

The SAFER Act



Students' Access to Freedom & Educational Rights

Ensuring Students Are Protected from Discriminatory Harassment



Introduction

Civil rights laws protecting students from discrimination were enacted decades ago, but discriminatory harassment in schools persists at extraordinary rates. Too often, schools fail to provide students—including women and girls, students of color, LGBTQI+ students, and disabled students, who experience especially high rates of sexual misconduct—the support and services they need after experiencing harassment. This lack of support leads to students being denied equal educational opportunities. These injustices occur, in part, because courts have created barriers for student survivors seeking to enforce protections against sex-based harassment under Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally funded education programs and activities. These barriers have been mirrored in interpretations of Title VI of the Civil Rights Act of 1964 (prohibiting discrimination based on race, color, national origin) and Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination based on disability). While Title IX, Title VI, Section 504, and the Age Discrimination Act (Age Act) all prohibit discrimination in schools that receive federal funding, the SAFER Act is needed to strengthen protections against harassment based on sex, race, color, national origin, disability, and age.

Harassment Against Students Is Pervasive and Harmful

Harassment in schools that targets students because of their race, color, national origin, disability, sex (including sexual orientation, gender identity, and pregnancy) is pervasive.

- During the 2020-21 school year, 83.1% of LGBTQI+ students attending school in-person experienced harassment or assault based on their sexual orientation, gender, or gender expression; 50.7% of LGBTQI+ students attending school virtually experienced online harassment or threats based on the same personal characteristics.¹
- 64% of girls who were pregnant or parenting report not feeling safe at school as a barrier to attending school compared to 32% of girls overall.²
- As of 2019, out of all protected classes, race was the most common category of bias motivating campus hate crimes at postsecondary institutions, at 45% of reported hate crimes.³
- Students with disabilities are two to three times more likely to be bullied than their nondisabled peers.⁴

Additionally, women and girls of color, LGBTQI+ individuals, and disabled people experience high rates of sexual harassment in schools, and because of discrimination and bias, are more likely to be disbelieved, blamed, or punished when reporting harassment.⁵

- 21% of girls ages 14-18 have been kissed or touched without their consent, including 56% of girls who are pregnant or parenting, 38% of LGBTQI+ girls, 24% of Latina girls, 23% of Indigenous girls, and 22% of Black girls.⁶

- 53.9% of LGBTQI+ youth ages 13 through 21 have been sexually harassed,⁷ and disabled children are 2.9 times more likely than their peers to be sexually assaulted.⁸
- In college, 59% of women, 65% of transgender and gender-nonconforming students, and 36% of men have experienced sexual harassment since enrolling at their institution of higher education.⁹

When schools fail to protect students from harassment - including by failing to offer supportive measures and remedies that are designed to preserve and restore the educational opportunities of the victim - students often suffer in the form of emotional distress, mental health consequences, lower academic achievement, lost scholarships and financial aid, poor school attendance, and decreased school completion rates.

Know Your IX surveyed student survivors of sexual assault and other forms of harassment¹⁰ and found that 70% of student survivors who reported to their schools stated they experienced adverse effects on their safety and privacy.

- One college student survivor reported that their school's Title IX office refused to provide the student with academic support such as extensions on assignments. As a result, the student said: "I got the worst grades I ever have in my entire life," and that the experience deeply impacted their ability to engage on campus.¹¹
- A high school survivor shared that when she told her school counselor she was uncomfortable being in the same room as her perpetrator for meetings related to a shared program, the counselor recommended she withdraw from the program if she "couldn't handle it."¹²
- A college survivor reported that she was forced into mediation with her perpetrator despite her no contact order against the perpetrator, and said that: "During this process, they refused to remove him from classes/ extracurriculars with me. I had to quit debate and sacrifice a scholarship, had to endure classes with him, and was stalked on campus for nearly a year."¹³

Indeed, instead of taking the safety and privacy needs of survivors seriously, many schools punish survivors:

- Student survivors are more than twice as likely as their peers to be subjected to exclusionary discipline for conduct both related and unrelated to their report of sexual assault.¹⁴
- NWLC's former client, who was fourteen years old when she was sexually assaulted at school multiple times, was suspended along with her assailants for "sexual misconduct" because the school police officer investigating her report did not believe her and coerced her into saying that she was actually a "willing participant" in her own assaults.¹⁵

Too often, survivors are pushed out of school because their schools fail to support them in the wake of their victimization.

- Know Your IX's survey also found that 39% of survivors who reported sexual violence to their schools experienced a substantial disruption in their education. Of them, 27% of survivors took a leave of absence, 20% transferred schools, and nearly 10% withdrew from school entirely.¹⁶
- Other studies show that 34% of college survivors of sexual assault are forced to drop out.¹⁷

The Legal Landscape: Few Student Victims Can Obtain Relief and Support Under Current Litigation Standards

Though federal civil right statutes broadly protect against discrimination, court-created barriers make it unfairly difficult for students to hold their schools accountable for failing to ensure safe learning environments. Decades ago, the Supreme Court created standards for proving unlawful sex harassment under Title IX that are more burdensome than those applicable to workplace sex harassment lawsuits under Title VII of the Civil Rights Act

of 1964.¹⁸ Student plaintiffs must now prove that they were subject to severe *and* pervasive harassment; that a narrow set of high-ranking school employees had actual knowledge of the harassment; and that the school was deliberately indifferent in its response to the harassment. In contrast, in order to recover in a Title VII workplace sex harassment lawsuit, a plaintiff who was harassed by a coworker or other non-supervisor need only show their employer reacted negligently in response to severe *or* pervasive harassment of which the employer knew or should have known. Moreover, in certain instances—such as when a supervisor fires someone because they refuse to submit to sexual advances—Title VII automatically holds an employer liable. Thus, schools are required to do less to address harassment against their students than to address harassment of employees, and young students must suffer worse harassment than adult employees before they are entitled to a remedy in court.

Some lower courts have imposed additional barriers to holding schools accountable for harassment. For example, the “one free rape rule” holds a school liable for its failure to address harassment only if that failure causes the same plaintiff to experience further harassment—even if the school’s non-response hinders a student’s access to education.

Finally, the Supreme Court recently significantly limited relief for complainants filing disability discrimination claims under Section 504 by holding that emotional distress damages were not available to them.¹⁹ Advocates fear courts will apply the same rule to Title VI and Title IX, and indeed, lower courts have begun to apply this holding to Title IX claims.²⁰ For plaintiffs in harassment cases, this often means being walled off from any meaningful remedy, as many of those who experience harassment suffer primarily emotional harms, rather than financial harms.

The SAFER Act’s Solutions

The Students’ Access to Freedom & Educational Rights (SAFER) Act will remove these court-created barriers and allow a return to the spirit, intent, and promise of our civil rights laws’ protections against harassment in schools, by amending Title IX, Title VI, Section 504, and the Age Discrimination Act and:

- Holding schools responsible for harassment by school employees or agents, when the harassment is enabled or assisted by their position of authority exercised.
- Holding schools responsible for failing to respond to harassment when employees or agents knew about the harassment or should have known about it in the exercise of reasonable care.
- Ensuring that schools are responsible for addressing harassment that happens off-campus when that harassment leads to a hostile environment on campus.
- Ensuring schools no longer respond to harassment in insufficient and harmful ways, by requiring them to act reasonably to address and harassment and prevent its recurrence (a more robust requirement than under current law, where schools’ responses are legally sufficient so long as they are not “deliberately indifferent”).
- Rejecting the “one free rape rule” by holding schools responsible when they fail to address harassment, regardless of whether the student experienced further harassment as a result of the school’s failure to respond.
- Ensuring uniform protections for harassment based on sex, race, color, national origin, disability, and age, which also ensures that students experiencing intersectional forms of harassment (e.g., harassment based on being a Black woman, or on being a bisexual girl with a disability) are not subjected to different, conflicting standards for proving different “types” of discrimination.
- Making clear that plaintiffs can recover money damages for emotional distress and punitive damages, under Title IX, Title VI, Section 504, and the Age Act, allowing plaintiffs to receive a full remedy and ensuring that schools are motivated to take harassment seriously.
- Ensuring stronger enforcement of civil rights protections by the Department of Education by allowing its Office for Civil Rights to levy fines against institutions for civil rights violations.
- Ensuring greater transparency of federal investigations of schools for violating civil rights laws by requiring the Department of Education to publish on its website a list of schools under investigation, any sanctions or findings related to the investigation, and any resolution agreement the school enters into with the Department.

The SAFER Act will provide additional crucial protections to student survivors of sexual assault and other forms of sex-based harassment by:

- Requiring schools to provide effective supportive measures and protections against retaliation to student survivors so they can keep learning in the wake of sex-based harassment.
- Investing in Title IX coordinators, training, and more effective responses to sex-based harassment in schools.
- Ensuring greater awareness by K-12 schools of students' experiences with sex-based harassment through climate surveys.
- Ensuring greater transparency of Title IX religious exemptions by requiring the Department of Education to make publicly available a list of schools with Title IX religious exemptions and requiring schools to indicate on their websites if they claim a religious exemption.

The SAFER Act provides stronger protections that help fulfill the promises of civil rights law and ensures a better future for all students' access to education.

¹ Joseph G. Kosciw et al., GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools 19-20* (2021), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

² Kelli Garcia and Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2007), https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf.

³ The other motivating biases include ethnicity, religion, sexual orientation, gender, gender identity, and disability. Nat'l Center for Educ. Statistics, *Hate Crime Incidents at Postsecondary Institutions 4-5* (May 2022), https://nces.ed.gov/programs/coe/pdf/2022/a22_508.pdf. See also Victoria Nelson, Center for American Progress, *Addressing Racial Trauma and Hate Crimes on College Campuses* (Aug. 9, 2019), <https://www.americanprogress.org/article/addressing-racial-trauma-hate-crimes-college-campuses/> (showing that, between 2011 and 2016, there was a 40% increase in college campus hate incidents, with racial bias being the most common motivation behind these hate incidents).

⁴ Marshall, C. A., Kendall, E., Banks, M. E., & Gover, R. M. S. (Eds.). (2009) *Disabilities: Insights from across fields around the world, Vol. 1. The experience: definitions, causes, and consequences*.

⁵ LGBTQ+ students are often perceived as "promiscuous," "hypersexual," "deviant," or "attention-seeking." See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 *Cardozo L. Rev.* 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; 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>. Disabled students are often seen as less credible and may also have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability. See, e.g., 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>; Leigh Ann Davis, *The Arc, People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), <https://www.thearc.org/document.doc?id=3657>. And, schools are also more likely to ignore, blame, and punish women and girls of color who report sex-based harassment due to harmful race and sex stereotypes that label them as "promiscuous," less deserving of protection and care than white women, or simply unable to be a victim of sexual harassment. See, e.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 *Harvard J.L. & Gender* 16, 17, 24-29 (May 15, 2018; revised Aug. 3, 2019), <https://srn.com/abstract=3168909>; Rebecca Epstein et al., Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, 1 (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>; Katherine Giscombe, *Sexual Harassment and Women of Color*, *Catalyst* (Feb. 3, 2018), <http://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color>.

⁶ 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>. In addition, 6% of girls ages 14-18 have been forced to have sex when they did not want to (i.e., raped), including 15% of LGBTQ+ girls, 11% of Indigenous girls, 9% of Black girls, and 7% of Latina girls. *Id.* at 3; 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>.

⁷ GLSEN, *supra* note 1, at 22.

⁸ 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-schoolpushout-for-girls-with-disabilities>.

⁹ Association of American Universities, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct A7-60, A7-62* (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aaucampus-climate-survey-2019>.

¹⁰ Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* (Mar. 2021), <https://www.knowyourix.org/thecostofreporting>.

¹¹ Know Your IX, The Every Voice Coalition, & SafeBAE, *Student Listening Sessions* (2022).

¹² Know Your IX, *supra* note 10, at 6.

¹³ Know Your IX, *supra* note 10, at 18.

¹⁴ *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence*, *supra* note 6, at 8.

¹⁵ *Doe v. Sch. Bd. of Miami-Dade Cnty.*, 403 F. Supp. 3d 1241, 1251 (S.D. Fla. 2019).

¹⁶ Know Your IX, *supra* note 10, at 1.

¹⁷ Mengo & Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 *J.C. Student Retention: Res., Theory & Prac.* 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>.

¹⁸ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 645, 650 (1999); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998).

¹⁹ *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576, reh'g denied, 142 S. Ct. 2853 (2022).

²⁰ See, e.g., *Doe 1 v. Univ. of Missouri*, 2022 WL 3366765, at *3 (W. D. Mo., 2022) (applying the Supreme Court's holding in *Cummings* to limit the ability of Title IX plaintiffs to seek emotional distress damages); *Bonnewitz v. Baylor Univ.*, No. 6:21-cv-00491-ADA-DTG, 2022 WL 2688399, 2022 U.S. Dist. LEXIS 122572, at *9-12 (W.D. Tex., 2022) (same); *Doe next friend of Doe v. City of Pawtucket*, 2022 WL 4551953, at *3 (D.R.I., 2022) (same). This trend of lower courts applying *Cummings'* holding to bar emotional distress damages in Title IX claims foreshadows the same outcome for Title VI discrimination claims—this much was predicted by the dissenting opinion in *Cummings*, 142 S. Ct. at 1582 (Breyer, J., dissenting).