

September 12, 2022

Submitted via [www.regulations.gov](http://www.regulations.gov)

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

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

**Re: ED Docket No. 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:

As state legislators, we are pleased to write in support of the Department of Education's Notice of Proposed Rulemaking regarding Title IX regulations on sex discrimination—including sex-based harassment, anti-LGBTQI+ discrimination, and discrimination against pregnant and parenting students.

Sex-based harassment in schools is prevalent, underreported, and can profoundly disrupt students' access to education. For example, one in five girls ages 14-18 have been kissed or touched without their consent, and one in four women are sexually assaulted in college, but only 2 percent of girls ages 14-18 and 12 percent of college women who are sexually assaulted report the incident to their schools.<sup>1</sup> When students do report sex-based harassment, they are often ignored, suspended or expelled, or pushed out of school. For example, more than one in three sexual assault survivors are forced to drop out of college.<sup>2</sup> Girls and women of color, LGBTQI+ students, pregnant and parenting students, and disabled students often face stereotypes casting them as less credible when they report sex-based harassment, which makes more likely for them to be punished or ignored when they ask for help.

LGBTQI+ students also face significant barriers to education. In 2019, more than 80 percent of LGBTQI+ students were verbally harassed and over one-third were physically harassed because of their identity.<sup>3</sup> But when they ask for help, more than 20 percent were told to change their own behavior by, for example, changing the way they dressed, and over 7 percent were disciplined after reporting their victimization to school staff.<sup>4</sup> Transgender students experience some of the highest levels of discrimination, including an unprecedented wave of attacks on their rights through the state laws, such as anti-trans sports bans. Among transgender adults who were out or perceived as transgender in K–12 school, more than one in six were pushed out of at least one school because of the anti-transgender mistreatment they faced.<sup>5</sup>

Finally, discrimination against pregnant and parenting students is far too common. More than 2 percent of teens ages 15-19 give birth to a child,<sup>6</sup> and 22 percent of college students are parents, with 44 percent of

---

<sup>1</sup> AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ix, A7-27 (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>; National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 2, 3 (2017), <https://nwl.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

<sup>2</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>3</sup> GLSEN, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 28 (2020), <https://www.glsen.org/research/2019-national-school-climate-survey>.

<sup>4</sup> *Id.* at 35-37.

<sup>5</sup> National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 12 (2017), <http://www.ustranssurvey.org/reports>.

<sup>6</sup> Department of Health & Human Services, Centers for Disease Control & Prevention, National Center for Health Statistics, *NCHS Data Brief, Continued Declines in Teen Births in the United States* (2015) 1, <https://www.cdc.gov/nchs/data/databriefs/db259.pdf>.

them working full time while enrolled.<sup>7</sup> Despite their additional responsibilities, parenting college students tend to have higher GPAs than their non-parenting peers.<sup>8</sup> Unfortunately, punitive attendance policies and other lack of support can push pregnant and parenting students out of school if they are not accommodated when they miss class for prenatal appointments, childbirth, their children’s medical appointments, child care, or lactation.<sup>9</sup> Nearly one-third of girls who do not complete high school report that becoming pregnant was a primary factor in their decision to leave school.<sup>10</sup> Student parents end up with lower levels of college enrollment and completion and higher levels of debt upon graduation.<sup>11</sup>

We are committed to protecting students in our states and across the country from all forms of sex discrimination. To that end, we offer the following recommendations regarding the proposed Title IX rules:

We urge the Department to keep these proposed provisions in the final Title IX rules:

- **Sex-based harassment.** Require schools to address sex-based harassment as long as it is so “severe or pervasive” that it “limits” a student’s access to education, even if the harassment occurred off campus or abroad, and even if the complainant has since left the school, as long as they were participating or attempting to participate in a school program or activity when they experienced the harassment (proposed §§ 106.2, 106.11).
- **Supportive measures.** Require schools to take “prompt and effective action” in response to possible sex discrimination, including by offering supportive measures to all complainants—regardless of whether they request an investigation or informal resolution, and even if their complaint is dismissed (proposed §§ 106.44(a), 106.44(g), 106.45(d)(4)(i)).
- **Retaliation.** Prohibit schools from retaliating against students who report sex discrimination or who participate in a Title IX investigation, including by disciplining them for collateral conduct (e.g., alcohol or drug use, self-defense); or for making a “false” statement based *solely* on the school’s decision of whether sex discrimination occurred (proposed §§106.45(h)(5), 106.71(a)).
- **LGBTQI+ status.** Define sex discrimination to include discrimination on the basis of sex stereotypes, sex characteristics (including intersex traits), sexual orientation, and gender identity, (proposed § 106.11), including preventing a student from participating in an education program or activity consistent with their gender identity (proposed § 106.31(a)(2)).
- **Pregnancy or related conditions.** Prohibit schools from discriminating based on pregnancy or related conditions, which includes childbirth, termination of pregnancy, and lactation (proposed §§ 106.2, 106.40(b)(1)). Require schools to allow these students to participate voluntarily in a separate portion of their school’s program, take a leave of absence for as long as medically necessary (or longer), and take lactation breaks in a clean, private, non-bathroom space (proposed §§ 106.40(b)(1), 106.40(b)(3)(iii)-(iv), 106.40(b)(4)(iii)). Prohibit schools from requiring these students to provide a medical certification about their ability to participate in a school program, unless *all* students must provide such certification (proposed § 106.40(b)(6)). Require schools to make “voluntary and reasonable modifications” for a student’s or employee’s pregnancy or related condition, unless a modification is “so significant” that it “alters the essential nature” of the school’s program or activity (proposed § 106.40(b)(4)-(4)(i)).
- **State/local protections.** Allow schools to follow state or local laws that provide greater protections against sex discrimination (proposed § 106.6(h)).

---

<sup>7</sup> Government Accountability Office, *Higher Education: More Information Could Help Student Parents Access Additional Federal Student Aid* 9 (Aug. 2019), <https://www.gao.gov/assets/gao-19-522.pdf>.

<sup>8</sup> Institute for Women’s Policy Research, *Parents in College: By the Numbers* 1 (Apr. 2019), <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers>.

<sup>9</sup> National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant & Parenting* 6-7 (2017), [https://nwlc.org/wp-content/uploads/2017/04/Final\\_nwlc\\_Gates\\_PregParenting.pdf](https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf).

<sup>10</sup> Kate Perper *et al.*, *Diploma Attainment Among Teen Mothers*, *Child Trends* 6-7 (2010), <https://www.childtrends.org/publications/diploma-attainment-among-teen-mothers>.

<sup>11</sup> *Id.* at 6-7; Wanda S. Pillow, *Unfit Subjects: Educational Policy & the Teen Mother* 117 (2004).

We urge the Department to strengthen certain provisions:

- **Confidential employees.** Require (instead of merely allowing) schools to designate “confidential employees,” who are not required to report possible sex discrimination to the Title IX coordinator.
- **Supportive measures.** Require schools to provide a specific supportive measure if a party requests that measure and it is “reasonably available,” and to offer additional supportive measures if the school is aware that currently offered measures are ineffective.
- **Serial harassers.** Clarify that when a school chooses to dismiss a complaint because the respondent has left the school, it must take additional “steps” that may include determining whether there were other victims and whether school staff helped cover up the harassment.
- **Retaliation.** Clarify that retaliation includes disciplining a complainant for conduct that the school knows or should know “results from” the discrimination (*e.g.*, missing school, expressing trauma, telling others about being harassed); disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (*e.g.*, a disciplined respondent files a counter-complaint against their victim alleging the victim was the actual harasser); requiring a complainant to leave a school program after reporting sex discrimination; or requiring a complainant to enter a confidentiality agreement to access their Title IX rights.
- **Questioning parties and witnesses.** Provide further guidance as to how institutions of higher education can conduct questioning regarding sex-based harassment while minimizing reliance on cross-examination and live hearings (*e.g.*, having a decision-maker ask questions of parties and witnesses in individual meetings, including questions submitted by the other party).
- **Appeals.** Require K-12 schools to offer appeals on an equal basis to both parties (as the proposed rules already require for institutions for higher education).
- **Anti-transgender harassment.** Clarify that harassment based on a student’s gender identity includes *intentional* misuse of names and pronouns (versus making an error and correcting it).
- **Pregnancy or related conditions.** Require schools to presume that medically necessary absences (*e.g.*, for prenatal care, lactation breaks, abortion care) are inherently “reasonable” modifications and must be granted. Prohibit schools from forcing students and employees to accept a modification that they do not want or need. If a modification is not available or turns out to be ineffective, require schools to identify other modifications that would meet the student’s or employee’s needs. Prohibit schools from forcing students who are pregnant or have a related condition to participate in a separate portion of their school’s program or activity. Prohibit schools from disciplining or referring students to law enforcement based on termination of pregnancy.
- **Parental, family, or marital status.** Prohibit discrimination based on parental, family, or marital status (instead of prohibiting it only when such discrimination applies differently to people based on gender) (proposed § 106.40(a)).
- **Protected people.** Use the term “person” (or “worker,” if applicable) in the regulations when describing who Title IX protects. This is consistent with the Title IX statute, which prohibits sex discrimination against any “person” under an “education program or activity,” including visitors and independent contractors (not just students and employees).<sup>12</sup>
- **LGBTQI+ and pregnant students’ privacy:** Issue guidance on protecting the privacy and safety of LGBTQI+ and pregnant students and employees, so that school records are not used to out an LGBTQI+ individual or, in states where abortion is criminalized, to prosecute a pregnant individual who had an abortion or miscarriage.

---

<sup>12</sup> 20 U.S.C. § 1681(a).

We also oppose some of the Department’s proposals and urge you to do this instead:

- **Standard of proof.** Require schools to use the preponderance of the evidence standard in Title IX investigations (instead of allowing schools to use the clear and convincing evidence standard).
- **Presumption favoring respondents.** Remove the proposed requirement for schools to presume that a respondent is not responsible for sex discrimination until the end of an investigation and to inform both parties of this presumption (proposed §§ 106.45(b)(3), 106.46(c)(2)(i)). This presumption is not required for any other type of school misconduct and exacerbates the harmful and false rape myth that girls and women tend to lie about sex-based harassment.
- **Exclusionary rule.** Remove the proposed exclusionary rule, which would require that, if a party or witness does not respond to a question “related to their credibility,” the school would have to ignore any statement they make that “supports their position” (proposed § 106.46(f)(4)). 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.

Finally, we were disappointed that the Department did not include certain provisions in this Title IX rulemaking and urge you to address these other issues as soon as possible:

- **Athletics.** Issue proposed rules addressing athletics by the end of 2022, with a focus on ensuring inclusion of transgender students in athletics.
- **Religious exemptions.** Issue proposed rules regarding religious exemptions to (i) rescind the 2020 rule that allows non-religious schools to claim religious exemptions, and (ii) require schools to notify the Department of any claimed religious exemption and to publicize any exemptions in their required nondiscrimination notices to students and employees.
- **Dress codes.** Issue proposed rules to prohibit sex-based dress and appearance codes, which disproportionately target and harm girls and women (especially those who are Black or Indigenous) and LGBTQI+ students.
- **Sex-segregated education.** Issue proposed rules to rescind the 2006 rules that resulted in a proliferation of sex-segregated classes and schools, which mostly rely on debunked sex stereotypes about “innate” neurological and developmental differences between girls and boys.

Thank you for your consideration of our recommendations. If you have any questions, please reach out to Rep. Anna Moeller (Illinois) ([stateremmoeller@gmail.com](mailto:stateremmoeller@gmail.com)), Rep. Maggie O’Neil (Maine) ([margaret.oneil@legislature.maine.gov](mailto:margaret.oneil@legislature.maine.gov)), and Rep. Rebecca Kislak (Rhode Island) ([rep-kislak@rilegislature.gov](mailto:rep-kislak@rilegislature.gov)).

Sincerely,

Alana M DiMario  
State Senator  
Rhode Island

Ann M. Williams  
State Representative  
Illinois

Barbara Evans Fleischauer  
State Delegate  
West Virginia

Amanda M Cappelletti  
State Senator  
Pennsylvania

Anna Moeller  
State Representative  
Illinois

Brian J. Feldman  
State Senator  
Maryland

Amy Roeder  
Representative  
Maine

Ariana Kelly  
Delegate  
Maryland

Carol Ammons  
Representative  
Illinois

Celina Villanueva State Senator Illinois	Jennifer Gong-Gershowitz State Representative Illinois	Lisa Bunker State Rep New Hampshire
Charlotte Warren Representative Maine	Jillian Gilchrest State Representative Connecticut	Lisa Subeck Representative Wisconsin
Chris Blazewski Representative Rhode Island	Joe Fitzgibbon Representative Washington	Lois Galgay Reckitt State Representative Maine
Daneyá Esgar Majority Leader Colorado	John Ray Clemmons State Representative Tennessee	Lori K Gramlich State Representative Maine
Daniel Didech State Representative Illinois	Joyce Mason State Representative Illinois	Maggie O'Neil Representative Maine
David Fraser-Hidalgo State Delegate Maryland	Judith S. Schwank State Senator Pennsylvania	Marcia Ranglin-Vassell State Representative Rhode Island
Dawn Euer Senator Rhode Island	Julie von Haefen Representative North Carolina	Mary Jo Daley State Representative Pennsylvania
Deborah Ruggiero State Representative Rhode Island	Kelly Cassidy Representative Illinois	Megan Hunt State Senator Nebraska
Denise Tepler State Representative Maine	Kristen S. Cloutier State Representative Maine	Melanie Sachs State Representative, HD 48 Maine
Elizabeth "Liz" Thomson Representative New Mexico	Laura Sibia Representative Vermont	Mike Schlossberg State Representative Pennsylvania
Erin Sheehan Representative Maine	Laurie Osher State Representative Maine	Nily Rozic Assemblywoman New York
Jani Iwamoto Senator, Assistant Minority Whip Utah	Liana Cassar State Representative Rhode Island	Pamelya Herndon State Representative New Mexico

Park Cannon  
State Representative  
Georgia

Terra Costa Howard  
State Representative  
Illinois

Rachel Talbot Ross  
Assistant House Majority Leader  
Maine

Thom Harnett  
State Representative  
Maine

Rebecca Kislak  
Representative  
Rhode Island

Tiara Mack  
State Senator  
Rhode Island

Rebecca Millett  
State Representative  
Maine

Vicki Doudera  
State Representative  
Maine

Robyn Gabel  
State Representative  
Illinois

Victoria Morales  
State Representative  
Maine

Ryan M. Fecteau  
Speaker  
Maine

Samuel D. Zurier  
State Senator, District 3  
Rhode Island

Sara Gelser Blouin  
Senator  
Oregon

Shari Nacson, LISW-S  
Clinical Social Worker  
Ohio

Sophie Warren  
State Representative  
Maine

Sue Errington  
State Representative  
Indiana

Teresa Tanzi  
State Representative  
Rhode Island