Id.*

<sup>239</sup> Cynthia Costello, Institute for Women's Policy Research, *Pathways to Postsecondary Education for Pregnant and Parenting Teens* (May 2014), <https://files.eric.ed.gov/fulltext/ED556724.pdf>.

<sup>240</sup> National Women's Law Center, *A Call to Action to Support LGBTQI Pregnant, Expectant, and Parenting Students* (March 2022), <https://nwc.org/resource/a-call-to-action-to-support-lgbtqi-pregnant-expectant-and-parenting-students>.

<sup>241</sup> *Id.*

<sup>242</sup> Institute for Women's Policy and Research, *Parents in College by the Numbers* (April 11, 2019), <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers>.

full time while enrolled. In addition, 40 percent of Black women in college are mothers and are more likely to be student parents than their white peers.<sup>243</sup> Despite earning higher GPAs than their non-parenting students,<sup>244</sup> parenting college students are less likely to graduate.<sup>245</sup> This is not due to personal failing, but rather a lack of institutional support and recognition of the unique barriers to college completion for parenting students.<sup>246</sup> Parenting students often experience feeling disconnected from the larger education community and are not aware who they can speak to when they experience discrimination because of their parenting status.<sup>247</sup>

Despite these roadblocks, when educational institutions listen to, support, and prevent discrimination against pregnant and parenting students, these students thrive. While balancing their health, caregiving responsibilities, and educational goals is challenging, these added responsibilities often renew students' dedication to their studies.<sup>248</sup>

The Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*<sup>249</sup> highlights the importance and timeliness of the Departments' proposed rules. The Department plays a critical role in advancing and enforcing the civil rights protections of *all* pregnant and parenting students and workers in educational settings, and helping to ensure that individuals' reproductive decisions do not dictate their educational outcomes, even as those reproductive decisions are under attack as never before in the history of Title IX.

## **B. The Proposed Rules Should Provide Additional Clarity on Pregnancy-Related Conditions and Stronger Protections Against Discrimination on the Basis of Parental, Family, or Marital Status.**

### ***Pregnancy or related conditions***

While Title IX has always prohibited recipients from discriminating against students based on their pregnancy or pregnancy-related medical condition, this type of sex-based discrimination is still a frequent occurrence.<sup>250</sup>

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> Renee Ryberg, Rachel Rosenberg & Jessica Warren, Child Trends, *Higher Education Can Support Parenting Students and Their Children with Accessible and Equitable Services* (Jan. 2021), <https://www.childtrends.org/publications/higher-education-support-parenting-students-and-their-children-with-accessible-equitable-services>.

<sup>246</sup> See e.g., Barbara Gault & Lindsey Reichlin Cruse, Institute for Women's Policy and Research, *Access to Child Care Can Improve Student Parent Graduation Rates* (May 2017), <https://iwpr.org/iwpr-general/access-to-child-care-can-improve-student-parent-graduation-rates>.

<sup>247</sup> Generation Hope, *National Student Parent Survey Results and Recommendations* (May 2020), <https://www.generationhope.org/student-parents-report-2020>.

<sup>248</sup> NWLC Pregnant or Parenting Students Report, *supra* note 12, at 1.

<sup>249</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_ (2022).

<sup>250</sup> See e.g., Dep't. Educ., Office for Civil Rights, *Salt Lake Community College*, No. 08-22-2021, June 14, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08222021-a.pdf> [hereinafter OCR Findings on Salt Lake Community College] (finding college violated pregnant student's rights under Title IX and Section 504 of the Rehabilitation Act); Dep't. Educ., Office for Civil Rights, *Cal. St. Univ. East Bay*, No. 09-18-2245 (Aug. 1, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09182245-a.pdf> [hereinafter OCR Findings on CSU East Bay] (pregnant student denied accommodations and excused absences); Dep't. Educ., Office for Civil Rights, *Fresno City College*, No. 09-18-2013 (Apr. 10, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09182013-a.pdf> (student denied pregnancy-related absences); *Conley v. Northwest Florida State Coll.*, 145 F. Supp.3d 1073 (N.D. Fla. 2015) (denying recipient's motion to dismiss student's Title IX claim alleging pregnancy discrimination when professor urged pregnant student to not participate in paramedic program).

We support proposed §§ 106.2 (“pregnancy or related conditions”), 106.211(2)(ii), 106.40(b)(1), and 106.57(b) prohibiting schools from discriminating against any “person” (including students and employees) based on “current, potential, or past” pregnancy or related conditions and urge the Department to include “perceived” and “expected” pregnancy or related conditions to the list. This language would better fully capture the ways pregnancy stigma and bias prevent equal access to educational opportunities. For example, we recently supported a high school student who had her academic honors designation revoked simply because false rumors spread that she was pregnant and had an abortion. This language would also ensure that students planning to become pregnant are not discriminated against on that basis and that women and girls and others assigned female at birth are not denied opportunities in programs because they might become pregnant.

In addition, we support proposed § 106.2 explicitly adding “lactation” as an example of a related condition, in addition to childbirth and termination of pregnancy. We urge the Department to clarify in the regulations that its enumeration of pregnancy-related conditions is non-exhaustive and that the term “pregnancy-related conditions” also includes mental and physical conditions including, but not limited to gestational diabetes, preeclampsia, mastitis, hyperemesis gravidarum, “morning sickness,” fatigue, dehydration, and postpartum depression. Additionally, the Department should clarify that a pregnancy-related condition need not qualify as an ADA disability.

Proposed § 106.40(b)(2) would also require employees who know of a student’s pregnancy or related condition to provide the student the Title IX coordinator’s contact information for assistance, and proposed § 106.40(b)(3)(i) would require Title IX coordinators to notify the student of their rights if the student or someone with the legal right to act on behalf of the student notifies the Title IX coordinator of the student’s pregnancy or related condition. We appreciate the intent behind these requirements but ask the Department to instruct schools in the final regulations and in supplemental guidance on how best to protect student privacy to ensure that school records, including school health records, are not used to support pregnancy-related prosecutions including through documentation indicating whether students who have been pregnant in the past are not currently pregnant.<sup>251</sup>

Additionally, the proposed requirement that a student receives the Title IX Coordinator’s contact information “for assistance” is vague and potentially overstates the scope of support Title IX coordinators can provide in states where aiding and abetting abortion is criminalized.<sup>252</sup> Therefore, we ask the Department to clarify that an employee must promptly inform the student (i) how to notify the Title IX coordinator of the student’s pregnancy or related conditions *in order to receive information about their rights* and (ii) provide contact information for the Title IX Coordinator. The specificity of this language will clarify the scope of a school’s legal obligations to students who are pregnant or have a related condition. The Department should clarify that Title IX’s preemption extends to state laws that criminalize aiding and abetting abortion to the extent they directly conflict with recipients’ obligations to provide medically

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<sup>251</sup> See e.g., *Bonamici Leads 60 Colleagues in Calling for Pregnant Students to be Protected Under Title IX*, Press Release, (July 21, 2022), <https://bonamici.house.gov/media/press-releases/bonamici-leads-60-colleagues-calling-pregnant-students-be-protected-under-title>.

<sup>252</sup> While all students deserve access to reproductive healthcare, including abortions, without penalty, we note that this is crucial for survivors of intimate partner violence. Such survivors experience higher rates of violence when they are pregnant and pregnancy further ties survivors of rape and intimate partner violence to their abusers, making it harder to escape their perpetrator. See, e.g., Donna St. George, *CDC Explores Pregnancy-Homicide Link*, Washington Post (Feb. 23, 2005), <https://www.washingtonpost.com/wp-dyn/articles/A45626-2005Feb22.html>; Hannah Craig, *Limiting Abortion Rights Keeps DV Victims In Danger* (July 11, 2022), <https://www.domesticshelters.org/articles/in-the-news/how-limiting-abortion-rights-keeps-survivors-in-danger>.

necessary absences and reasonable modifications to students with pregnancy-related medical conditions.<sup>253</sup>

Finally, we urge the Department to clarify that Title IX does not permit a school to use pregnancy-related information received through Title IX requirements to be provided to criminal law enforcement officers and to clarify that referring a student to law enforcement based on their termination of pregnancy can violate Title IX's guarantee of equal education access and its prohibition on retaliation.

### **Parental, family, or marital status**

Parenting and caregiving students face unique barriers to accessing and completing their education.<sup>254</sup> Becoming a parent is a primary reason young girls do not complete high school<sup>255</sup> and women account for 72 percent of students who are parents of children living in their household.<sup>256</sup> In addition, 86.4 percent of young (18- to 24-year-old) Black women who are parents were caring for the children on their own,<sup>257</sup> and only 11.3 percent of young women who are parents are in school.<sup>258</sup>

The proposed rules, like the current rules, do not view discrimination based *solely* on parental, family, or marital status as a type of sex discrimination. Rather, proposed §§ 106.21(c)(2)(i), 106.40(a), and 106.57(a)(1)) would only make it unlawful to adopt a policy disadvantaging students, workers or applicants based on their parental, family or marital status if the policy "treats persons differently on the basis of sex." This narrow prohibition is incomplete and already currently leads school administrators to believe that they can discriminate against parenting students (versus non-parenting students) or non-birthing parents (versus birthing parents), 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 is often based on sex stereotypes (such as a stereotype that women or girls who are mothers are likely to neglect their education or that men or boys should not be responsible for providing care to children).

Federal courts have clarified that it is unlawful sex discrimination to use sex-based stereotypes to deny equal education opportunities because of a student's marital or parental status, regardless of how the

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<sup>253</sup> Alternatively, the Department could explicitly require recipients to provide students who are pregnant or have a related condition with an information packet (similar to the Clery Act's requirement to provide victim resource packets), thereby preempting pregnancy-related criminal statutes. See, *Crosby v. Nat'l Foreign Trade Counsel*, 530 U.S. 363, 373 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (implied conflict preemption only nullifies State action if it is impossible for a private party to comply with both state and federal law or if State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress) (internal quotations omitted); see also, National Right to Life Committee, *Post-Roe Model Abortion Law* (June 15, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf> (prohibiting "knowingly or intentionally giving information to a pregnant woman, or someone seeking the information on her behalf, by telephone, the internet, or any other medium of communication, regarding self-administered abortions or the means to obtain a[n] illegal abortion, knowing that the information will be used, or is reasonably likely to be used, for a self-administered abortion or an illegal abortion").

<sup>254</sup> See, e.g., Alisha Haridasani, *No Time to be a Child*, New York Times (Sept. 25, 2021), <https://www.nytimes.com/2021/09/25/us/young-girls-caregiving-covid.html>.

<sup>255</sup> NWLC Pregnant or Parenting Students Report, *supra* note 12, at 1.

<sup>256</sup> Data is specific to women ages 18 and older. National Women's Law Center calculations based on August 2021–May 2022 monthly Current Population Survey (CPS) microdata samples, accessed through Sarah Flood *et al.*, Integrated Public Use Microdata Series Current Population Survey (IPUMS CPS): Version 9.0, <https://doi.org/10.18128/D030.V9.0>.

<sup>257</sup> NWLC calculations using February 2020–April 2022 monthly Current Population Survey (CPS) microdata samples, accessed through Sarah Flood *et al.*, Integrated Public Use Microdata Series Current Population Survey (IPUMS CPS): Version 9.0, <https://doi.org/10.18128/D030.V9.0>. Caring for children on their own means Black women who indicated the age of their own youngest child in the household is under 18 and indicated they are married but their spouse is not present, separated, divorced, widowed, or never married/single.

<sup>258</sup> *Id.* "In school" means they are in high school or college either part time or full time. "Parents" are those with their own kids living in their household.

recipient treats parenting students of a different sex.<sup>259</sup> It is also well established that parenting students experience discrimination that relies on outdated sex stereotypes about caregiving, such as the idea that women must be responsible for home and child care. Additionally, the EEOC has long found that harmful gender stereotypes relating to family responsibilities violate Title VII.<sup>260</sup>

We also note that the Department's proposal would 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 define "family status," as existing regulations and guidances do not.

Finally, under the current rules, which are very similar to the proposed rules in their treatment of parental status, 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. Therefore, we urge the Department to make clear that providing reasonable modifications and supports to students affected by pregnancy and related conditions or students with caregiving responsibilities does not constitute discrimination against those not so affected or without such responsibilities.

**C. The Critically Important Proposed Rules on Reasonable Modifications for Pregnancy and Related Conditions, Voluntary Leaves of Absence, and Lactation Supports Should Be Further Strengthened.**

***Participation***

Despite current § 106.40(b)(3) and proposed § 106.40(b)(1) requiring that pregnant students can only be placed in separate educational programs or activities if their participation in such programs or activities is voluntary, pregnant and parenting students, particularly those in high school, are routinely forced, coerced, or pressured into inferior alternative education programs. Additionally, there is currently no repository of information on which districts or schools have separate programs or services for pregnant and parenting students or the quality of those offerings.<sup>261</sup> We urge the Department to explicitly prohibit schools from requiring pregnant or parenting students to participate in separate programs and to specify that such programs must be "substantially equal" (not merely "comparable") in "purpose, scope, and quality" to those offered to students who are not pregnant or parenting.

We also support proposed § 106.40(b)(6) 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

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<sup>259</sup> *E.g., Tingley-Kelley v. Trustees of Univ. of Pennsylvania*, 677 F. Supp. 2d 764 (E.D. Pa. 2010).

<sup>260</sup> *See, e.g.,* Equal Employment Opportunity Commission, *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities>.

<sup>261</sup> NWLC CRDC Comment, *supra* note 53, at 32.



participate in a program or activity, except in cases where *all* students are required to provide such certification. This would prevent recipients from relying on generalizations about pregnancy to only require pregnant students to prove they are physically capable of participating in a program or activity.

We also strongly support the Department providing new regulatory clarity regarding reasonable modifications, voluntary leave absence, and lactation spaces in § 106.40(b)(3) (as discussed further below), but we urge the Department to clarify that the obligation to provide reasonable modifications to address pregnancy or related conditions; to allow a student affected by pregnancy or related conditions to take a voluntary leave of absence; and to ensure the availability of a lactation space are obligations of the *recipient*, not just personal obligations of the Title IX coordinator. Proposed § 106.40(b)(3)(ii), (iii), and (iv) specifically charge the Title IX coordinator (and only the Title IX coordinator) with these obligations, which may lead recipients to assert that no other agent or employee of the recipient has a responsibility to comply with these provisions or that the recipient is not responsible for any failure of the Title IX coordinator to meet these obligations.

### **Absences**

Punitive absence policies push pregnant and parenting students out of school by disciplining them for missing class for medical appointments, their own medical recovery and needs, when their children are ill, or if child care arrangements fall through. For example, in a 2017 survey, high school girls who are pregnant or parenting (54 percent) were more likely than girls overall (25 percent) to report they had missed 15 days or more of school in a year.<sup>262</sup> When individual schools or instructors have the discretion to create their own attendance policies, it is likely that pregnant and parenting students' needs will not be considered. Pregnant and parenting students should not have to choose between their health and their education.

We support proposed § 106.40(b)(3)(iii) 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. 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, proposed § 106.40(b)(4) 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, pursuant to § 106.40(b)(3)—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 discretionary determination that providing such breaks amounts to a “fundamental alteration” of the educational program. Under the proposed rule, students in higher education who take a medically necessary “leave” because a request for a shorter “absence” is denied may also have to deregister during the leave, which may result in ineligibility for critical benefits like housing and healthcare. Therefore, we urge the Department to require schools to presume that medically necessary absences (e.g., prenatal care, lactation breaks, abortion care) are “reasonable modifications” and must be granted.

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<sup>262</sup> NWLC Pregnant or Parenting Students Report, *supra* note 12, at 7.

The proposed rules' treatment of absences 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. Our recommendation would be an expansion of the proposed rules (where the only students entitled to absences would be those who are pregnant, lactating, or recovering from childbirth) and would be consistent with the Department's definition of "parental status" at § proposed 106.2, which would apply to all parents of minor children and disabled adults.

In addition, the Department should not deprive pregnant and postpartum workers<sup>263</sup> at educational institutions of the protections afforded to students. Allowing employers to deny pregnant and postpartum workers job-protected time off would further enshrine the stereotype that motherhood and work are incompatible, enacting the very sex-based exclusion Title IX was meant to eradicate. We urge the Department to clarify at proposed § 106.57(c) that workers are entitled, at minimum, to a voluntary leave of absence while medically necessary, including but not limited to, leave to recover from childbirth; and any other medically necessary time off, such as for pre- and post-natal appointments, and bedrest. We also ask the Department to amend proposed § 106.57(d) to state that, to the extent a recipient maintains a leave policy for employees that is more generous, the recipient must permit the employee to take leave under that policy instead if the employee so chooses.

### ***Reasonable modifications***

Proposed §§ 106.40(b)(3), 106.40(b)(3)(ii), and 106.40(b)(4) would require schools to "promptly" make "voluntary and reasonable modifications" 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. We appreciate the requirement that the modifications must be voluntary, but we note that as written, the language of the proposed rules is somewhat vague as to what is meant by the term and whether it refers to the voluntary acceptance of the modification by the student or the voluntary provision of the modification by the recipient. Therefore, we encourage the Department to explain what is meant by "voluntary" by explicitly stating in the regulations that a recipient shall not force a student to accept a modification that the student does not want or need. Additionally, 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 set out above, we urge the Department to require educational institutions to presume that medically necessary absences (e.g., for prenatal care, lactation breaks, abortion care) are inherently "reasonable" modifications and must be granted. Additionally, the Department should clarify that if a modification turns out to be ineffective or a requested modification would "fundamentally alter" 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.

It is a common occurrence that a pregnant person has or develops a disability during or as a result of their pregnancy (or as a result of their pregnancy-related condition) and some of these disabilities endure post-partum. In fact, several complaints filed to the Department's Office for Civil Rights involve pregnant students who alleged violations under Title IX *and* federal disability laws including the IDEA or Section

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<sup>263</sup> See *supra* notes 102-107 and accompanying text.

504.<sup>264</sup> Upon finalizing the regulations, we urge the Department to issue supplemental guidance instructing schools that, consistent with proposed § 106.8(e), if a the Title IX coordinator is administering reasonable modifications to a pregnant student with a documented disability, then the school is required to consult with the student’s IEP team and/or Section 504 team.

We oppose proposed § 106.57(c), which would make the right of employees<sup>265</sup> who are pregnant or have a related condition to modifications dependent on the rights of employees with temporary disabilities to access modifications. The Department should extend affirmative rights to modifications to *employees* who are pregnant or have a related condition, just as proposed § 106.40(b) would grant affirmative rights to modifications to students who are pregnant or have a related condition. 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 have affirmative rights under Title IX that are independent of other civil rights laws. Moreover, many students, particularly at institutions of higher education, hold paid employment on campus. It would defy logic to guarantee a pregnant student access to a stool to rest while studying in their science lab, but not to guarantee them the same modification while they perform wage labor as a receptionist for the science department at their university. In both contexts, the modification is necessary to ensure that they can fully access the educational environment. Therefore, we urge the Department to issue a final rule clarifying that employees, like students, have an affirmative right to reasonable modifications to the recipient’s policies, practices, and procedures, including but not limited to: changes in physical space or supplies; elevator access; adjustments to uniform requirements or dress codes; adjustment of shift start-end time; reduced or modified work schedule; help with manual labor or limits on lifting; desk duty or light duty; and temporary transfer to an alternate position. As with students, such modifications must be provided on an individualized and voluntary basis.

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. Under the proposed rules, the only individuals entitled to modifications would be those who are pregnant, lactating, or recovering from childbirth. Our recommendation would make modifications available to all types of caregivers and would be consistent with the Department’s definition of “parental status” at proposed § 106.2, which would apply to all parents of minor children and disabled adults.

The proposed rules do not clarify whether schools are allowed to require medical documentation in order to grant requests for reasonable modifications.<sup>266</sup> Where the modification is obvious (*e.g.*, more frequent bathroom or lactation breaks, larger desk), we urge the Department to prohibit schools from requiring students or workers to obtain a certification from their healthcare provider in order to receive that modification and to explicitly state in the final rule that medical documentation is unnecessary in the vast majority of cases. Forcing pregnant and parenting students and workers to get medical documentation for reasonable modifications, particularly very routine or obvious modifications such as bathroom breaks or a larger desk, is unnecessarily burdensome.

We also ask the Department to add more specific examples of modifications for pregnant and parenting students and workers at proposed § 106.40(b)(4)(iii), including accessible parking, academic counseling,

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<sup>264</sup> See *e.g.*, OCR Findings on Salt Lake Community College, *supra* note 250; OCR Findings on CSU East Bay, *supra* note 250.

<sup>265</sup> Again, this should extend to non-employee workers as well because Title IX protects any “person.” See *supra* notes 102-107 and accompanying text.

<sup>266</sup> 87 Fed. Reg. at 41525-41526

homework assistance to address medically necessary absences, referral to child care or preschool options, and assistance in accessing social assistance programs (e.g., public health care, nutrition assistance)

Finally, we support proposed §§ 106.40(b)(3)(iv), 106.40(b)(4)(iii), and 106.57(e), which would require schools to give lactating students and employees reasonable breaks and a clean, private non-bathroom space to pump breastmilk or breastfeed. We request the Department clarify that lactation spaces must include a flat surface and a chair,<sup>267</sup> and nearby access to running water and a refrigerator in to store expressed milk. The Department should also explicitly state that lactation spaces must be in reasonable proximity to the student’s place of study or worker’s specific place of work. These are the bare minimum features of a lactation space for it to be functional. What’s more, nearly all recipients under Title IX are already required to provide a lactation space to certain employees under the Fair Labor Standards Act.<sup>268</sup> As such, the cost of making these spaces more broadly available should be minimal.

The Department should also clarify in the regulations and in supplemental guidance that if multiple lactating students or workers need access to a lactation space at the same time, recipients should discuss various options with all parties to create a solution that meets everyone’s needs. Such options can include using a signage or scheduling system or creating a multi-person space by placing partitions or screens in the space.<sup>269</sup>

We urge the Department to clarify that students and workers still have a right to express milk or breastfeed in places other than designated lactation spaces, if they wish. For example, it may be easier for a professor to express milk in their office, or for a student to nurse at a child care facility. Such a regulation would align with laws in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands that allow lactating people to breastfeed in any public or private place they are otherwise allowed to be.<sup>270</sup> This language gives agency to the lactating person and challenges outdated messages that it is shameful or indecent to express breastmilk in public. We also suggest the Department adopt more gender-neutral language, such as “lactating person,” “express milk,” and “nursing.”

#### **D. The Proposed Rules’ Protections Against Sex-Based Harassment Provide Important Protections for Pregnant and Parenting Students.**

We support proposed § 106.40(b)(3)(i)(F) stating that schools must address harassment based on pregnancy or related conditions as a form of sex-based harassment, and we offer the same comments here as for sex-based harassment detailed above in **Part I** (p.2-44). 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 (including termination of pregnancy) are not used to support prosecutions related to pregnancy outcomes, including abortion. The Department should also clarify how the Supreme Court’s decision in *Dobbs* interacts with other privacy laws affecting students, like the Family Educational Rights and Privacy Act (FERPA) and the

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<sup>267</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) (last visited Sept. 9, 2022), <https://www1.nyc.gov/site/cchr/law/lactation-faqs.page> [hereinafter NYC Lactation Accommodations FAQ].

<sup>268</sup> 29 U.S.C. 207(r)(1).

<sup>269</sup> NYC Lactation Accommodations FAQ at #21.

<sup>270</sup> National Conference of State Legislatures, *State Breastfeeding Laws* (last visited Sept. 9, 2022), <https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx>.

Health Insurance Portability and Accountability Act (HIPAA) and clarify that a student is protected by FERPA if they disclose an abortion to an academic counselor or mental health care provider.

Furthermore, as explained above in **Part III.B: Parental, family, or marital status** (p.55-56), 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. The Proposed Rules Appropriately Address Not Only Sex-Based Harassment, but also the Range of 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. We support an approach that recognizes sex-based harassment as one form of sex discrimination rather than treating it as though it is a fundamentally separate issue. 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** (p.2-44).

##### **B. The Proposed Rules Should Provide Stronger Protections Against Sex-Based Treatment or Separation.**

#### **De minimis harm**

We support proposed § 106.31(a)(2) 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. However, the only specific example in proposed § 106.31(a)(2) of what causes “more than *de minimis* harm” is preventing someone from participating in an education program or activity consistently with their gender identity. We urge the Department to provide examples in supplemental guidance of sex-based treatment or separation that causes “more than *de minimis* harm.” (See **Part II.C** at p.47-49 above for a more detailed discussion.)

#### ***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 frequently reinforce traditional notions of white femininity and the idea that girls’ bodies are “shameful” or “vulgar.”<sup>271</sup> They can also 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>272</sup> And they often force transgender, nonbinary, and gender-nonconforming students to conform narrowly to traditional gender norms.<sup>273</sup> In addition, dress and grooming codes are often rooted in Eurocentric standards and treat common Black protective hairstyles—

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<sup>271</sup> National Women’s Law Center, *Dress Coded: Black Girls, Bodies, and Bias in DC Schools* 12–14, 19, 22 (2018), <https://nwlc.org/resource/dresscoded> [hereinafter NWLC Dress Code Report].

<sup>272</sup> *Id.* at 1, 20, 27.

<sup>273</sup> *Id.* at 12, 27.

such as braids, locs, hair wraps, Bantu knots,<sup>274</sup> or bandanas<sup>275</sup>—as unprofessional and disrespectful. These codes also often include hair length requirements that disproportionately harm Indigenous students, Sikh students, and other students of color for whom wearing long hair may be an important part of their identity.<sup>276</sup> Enforcement of sex discriminatory dress codes against girls and gender-nonconforming students through exclusionary discipline forces them to miss important class time; sends the message that they do not belong; subjects them to significant public humiliation, stress, and anxiety; and damages their confidence, psychological well-being, and sense of belonging in school.<sup>277</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>278</sup>

### **Single-sex regulations**

Sex-segregated classes, activities, and schools often rely on debunked misinformation suggesting there are neurological differences between girls and boys requiring different learning environments. In reality, this rationale for sex-segregated education is rooted in sex-based stereotypes; numerous studies by reputable neuroscientists and child development experts have consistently found that cognitive abilities and learning needs differ more *within* groups of girls and boys than *between* them.<sup>279</sup> A 2014 analysis of 184 studies by the American Psychological Association, representing testing of more than 1.6 million PK–12 students, also concluded that sex-segregated education provides no benefits over coeducational schooling.<sup>280</sup> Unfortunately, in 2006, the Department issued Title IX regulations on single-sex education that resulted in a proliferation of sex-segregated classes and schools. As of 2018, nearly 800 coeducational public schools today have at least some sex-segregated programming at the PK–12 level, including academic classes.<sup>281</sup> The United States also has more than 130 all-girl or all-boy public schools, including public charter and magnet schools.<sup>282</sup> Although recent single-sex programs for Black boys have

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<sup>274</sup> *Id.* at 10; Frederick Reese, *Natural Hair Bias Is the Latest Tool Being Used to Criminalize Black Girls, Marginalize Black Women*, Atlanta Black Star (June 1, 2007), <https://atlantablackstar.com/2017/06/01/natural-hair-bias-is-the-latest-tool-being-used-to-criminalize-black-girls-marginalize-black-women/>; Vanessa King, *Race, Stigma, and the Politics of Black Girls Hair* (2018), <https://cornerstone.lib.mnsu.edu/cgi/viewcontent.cgi?article=1762&context=etds>.

<sup>275</sup> See Amira Rasool, *A High School Student Was Arrested and Suspended for Wearing a Bandana*, Teen Vogue (Aug. 16, 2018), <https://www.teenvogue.com/story/high-school-student-arrested-wearing-bandana>; see also NWLC Dress Code Report, *supra* note 271, at 11.

<sup>276</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>277</sup> Emily K. Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-term Education Outcomes* 27 (2018), <https://strategiesforyouth.org/sitefiles/wp-content/uploads/2019/10/PatrollingPublicSchools.pdf>; Kelly Wallace, *Do school dress codes end up body-shaming girls?*, CNN Health (May 30, 2017), <https://www.cnn.com/2017/05/30/health/school-dress-codes-body-shaming-girls-parenting/index.html>; Pooja Patel, *Dress Codes Are Body-Shaming and Sexist*, Nat'l Eating Disorders Ass'n (2015), <https://www.nationaleatingdisorders.org/blog/dress-codes-are-body-shaming-and-sexist>.

<sup>278</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>279</sup> NCWGE Report, *supra* note 230, at 44.

<sup>280</sup> Erin Pahlke *et al.*, *The Effects of Single-Sex Compared with Coeducational Schooling on Students' Performance and Attitudes: A Meta-Analysis*, 140(4) Psychological Bulletin 1042-1072 (2014), <https://www.apa.org/pubs/journals/releases/bul-a0035740.pdf>.

<sup>281</sup> Sue Klein *et al.*, *Tracking Deliberate Sex Segregation in U.S. K-12 Public Schools* 1, Feminist Majority Foundation (2018), <https://feminist.org/wp-content/uploads/2020/06/SexSegReport2018.pdf>.

<sup>282</sup> *Id.*

been created with the stated goal of remediating unmet needs and discriminatory history, these programs ignore the same history and unmet need of Black girls.<sup>283</sup>

We were disappointed that the proposed rules do not address the 2006 single-sex 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. The Proposed Rules Should Ensure That Required Notices of Nondiscrimination Provide Greater Clarity and Accuracy Regarding Recipients' Obligations and Commitments.**

#### ***Enumeration of protected classes***

We support proposed § 106.8(c) requiring schools to adopt and publish a policy against sex discrimination and grievance procedures to address complaints of sex discrimination. We also ask the Department to require schools to notify students, families, employees, applicants, and other required groups that the nondiscrimination policy and grievance 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 (including childbirth, termination of pregnancy, and lactation), so that they know which types of conduct constitute sex discrimination and when they can ask their schools for help.<sup>284</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>285</sup> current § 106.12(c) allows 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. Second, current § 106.12(b) assures schools that they may assert a religious exemption *after* they are already under investigation by the Department for violating Title IX. This means students and employees are not entitled to any prior notice of a school’s intent to discriminate based on sex despite current § 106.8(b)(1) and proposed § 106.8(c)(1) requiring schools to notify students, their families, employees, and applicants of schools’ anti-sex discrimination policies.

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<sup>283</sup> E.g., Letter from African American Policy Forum to President Barack Obama, *Why We Can't Wait: Women of Color Urge Inclusion in 'My Brother's Keeper'* (June 17, 2014; updated May 4, 2021), <https://www.aapf.org/post/why-we-can-t-wait-women-of-color-urge-inclusion-in-my-brother-s-keeper>; Maryland State Department of Education, *Transforming the Culture of Maryland's Schools for Black Boys* (April 2021), <https://www.marylandpublicschools.org/stateboard/Documents/2021/0427/MSDETTransformCultureforBlackBoy.pdf> (relying on Sax and Gurian's theories to recommend establishing single-sex classes targeting Black boys); American Civil Liberties Union, *Leaving Girls Behind: An Analysis of Washington D.C.'s "Empowering Males of Color" Initiative* (May 2016), <https://www.aclu.org/report/leaving-girls-behind>.

<sup>284</sup> 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>285</sup> 20 U.S.C. § 1681(a)(3).

Unfortunately, the proposed rules do not address these changes. We urge the Department to swiftly issue proposed Title IX regulations that (i) rescind the 2020 changes to § § 106.12(c) and (ii) change § 106.12(b) to require schools to notify the Department of any religious exemption claims and to publicize any claimed exemptions in their required nondiscrimination notices.

## **V. Directed Questions**

### **A. Question 1: FERPA and Title IX.**

See above discussion on protecting complainant privacy when providing supportive measures (p.25), when providing notice of the allegations (p.34), when allowing advisors and support persons to participate (p.37), when providing the parties access to evidence (p.39), and when providing notice of the determination (p.42-43).

In addition, we ask the Department to consider ways to protect complainant privacy when a school has notice of possible sex discrimination. Given the complexities that can arise based on employee obligations to report possible sex-based harassment or other sex discrimination to the Title IX coordinator, the Department should issue supplemental guidance instructing schools on how to respond to possible sex-based harassment or other sex discrimination based on sexual orientation or gender identity while protecting the privacy and safety of LGBTQI+ students and employees, who may not wish to be outed to their parents or the school; this issue is especially fraught for minor LGBTQI+ students who attend schools in hostile states with anti-LGBTQI+ laws on the books, where creating a record of a students' LGBTQI+ status could expose them to harm or their families to criminalization.<sup>286</sup> Similarly, we also ask the Department to issue supplemental guidance instructing schools on how to protect the privacy and safety of pregnant students and employees, who are today at increased risk of criminalization if they seek an abortion or have a miscarriage, or provide support or assistance to those seeking an abortion. Such guidance should address the intersections of Title IX obligations with FERPA, HIPAA, and other privacy requirements and considerations, including considerations related to data minimization, protection, and consent. We offer the following categories of hypothetical scenarios to the Department to outline our concerns:

*1. Pregnancy and LGBTQI+ discrimination:* If an employee with reporting obligations under the Title IX rules witnesses firsthand discrimination on the basis of a person's LGBTQI+ status or pregnancy status, that employee would be required to report it to the Title IX coordinator—even without the victim's consent. For example, suppose Dean A and Dean B are in the faculty lounge of University X, a religiously affiliated school that opposes abortion no matter the circumstances, located in a state that has recently criminalized abortion. Dean A tells Dean B about a pregnant student who disclosed her pregnancy to get excused absences from Dean A's class, and that six weeks later, the student tearfully told Dean A she had a miscarriage and needed a third absence to be excused. Dean A tells Dean B that she thinks the student actually had an abortion and says, "If she keeps missing my lectures, I'm just going to fail her." Dean A also tells Dean B that she wants to report the student to the local police to investigate her suspicions about the abortion. Or, suppose a staff member observes a teacher repeatedly using derogatory language, or gendered terms of address to which a particular LGBTQI+ student has repeatedly objected. The staff member is concerned when they observe that the teacher flatly rejects the

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<sup>286</sup> For example, if a transgender student lives in a state that criminalizes access to gender-affirming care experiences discrimination once they begin transitioning and this is reported to the Title IX coordinator, this report would create a written record that would put their family at risk of criminalization.



student's concerns and starts becoming hostile toward the student in class, which prompts the staff members to inform the high school principal. Under the proposed rules, the high school principal would have to report the possible sex discrimination to the Title IX coordinator, who would also disclose the discrimination faced by the minor student to their parents. Both examples would result in the school having a written record of the victim's LGBTQI+ status or pregnancy status (and, in the case of a minor experiencing discrimination, result in parental notification). While we recognize the importance of schools being required to address discrimination against these students, we are concerned that this would potentially put these students at risk, particularly in an institution that opposes abortion access or LGBTQI+ identity as a matter of institutional policy. For example, in the case where an employee makes a report of pregnancy discrimination against a student who attends school in a state that criminalizes abortions, and that student either has a miscarriage or obtains an abortion, the school would have a record establishing that the student was formerly pregnant. If someone reports the student<sup>287</sup> for getting an illegal abortion, the police could request this school record establishing that they were formerly pregnant—creating possible broad criminal exposure. And, where an employee makes a report of discrimination against an LGBTQI+ student to the Title IX coordinator, this would result in notice to the student's family in the PK-12 context, which would expose their LGBTQI+ status and risk their safety if their family is not supportive.

*2. Other sex discrimination that discloses LGBTQI+ or pregnancy status:* A student may approach an employee with Title IX reporting obligations to disclose that they were sexually assaulted or experienced dating violence by their partner, and in doing so, either disclose an LGBTQI+ identity, a queer relationship, or a pregnancy. In any of these situations, the employee would have to disclose the sexual assault or dating violence to the Title IX coordinator. Here, while potentially not the focus of a Title IX violation, a description of the incident could nevertheless risk creating a written record of the survivor's LGBTQI+ status (for example, if the employee also discloses the respondent's identity) and/or pregnancy (for example, the employee may mention that the survivor has become pregnant as a result of the assault).

*3. An LGBTQI+ person or pregnant person asks for supportive measures for sex discrimination:* An LGBTQI+ person or pregnant person may approach the Title IX coordinator to access supportive measures in the wake of LGBTQI-related discrimination (for example, to change their schedule so they do not have to continue attending class with their harasser) or pregnancy-related discrimination (for example, to obtain time off from school to go to a prenatal appointment, get an abortion, or recover from a miscarriage). Here, actions by staff or administrators in assessing and implementing supportive measures could lead to, or sometimes effectively require, disclosure and documentation of pregnancy or LGBTQI+ status—again with potential consequences related to both individual-level discrimination and state laws or policies that target LGBTQI+ status or pregnancy.

## **B. Question 2: Recipient Obligations.**

See above discussion in **Part I** (p.2-44), including our recommended reporting requirements for employees at institutions of higher education when they have notice of possible sex discrimination (p.14-18).

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<sup>287</sup> We also acknowledge that, in the worst-case scenario, the person reporting the formerly pregnant student may be the Title IX coordinator.

**C. Question 3: Single Investigator Model**

See above discussion in **Part I.D** (p.41-42).

**D. Question 4: Standard of Proof.**

See above discussion in **Part I.D** (p.42).

Thank you for your consideration of our recommendations. If you have any questions, please contact us as set out below.

Thank you,  
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