

Paul Carlos Southwick (OSB 095141)

TRIAL ATTORNEY

Joseph Baxter (OSB 215137)

Paul Southwick Law, LLC

8532 N. Ivanhoe St. #208

Portland, OR 97203

Email: paul@paulsouthwick.com

Email: joe@paulsouthwick.com

Phone: 503-806-9517

Timothy R. Volpert (OSB 814074)

Tim Volpert PC

2111 NE Hancock St. Ste. 2B

Portland, OR 97212

Email: tim@timvolpertlaw.com

Phone: 503-703-9054

Misha Isaak (OSB 086430)

Alletta S. Brenner (OSB 142844)

Perkins Coie LLP

1120 N.W. Couch Street, Tenth Floor

Portland, Oregon 97209-4128

Email: ABrenner@perkinscoie.com

Email: misaak@perkinscoie.com

Phone: 503-727-2000

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION**

Elizabeth HUNTER; et al.,

Plaintiffs,

v.

DEPARTMENT OF EDUCATION; and Catherine
LHAMON, in her official capacity as Assistant Secretary for
the Office of Civil Rights, U.S. Department of Education,

Defendants,

COUNCIL FOR CHRISTIAN COLLEGES &
UNIVERSITIES, WESTERN BAPTIST COLLEGE
d/b/a CORBAN UNIVERSITY, WILLIAM JESSUP
UNIVERSITY AND PHOENIX SEMINARY,

Intervenor-Defendants.

Case No. 6:21-cv-00474-AA

**DECLARATION OF PAUL
CARLOS SOUTHWICK
ISO SUPPLEMENTAL
BRIEF OF NEWLY
DISCOVERED FACTS**

I, Paul Carlos Southwick, declare:

1. I am over 18 years of age and have personal knowledge of the matters stated in this declaration

and would testify truthfully to them if called upon to do so.

2. Attached as **Exhibit A** is a research brief published by The Trevor Project on September 28, 2022, entitled "Suicide Risk and Access to Care Among LGBTQ College Students."
3. Attached as **Exhibit B** is a report by the Trevor Project entitled "2022 National Survey on LGBTQ Youth Mental Health."
4. Attached as **Exhibit C** is a USA Today news article entitled "Christian Florida School Tells Parents Gay and Transgender Students Must 'Leave Immediately,'" published September 20, 2022.
5. Attached as **Exhibit D** is a Fox News.com article entitled "BYU Removes Pamphlets Advertising Off-campus LGBTQ Resources from New Student Bags," published September 4, 2022.
6. Attached as **Exhibit E** is a news article published by Insight into Diversity entitled "Samford University Rejects Formation of LGBTQ+ Law Student Group," published October 25, 2022.
7. Attached as **Exhibit F** is an amicus brief filed by Ilan H. Meyer, PhD, and other social scientists and legal scholars in *303 Creatives and Lorie Smith v. Aubrey Elinis, et al.*, filed August 30, 2022.
8. Attached as **Exhibit G** is a report by Eric Kaufmann for the Center for the Study of Partisanship and Ideology entitled, "Diverse and Divided: A Political Demography of American Elite Students, Report No. 7," published October 3, 2022.
9. Attached as **Exhibit H** are compiled documents comprising 1) a request for assurance of religious exemption submitted to the Office for Civil Rights (OCR) by La Sierra University on June 10, 2022 in response to an investigation launched by OCR on May 3, 2022 into allegations of discrimination in violation of Title IX included in OCR Case No.

09-21-2314, which was filed by plaintiffs' counsel on behalf of Cameron Martinez on July 27, 2021, 2) a letter from OCR to La Sierra University, dated July 20, 2022, granting assurance of religious exemption to the provisions of Title IX pertinent to the investigation, and 3) a letter from OCR to plaintiffs' counsel, dismissing said allegations of discrimination on the basis of lack of jurisdiction resulting from the assurance of religious exemption granted.

10. Attached as **Exhibit I** are compiled documents: 1) a letter submitted by Colorado Christian University (CCU) to OCR on May 3, 2022, in response to an investigation launched by OCR on April 8, 2022, into allegations of discrimination included in OCR Case No. 8-21-2214, which was filed by plaintiffs' counsel on behalf of Journey Mueller on August 3, 2021. In the letter, CCU asserted its religious exemption from certain provisions of Title IX and requested dismissal of the case. 2) A letter from OCR to Colorado Christian University dated July 20, 2022, confirming its prior assurance of religious exemption to certain provisions of Title IX.

11. Attached as **Exhibit J** are selected, compiled public comments in response to the U.S. Department of Education's notice of proposed rulemaking, submitted by groups and individuals in August and September of 2022 and made public by the Department between September and November 2022.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 14th day of November, 2022.

By: s/Paul Carlos Southwick
Paul Carlos Southwick

Suicide Risk and Access to Care Among LGBTQ College Students

LGBTQ college students with access to mental health services through their college had 84% lower odds of attempting suicide in the past year compared to LGBTQ college students without access.

SEP. 28, 2022



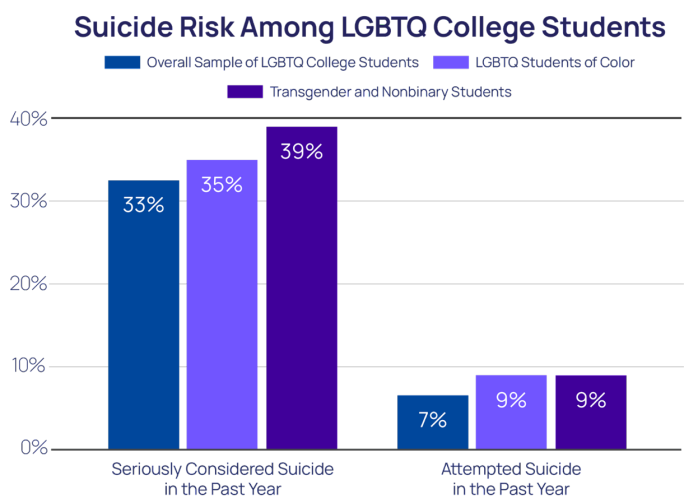
Background

For many lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ) young people, going to college or university is an opportunity to connect with other LGBTQ people. However, if campuses do not meet the unique needs of LGBTQ students, such as

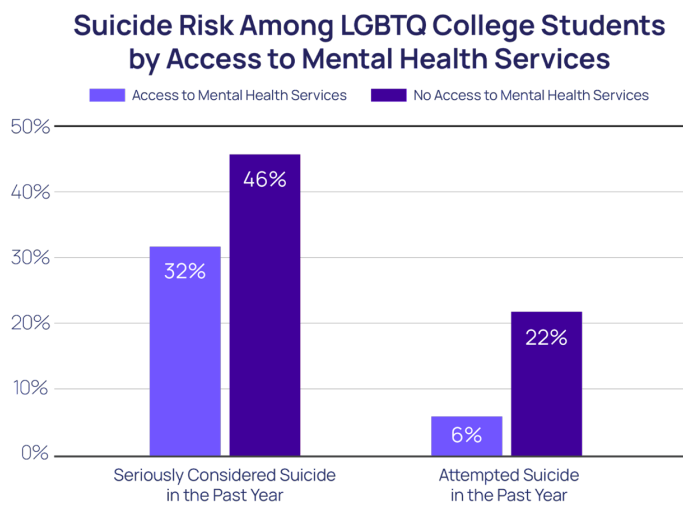
community support and affirming care, the college environment may also present challenges. Minority stress theory proposes that stress related to having a marginalized social identity, such as being LGBTQ, can contribute to a number of adverse mental and physical health outcomes, including increased suicide risk (Meyer, 2003). As such, barriers faced by LGBTQ young people in college environments may contribute to minority stress and increase their risk of suicide compared to their straight, cisgender peers. Additionally, LGBTQ college students have more negative perceptions of campus climate compared to their heterosexual and cisgender peers (Rankin et al., 2010). LGBTQ college students report high rates of a number of negative experiences and mental health outcomes, including victimization, discrimination, depression, and suicide risk (Woodford et al., 2018). Despite this, protective factors, such as supportive faculty members (Linley et al., 2016) and affirming school policies and spaces (Pitcher et al., 2018), can help mitigate disparities. However, LGBTQ college students often report high rates of unmet needs and barriers to using on-campus mental health services (Dunbar et al., 2017), and limited access to LGBTQ-specific services (Nguyen et al., 2018). Using data from The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health, this brief adds to the existing literature by examining suicide risk, access to mental health services, and access to LGBTQ services among a national sample of LGBTQ young people enrolled in a college or university, henceforth referred to as college students.

Download the Research Brief

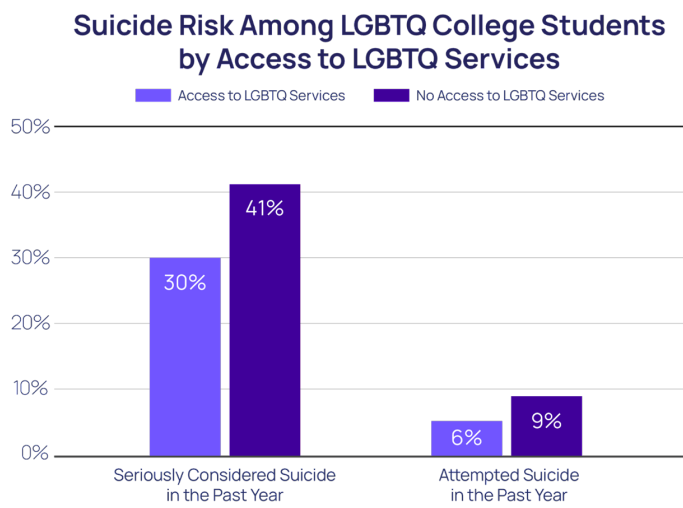
Results



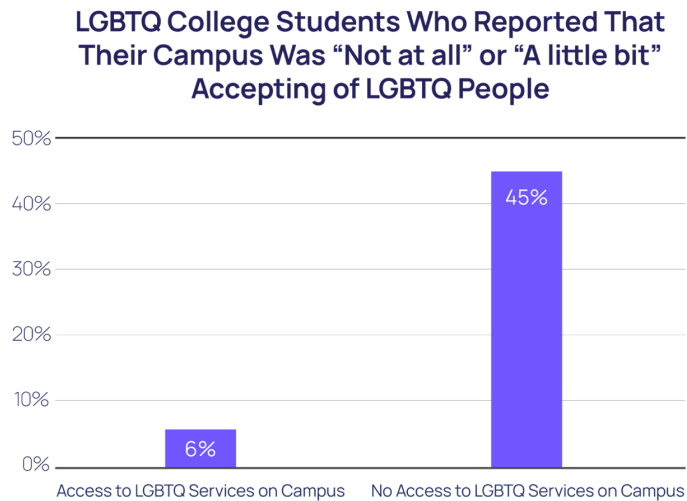
Overall, one in three (33%) LGBTQ college students seriously considered suicide in the past year, and 7% reported a suicide attempt in the past year. Rates of considering suicide were higher among LGBTQ college students of color (35%), multisexual students (35%), and transgender and nonbinary students (39%), compared to White LGBTQ students (31%), monosexual students (29%), and cisgender LGBTQ students (26%), respectively. Furthermore, LGBTQ students of color (9%) and transgender and nonbinary students (9%) reported significantly higher rates of attempting suicide in the past year compared to White LGBTQ students (6%) and cisgender LGBTQ students (4%), respectively.



LGBTQ college students with access to mental health services through their college had 84% lower odds of attempting suicide in the past year (aOR = 0.16) compared to LGBTQ college students without access. The majority of LGBTQ college students (86%) reported that their college offered mental health services to students; however, LGBTQ college students reported that common barriers to accessing care included that they did not feel comfortable going (33%), long waitlists, (29%), and privacy concerns (17%). Compared to LGBTQ college students who reported that they had access to mental health services through their college (46%), those who did not have access to mental health services through their college reported significantly higher rates of seriously considering suicide in the past year (54%). Similarly, LGBTQ college students who did not have access to mental health services through their college (22%) reported significantly higher rates of attempting suicide in the past year compared to those who had access (6%).



LGBTQ college students with access to LGBTQ student services through their college had 44% lower odds of attempting suicide in the past year (aOR = 0.56) compared to LGBTQ college students without access. Over six in ten (63%) LGBTQ college students reported that their college had LGBTQ-specific services, such as an LGBTQ center, available. Compared to LGBTQ college students who reported that they had access to LGBTQ student services through their college (30%), those who did not have access to LGBTQ student services through their college reported significantly higher rates of seriously considering suicide in the past year (41%). Similarly, LGBTQ college students who did not have access to LGBTQ student services through their college (9%) reported significantly higher rates of attempting suicide in the past year compared to those who had access (6%).



Nearly nine in ten LGBTQ college students (89%) reported that their college was accepting of LGBTQ people, and this was associated with the availability of LGBTQ-specific services. Nearly half of LGBTQ college students who did not have access to LGBTQ services through their college (45%) reported that their college was unaccepting of LGBTQ people, compared to only 6% of those who had access.

Methods

Data were collected from an online survey conducted between September and December 2021 of 33,993 LGBTQ youth recruited via targeted ads on social media. Survey respondents who indicated that they were currently enrolled in school were asked “What type of school are you enrolled in?” Respondents who selected either community/junior college, 4-year university, or graduate school were included in analyses. To assess whether youth’s college is accepting of

LGBTQ people, students were asked, “How accepting is your college/university of LGBTQ people?” with response options of 1) Not at all, 2) A little bit, 3) Somewhat, and 4) A lot. To assess whether students have access to LGBTQ or mental health services through their college, youth were asked, “Does your college/university have LGBTQ services (e.g. an LGBTQ Center)?” and “Does your college/university offer mental health services to students?” with response options of 1) No, 2) Yes, and 3) I don’t know. The questions assessing past-year suicidal ideation and suicide attempts were taken from the Centers for Disease Control and Prevention’s Youth Risk Behavior Survey (Johns et al., 2020). Separate adjusted logistic regression models were conducted to determine the association between having access to mental health services or LGBTQ services and attempting suicide in the past year, while controlling for age, race/ethnicity, sex assigned at birth, gender identity, and sexual identity.

Looking Ahead

Despite the potential presence of protective factors like affirming community and services, suicide risk persists among LGBTQ college students, especially on campuses that do not offer mental health and LGBTQ-specific student services. Suicide risk was highest among LGBTQ students of color, multisexual students, and transgender and nonbinary students. Specifically, LGBTQ students of color reported attempting suicide at 1.5 times

the rate of their White LGBTQ peers, and transgender and nonbinary youth reported attempting suicide at more than twice the rate of their LGBTQ cisgender peers. These data illuminate that LGBTQ college students who hold multiple marginalized identities likely face barriers and/or stigma compounding their minority stress not only based on their sexual orientation, but also based on their race/ethnicity and gender identity, among other marginalized identities.

Having access to mental health services and LGBTQ services through college is critical for reducing suicide attempts among LGBTQ college students. While the majority of LGBTQ college students reported that their college or university offered mental health services, and that their college or university was accepting of LGBTQ people, having access to mental health services and LGBTQ-specific services were associated with 84% and 44% lower odds of attempting suicide in the past year, respectively. Colleges should be aware that making these services available, accessible, and affirming is critical to the mental health and well-being of LGBTQ students. Colleges should be mindful of utilizing gender-affirming language (Singh, Meng, & Hansen, 2013), providing inclusive and comprehensive physical and mental health care for LGBTQ students (Goldberg et al., 2019), and having LGBTQ-specific resources embedded into student health centers and counseling centers to make care more accessible to LGBTQ students (Aubrey et al., 2020). Campuses – especially those with small student bodies – must also make sure that

their mental health and LGBTQ services can protect the privacy of LGBTQ students seeking support.

The Trevor Project is committed to finding ways for all LGBTQ young people to feel safe and supported. Our 24/7 crisis services are available in three different modalities – phone, chat, and text – so that youth in crisis have multiple avenues to communicate with culturally competent and affirming counselors. We offer our guide to Creating Safer Spaces in Schools for LGBTQ Youth on our website for those interested in learning how to support LGBTQ students. Our TrevorSpace platform also connects young people with supportive peers online, if they are struggling to find community in their current setting. Further, Trevor's research, advocacy, and public training teams are focused on using data, policies, and education to enhance the ability of youth-serving professionals to understand and address the unique needs of LGBTQ young people pursuing higher education opportunities.

References

- Aubrey, J. S., Pitts, M. J., Lutovsky, B. R., Jiao, J., Yan, K., & Stanley, S. J. (2020). Investigating disparities by sex and LGBTQ identity: a content analysis of sexual health information on college student health center websites. *Journal of Health Communication*, 25(7), 584-593. <https://doi.org/10.1080/10810730.2020.1825567>

- Dunbar, M. S., Sontag-Padilla, L., Ramchand, R., Seelam, R., & Stein, B. D. (2017). Mental health service utilization among lesbian, gay, bisexual, and questioning or queer college students. *Journal of Adolescent Health, 61*(3), 294–301. <https://doi.org/10.1016/j.jadohealth.2017.03.008>
- Goldberg, A. E., Kuvalanka, K. A., Budge, S. L., Benz, M. B., & Smith, J. Z. (2019). Health care experiences of transgender binary and nonbinary university students. *The Counseling Psychologist, 47*(1), 59–97. <https://doi.org/10.1177/0011000019827568>
- Johns, M. M., Lowry, R. R., Haderxhanaj, L. T., Rasberry, C., Robin, L., Scales, L., Stone, D., Suarez, N., & Underwood, J. M. (2020). Trends in violence victimization and suicide risk by sexual identity among high school students – youth risk behavior survey, United States, 2015–2019. *MMWR Morbidity and Mortality Weekly Report, 69*(Suppl-1), 19–27. <http://dx.doi.org/10.15585/mmwr.su6901a3>
- Linley, J. L., Nguyen, D., Brazelton, G. B., Becker, B., Renn, K., & Woodford, M. (2016). Faculty as sources of support for LGBTQ college students. *College Teaching, 64*(2), 55–63. <http://dx.doi.org/10.1080/87567555.2015.1078275>
- Meyer, I. H. (2003). Prejudice, social stress, and mental health in lesbian, gay, and bisexual populations: Conceptual issues and research evidence. *Psychological Bulletin, 129*(5), 674–697.

- Nguyen, D. J., Brazelton, G. B., Renn, K. A., & Woodford, M. R. (2018). Exploring the availability and influence of LGBTQ+ studentservices resources on student success at community colleges: A mixed methods analysis. *Community College Journal of Research and Practice*, 42(11), 783–796. <https://doi.org/10.1080/10668926.2018.1444522>
- Pitcher, E. N., Camacho, T. P., Renn, K. A., & Woodford, M. R. (2018). Affirming policies, programs, and supportive services: Using anorganizational perspective to understand LGBTQ+ college student success. *Journal of Diversity in Higher Education*, 11(2), 117–132. <https://doi.org/10.1037/dhe0000048>
- Rankin, S., Blumenfeld, W. J., Weber, G. N., & Frazer S. J. (2010). *State of higher education for LGBT people: Campus pride 2010national college climate survey*. Campus Pride.
- Singh, A. A., Meng, S., & Hansen, A. (2013). “It’s already hard enough being a student”: Developing affirming college environmentsfor trans youth. *Journal of LGBT Youth*, 10(3), 208–223. <https://doi.org/10.1080/19361653.2013.800770>
- Woodford, M. R., Weber, G., Nicolazzo, Z., Hunt, R., Kulick, A., Coleman, T., Coulombe, S., & Renn, K. A. (2018). Depression andattempted suicide among LGBTQ college students: Fostering resilience to the effects of heterosexism and cisgenderism on campus. *Journal of*

College Student Development, 59(4), 421–438. <https://doi.org/10.1353/csd.2018.0040>

Download the Research Brief

For more information please contact:
Research@TheTrevorProject.org

The Trevor Project is the world's largest suicide prevention and crisis intervention organization for LGBTQ (lesbian, gay, bisexual, transgender, queer, and questioning) young people.

SIGN UP FOR OUR
NEWSLETTER

Email Address

Subscribe

CONTACT US

BLOG

PRESS

CAREERS

TERMS OF SERVICE

PRIVACY POLICY



THE TREVOR PROJECT 

2022 National Survey on LGBTQ Youth Mental Health



Table of Contents

Introduction	3
Mental Health & Suicide Risk	5
Mental Health Care	11
Impact of Current Events	13
Unique Challenges	15
Ways to Support LGBTQ Youth	20
Sources of Joy	24
Methodology	25

Introduction

The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health demonstrates that rates of suicidal thoughts have trended upward among LGBTQ young people over the last three years, making our life-saving work all the more important.

Capturing the experiences of nearly 34,000 LGBTQ youth ages 13-24 across the United States, with 45% of respondents being LGBTQ youth of color and 48% being transgender or nonbinary, our fourth annual national survey is one of the most diverse surveys of LGBTQ youth ever conducted.

These data provide critical insights into some of the unique suicide risk factors faced by LGBTQ youth, top barriers to mental health care, and the negative impacts of COVID-19 and relentless anti-transgender legislation. This research also highlights several ways in which we can all support the LGBTQ young people in our lives — and help prevent suicide.

It's essential to emphasize that we still do not have known counts or registries of the LGBTQ youth population — and comprehensive, intersectional data on LGBTQ youth mental health outcomes remain limited. So our annual national survey strives to fill in these gaps and amplify the experiences of young LGBTQ people, a marginalized group consistently found to be at significantly increased risk for suicide because of how they are mistreated and stigmatized in society.

We hope these data and trends will be used by fellow researchers, policymakers, and youth-serving organizations to advance policies and practices that better support LGBTQ youth around the globe and work to end the public health crisis of suicide.

Over the next year, The Trevor Project will release new data from this diverse, national sample in the form of research briefs and research reports on a wide variety of topics related to LGBTQ youth mental health and suicide prevention. And as always, we will continue to do all we can to advocate for LGBTQ-inclusive policies, raise public awareness and acceptance, and be there for every single LGBTQ young person who needs help or support, 24/7.

Amit Paley (he/him)
CEO & Executive Director



Key Findings

45% of LGBTQ youth seriously considered attempting suicide in the past year.



Nearly 1 in 5 transgender and nonbinary youth attempted suicide and LGBTQ youth of color reported higher rates than their white peers.

LGBTQ youth who felt high social support from their family reported attempting suicide at **less than half the rate** of those who felt low or moderate social support.

Fewer than 1 in 3 transgender and nonbinary youth found their home to be gender-affirming.

LGBTQ youth who found their school to be LGBTQ-affirming reported **lower rates of attempting suicide**.

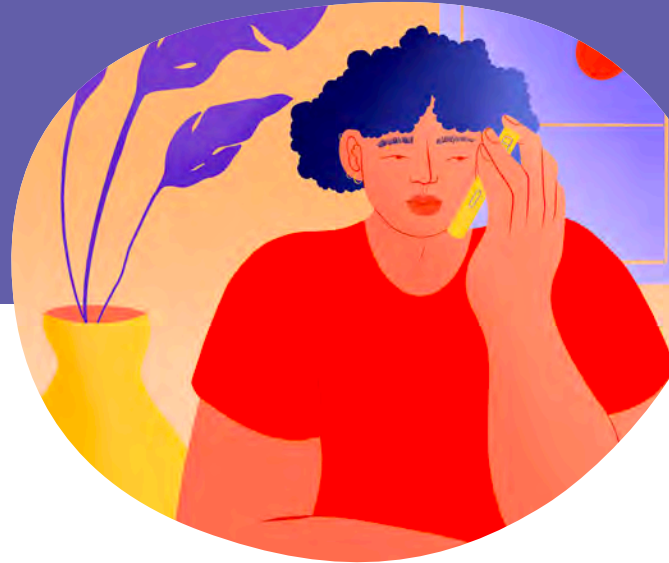
60% of LGBTQ youth who wanted mental health care in the past year were not able to get it.



LGBTQ youth who live in a community that is accepting of LGBTQ people reported **significantly lower rates of attempting suicide** than those who do not.

Mental Health & Suicide Risk

LGBTQ youth are not inherently prone to suicide risk because of their sexual orientation or gender identity but rather placed at higher risk because of how they are mistreated and stigmatized in society.



Suicide Risk

45% of LGBTQ youth seriously considered suicide in the past year

including more than half of transgender and nonbinary youth (53%) and 1 in 3 cisgender youth (33%).

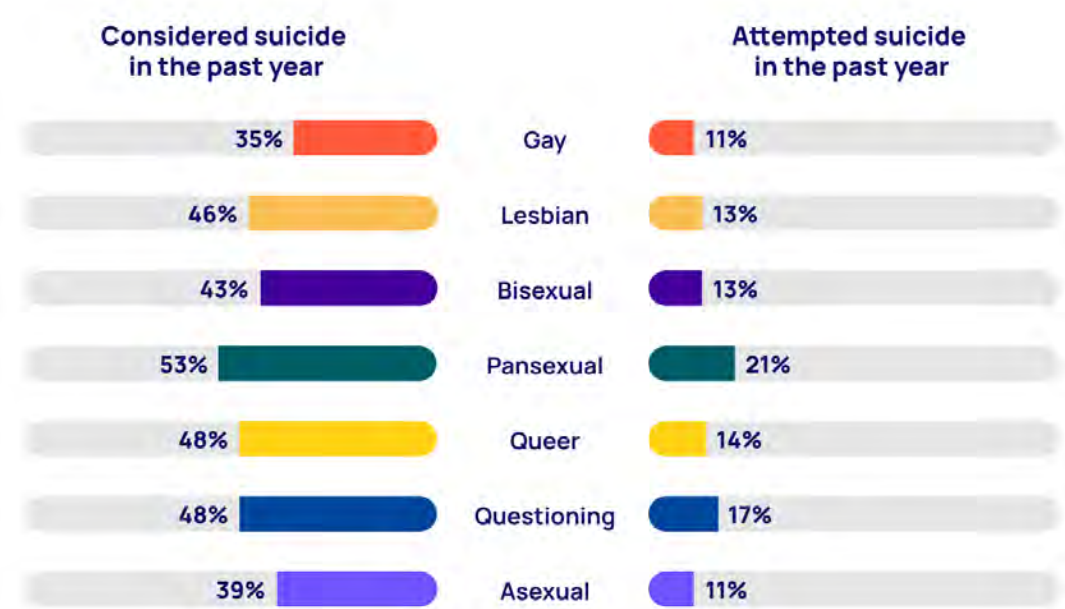
14% of LGBTQ youth attempted suicide in the past year

including nearly 1 in 5 transgender and nonbinary youth (19%) and nearly 1 in 10 cisgender youth (9%).

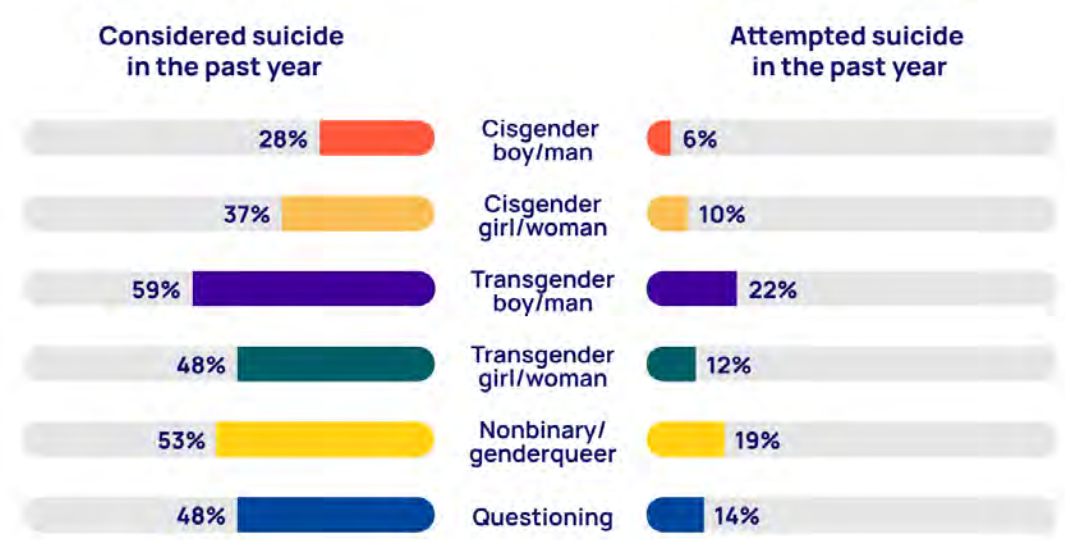
Rates of considered and attempted suicide among LGBTQ youth by age



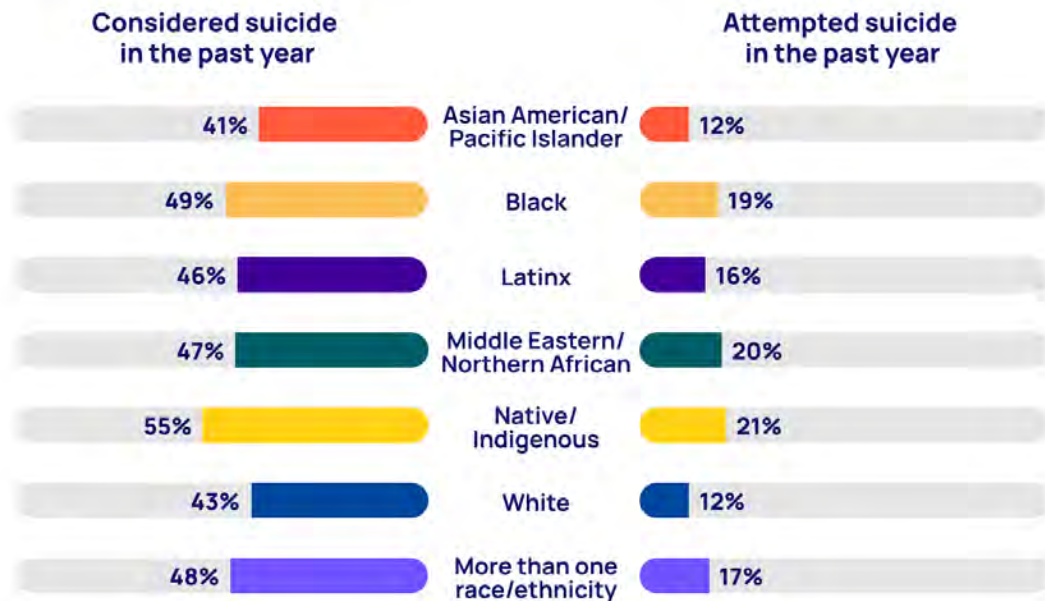
Rates of considered and attempted suicide among LGBTQ youth by sexual orientation



Rates of considered and attempted suicide among LGBTQ youth by gender identity



Rates of considered and attempted suicide among LGBTQ youth by race/ethnicity



12% of white youth attempted suicide in the past year

compared to...

21% of Native/ Indigenous youth	20% of Middle Eastern/ Northern African youth	19% of Black youth
17% of Multiracial youth	16% of Latinx youth	12% of Asian American/ Pacific Islander youth

“

Although our data continue to show high rates of mental health and suicide risk among LGBTQ young people, it is crucial to note that these rates vary widely based on the way LGBTQ youth are treated.

Dr. Myeshia Price (she/her or they/them)
Senior Research Scientist, The Trevor Project

”

Anxiety & Depression

73% of LGBTQ youth reported experiencing symptoms of anxiety

including more than three-quarters of transgender and nonbinary youth (78%) and nearly two-thirds of cisgender youth (65%).

58% of LGBTQ youth reported experiencing symptoms of depression

including nearly two-thirds of transgender and nonbinary youth (65%) and nearly half of cisgender youth (47%).

Anxiety & depression symptoms reported among LGBTQ youth by age

Experienced symptoms of anxiety

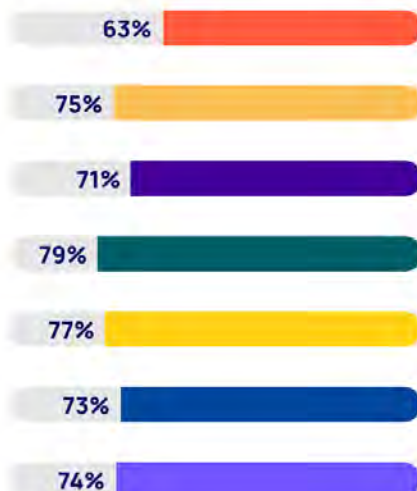


Experienced symptoms of depression

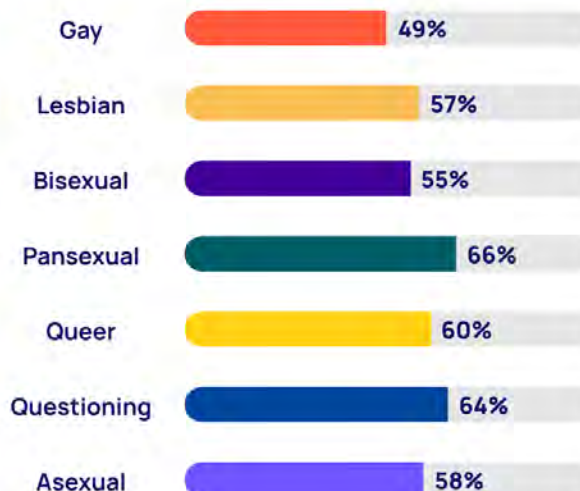


Anxiety & depression symptoms reported among LGBTQ youth by sexual orientation

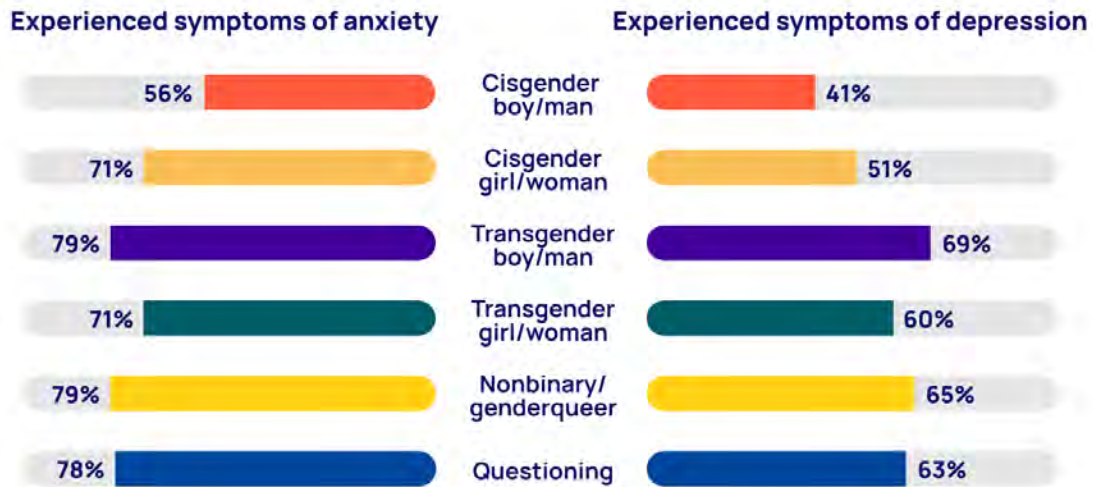
Experienced symptoms of anxiety



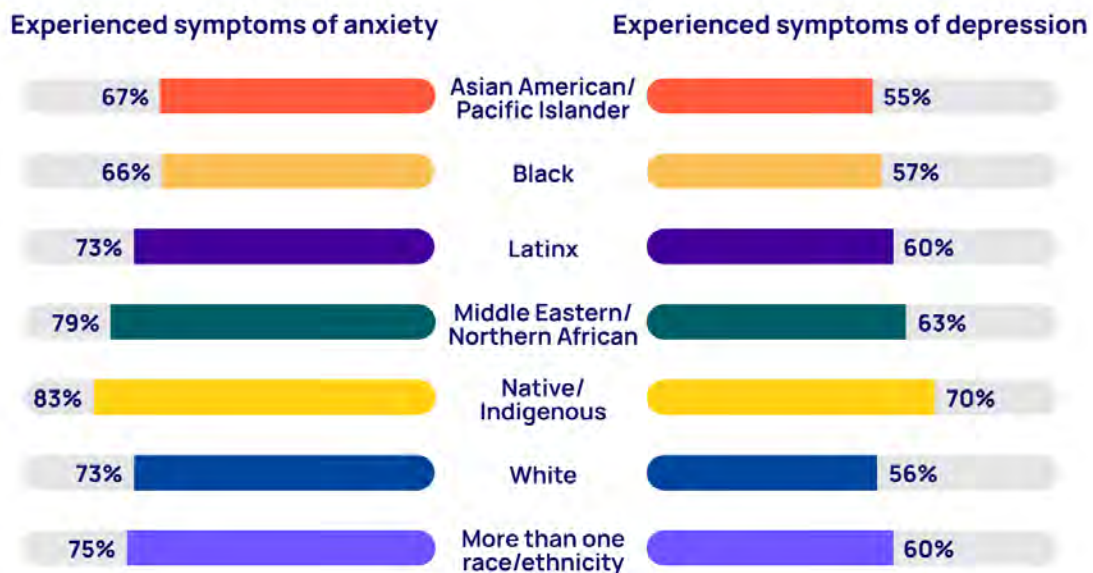
Experienced symptoms of depression



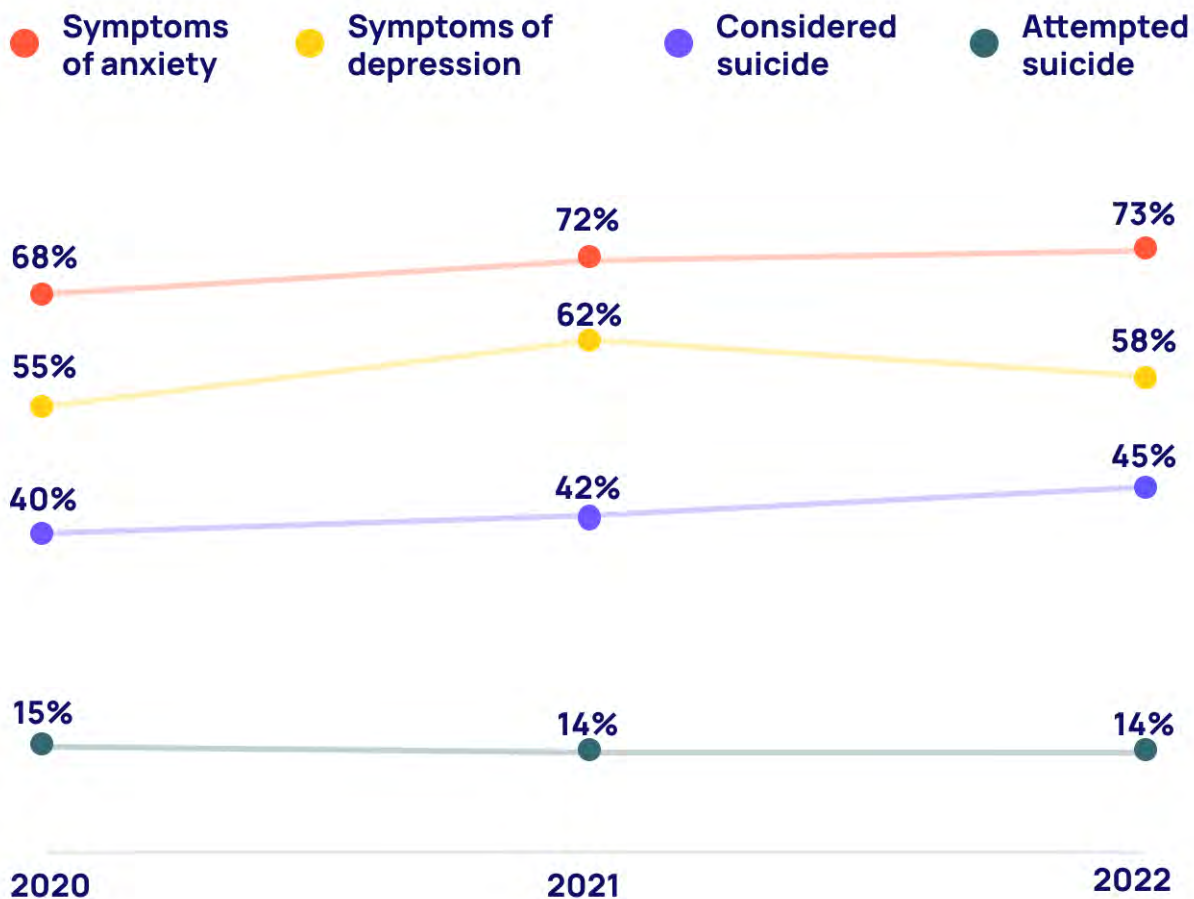
Anxiety & depression symptoms reported among LGBTQ youth by gender identity



Anxiety & depression symptoms reported among LGBTQ youth by race/ethnicity



Trends in LGBTQ youth mental health & suicide risk from 2020-2022



Mental Health Care

Despite the prevalence of anxiety, depression, and suicide risk among LGBTQ youth, a majority could not access the mental health care they desired.



Access to Care

Among all LGBTQ youth, 82% wanted mental health care and 18% did not.

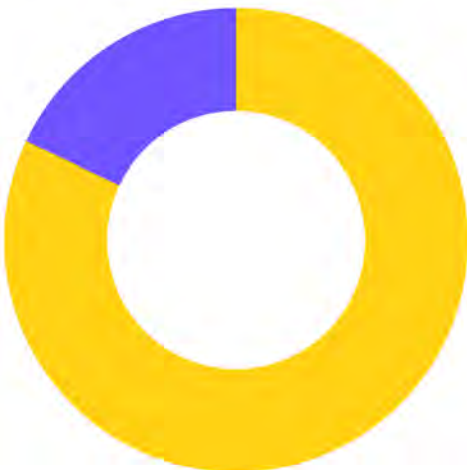
60% of LGBTQ youth who wanted mental health care in the past year were not able to get it

including nearly 3 in 5 transgender and nonbinary youth (58%) and more than 3 in 5 cisgender youth (62%).

Desire for and access to mental health care

Desire for mental health care

82% Wanted care
18% Didn't want care

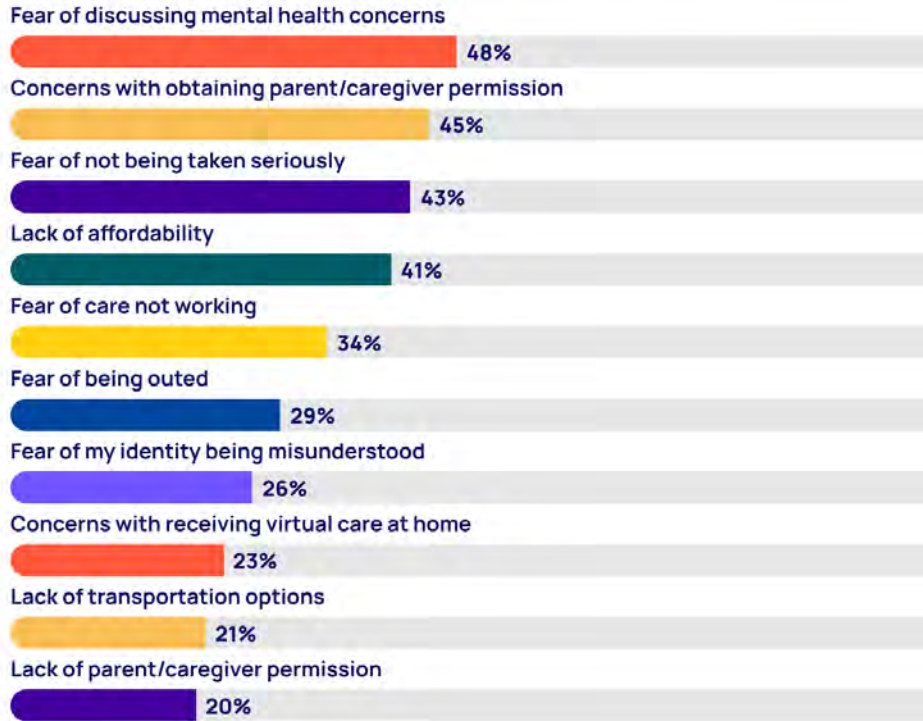


Access to mental health care

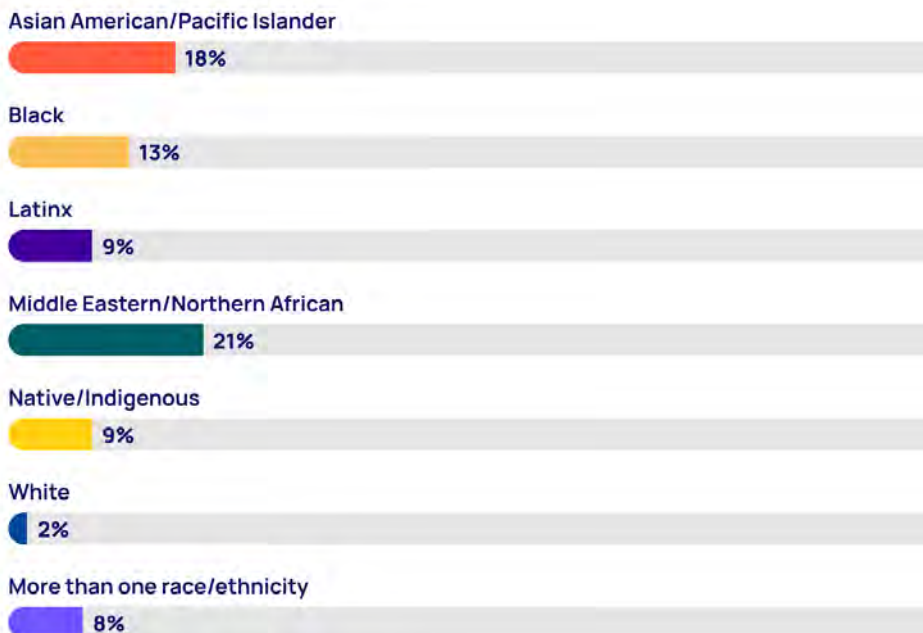
60% Wanted but did not receive care
40% Wanted and received care



LGBTQ youth who wanted mental health care but were unable to get it cited the following top ten reasons



LGBTQ youth who did not feel care providers would understand their culture by race/ethnicity



Impact of Current Events

The COVID-19 pandemic and record wave of anti-transgender legislation continue to negatively impact LGBTQ youth's mental health.



COVID-19

56% of LGBTQ youth reported that their mental health was poor most of the time or always due to the COVID-19 pandemic

including more than 3 in 5 transgender and nonbinary youth (62%) and nearly half of cisgender youth (49%).

LGBTQ youth who reported that their mental health was “poor” most of the time or always due to the COVID-19 pandemic

Ages 13–17



60%

Ages 18–24



51%

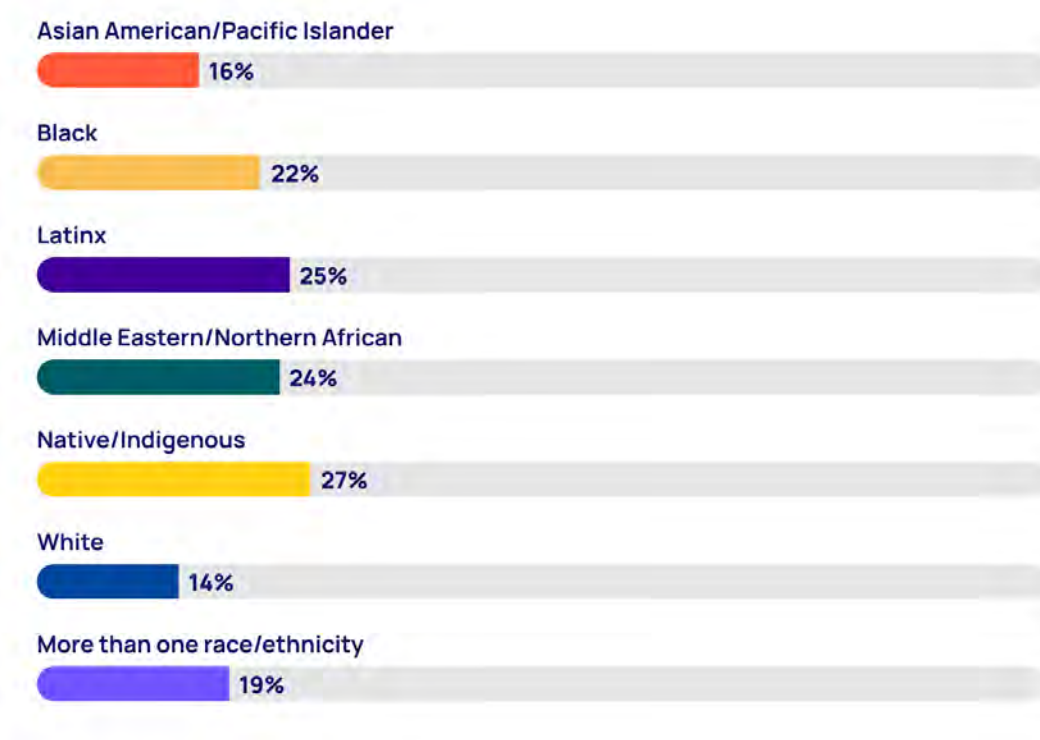
“

Recent political attacks aimed at transgender and nonbinary youth have not only threatened their access to health care, support systems, and affirming spaces at school, they’ve also negatively impacted their mental health.

Dr. Jonah DeChants (he/him)
Research Scientist, The Trevor Project

”

LGBTQ youth who reported a close family member or friend died due to COVID-19



Anti-Transgender Legislation

93% of transgender and nonbinary youth said that they have worried about transgender people being denied access to gender-affirming medical care due to state or local laws.

91% of transgender and nonbinary youth said that they have worried about transgender people being denied access to the bathroom due to state or local laws.

83% of transgender and nonbinary youth said that they have worried about transgender people being denied the ability to play sports due to state or local laws.

Unique Challenges

LGBTQ youth who experienced anti-LGBTQ victimization — including being physically threatened or harmed, discriminated against, or subjected to conversion therapy — reported more than twice the rate of attempting suicide in the past year compared to those who did not have any of these anti-LGBTQ experiences.



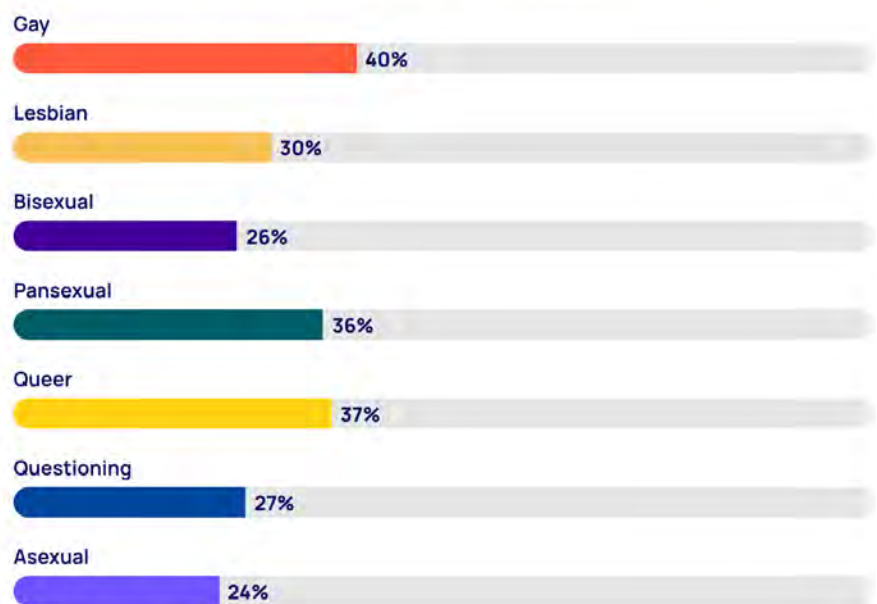
Physical Harm

36% of LGBTQ youth reported that they have been physically threatened or harmed due to either their sexual orientation or gender identity.

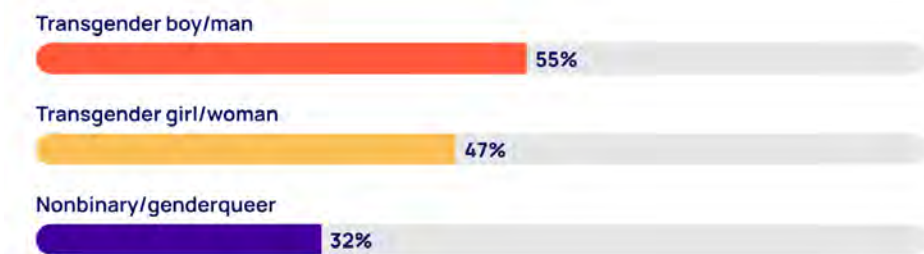
31% of LGBTQ youth reported that they have been physically threatened or harmed due to their sexual orientation.

37% of transgender and nonbinary youth reported that they have been physically threatened or harmed due to their gender identity.

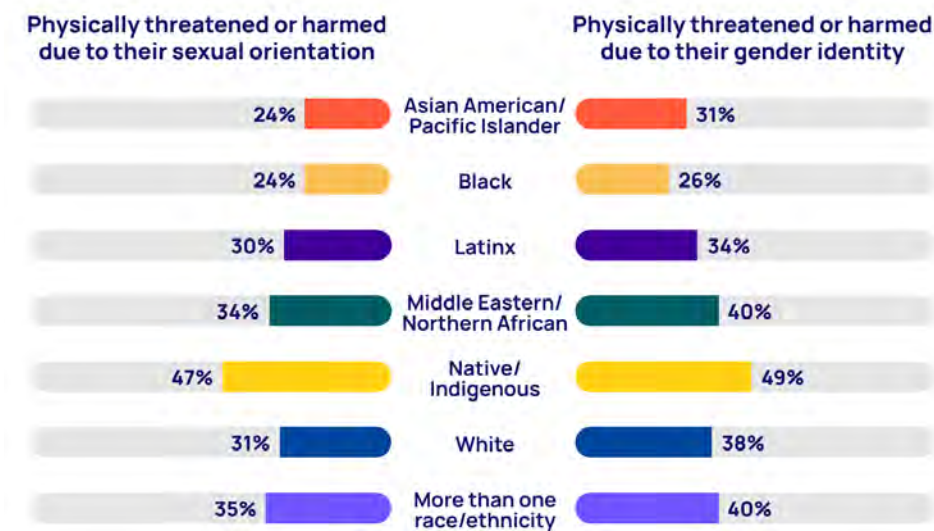
Rates of LGBTQ youth who have been physically threatened or harmed due to their sexual orientation



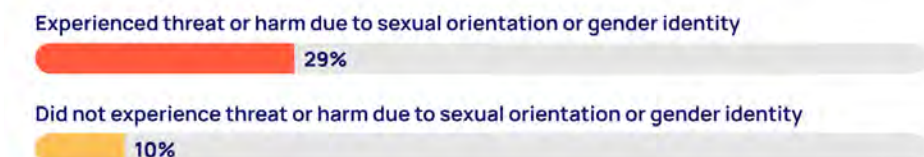
Rates of transgender and nonbinary youth who have been physically threatened or harmed due to their gender identity



Rates of LGBTQ youth who have been physically threatened or harmed by race/ethnicity



LGBTQ youth who attempted suicide in the past year, comparison across those who have ever been physically threatened or harmed due to either their sexual orientation or gender identity



Unique Challenges

Physical Harm

Discrimination

“

We must recognize that LGBTQ young people face stressors simply for being who they are that their peers never have to worry about.

Amit Paley (he/him)
CEO & Executive Director, The Trevor Project

”

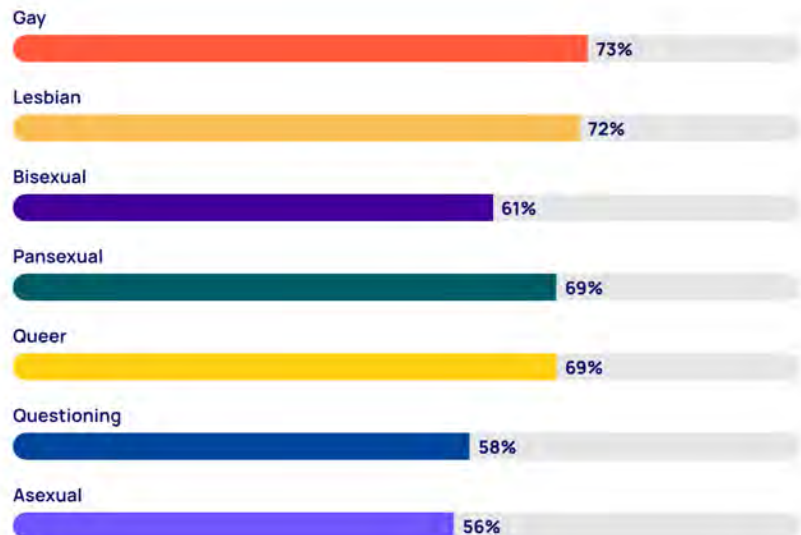
Discrimination

73% of LGBTQ youth reported that they have experienced discrimination based on their sexual orientation or gender identity at least once in their lifetime.

65% of LGBTQ youth reported that they have experienced discrimination based on their sexual orientation.

71% of transgender and nonbinary youth reported that they have experienced discrimination based on their gender identity.

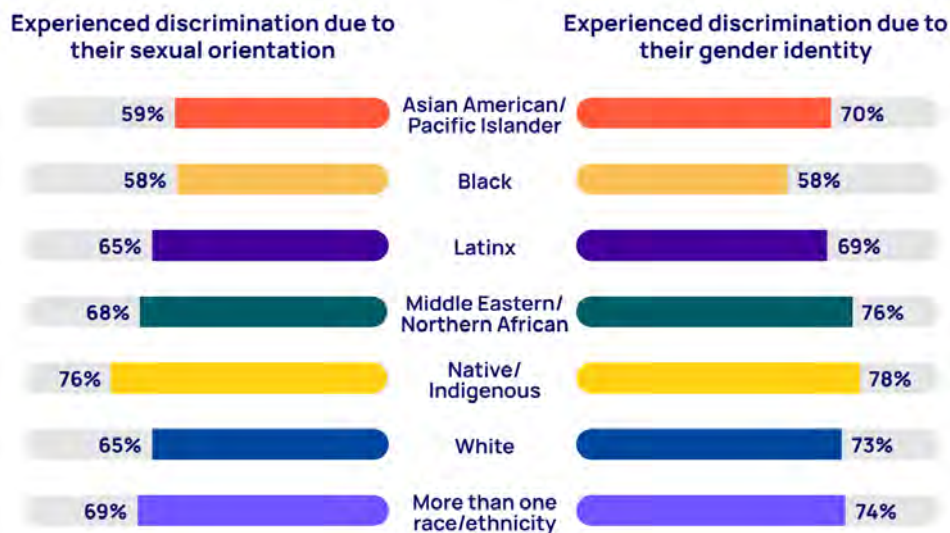
Rates of LGBTQ youth who have experienced discrimination due to their sexual orientation



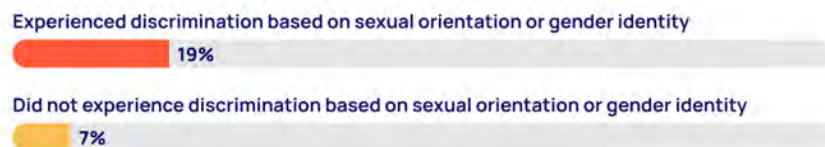
Rates of transgender and nonbinary youth who have experienced discrimination due to their gender identity



Rates of LGBTQ youth who have experienced discrimination by race/ethnicity



LGBTQ youth who attempted suicide in the past year, comparison across those who have ever experienced discrimination



Conversion Therapy

17% of LGBTQ youth reported being threatened with or subjected to conversion therapy

including more than 1 in 5 transgender and nonbinary youth (22%) and more than 1 in 10 cisgender youth (11%).

LGBTQ youth who reported being threatened with or subjected to conversion therapy

83% Not subjected to or threatened with conversion therapy
11% Threatened with conversion therapy
6% Subjected to conversion therapy



“

Conversion therapy has been consistently associated with negative mental health outcomes and greater risk for suicide. That's why this so-called 'therapy' is widely opposed by all major medical and mental health organizations, and why it is a major focus of The Trevor Project's advocacy work.

Amit Paley (he/him)
CEO & Executive Director, The Trevor Project

”

LGBTQ youth who attempted suicide in the past year, comparison across those subjected to conversion therapy



Ways to Support the LGBTQ Youth in Your Life

LGBTQ youth who lived in an accepting community, had access to LGBTQ-affirming spaces, and/or felt high social support from family and friends reported significantly lower rates of attempting suicide in the past year.



Access to Affirming Homes & Schools

LGBTQ youth who live in a community that is accepting of LGBTQ people reported significantly lower rates of attempting suicide compared to those who do not.

Nearly 2 in 5 LGBTQ youth reported living in a community that is somewhat or very unaccepting of LGBTQ people.

LGBTQ youth who identified home or school as an LGBTQ-affirming space

Identified home as an LGBTQ-affirming space



Identified school as an LGBTQ-affirming space



Transgender and nonbinary youth who identified home or school as a gender-affirming space

Identified home as a gender-affirming space



Identified school as a gender-affirming space



Ways to Support the LGBTQ Youth in Your Life

Access to Affirming
Homes & Schools

LGBTQ youth who attempted suicide in the past year, comparison across access to LGBTQ-affirming spaces



Transgender and nonbinary youth who attempted suicide in the past year, comparison across access to gender-affirming spaces



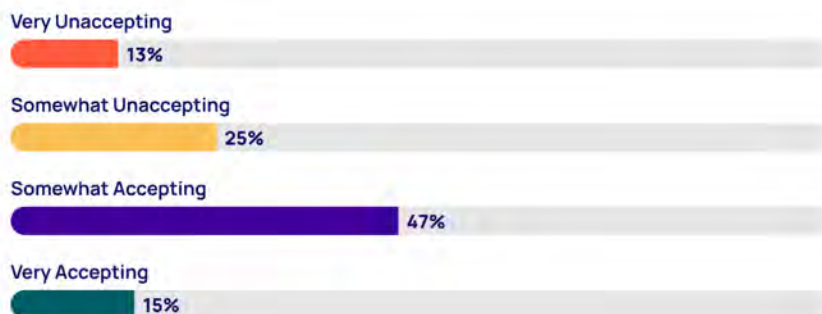
“

These findings emphasize the wide range of experiences and identities held by LGBTQ young people across the country, as well as the clear need to break down barriers to care and promote acceptance at the local level to help save young LGBTQ lives.

Dr. Myeshia Price (she/her or they/them)
Senior Research Scientist, The Trevor Project

”

Reports of community acceptance of LGBTQ people among LGBTQ youth



Ways to Support the LGBTQ Youth in Your Life

Access to Affirming
Homes & Schools

The Importance of LGBTQ
Representation & Advocacy

Suicide attempt rate by community acceptance of LGBTQ people



The Importance of LGBTQ Representation & Advocacy

89% of LGBTQ youth reported that seeing LGBTQ representation in TV/ movies made them feel good about being LGBTQ.

LGBTQ youth also reported feeling good about being LGBTQ when...

79% musicians come out as LGBTQ

74% other celebrities come out as LGBTQ

71% non-LGBTQ celebrities advocate for LGBTQ people

70% companies are led by LGBTQ people

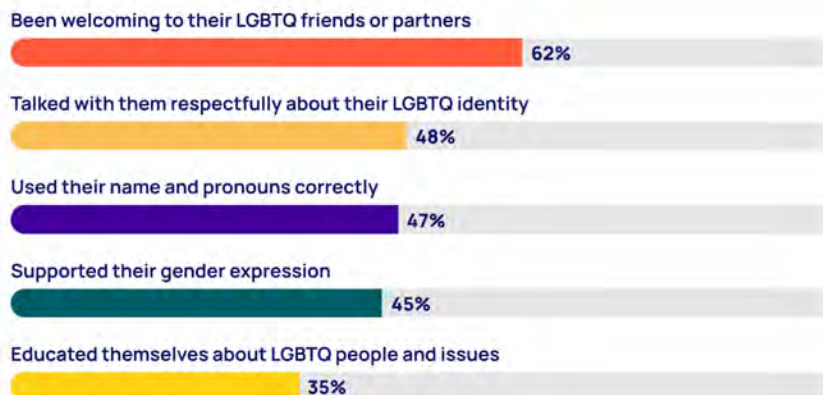
67% athletes come out as LGBTQ

Ways to Support the LGBTQ Youth in Your Life

Support from Parents & Caregivers

Support from Parents & Caregivers

Five most common ways that LGBTQ youth reported feeling supported by their parents or caregivers



“

The fact that very simple things — like support from family and friends, seeing LGBTQ representation in media, and having your gender expression and pronouns respected — can have such a positive impact on the mental health of an LGBTQ young person is inspiring, and it should command more attention in conversations around suicide prevention and public debates around LGBTQ inclusion.

Amit Paley (he/him)
CEO & Executive Director, The Trevor Project

”

Suicide attempt rate by LGBTQ youth social support



LGBTQ youth reported lower rates of attempting suicide when they felt more supported by their friends and family.

Where did LGBTQ youth find moments of joy?

Although LGBTQ youth reported many serious challenges, they also described hundreds of ways in which they find joy and strength in their lives. From their favorite content and activities to seeing representation and allyship, the wide range of responses emphasizes that we can all help create safe, supportive environments where LGBTQ youth can feel happy and express themselves.

**moving to a new place
that feels like home**

wearing my first binder

going to drag shows



**changing my name to
something that fit me**

**seeing LGBTQ people of
color in media**

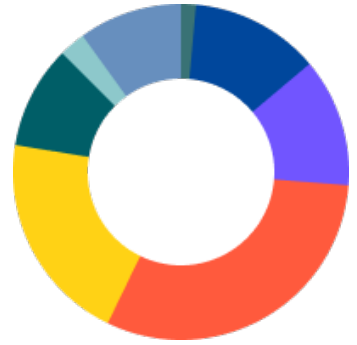
**just knowing that there's
people out there like me**

All sources of joy for LGBTQ youth:

Therapy & medication	Learning I'm not alone and there are more people like me	LGBTQ clubs on campus
Gender affirming clothing	Protective laws/victories for LGBTQ rights	Athletics & exercise
Family & parental support	Supportive teachers	Going to college
The LGBTQ community	Having a safe space to express gender, gender identity, and sexuality	Drag shows
Accepting & affirming friends	All gender restrooms	Dance
Hope & excitement for the future	Queer role models	Living as their authentic self
Happy LGBTQ elders & married couples	Pets/Animals	Escapism/fantasy/fandom
Online communities & support	Taking care of younger siblings	Gender affirming hormones
Learning about LGBTQ history	Art, art expression, art therapy/ crafting/drawing	Financial stability
Faith & spirituality	Video games/gamer community	LGBTQ celebrities, influencers & representation in media
Music (BTS, Lil Nas X, etc)		Self-love & acceptance
Partners/falling in love		Cooking
Cisnet allies		

Methodology

The content and methodology for The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health were approved by an independent Institutional Review Board.



A quantitative cross-sectional design was used to collect data through an online survey platform between September 20 and December 31, 2021. A sample of individuals ages 13–24 who resided in the United States was recruited via targeted ads on social media. No recruitment was conducted via The Trevor Project's website or social media channels. Respondents were defined as being LGBTQ if they identified with a sexual orientation other than straight/heterosexual, a gender identity other than cisgender, or both. In order to ensure the representativeness of the sample, targeted recruitment was conducted to ensure adequate sample sizes with respect to geography, gender identity, and race/ethnicity. Qualified respondents completed a secure online questionnaire that included a maximum of 143 questions. Questions on considering and attempting suicide in the past year were taken from the Centers for Disease Control and Prevention's Youth Risk Behavior Survey to allow for comparisons to their nationally representative sample. Each question related to mental health and suicide was preceded by a message stating, "If at any time you need to talk to someone about your mental health or thoughts of suicide, please call The Trevor Project at 1-866-488-7386."

Although 114,288 individuals from unique IP addresses began the survey, 30,976 did not complete the initial demographic screening questions, and 38,484 were screened out based on ages outside of the sample range and residency outside of the United States. This resulted in an eligible sample of 44,828 LGBTQ youth ages 13–24. A validity check was placed midway through the survey which asked participants to select "agree" from a five-point statement with answers ranging from "strongly disagree" to "strongly agree." Youth who did not select "agree" (n=918) or who did not reach the validity question in the mid-point of the survey (n=9506) were removed from the analytic sample. Additionally, 194 indicated that they weren't honest in their responses, and 217 were identified as mischievous responders based on written responses. This resulted in a final analytic sample of 33,993 LGBTQ youth ages 13–24 who resided in the United States.

This report uses "transgender and nonbinary" as an umbrella term to encompass non-cisgender youth, which includes young people who identify as transgender and nonbinary as well as other labels outside of the cisgender binary, including genderqueer, agender, genderfluid, gender neutral, bigender, androgynous, and gender non-conforming, among others.

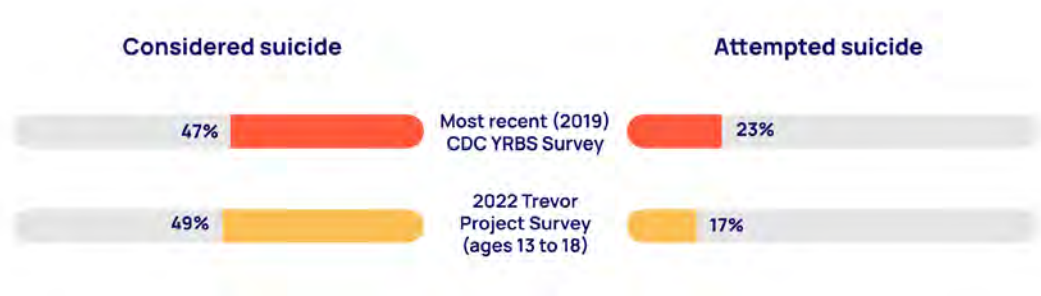
Comparability

In order to better understand how our sample compares to a national probabilistic sample, we included questions regarding considering and attempting suicide that were identical to those used by the Centers for Disease Control and Prevention (CDC) in their Youth Risk Behavior Surveillance System (YRBS).

Analyses were conducted to compare rates of seriously considering suicide and attempting suicide in the past 12 months among youth ages 13–18 in our sample to the 2019 YRBS sample of lesbian, gay, and bisexual (LGB) high school students.

YRBS prevalence rates among LGB youth for seriously considering suicide (47%) were comparable to rates among the same age range in our sample (49%).

Additionally, 23% of LGB youth in the 2019 YRBS reported a suicide attempt in the past 12 months compared to 17% in our sample of youth ages 13–18.

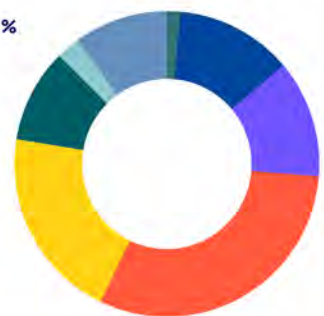


Sample Breakdown of Respondents’ Demographics

By age



By sexual orientation



By gender identity

- Girl or woman: **29%**
- Boy or man: **25%**
- Nonbinary, bigender, genderfluid or genderqueer: **37%**
- Not sure or questioning: **9%**



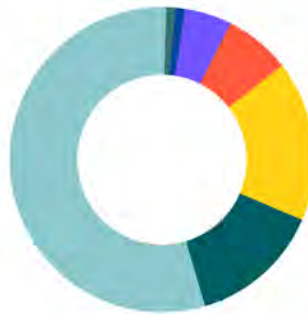
By transgender & nonbinary identity

- Cisgender: **33%**
- Questioning if transgender or nonbinary: **19%**
- Transgender or nonbinary: **48%**



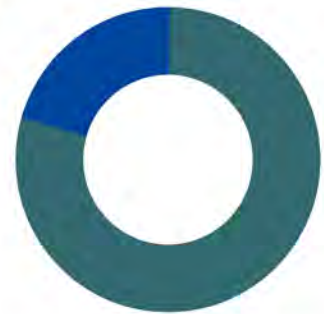
By race/ethnicity

- Middle Eastern/Northern African: **1%**
- Native/Indigenous: **1%**
- Asian American/Pacific Islander: **5%**
- Black: **7%**
- Latinx: **17%**
- More than one race/ethnicity: **14%**
- White: **55%**



By socioeconomic status

- More than meets basic needs: **80%**
- Just meets basic needs or less: **20%**



By region

- Northeast: **16%**
- South: **34%**
- Midwest: **23%**
- West: **27%**





Crisis Services

Direct suicide prevention and crisis intervention services to support LGBTQ youth 24/7 via phone, text, and chat



Peer Support

The world's largest safe space social networking community for LGBTQ youth



Research

Evaluations and external research that support The Trevor Project in significantly improving its services while maintaining preeminence in scientific inquiry



Advocacy

Advocacy at the federal, state, and local levels to fight for policies and laws that protect LGBTQ youth



Education and Public Awareness

Programs, trainings, and content promoting awareness around issues and policies relevant to LGBTQ youth and the adults who support them

THE TREVOR PROJECT

The Trevor Project is the world's largest suicide prevention and mental health organization for lesbian, gay, bisexual, transgender, queer & questioning (LGBTQ) young people.

For over 20 years, we have worked to save young lives by providing support through our free and confidential crisis services programs, including TrevorLifeline, TrevorChat, and TrevorText. We also run TrevorSpace, the world's largest safe space social networking site for LGBTQ youth, and operate innovative advocacy, research, and education programs across the country.



EDUCATION

Christian Florida school tells parents gay and transgender students must 'leave immediately'



Scott Gleeson

USA TODAY

Published 9:41 a.m. ET Aug. 22, 2022 | Updated 8:38 p.m. ET Sept. 20, 2022

A Florida-based Christian school sent out an email informing parents that LGBTQ-identifying students "will be asked to leave the school immediately."

According to the email obtained by NBC News, the top administrator of Grace Christian School in Valrico, Florida, Barry McKeen, sent the email to the families for the kindergarten-grade 12 school on June 6. He later confirmed and doubled down on the policy in an Aug. 18 video on the school's official Facebook page.

The June email read: "We believe that any form of homosexuality, lesbianism, bisexuality, transgender identity/lifestyle, self-identification, bestiality, incest, fornication, adultery and pornography are sinful in the sight of God and the church. Students who are found participating in these lifestyles will be asked to leave the school immediately."

According to the email, the school said students will be "referred to by the gender on their birth certificate."

Education: Texas mom's campaign to ban LGBTQ library books divided her town – and her family

The email, titled, "Important School Policy Point of Emphasis. ... Please Read," also emphasized, according to NBC News, a verse from the Bible, Genesis 1:26-28, as a means to condemn "elective sex reassignment, transvestite, transgender, or non-binary gender fluid acts of conduct."

Gender is defined as a social construct, whereas sex is defined as by biological differences, according to the National Institutes of Health. Messages left by USA TODAY for Grace Christian School on Monday morning were not immediately returned.

The school's policies are not new policies, however, the email enforcing them is. Parents were informed through the June email they must sign documents complying with the standards before students may enroll this month. In the August Facebook video, McKeen said: "It is true that a student can not come to our school ... and be transgender or homosexual. This is rooted in scriptures. ...we have had these policies in our school since day number one in the early 1970s."

Opinion: Virginia Gov. Glenn Youngkin joins GOP's war on transgender students



BYU removes pamphlets advertising off-campus LGBTQ resources from new student bags

By Jon Brown

Published September 04, 2022

Fox News

Brigham Young University (BYU) removed pamphlets advertising off-campus resources for LGBTQ students from welcome bags given to new students in August.

The university, which is owned by the Church of Jesus Christ of Latter-day Saints, removed the literature from the bags because the administration wants students to use the school's new Office of Belonging as their primary resource for such things, according to NBC News.

Made by RaYnbow Collective, a nonprofit not officially affiliated with BYU, the pamphlets offered information about regular events available to LGBTQ students off campus, as well as lists of local organizations that offer therapy, safe housing, mentorship and other things.

Maddison Tenney, a BYU student who is gay, told NBC News that she made the pamphlets after having felt lonely as a new student at the university in Provo, Utah, where students are forbidden from engaging in "same-sex romantic behavior" at the risk of being unenrolled.

CATHOLIC UNIVERSITY CRITICIZED FOR NEW 'GENDER INCLUSIVE' GUIDE 'FUNDAMENTAL' TO SCHOOL'S MISSION: 'SHAMEFUL'



The BYU Centennial Carillon stands at the north end of campus (DenisTangneyJr via Getty Images)

"I remember sitting in my white dorm room with these cement walls and breaking down," Tenney told the outlet. "I didn't know anyone who was like me, who wanted to be faithful and embrace the fullness of themselves."

Tenney explained that she paid the requisite \$200 and signed a contract with BYU's student newspaper, Daily Universe, which compiled the welcome bags. She then dropped off 5,000 of the pamphlets, which she described as "very vanilla, very inline with church teachings."

"We tried really hard to make sure it was kosher and in line with policy," she said. "We didn't hear anything back besides, 'It looks great.'"

Tenney later reportedly received a message from a friend who told her she had been instructed as a resident assistant to remove the RaYnbow Collective pamphlets from each bag outside students' rooms.

CHRISTIAN SCHOOL REFUSES TO CHANGE LONG-HELD POLICY EXCLUDING SEXUAL BEHAVIOR DESPITE ALLEGED DEATH THREATS



A person holds a rainbow flag during a gay pride parade. (REUTERS/Axel Schmidt)

Upon further investigation, Tenney learned that the Office of Student Life decided to remove the pamphlets after deeming that they went against the teachings of the church.

The administration explained in a statement to NBC that they "would like our students and employees to utilize our new Office of Belonging as their primary resource in these efforts."

"The decision to remove the materials by Student Life was based on the university's commitment to provide support through the Office of Belonging and our counseling services and not to allow outside entities to imply affiliation with or endorsement from the university," the statement added.

[CLICK HERE TO GET THE FOX NEWS APP](#)

BYU created the Office of Belonging in August 2021, and said in its announcement that the office would "focus primarily on coordinating and enhancing belonging services and efforts on campus."

Jon Brown is a writer for Fox News Digital. Story tips can be sent to jon.brown@fox.com.

Print Close

URL

<https://www.foxnews.com/us/byu-removed-pamphlets-advertising-campus-lgbtq-resources-new-student-bags>

[Home](#) | [Video](#) | [Politics](#) | [U.S.](#) | [Opinion](#) | [Entertainment](#) | [Tech](#) | [Science](#) | [Health](#) | [Travel](#) | [Lifestyle](#) | [World](#) | [Sports](#) | [Weather](#)

[Privacy](#) | [Terms](#)

This material may not be published, broadcast, rewritten, or redistributed. © FOX News Network, LLC. All rights reserved. Quotes displayed in real-time or delayed by at least 15 minutes. Market data provided by Factset. Powered and implemented by FactSet Digital Solutions. Legal Statement. Mutual Fund and ETF data provided by Refinitiv Lipper. Do Not Sell my Personal Information - New Terms of Use - FAQ



2023
INSPIRING PROGRAMS IN
BUSINESS AWARD
FROM INSIGHT MAGAZINE

Inspiring Programs in Business Award

Recognizing Schools of Business and Higher Education
Partners That Promote Diversity and Inclusion

Nominate your program today

Samford University Rejects Formation of LGBTQ+ Law Student Group

By INSIGHT Staff -
October 25, 2022



Samford University. Photo credit Chuck Grimmert

Samford University, a private Christian institution in Alabama, has rejected the formation of an LGBTQ+ organization on the grounds that it does not align with the university's beliefs and that it may provide LGBTQ+ students with opportunities to "advocate for a larger agenda," according to a recent letter from University President Beck Taylor.

The group, OUTLaw, is comprised of more than 50 students at the university's Cumberland School of Law. The students submitted an application to officially form the group last fall. Samford sent a rejection letter following a meeting between OUTLaw members and the university administration.

"If by 'agenda' President Taylor means that we intend to let the LGBTQ+ population at Samford know that they are welcomed and loved just the way they are, then by all means his accusations are well-founded," the group wrote in a statement Monday. "But in contrast to the imaginary 'harm' contemplated by President Taylor, the LGBTQ+ students at Samford's law school—in addition to those in its undergraduate program—must now deal with the real and immediate harms posed by the anti-LGBTQ+ stigma which the University's position endorses."

The group has created a [petition](#) to pressure the university into approving its status as an official campus organization. Without such recognition, OUTLaw cannot participate in the same activities as other identity and affinity groups, host guest speakers, or reserve rooms in the law library for meetings.

This incident is not the first time the university has refused to formally recognize an LGBTQ+ group on campus. In 2017, Samford administrators denied recognition to an undergraduate LGBTQ+ group despite receiving significant support from the faculty senate.

"It's not shocking because it's more of the same of what we've seen, insofar as discriminatory practices," alumna Brit Blalock and founder of Safe Samford, an unofficial LGBTQ+ student support group, told news site AL.com "But what's particularly strange about this is it's happening inside the law school, which has not been bound to the same student organization process that the undergrads have."

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

2022 WL 3757343 (U.S.) (Appellate Brief)
Supreme Court of the United States.303 CREATIVE, LLC & Lorie Smith, Petitioners,
v.
Aubrey ELENIS, et al., Respondents.No. 21-476.
August 30, 2022.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

**Brief for Ilan H. Meyer, PhD, and Other Social Scientists
and Legal Scholars as Amici Curiae Supporting Respondents**Elana C. Redfield, The Williams Institute, UCLA School of Law, 1060 Veteran Avenue, Suite 134, Los Angeles, CA 90095,
Stephen B. Kinnaird, Counsel of Record, Tor Tarantola, Paul Hastings LLP, 2050 M Street, N.W., Washington, D.C. 20036,
(202) 551-1700, stephenkinnaird@paulhastings.com.***i TABLE OF CONTENTS**

Table of Authorities	iii
Interest of Amici Curiae	1
Introduction	3
Summary of Argument	8
Argument	11
I. Stigma is a fundamental cause of health inequalities	11
II. LGB people face discrimination and other minority stressors stemming from anti-LGB stigma	14
A. LGB people face minority stressors stemming from anti-LGB stigma and prejudice	14
B. LGB people have endured a long history of stigma and discrimination	19
C. LGB people continue to experience significant discrimination	21
D. Exclusion from public accommodations is a minority stressor	27
*ii III. Minority stress adversely affects the health, well-being, and relationship quality of LGB people	29
A. Minority stress negatively impacts the health and wellbeing of LGB people	29
B. Minority stress negatively impacts same-sex couples' relationship quality	31
C. Better social and legal conditions are associated with fewer adverse effects of minority stress	33
D. This research reflects a broad scientific consensus	35
Conclusion	38
Appendix: List of Amici	1a

iii TABLE OF AUTHORITIES*Cases**

 <i>Arcara v. Cloud Books, Inc.</i> , 478 U.S. 697 (1986)	3, 4
 <i>Baskin v. Bogin</i> , 766 F.3d 648 (7th Cir. 2014)	9, 19
 <i>Bd of Dirs. of Rotary Int'l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987)	5
 <i>Bostock v Clayton County</i> , 140 S. Ct. 1731 (2020)	2, 25, 31

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

 <i>Cohen v Cowles Media Co.</i> , 501 U.S. 663 (1991)	4
 <i>Hurley v Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston</i> , 515 U.S. 557 (1995)	7
 <i>Lawrence v. Texas</i> , 539 U.S. 558 (2003)	9, 19, 31
 <i>Lorain J Co. v United States</i> , 342 U.S. 143 (1951)	4
 <i>Masterpiece Cakeshop, Ltd v Colo. CR. Comm'n</i> , 138 S. Ct. 1719 (2018)	3
*iv  <i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)	passim
 <i>Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.</i> , 413 U.S. 376 (1973)	3
 <i>Roberts v US Jaycees</i> , 468 U.S. 609 (1984)	5, 7, 34, 35
 <i>Romer v. Evans</i> , 517 U.S. 620 (1996)	9, 19
 <i>Turner Broad Sys., Inc v. FCC</i> , 512 U.S. 622 (1994)	5
 <i>United States v Windsor</i> , 570 U.S. 744 (2013)	9, 19, 31
 <i>Windsor v United States</i> , 699 F.3d 169 (2d Cir. 2012)	9, 19
Constitutional Provisions	
U.S. Const. amend. I	3, 4, 7
Statutes	
Colo. Rev. Stat. § 24-34-601	3, 6
2007 Colo. Sess. Laws 1254	20
2008 Colo. Sess. Laws 1596	20
*v Other Authorities	
M.V. Lee Badgett et al., <i>LGBTQ Economics</i> , 35 J. Econ. Persps. 141 (2021)	25
Letter from M.V. Lee Badgett, Professor of Econ., Univ. of Mass. Amherst, to Members of the S. Comm. on the Judiciary (Mar. 17, 2021)	22
Kimberly F. Balsam & Dawn M. Szymanski, <i>Relationship Quality and Domestic Violence in Women's Same-Sex Relationships</i> , 29 Psych. Women Q. 258 (2005)	33
Melissa Block, <i>Accusations of "Grooming" Are the Latest Political Attack-with Homophobic Origins</i> , NPR (May 11, 2022, 5:27 AM)	13
Walter Bockting et al., <i>Adult Development and Quality of Life of Transgender and Gender Nonconforming People</i> , 23 Current Op. Endocrinology, Diabetes & Obesity 188 (2016)	1
*vi Brian B. Boutwell et al., <i>The Prevalence of Discrimination Across Racial Groups in Contemporary America</i> , 12 PLoS ONE (Aug. 24, 2017)	37
Letter from Todd Brower, Jud. Educ. Dir., Williams Inst., to Members of the S. Comm. on the Judiciary (Mar. 17, 2021)	24
Ronald T. Campbell & Donald W. Fiske, <i>Convergent and Discriminant Validation by the Multitrait -Multimethod Matrix</i> , 56 Psych. Bull. 81 (1959)	37
Hongjian Cao et al., <i>Sexual Minority Stress and Same-Sex Relationship Well-Being</i> , 79 J. Marriage & Fam. 1258 (2017)	32
Susan D. Cochran & Vickie M. Mays, <i>Sexual Orientation and Mental Health</i> , in <i>Handbook of Psychology and Sexual Orientation</i> 204 (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013)	30

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

*vii Kerith J. Conron & Bianca D.M. Wilson, Williams Inst., <i>LGBT Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems</i> (2019)	24
Jennifer Crocker et al., <i>Social Stigma</i> , in 2 <i>The Handbook of Social Psychology</i> 504 (Daniel T. Gilbert et al. eds., 4th ed. 1998)	11
John F. Dovidio et al., <i>Aversive Racism and Contemporary Bias</i> , in <i>The Cambridge Handbook of the Psychology of Prejudice</i> 267 (Chris G. Sibley & Fiona Kate Barlow eds., 2016)	12
David Matthew Doyle & Lisa Molix, <i>Social Stigma and Sexual Minorities' Romantic Relationship Functioning</i> , 41 <i>Personality & Soc. Psych. Bull.</i> 1363 (2015)	32
Katie M. Edwards & Kateryna M. Sylaska, <i>The Perpetration of Intimate Partner Violence Among LGBTQ College Youth</i> , 42 <i>J. Youth & Adolescence</i> 1721 (2013)	33
*viii Andrew R. Flores et al., <i>Victimization Rates and Traits of Sexual and Gender Minorities in the United States</i> , 6 <i>Sci. Advances</i> (Oct. 2, 2020)	21
David M. Frost & Allen J. LeBlanc, <i>Stress in the Lives of Same-Sex Couples</i> , in <i>LGBTQ Divorce and Relationship Dissolution</i> 70 (Abbie E. Goldberg & Adam P. Romero eds., 2018)	32
David M. Frost & Ilan H. Meyer, <i>Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals</i> , 59 <i>J. Counseling Psych.</i> 97 (2009)	16
David M. Frost et al., <i>Couple-Level Minority Stress</i> , 58 <i>J. Health & Soc. Behav.</i> 455 (2017)	32
David M. Frost et al., <i>Minority Stress and Physical Health Among Sexual Minority Individuals</i> , 38 <i>J. Behav. Med.</i> 1 (2015)	17, 31
*ix David M. Frost et al., <i>Social Change and Relationship Quality Among Sexual Minority Individuals</i> , 84 <i>J. Marriage & Fam.</i> 920 (2022)	32
David M. Frost, <i>Similarities and Differences in the Pursuit of Intimacy Among Sexual Minority and Heterosexual Individuals</i> , 67 <i>J. Soc. Issues</i> 282 (2011)	31
Erving Goffman, <i>Stigma: Notes on the Management of Spoiled Identity</i> (1963)	10
Mark L. Hatzenbuehler et al., <i>The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations</i> , 100 <i>Am. J. Pub. Health</i> 452 (2010)	34
Mark L. Hatzenbuehler et al., <i>State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations</i> 99 <i>Am. J. Pub. Health</i> 2275 (2009)	33
*x Mark L. Hatzenbuehler et al., <i>Stigma as a Fundamental Cause of Population Health Inequalities</i> , 103 <i>Am. J. Pub. Health</i> 813 (2013)	passim
Gregory M. Herek, <i>Hate Crimes and Stigma -Related Experiences Among Sexual Minority Adults in the United States</i> , 24 <i>J. Interpersonal Violence</i> 54 (2009)	16
Gregory M. Herek, <i>Sexual Stigma and Sexual Prejudice in the United States</i> , in <i>Contemporary Perspectives on Lesbian, Gay, and Bisexual Identities</i> 65 (Debra A. Hope ed., 2009)	15
Gregory M. Herek & Linda D. Garnets, <i>Sexual Orientation and Mental Health</i> , <i>Ann. Rev. Clinical Psych.</i> 353 (2007)	30
Gregory M. Herek et al., <i>Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults</i> , 57 <i>J. Consulting & Clinical Psych.</i> 945 (1999)	17

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

*xi Inst. of Med., <i>The Health of Lesbian, Gay, Bisexual, and Transgender People</i> (2011)	35
Michael King et al., <i>A Systematic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People</i> , 70 BMC Psychiatry 1 (Aug. 18, 2008)	30
Lamda Legal, <i>When Health Care Isn't Caring</i> (2010)	24
Matt Laviates, "Groomer, "Propedophile": Old Tropes Find New Life in Anti-LGBTQ Movement, NBC News (April 12, 2022, 12:54 PM)	12
Allen J. LeBlanc & David M. Frost, <i>Couple-Level Minority Stress and Mental Health Among People in Same-Sex Relationships</i> , 10 Soc'y & Mental Health 276 (2020)	32, 33
Allen J. LeBlanc et al., <i>Minority Stress and Stress Proliferation Among Same - Sex and Other Marginalized Couples</i> , 77 J. Marriage & Fam. 40 (2015)	33
*xii Diane K. Levy et al., Urban Inst., <i>A Paired-Tested Pilot Study of Housing Discrimination Against Same-Sex Couples and Transgender Individuals</i> (2017)	22
Bruce G. Link & Jo C. Phelan, <i>Conceptualizing Stigma</i> , 27 Ann. Rev. Socio. 363 (2001)	11
Joseph G. Kosciw et al., GLSEN, <i>The 2015 National School Climate Survey</i> (2016)	23
Lindsay Mahowald et al., Ctr. for Am. Progress, <i>The State of the LGBTQ Community in 2020</i> (2020)	24, 26
Christy Mallory & Brad Sears, Williams Inst., <i>Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity</i> (2015)	26
Christy Mallory & Brad Sears, Williams Inst., <i>Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity</i> (2016)	24, 27
*xiii Christy Mallory & Brad Sears, Williams Inst., <i>Evidence of Housing Discrimination Based on Sexual Orientation and Gender Identity</i> (2016)	23
Christy Mallory et al., Williams Inst., <i>The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia</i> (2017) .	22
Christy Mallory et al., Williams Inst., <i>The Impact of Stigma and Discrimination Against LGBT People in Florida</i> (2017)	22
Christy Mallory et al., Williams Inst., <i>The Impact of Stigma and Discrimination Against LGBT People in Texas</i> (2017)	22
Vickie M. Mays & Susan D. Cochran, <i>Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States</i> , 91 Am. J. Pub. Health 1869 (2001)	30
Ilan H. Meyer et al., Williams Inst., <i>LGBTQ People in the US</i> (2021)	21, 26
*xiv Ilan H. Meyer, <i>Minority Stress and Mental Health in Gay Men</i> , 36 J. Health & Soc. Behav. 38 (1995)	15, 18
Ilan H. Meyer, <i>Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations</i> , 129 Psych. Bull. 674 (2003)	15, 16, 30, 32
Ilan H. Meyer et al., <i>Social Patterning of Stress and Coping</i> , 67 Soc. Sci. & Med. 368 (2008)	15, 16
Nat'l Acads. of Scis., Eng'g, & Med., <i>Understanding the Well-Being ofLGBTQI* Populations</i> (2020)	35
Off. of Disease Prevention & Health Promotion, U.S. Dep't of Health & Hum. Servs., <i>Healthy People 2020. Lesbian, Gay, Bisexual, and Transgender Health</i>	36

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

Off. of Disease Prevention & Health Promotion, U.S. Dep't of Health & Hum. Servs., <i>Healthy People 2030' Discrimination</i>	36
*xv Leonard I. Pearlin, <i>Stress and Mental Health</i> , in <i>A Handbook for the Study of Mental Health</i> 161 (Allan V. Horwitz & Teresa L. Scheid eds., 1999)	14
Julia Raifman et al., <i>Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts</i> , 171 JAMA Pediatrics 350 (2017)	34
Ellen D.B. Riggle et al., <i>Psychological Distress, Well Being, and Legal Recognition in Same-Sex Couple Relationships</i> , 24 J. Fam. Psych. 82 (2010)	34
Adam P. Romero et al., Williams Inst., <i>LGBTPeople and Housing Affordability, Discrimination, and Homelessness</i> (2020)	23
Sharon Scales Rostosky & Ellen D.B. Riggle, <i>Same-Sex Relationships and Minority Stress</i> , 13 Current Op. Psych. 29 (2017) ..	32
*xvi Sharon Scales Rostosky et al., <i>Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults</i> , 56 J. Counseling Psych. 56 (2009)	34
Brad Sears et al., Williams Inst., <i>Documenting Discrimination in State Employment</i> (2009)	20
Brad Sears et al., Williams Inst., <i>LGBTPeople's' Experiences of Workplace Discrimination and Harassment</i> (2021)	25
Hans Selye, <i>History of the Stress Concept</i> , in <i>Handbook of Stress</i> 7 (Leo Goldberger & Shlomo Breznitz eds., 2nd ed. 1993)	14
Hua Sun & Lei Gao, <i>Lending Practices to Same-Sex Borrowers</i> , 116 PNAS 9293 (2019)	24
Peggy A. Thoits, <i>Stress and Health</i> , 51 J. Health & Soc. Behav. S41 (2010)	15, 17
*xvii Blair Wheaton, <i>The Nature of Stressors</i> , in <i>A Handbook for the Study of Mental Health</i> 176 (Allan V. Horwitz & Teresa L. Scheid eds., 1999)	14
Letter from Williams Inst. Scholars to Members of the S. Comm. on the Judiciary (Mar. 22, 2021)	22
Bianca D.M. Wilson et al., Williams Inst., <i>LGBRenters and Eviction Risk</i> (2021)	23
Joshua R. Wolff et al., <i>Sexual Minority Students in Non - Affirming Religious Higher Education</i> , 3 Psych. Sexual Orientation & Gender Diversity 201 (2016)	23

***1 INTEREST OF AMICI CURIAE¹**

Ilan H. Meyer, Ph.D., is Distinguished Senior Scholar for Public Policy at the Williams Institute, UCLA School of Law, and Professor Emeritus of Sociomedical Sciences at Columbia University. Dr. Meyer studies public health issues related to minority health, particularly the relationship of minority status, minority identity, prejudice, and discrimination to health outcomes in sexual and gender minorities. For his work, Dr. Meyer has received the California Psychological Association Distinguished Scientific Contribution in Psychology Award (2018), the American Psychological Association Presidential Citation (2019), and the National Institutes of Health Sexual and Gender Minority Distinguished Investigator Award (2022), among others.

Other amici, listed in the Appendix, include scholars of public health and social science who are recognized experts on the health and wellbeing of sexual minorities, including lesbians, gay men, and bisexuals (“LGB people”).² Many of *2 the amici have

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

conducted extensive research and authored publications in peer-reviewed academic journals on the effects of discrimination on LGB people.³ Amici also include legal scholars who are recognized experts on the law and policy affecting LGB people's health and well-being.

This Court and others have relied on work by several of the amici. *See, e.g., Bostock v. Clayton County*, 140 S. Ct. 1731, 1752 (2020) (citing Cary Franklin, *3 *Inventing the "Traditional Concept" of SexDiscrimination*, 125 Harv. L. Rev. 1307, 1338 (2012)); *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (citing Br. for Gary J. Gates as Amicus Curiae).

As scholars who specialize in issues related to LGB people, amici have a substantial interest in the question before the Court. In particular, amici describe the harmful effects on LGB people when a business or other place of public accommodation discriminates against them on the basis of sexual orientation.

INTRODUCTION

The Accommodations Clause of the Colorado Anti-Discrimination Act (CADA), like countless state and federal laws that regulate commerce, is neutral and generally applicable. *See Masterpiece Cakeshop, Ltd v Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1727, 1728 (2018). It is not aimed at speech or expressive conduct, nor does it single out particular speakers.⁴ It applies broadly to all businesses that qualify as “place[s] of public accommodation”—that is, to businesses that sell *4 goods or services to the general public, *Colo. Rev. Stat. § 24-34-601(1)*—and bars discrimination on enumerated bases, including sexual orientation, *id. § 24-34-601(2)(a)*. In short, it bars only exclusionary commercial conduct.

Generally applicable laws that are not directed to speech do not raise First Amendment concerns, even when their enforcement burdens or compels protected speech to some degree. Thus, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986), this Court found no First Amendment problem when a bookseller complained that his bookshop was shut down by enforcement of a generally applicable state law that required closure of premises where solicitation of prostitution took place. The Court remarked that “every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities,” *id. at 706*, and heightened scrutiny was appropriate only when the law was directed at expressive conduct or inevitably placed a disproportionate burden on the First Amendment activity, *id. at 707*; *see also Lorain J. Co. v. United States*, 342 U.S. 143, 155-56 (1951) (no First Amendment violation where antitrust law prevented newspapers from refusing to sell advertising space to certain businesses); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (promissory-estoppel law).

“[E]nforcement of such general laws against the press”—and, a fortiori, against businesses *5 that offer speech-related services to the public, like 303 Creative—“is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.” *Cohen*, 501 U.S. at 670. The fact that Smith may find compliance with CADA contrary to her beliefs is of no moment in terms of the First Amendment, any more than a libertarian's objection to tax laws. Blocking enforcement of generally applicable laws based on a regulated person's moral or philosophical objections to them has staggering implications.

Despite the clarity of these principles, Petitioners Smith and 303 Creative (collectively, “the Company”) have advocated (Br. 15) that the application of CADA to the Company's web-design business requires strict scrutiny, which means that CADA can be upheld only if it is the least restrictive means of serving a compelling state interest. Such a standard would buck a long line of

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

this Court's precedents. As Respondents have argued (Br. 25-28), even if CADA singled out expressive conduct—which it does not—it would still warrant only intermediate scrutiny. See  *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (applying intermediate scrutiny because a content-neutral law “single[d] out the press”).

Nonetheless, CADA's application here withstands even strict scrutiny. Remedying discrimination that excludes certain groups from equal *6 participation in economic life is inherently a compelling state interest. See  *Bd of Dirs. of Rotary Int'l v Rotary Club of Duarte*, 481 U.S. 537, 549 (1987);  *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). But it is especially so here, for not only marketplace exclusion but also the health of LGB persons is at stake. The object of this brief is to inform the Court of the established and extensive social science literature demonstrating that minority stress has proven, detrimental effects on the health of LGB persons, and there is a high risk of such negative effects if this Court were to allow the kind of discriminatory exclusion that the Company wishes to practice.

As the Court weighs the prevention of these harms against the Company's putative speech interests, three considerations are paramount.

First, Smith's insistence that she harbors no ill will toward LGB persons is not relevant to whether the Company is engaged in discriminatory conduct, or to the effects upon LGB persons of that conduct. A person might have no ill will toward African Americans per se but still hold a sincere belief that people of different races should not mix, and therefore that a restaurant should be able to exclude African Americans and that schools should be segregated. That is still discrimination on the basis of race, and the Company similarly seeks to discriminate on the basis of LGB orientation. LGB people correctly understand such conduct as discrimination against *7 them and, as a result, experience the harms documented by the research presented in this brief.

Second, the Company has stipulated that it is a “place of public accommodation” and that it “offer[s] services to the public.” Pet. App. 189a. As such, it concedes that it is not a purely private and selective vendor open only to certain customers based on religious criteria. It also implicitly concedes that it is not a “place that is principally used for religious purposes,” which would exempt it from CADA's definition of a place of public accommodation. *Colo. Rev. Stat. § 24-34-601(1)*.

Finally, the principle that combatting offensive *speech* is not a compelling interest, see  *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995), is not dispositive here. Rather, this case is about the harm that results from the Company's exclusionary *conduct*. As this Court has held, combatting that harm “plainly serves compelling state interests of the highest order,” even when the goods and services at issue involve protected speech.  *Roberts*, 468 U.S. at 624 (applied to leadership training and business contacts).

As the remainder of this brief demonstrates, the harm to LGB people of exclusionary conduct is substantial, and preventing it is a compelling interest that outweighs the Company's speech interests under any legal standard.

*8 SUMMARY OF ARGUMENT

The core question in this case is whether the First Amendment guarantees a web designer the right to engage in harmful discriminatory conduct directed at same-sex couples, which the State of Colorado seeks to prohibit. Amici submit this brief to provide the Court with essential information about the long history and present-day impacts of discrimination experienced by same-sex couples and LGB people generally, as well as the types of harms that the Company's actions could produce. Our research and expertise lead us to the inescapable conclusion that discrimination causes harm to the dignity of LGB people and to their health and well-being.

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

To prevent discriminatory harm to LGB people, providers of services to the public must be expected to comply with antidiscrimination laws. The Company argues that it should be exempt from these expectations due to Smith's religious beliefs, despite the fact that she wishes to offer a commercial service to the general public. But the Company is not a religious institution; it is a business. Same-sex couples, and LGB people generally, may expect some religious institutions to disapprove of their relationships and marriages. However, same-sex couples should not have this expectation when engaging with businesses in the marketplace.

LGB people also understand that a business that rejects same-sex couples is hostile to them *9 as LGB individuals, not just to their weddings. Should this Court accept the Company's position, it would guarantee a marketplace that is segregated into businesses that are open to same-sex couples and those that are not. Engaging in commercial activities in such a segregated marketplace will have both *tangible* and *symbolic stress*-ful effects on LGB consumers. LGB people will bear the burden of finding businesses that do not discriminate against them, a process that may entail significant harm to their dignity and wellbeing.

LGB people are no strangers to discrimination and violence. As the Seventh Circuit has explained, “homosexuals are among the most stigmatized, misunderstood, and discriminated against minorities in the history of the world.”  *Baskin v. Bogin*, 766 F.3d 648, 658 (7th Cir. 2014); accord  *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff'd*,  570 U.S. 744 (2013). But this Court has repeatedly ruled that such harm to the dignity of LGB people is of constitutional proportion. *See, e.g.,*  *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015). This Court's decisions recognizing some of these harms⁵ have helped *10 LGB people live with dignity. And yet, many of these harms persist.

As we will show, the minority-stress literature converges on one conclusion: when a place of public accommodation refuses to serve LGB people because of their sexual orientation or their desire to marry a same-sex partner, that refusal causes minority stress. Minority stress is experienced as additive stress to the general stress all people experience. And that added stress has powerful tangible and symbolic implications for LGB people. In turn, decades of social-science and public-health research have shown that stress adversely impacts the health and well-being of LGB people. In comparison with heterosexual people, this excess stress (*minority stress*) leads to excess adverse mental and physical health outcomes, including depression, substance use, and suicide attempts.

*11 Discrimination against LGB people in the marketplace, even if non-discriminating alternatives are available, imposes real harms on LGB people's mental and physical health. States have a compelling interest in addressing these harms by prohibiting discrimination.

ARGUMENT

I. Stigma is a fundamental cause of health inequalities.

The concept of *stigma* was first suggested in 1963 by sociologist Erving Goffman⁶; it has since risen as a conceptual framework in the social sciences and has been identified as a fundamental cause of health disparities among populations defined by social status (e.g., LGB people versus heterosexuals). Stigma refers to the social process of attributing low regard to a member of a disliked social group, such as LGB people, racial and ethnic minorities, religious minorities, and people with disabilities, among others. It is “a social identity that is devalued.”⁷ Link and Phelan identified as essential elements of stigma interrelated components of “labeling, stereotyping, *12 separation, status loss, and discrimination” in the context of differences in social

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

power.⁸ Racism is an example of stigma, but “the stigma concept encompasses multiple statuses and characteristics, such as sexual orientation ...; thus, stigma can be seen as broader in scope than racism.”⁹

Hatzenbuehler, Phelan, and Link defined stigma as a fundamental cause of health disparities in the United States, in that stigma underpins several processes that lead to poor health.¹⁰ These processes include impeding the availability of resources (money, education, prestige) and beneficial social relationships, and increasing the experience of stress. These stigma-induced processes lead, in turn, to adverse mental and physical health outcomes.

Stigma is referred to as a *fundamental cause* of health disparities because it is resistant to change across historical periods. For example, while the Jim Crow laws may have gone by the wayside, they have been replaced by less overt forms of racism that researchers call *aversive racism*.¹¹ Similarly, while same-sex marriages have become more accepted in American society, there has been evolving stigma against LGBT people—for example, the recent resurgence of accusations that LGBT people are “groomers” who aim to corrupt young school children.¹² Thus, over time, stigma produces new mechanisms for exclusion and discrimination and increases stress-related stigma in members of the target minority group.¹³

Below, we discuss the specific impacts of stigma on LGBT people.

***14 II. LGBT people face discrimination and other minority stressors stemming from anti-LGBT stigma.**

A. LGBT people face minority stressors stemming from anti-LGBT stigma and prejudice.

Because of widespread anti-LGBT stigma, experiences of discrimination and rejection are among significant minority stressors that adversely impact LGBT people's health and wellbeing. A stressor is “any condition having the potential to arouse the adaptive machinery of the individual.”¹⁴ Stress can be described, using an engineering analogy, as the load relative to the supportive surface.¹⁵ Like a surface that may break when the load weight exceeds the surface's capacity to withstand the load, so too can stress reach a breaking point beyond which an organism may reach “exhaustion.”¹⁶ A stressor is stressful because it requires an adaptation effort by the individual exposed to it.¹⁷ Research over decades has shown that stress causes mental and physical disorders, such as self-rated poor health, chronic health conditions, disabilities, [high blood pressure](#), psychological distress, and anxiety and [depressive disorders](#).¹⁸

LGBT people are exposed to stressors that stem from anti-LGBT stigma, which researchers refer to as *minority stress*.¹⁹ In addition, all people (including LGBT people) are exposed to *general stressors*, which do not stem from anti-LGBT stigma. LGBT and non-LGBT people may also experience stigma stressors related to other identities, such as their race/ethnicity.²⁰ Because minority stress relates to stigma against LGBT people, it is unique to them. Thus, minority stress refers to *excess* exposure to stress by LGBT people as compared with heterosexuals, which requires special adaptation by LGBT individuals.²¹ Adaptation is a stress response that can have physical and psychological implications. Because any stress can cause mental and physical disorders, the excess exposure to minority stress among LGBT people, as compared with heterosexuals, confers an excess risk for diseases caused by stress.²²

*17 Minority stress is defined by specific stress processes, including, among others, *prejudice events and conditions* and *expectations of rejection and discrimination*.²³ *Prejudice events and conditions* refers to large and small events and conditions that stem from societal anti-LGBT stigma. Thus, being fired from a job is a general stressor that could affect any person, but it is classified as a prejudice event—or a minority stressor—when it is motivated by discrimination against LGBT people.

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

Minority stress has both structural and interpersonal manifestations. Structural stigma refers to exclusion from resources and advantages available to heterosexuals, such as the historical exclusion of LGB people from the institution of marriage prior to *Obergefell*. Legally sanctioned exclusion from the marketplace, advocated by the Company here, would be a form of structural stigma. Structural stigma can also lead to stressful events through the experience of interpersonal interactions that are perpetrated by individuals, such as hate crimes, discriminatory employment and housing practices, or legally sanctioned rejection and discrimination.

Because of the social significance of stigma, a discriminatory event may be perpetrated by one person, but it carries a symbolic message of social disapprobation. The added symbolic value makes *18 a prejudice event more damaging to the victim's psychological health than a similar event not motivated by prejudice.²⁴ This exemplifies an important quality of minority stress: prejudice events and conditions have a powerful impact because they convey deep cultural meaning.²⁵ Minority-stress events can be characterized as either major (e.g., being fired from a job) or seemingly minor, “everyday” events (e.g., being refused service at a restaurant). Even “[a] seemingly minor event, such as a slur directed at a gay man, may evoke deep feelings of rejection and fears of violence [seemingly] disproportionate to the event that precipitated them.”²⁶ Therefore, assessment of stressors related to stigma and prejudice must consider not only the tangible impact of stress-typically defined as the amount of adaptation required by the event-but also the symbolic meaning of the experience within the social context.

*19 In sum, stressors are ubiquitous in our society and experienced by LGB and heterosexual people alike. But LGB people are uniquely exposed to minority stressors that stem from stigma toward them. This added source of stress exposes LGB people to excess stress compared with heterosexuals and leads to excess adverse health outcomes in LGB as compared with heterosexual populations.

B. LGB people have endured a long history of stigma and discrimination.

LGB people have faced a long, painful history of public and private discrimination in the United States. In *Obergefell*, this Court observed that gay and lesbian people have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”  576 U.S. at 661; see also  *United States v Windsor*, 570 U.S. at 770 (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”);  *Lawrence*, 539 U.S. at 575 (discussing stigma from criminal sodomy statutes);  *Romer*, 517 U.S. at 632 (discussing animus in anti-LGB legislation). Speaking to both public and private discrimination, the Seventh Circuit has explained *20 that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community.”  *Baskin v. Bogin*, 766 F.3d 648, 658 (7th Cir. 2014); accord  *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*,  570 U.S. 744 (2013).

This history is well-documented. In Colorado specifically, a 1992 legislative report noted that LGB people “have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses.”²⁷ Colorado amended its antidiscrimination law in 2007 and again in 2008 to *21 address many of these same forms of discrimination against LGB people.²⁸

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

C. LGB people continue to experience significant discrimination.

Despite advances to protect the autonomy and equality of LGB people under the U.S. Constitution and some state and local laws, research shows that violence, mistreatment, and discrimination remain persistent and pervasive. One study has shown that LGB and transgender people are nearly four times as likely to experience violent attacks.²⁹ But anti-LGBT discrimination often manifests in the form of day-to-day interactions related to meeting basic needs. In a study of a nationally representative sample of LGBT people, almost half reported that they had generally been treated with less courtesy (45%) and less respect (44%) than non-LGBT people.³⁰

Research has documented the discrimination and harassment that LGB people continue to *22 face in almost all aspects of public life,³¹ including in employment,³² housing,³³ education,³⁴ *24 health care,³⁵ financial services,³⁶ government programs,³⁷ the judicial system,³⁸ and public accommodations.³⁹ The employment context provides a clear example. In a study conducted in *25 2021, one year after this Court decided *Bostock*, over 45% of LGBT workers reported experiencing unfair treatment at work at some point in their lives, including being fired, not hired, or harassed because of their sexual orientation or gender identity.⁴⁰ Nearly one-third (31.1%) of LGBT respondents reported experiencing employment-based discrimination or harassment during the five-year period prior to the study.⁴¹ Other studies have assessed employment discrimination using experimental methods, such as by submitting matching pairs of resumes.⁴² Results showed that LGBTQ candidates were significantly less likely than “effectively identical” non-LGBTQ candidates to be invited for an interview or to be offered a job.⁴³ An analysis of employment-discrimination complaints filed with state enforcement agencies (in 22 states that protected against LGBT discrimination) between 2008 and *26 2014 showed that complaints of discrimination based on sexual orientation and gender identity were filed at a similar rate by LGBT workers as complaints of discrimination based on race or sex were filed by people of color or women, respectively (between 4 and 5 complaints per 10,000 workers in the relevant class).⁴⁴

Most relevant to the present case, research shows that LGB people continue to experience discrimination by public accommodations when they seek goods and services in the marketplace. For example, in a nationally representative study of LGB people, 24% reported receiving poorer service in restaurants and stores.⁴⁵ Similarly, another recent study found that, of the 36% of LGBT people who had experienced discrimination within the past year, 51% said the experience occurred in a public space, such as a store.⁴⁶ Complaints filed with state enforcement agencies between 2008 and 2014 suggest that LGBT people continue to experience discrimination in *27 public accommodations at rates similar to those of women and people of color (between about 1 and 4 complaints filed per 100,000 people in the relevant class).⁴⁷ Data from Colorado are similar.⁴⁸

D. Exclusion from public accommodations is a minority stressor.

Based on the large body of research on minority stress, amici conclude that a wedding vendor's declining to serve same-sex couples would be a prejudice event—a type of minority stress which would subject LGB persons to indignities that have both tangible and symbolic impacts.

The potential pitfalls an LGB couple may encounter in finding a business willing to serve them demonstrate the basic premise of minority stress as an *excess* stress: the extra burden of finding an alternative vendor adds to the stress of planning a wedding as compared with heterosexual couples. Presuming an alternative business can be found at all, this added burden is unique to the class of customers who are shunned by the website designer for planning a same-sex wedding.

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

If a segregated marketplace becomes the norm, same-sex couples can expect to encounter *28 such struggles in other areas of commerce that involve commodified speech or expression. A rejected customer may not always be able to find an appropriate and timely replacement because an alternative business may not be available or because the immediacy of the particular need may limit the choice of businesses available in the area. *See, e.g.,* First Am. Compl. at ¶¶ 26, 27, 34, *Zawadski v Brewer Funeral Services, Inc.*, No. 55CI1:17-cv-00019-CM, (Miss. Cir. Ct., filed Mar. 7, 2017) (widower alleging funeral home refused to transport and cremate deceased same-sex spouse because of their sexual orientation, leaving the decedent's body without proper storage for hours and the family scrambling to find alternative funeral services).

Being discriminated against by service providers in the marketplace is stressful, as it requires LGB people to expend greater effort and expense to secure the services or goods provided to non-LGB people.⁴⁹ It is even more stressful because it conveys to the LGB person discriminated *29 against that they are inferior, evoking deep feelings of rejection informed by prior experiences of rejection and discrimination. Moreover, the possibility of public rejection from services and goods creates a stigmatizing social environment. As we discuss next, minority stress and a stigmatizing social environment adversely impact LGB people's health and well-being.

III. Minority stress adversely affects the health, well-being, and relationship quality of LGB people.

A. Minority stress negatively impacts the health and well-being of LGB people.

Stigma is a “fundamental social cause” of disease in that it “influences multiple disease outcomes through multiple risk factors among a substantial number of people.”⁵⁰ This makes stigma “a central driver of morbidity and mortality at a population level.”⁵¹ Stigma leads to poor health outcomes by blocking resources “of money, knowledge, power, prestige, and beneficial social connections,”⁵² increasing social isolation, limiting social support, and increasing stress.⁵³

*30 Decades of research have demonstrated the negative effects of minority stress on the health and well-being of LGB people. Studies have concluded that minority-stress processes are related to an array of mental health problems, including depressive symptoms, substance use, and suicide ideation and attempts.⁵⁴

Several studies have also demonstrated links between minority-stress factors and some physical health problems. For example, one study found that LGB people who had experienced a prejudice-related stressful life event were about three times more likely than those who did not experience such an event to have suffered a serious *31 physical health problem over a one-year period.⁵⁵ This effect remained statistically significant even after controlling for the experience of other non-prejudicial stress events and other factors known to affect physical health. Thus, prejudice-related stressful life events were more damaging to the physical health of LGB people than similar stressful life events that did not involve prejudice.

B. Minority stress negatively impacts same-sex couples' relationship quality.

LGB people have the same aspirations for achieving intimate relationships as heterosexuals, but they face greater social barriers to maintaining long-term relationships.⁵⁶ This Court's decisions in *Lawrence*, *Windsor*, *Obergefell*, and *Bostock* have helped remove some major barriers. But minority stress remains a burden for same-sex partners. Studies indicate that minority stress in LGB people's lives may negatively *32 affect couples' relationship quality.⁵⁷ While different-sex and same-sex couples all experience general stressors-such as stressors related to finances or household chores-same-sex couples experience additional minority stressors that stem from the stigmatization of same-sex relationships.⁵⁸ Stigma surrounding same-sex relationships

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

can also contribute to feelings of internalized homophobia among people in same-sex relationships,⁵⁹ which has been shown to be detrimental to relationship quality among sexual *33 minority individuals.⁶⁰ The mental-health effects of stigma can also strain relationships.⁶¹

C. Better social and legal conditions are associated with fewer adverse effects of minority stress.

Studies have used multiple approaches to study the impact of stigma and minority stress, including assessing the relationship between antidiscrimination laws and LGB health. One study found that LGB people who lived in states without laws extending protections to sexual minorities—for example, in employment or hatecrime laws—demonstrated higher levels of mental health problems compared to those living in states with laws that provide such protections.⁶² *34 Similarly, another study found that denying marriage rights to same-sex couples had a negative effect on the mental health of lesbians and gay men, regardless of their relationship status.⁶³ A study that looked at national variations in marriage laws prior to *Obergefell* showed that a state's permitting same-sex marriage was associated with a seven-percent reduction in the proportion of high school students reporting suicide attempts.⁶⁴

This research demonstrates the critical importance of the state's interest in combatting discrimination, providing empirical support for what this Court observed in *Roberts*: that public accommodation laws “protect[] the State's citizenry from a number of serious social and personal *35 harms” by ensuring that members of historically disadvantaged groups can participate as full members of civic society.  468 U.S. at 625.

D. This research reflects a broad scientific consensus.

To date, hundreds of peer-reviewed research articles have used the minority-stress framework. By and large, this body of work shows that exposure to minority stress negatively affects the health and well-being of LGB people. There is no significant disagreement among social scientists and public-health experts on this point. The National Academies of Sciences, Engineering, and Medicine (NASEM), formerly the Institute of Medicine, concluded that “[t]he disparities affecting [LGBT] populations are driven by experiences of minority stress, which include both structural and interpersonal stigma, prejudice, discrimination, violence, and trauma.”⁶⁵ NASEM operates under a congressional charter and provides independent, objective analysis of scientific research. Other leading public-health authorities, including the U.S. Department of Health and Human Services, have also recognized *36 stigma as a cause of health disparities between LGB and heterosexual populations.⁶⁶

In a brief supporting the Company, a group of six academics disputes the precise mechanisms by which discrimination harms LGB health. *See* Br. of Scholars of Fam. & Sexuality as Amici Curiae in Supp. of Pet'rs 4. But these academics agree that “the proposition that anti-gay discrimination can diminish psychological and physical health is widely acknowledged.” *id.* Their methodological critiques center on the difficulty of proving causation—a difficulty that attends observational studies generally, and which social scientists routinely address, including through *37 the use of diverse methods of study.⁶⁷ These difficulties do not undermine the consensus that even these six amici acknowledge—that discrimination negatively affects the health of LGB people.⁶⁸

*38 CONCLUSION

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

The scientific literature converges on one conclusion: discrimination by places of public accommodation hurts the health and well-being of LGB people. If this Court should find that the First Amendment prevents Colorado from remedying such harms, our Constitution will be made a source of stigma rather than dignity for LGB people.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ELANA C. REDFIELD

THE WILLIAMS INSTITUTE

UCLA SCHOOL OF LAW

1060 Veteran Avenue

Suite 134

Los Angeles, CA 90095

STEPHEN B. KINNAIRD

Counsel of Record

TOR TARANTOLA

PAUL HASTINGS LLP

2050 M Street, N.W.

Washington, D.C. 20036

(202) 551-1700

stephenkinnaird@paulhastings.com

Appendix not available.

Footnotes

- 1 No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners filed

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

their blanket consent to the filing of amicus briefs on March 10, 2022, and Respondents filed their blanket consent on April 11, 2022.

- 2 The outcome of this case will also implicate the rights of transgender people, including those in same-sex and opposite-sex relationships. Research shows that stigma and prejudice against transgender people can adversely affect their health and well-being. *See, e.g.,* Walter Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconforming People*, 23 *Current Op. Endocrinology, Diabetes & Obesity* 188, 188 (2016). But given the facts of this case, this brief focuses primarily on the effects of stigma and prejudice on LGB people.
- 3 *Sexual minorities* and *gender minorities* are terms social- and public-health scientists often use to refer to LGB and transgender people, respectively; LGBT refers to lesbian, gay, bisexual, and transgender people. In this brief we refer primarily to LGB people. When referring to the community, or when making statements to refer to both sexual and gender minorities, we use the term *LGBT*. It is also important to note that LGBT people include diverse populations in terms of race and ethnicity, socioeconomic status, state and region of residence, and other characteristics and, thus, experience LGBT discrimination at the intersection of these varied characteristics.
- 4 The Communications Clause does prohibit businesses from advertising policies that violate CADA's Accommodations Clause. *See Colo. Rev. Stat. § 24-34-601(2)(a)*. But because the advertising of unlawful commercial conduct is not protected by the First Amendment, the constitutionality of the Communications Clause stands or falls with the constitutionality of the Accommodations Clause. *See*  *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 389 (1973).
- 5 *See, e.g.,*  *Obergefell*, 576 U.S. at 681 (fundamental right to marry is guaranteed to same-sex couples by the Due Process and Equal Protection clauses of the Fourteenth Amendment);  *United States v. Windsor*, 570 U.S. 744, 749-52 (2013) (Defense of Marriage Act violates the Due Process Clause of the Fifth Amendment);  *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (right to intimate consensual sexual conduct is protected by the Due Process Clause of the Fourteenth Amendment);  *Romer v. Evans*, 517 U.S. 620, 623-24 (1996) (Equal Protection Clause bars state constitutional amendment prohibiting the extension of antidiscrimination protections to LGB people).
- 6 *See generally* Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963).
- 7 Jennifer Crocker et al., *Social Stigma*, in 2 *The Handbook of Social Psychology* 504, 505 (Daniel T. Gilbert et al. eds., 4th ed. 1998).
- 8 Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 *Ann. Rev. Socio.* 363, 363 (2001).
- 9 Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 *Am. J. Pub. Health* 813, 813 (2013).
- 10 *See id.*
- 11 *See* John F. Dovidio et al., *Aversive Racism and Contemporary Bias*, in *The Cambridge Handbook of the Psychology of Prejudice* 267, 267 (Chris G. Sibley & Fiona Kate Barlow eds., 2016).
- 12 *See, e.g.,* Matt Laviertes, “Groomer,” “Pro-pedophile”: Old Tropes Find New Life in Anti-LGBTQ Movement, NBC News (April 12, 2022, 12:54 PM), <https://www.nbcnews.com/nbc-out/out-politics-andpolicy/groomer-pedophile-old-tropes-find-new-life-antilgbtq-movement-rcna23931> [<https://perma.cc/QBC9-GKDR>]; Melissa Block, *Accusations of “Grooming” Are the Latest Political Attack-with Homophobic Origins*, NPR (May 11, 2022, 5:27

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

AM), <https://www.npr.org/2022/05/11/1096623939/accusations-grooming-political-attackhomophobic-origins> [<https://perma.cc/8BH4-844T>].

- 13 See Hatzenbuehler et al., *supra* note 9, at 816-17.
- 14 Leonard I. Pearlin, *Stress and Mental Health*, in *A Handbook for the Study of Mental Health* 161, 163 (Allan V. Horwitz & Teresa L. Scheid eds., 1999). Here we use *stress* to mean the *exposure* to a stressful event or condition (in common language it also refers to the resultant *feeling* of stress). Researchers typically distinguish between stress *exposure* (e.g., a stressful event such as being victimized by violence) and the potential *outcome* of the stress, which is measured as mental or physical health (e.g., psychological *distress*). See Pearlin, *supra*, at 175.
- 15 See Blair Wheaton, *The Nature of Stressors*, in *A Handbook for the Study of Mental Health* 176, 177 (Allan V. Horwitz & Teresa L. Scheid eds., 1999).
- 16 Hans Selye, *History of the Stress Concept*, in *Handbook of Stress* 7, 10 (Leo Goldberger & Shlomo Breznitz eds., 2nd ed. 1993).
- 17 See *id.*; Pearlin, *supra* note 14, at 163.
- 18 Peggy A. Thoits, *Stress and Health*, 51 J. Health & Soc. Behav. S41, S44-45 (2010).
- 19 See, e.g., Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38, 38 (1995) [hereinafter Meyer, *Minority Stress*]; Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations*, 129 Psych. Bull. 674, 674 (2003) [hereinafter Meyer, *Prejudice*]; cf. Ilan H. Meyer et al., *Social Patterning of Stress and Coping*, 67 Soc. Sci. & Med. 368, 371 (2008) [hereinafter Meyer et al., *Social Patterning* (examining “social stress theory”).
- 20 See Hatzenbuehler et al., *supra* note 9, at 813.
- 21 See Meyer et al., *Social Patterning*, *supra* note 19, at 376; cf. Gregory M. Herek, *Sexual Stigma and Sexual Prejudice in the United States*, in *Contemporary Perspectives on Lesbian, Gay, and Bisexual Identities* 65, 67 (Debra A. Hope ed., 2009); Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States*, 24 J. Interpersonal Violence 54, 57 (2009); Meyer, *Prejudice*, *supra* note 19, at 676; David M. Frost & Ilan H. Meyer, *Internalized Homophobia and Relationship Quality Among Lesbians, Gay Men, and Bisexuals*, 59 J. Counseling Psych. 97, 97 (2009).
- 22 Meyer et al., *Social Patterning*, *supra* note 19, at 368.
- 23 Meyer, *Prejudice*, *supra* note 19, at 680-82.
- 24 David M. Frost et al., *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 J. Behav. Med. 1, 1 (2015) [hereinafter Frost et al., *Minority Stress and Physical Health*]; Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 57 J. Consulting & Clinical Psych. 945, 945 (1999); Thoits, *supra* note 18, at S45.
- 25 Meyer, *Minority Stress*, *supra* note 19, at 41-42.
- 26 *Id.* at 42.
- 27 See Brad Sears et al., Williams Inst., *Documenting Discrimination in State Employment* 7-4 (2009) (quoting Report on Ballot Proposals of the Legislative Counsel of Colorado General Assembly, An Analysis of 1992 Ballot

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

Proposals, Research Publ. No. 369, at 9-12 (1992)), <https://williamsinstitute.law.ucla.edu/publications/lgbtdiscrim-state-employment/> [<https://perma.cc/D4WS-9QFE>].

- 28 See 2007 Colo. Sess. Laws 1254 (employment); 2008 Colo. Sess. Laws 1596 (places of public accommodation).
 - 29 Andrew R. Flores et al., *Victimization Rates and Traits of Sexual and Gender Minorities in the United States*, 6 Sci. Advances 5 (Oct. 2, 2020), <https://www.science.org/doi/10.1126/sciadv.aba6910>.
 - 30 Ilan H. Meyer et al., Williams Inst., *LGBTQ People in the U.S.* 21 tbl.9 (2021).
 - 31 See, e.g., Letter from Williams Inst. Scholars to Members of the S. Comm. on the Judiciary (Mar. 22, 2021), available at [https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Testimony-E quality-Act- State-Governments-Mar-2021.pdf](https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Testimony-E%20quality-Act- State-Governments-Mar-2021.pdf) [<https://perma.cc/UQF3-6PGR>]; see also Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Florida* 25-32 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-FL-Sep-2017.pdf> [<https://perma.cc/Q7MA-UHRQ>]; Christy Mallory et al., Williams Inst., *The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia* 25-32 (2017), <https://williamsinstitute.law.ucla.edu/wpcontent/uploads/Impact-LGBT-Discrimination-GA-Jan-2017.pdf> [<https://perma.cc/HK4Q-RN3A>]; Christy Mallory et al., Williams Inst., *The Impact of Stigma and Discrimination Against LGBT People in Texas* 25-31 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-TX-Apr-2017.pdf> [<https://perma.cc/34JP-6N5B>].
 - 32 See, e.g., Letter from M.V. Lee Badgett, Professor of Econ., Univ. of Mass. Amherst, to Members of the S. Comm. on the Judiciary (Mar. 17, 2021), available at [https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-E quality-Act-LGBT-Employment-Mar-2021.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-E%20quality-Act-LGBT-Employment-Mar-2021.pdf) [<https://perma.cc/Z4PH-FWV5>] (discussing employment discrimination experienced by LGB and transgender people).
 - 33 See, e.g., Diane K. Levy et al., Urban Inst., *A Paired-Tested Pilot Study of Housing Discrimination Against Same-Sex Couples and Transgender Individuals* xiii (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf [<https://perma.cc/7YML-GNDP>]; Adam P. Romero et al., Williams Inst., *LGBT People and Housing Affordability, Discrimination, and Homelessness* 4 (2020); Christy Mallory & Brad Sears, Williams Inst., *Evidence of Housing Discrimination Based on Sexual Orientation and Gender Identity* 1 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Discrimination-US-Feb-2016.pdf> [<https://perma.cc/69X5-S4GJ>].
- LGBT people are also more likely to rent their homes and thus have less stable housing. See Bianca D.M. Wilson et al., Williams Inst., *LGBT Renters and Eviction Risk* 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Eviction-Risk-Aug-2021.pdf> [<https://perma.cc/55JS-X7TF>].
- 34 See, e.g., Joseph G. Kosciw et al., GLSEN, *The 2015 National School Climate Survey* xvi-xvii (2016), [https://www.glsen.org/sites/default/files/2020-01/GLSEN2015NationalSchoolClimate% 20Survey-NSCS-FullReport.pdf](https://www.glsen.org/sites/default/files/2020-01/GLSEN2015NationalSchoolClimate%20Survey-NSCS-FullReport.pdf) [<https://perma.cc/PV7V-8F87>]; Joshua R. Wolff et al., *Sexual Minority Students in Non-Affirming Religious Higher Education*, 3 Psych. Sexual Orientation & Gender Diversity 201, 201 (2016).
 - 35 See Lambda Legal, *When Health Care Isn't Caring* 5- 6 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf [<https://perma.cc/R39K-D6PS>].
 - 36 See Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PNAS 9293, 9293 (2019).

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

- 37 See, e.g., Kerith J. Conron & Bianca D.M. Wilson, Williams Inst., *LGBT Youth of Color Impacted by the Child Welfare and Juvenile Justice Systems* 4-5 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-YOC-Social-Services-Jul-2019.pdf> [<https://perma.cc/VMC8-CCUG>].
- 38 See, e.g., Letter from Todd Brower, Jud. Educ. Dir., Williams Inst., to Members of the S. Comm. on the Judiciary (Mar. 17, 2021), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-Judicial-System-Mar-2021.pdf> [<https://perma.cc/WS7V-X5G4>].
- 39 See Christy Mallory & Brad Sears, Williams Inst., *Evidence of Discrimination in Public Accommodations Based on Sexual Orientation and Gender Identity* 1 (2016) [hereinafter Mallory & Sears, *Public Accommodations*], <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Public-Accomm-Discrimination-Feb-2016.pdf> [<https://perma.cc/ZTX8-WV7M>]; Lindsay Mahowald et al., Ctr. for Am. Progress, *The State of the LGBTQ Community in 2020*, at 4 (2020), <https://www.americanprogress.org/wp-content/uploads/2020/10/LGBTQpoll-report.pdf> [<https://perma.cc/ME47-3XEC>].
- 40 Brad Sears et al., Williams Inst., *LGBT People's' Experiences of Workplace Discrimination and Harassment* 32 tbl.2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf> [<https://perma.cc/VH4G-NC8J>].
- 41 *Id.* at 1.
- 42 See M.V. Lee Badgett et al., *LGBTQ Economics*, 35 J. Econ. Persps. 141, 159 (2021).
- 43 *Id.*
- 44 Christy Mallory & Brad Sears, Williams Inst., *Evidence of Employment Discrimination Based on Sexual Orientation and Gender Identity* 1 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Employment-Discrimination-US-Oct-2015.pdf> [<https://perma.cc/9PV9-B2N9>].
- 45 Meyer et al., *LGBTQ People in the US*, *supra* note 30, at 21 tbl.9.
- 46 Mahowald et al., *supra* note 39, at 4.
- 47 Mallory & Sears, *Public Accommodations*, *supra* note 39, at 1.
- 48 See *id.* at 4.
- 49 Comparisons of LGB and heterosexual people throughout our analysis assume everything else being equal in terms of other sources of potential discrimination, such as minority racial/ethnic identity. Of course, other forms of discrimination would similarly apply to LGB people and heterosexuals. Thus, racial discrimination would apply equally to Black heterosexual and LGB people, but only the LGB people would experience the additional anti-LGB discrimination.
- 50 Hatzenbuehler et al., *supra* note 9, at 813.
- 51 *Id.*
- 52 *Id.* at 814.
- 53 *Id.* at 815.

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

- 54 See Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 Am. J. Pub. Health 1869, 1869, 1871 tbl.1 (2001); Gregory M. Herek & Linda D. Garnets, *Sexual Orientation and Mental Health*, Ann. Rev. Clinical Psych. 353, 359-60 (2007); Michael King et al., *A Systematic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People*, 70 BMC Psychiatry 1 (Aug. 18, 2008), <https://bmcpsy psychiatry.biomedcentral.com/track/pdf/10.1186/1471-244X-8-70.pdf> [<https://perma.cc/K5M3-2BBZ>]; Meyer, *Prejudice*, *supra* note 19, at 679-80; Susan D. Cochran & Vickie M. Mays, *Sexual Orientation and Mental Health*, in *Handbook of Psychology and Sexual Orientation* 204, 208-09 (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013).
- 55 Frost et al., *Minority Stress and Physical Health*, *supra* note 24, at 1.
- 56 See David M. Frost, *Similarities and Differences in the Pursuit of Intimacy Among Sexual Minority and Heterosexual Individuals*, 67 J. Soc. Issues 282, 294 (2011).
- 57 See Hongjian Cao et al., *Sexual Minority Stress and Same-Sex Relationship Well-Being*, 79 J. Marriage & Fam. 1258, 1258 (2017); David Matthew Doyle & Lisa Molix, *Social Stigma and Sexual Minorities' Romantic Relationship Functioning*, 41 Personality & Soc. Psych. Bull. 1363, 1363 (2015); Sharon Scales Rostosky & Ellen D.B. Riggle, *Same-Sex Relationships and Minority Stress*, 13 Current Op. Psych. 29, 29 (2017); David M. Frost & Allen J. LeBlanc, *Stress in the Lives of Same-Sex Couples*, in *LGBTQ Divorce and Relationship Dissolution* 70, 72-73 (Abbie E. Goldberg & Adam P. Romero eds., 2018); David M. Frost et al., *Social Change and Relationship Quality Among Sexual Minority Individuals*, 84 J. Marriage & Fam. 920, 920 (2022).
- 58 See David M. Frost et al., *Couple-Level Minority Stress*, 58 J. Health & Soc. Behav. 455, 456 (2017); Meyer, *Prejudice*, *supra* note 19, at 678.
- 59 See Allen J. LeBlanc & David M. Frost, *Couple-Level Minority Stress and Mental Health Among People in Same-Sex Relationships*, 10 Soc'y & Mental Health 276, 277 (2020).
- 60 See Kimberly F. Balsam & Dawn M. Szymanski, *Relationship Quality and Domestic Violence in Women's Same-Sex Relationships*, 29 Psych. Women Q. 258, 258 (2005); Katie M. Edwards & Kateryna M. Sylaska, *The Perpetration of Intimate Partner Violence Among LGBTQ College Youth*, 42 J. Youth & Adolescence 1721, 1721 (2013).
- 61 Cf. LeBlanc & Frost, *supra* note 59, at 287; Allen J. LeBlanc et al., *Minority Stress and Stress Proliferation Among Same-Sex and Other Marginalized Couples*, 77 J. Marriage & Fam. 40, 40 (2015).
- 62 See Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations* 99 Am. J. Pub. Health 2275, 2275 (2009).
- 63 See Ellen D.B. Riggle et al., *Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 24 J. Fam. Psych. 82, 82 (2010); see also Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 56 J. Counseling Psych. 56, 56 (2009); Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations*, 100 Am. J. Pub. Health 452, 452 (2010).
- 64 Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*, 171 JAMA Pediatrics 350, 350 (2017).
- 65 Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI* Populations* 8 (2020) (citation omitted); see also Inst. of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People* 7 (2011).

303 CREATIVE, LLC & Lorie Smith, Petitioners, v. Aubrey..., 2022 WL 3757343...

- 66 See Off. of Disease Prevention & Health Promotion, U.S. Dep't of Health & Hum. Servs., *Healthy People 2020: Lesbian, Gay, Bisexual, and Transgender Health*, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> [<https://perma.cc/YL6N-TLFF>] (last visited Aug. 18, 2022); Off. of Disease Prevention & Health Promotion, U.S. Dep't of Health & Hum. Servs., *Healthy People 2030: Discrimination*, <https://health.gov/healthypeople/priorityareas/social-determinants-health/literature-summaries/discrimination> [<https://perma.cc/B3YG-75SR>] (last visited Aug. 18, 2022) (describing “[d]iscrimination as a social determinant of health”).
- 67 Cf. Ronald T. Campbell & Donald W. Fiske, *Convergent and Discriminant Validation by the Multitrait-Multimethod Matrix*, 56 Psych. Bull. 81, 81 (1959).
- 68 Their brief also misinterprets one study of racial discrimination, asserting that “less than half of one percent of reported discrimination was due to sexual orientation, even among LGB respondents.” Br. 9 (footnote omitted) (citing Brian B. Boutwell et al., *The Prevalence of Discrimination Across Racial Groups in Contemporary America*, 12 PLoS ONE 5 (Aug. 24, 2017), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0183356&type=printable> [<https://perma.cc/Y4HB-QTV6>]). But the analyses in that study “were limited to racial differentiation,” and “if [the] analyses were conducted based on sex or sexual orientation, the results may differ.” Boutwell et al., *supra*, at 7. Their brief also questions whether the Company's planned acts of discrimination would, on their own, affect an LGB person's health. See Br. 5. This is difficult to evaluate in this case's hypothetical posture. But regardless of whether any single instance of discrimination triggers a health problem for a particular customer, the stigma and burdens of a segregated market—which a ruling for the Company would require—contribute broadly to health inequalities. See *supra* pp. 27-31.

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.



Diverse and Divided: A Political Demography of American Elite Students

Eric Kaufmann*

Center for the Study of Partisanship and Ideology

Report No. 7

10/3/2022

* Professor of Politics at Birkbeck College, University of London; Research Fellow, Center for the Study of Partisanship and Ideology.

CSPI

Table of Contents

Table of Contents.....2

Summary 3

Introduction 5

Method.....5

Student Demographics 5

 Race 5

 Gender and Sexual Orientation 6

 Religion 7

 Differences by Discipline, and Between Faculty and Students.....9

The Politics of Students.....10

Segregation 11

Trends Over Time 17

The Gender Gap 19

The American Student Voter 21

Social Identity Gaps in the Elite Student Population.....25

Do Economic Factors Matter? 31

Are Students Influenced by their Peers’ Politics? 32

Attitudes and Partisanship 34

Viewpoint Diversity 36

Conclusion 42

Appendix 43

References 47

CSPI

Summary

- America's elite university students are more demographically diverse than the general population, but more politically divided along lines of race, gender, sexuality, and religion.
- Minority and female students are far more liberal on campus than in the general population, whereas straight white Christian men are somewhat more conservative on campus than in the general population. Current trends portend a politics in which elite women, minorities, gays, and the nonreligious are more left-leaning while elite whites, males, and Christians remain relatively conservative.
- White Christians tend to cluster in red state flagship universities, which are the most politically balanced in the country and have similar shares of liberal and conservative students. Yet many flagship universities in flyover states with conservative reputations actually have more liberal than conservative students.
- A quarter of students are LGBT, and there are roughly equal shares of Christian and nonreligious students. LGBT, Nonreligious, and Christians are set to become more important political groups among America's future leaders.
- Liberal arts colleges are the least politically diverse. Many have almost no conservatives, and thus very low viewpoint diversity. But they have high sexual diversity, at nearly 40 percent LGBT.
- Ivy League schools average 10-15 percent conservative and 60-75 percent liberal. Across 150 leading schools, there are nearly 2.5 liberals for every conservative.
- Democrats outnumber Republicans by a 55-23 margin on campus, and liberals outnumber conservatives 53-21. Elite students are thus two-thirds more Democratic and twice as liberal as the American population.
- Among elite students, there is a 15-point gender gap in political ideology and party identification between men and women. This is 3 to 5 times larger than the gender gap in the general population. It is also 2 to 3 times larger than the gender gap among either the 18-25 or college-educated general population. The campus gender gap has grown steadily since 2004.
- The university with the highest viewpoint diversity ranking is the University of Arkansas, whose students are 35% conservative, 37% liberal, 36% Republican, and 41% Democratic. The least diverse is Smith College, at 81% liberal, 1% conservative, 78% Democratic, and 2% Republican.
- Thirty percent of students and nearly the same share of academic staff in Social Sciences and Humanities (SSH) fields identify as the furthest left point on a 7-point conservative-liberal scale. For Sciences, Technology, Engineering, and Math (STEM) subjects, a smaller share – 20% of students and 10% of staff – identify as far left.
- Self-identified Jews make up only 3% of elite students and just 7% of Ivy League students, suggesting a considerable decline since the early 2000s.
- Homeschooled and parochial schooled undergraduates are as or more likely to identify as LGBT or non-binary as those from public or private school backgrounds.

CSPI

Note: An interactive version of the table in the appendix that allows users to search by University and sort by characteristic can be found at <http://www.sneps.net/viewpoint-diversity-ranking-of-leading-us-colleges>.

CSPI

Introduction

The most elite fifth of undergraduates in the country will supply most of the nation's future leaders. They are also an important leading indicator of emerging social and political trends. The Foundation for Individual Rights in Education (FIRE)'s campus expression surveys sampled 57,000 undergraduates across 159 of the top universities in the country, allowing for an unprecedented opportunity to learn more about this important group.

Method

This report makes use of FIRE's distinctive 2020 and 2021 student free speech surveys, drawn from College Pulse's panel of over 500,000 verified undergraduates.¹ This contains some 57,000 respondents and a rich range of political questions to explore emerging trends among elite students. The FIRE survey focuses on students at research-intensive, selective institutions. In 2021, 75% of FIRE respondents attended one of the 113 Research 1 (R1) institutions, and all attended one of the approximately 335 R1, R2, or R3 doctoral-granting institutions or a prestigious liberal arts college. This means the data represents about 3 in 4 R1 institutions, just over 10% of R2 schools, and very few R3 or lower-ranked institutions. The colleges in the survey educate around 1 in 5 of the nation's undergraduate students, focusing very much on the intellectually influential top tier.

Across the country, R1 schools, including those not in the FIRE dataset, enroll around 1 in 7 undergraduates. By comparison, the Higher Education Research Institute (HERI) Freshman Survey samples a representative stratified draw of around 100,000 freshmen pupils from roughly 100 institutions selected out of a possible 1,427 4-year degree-granting colleges.² This report should therefore be viewed as a portrait of the political views and demographics of the approximately 15% of American undergraduates who attend top institutions. The FIRE sample is weighted during analysis by College Pulse data weights based on official data submitted by each university to the Integrated Postsecondary Education Data System (IPEDS) database and other sources.³

Student Demographics

Race

I begin with the basic demography of the 57,000 college students surveyed by FIRE. The survey aimed at a reasonably representative sample of the student body of research-intensive universities and elite colleges. In the combined 2020-21 sample of approximately 57,000 students, 52% of respondents are white, 19% are Asian, 11% Hispanic, 7% black, and 7% multiracial. With survey weights applied, the white share rises to 61%, which is about 10 points whiter than Gen-Z as a whole. The HERI survey, based on a far less exclusive sample of colleges, shows a more racially diverse student population, with 50% white, 11% Latino, and 10% black. However, the Asian share was lower in the HERI data, at 12%, and the multiracial component higher, at 16%.

In the FIRE data, only six colleges were more than 80% white, though all were at least 10% minority: BYU, Maine, UNH, Vermont, Wyoming, and Utah State. A larger number of institutions were less than 20% white, with three under 10% white, including Howard (0%), Cal State Los Angeles (6%), and UC Riverside (7%). These figures approximate to actual reported numbers from the universities themselves.

CSPI

The share of white students in Ivy League universities averaged 41% in the survey data, with Asians at 27%, both of which tally with the university figures.⁴ Asian students comprised 19% of the FIRE student sample overall, well above this group's share of the national population of 18-24-year-olds, which is around 5%.⁵ In the FIRE data, the colleges with the highest Asian share were Carnegie-Mellon, Stony Brook, and the University of Hawaii. These campuses' official Asian component stands at 33%, 27%, and 37%, respectively. At the other end of the scale, Asians made up under 3% of students in the FIRE sample at six institutions (BYU, Kansas, Kent State, New Mexico State, Utah State, and the University of Maine).

The African American share in the dataset was 7%, ranging from less than 1% at four schools (BYU, Colorado School of Mines, Oregon State, University of Idaho) to 88% at Howard University, a historically black institution. Latinos made up nearly 11% of students, ranging from over half the student body at four colleges (Cal State Fresno, Cal State Los Angeles, Florida International, and New Mexico State) to between 1 and 2% at the University of Vermont, University of Maine, Howard University, and Ohio University. Official figures place the Hispanic share of the student population at around 55% at Cal State Fresno and 70% in the other three colleges.

Gender and Sexual Orientation

In terms of gender, 61% of the unweighted sample are female and 36% male, with 3% gender nonconforming. With survey weights applied the numbers are 50% female, 48% male, and 2% gender nonconforming. The unweighted figures are not far off the national student figures, in which around 60% of students are female. Nine institutions are more than 75% female in the data. This is accurate for mainly female colleges, though in some cases the samples overstate a particular university's actual sex ratio. Clearly there is a certain amount of measurement error at the college level given an average enrollment of 20,000 undergraduate students and a sample size of around 250 students per school. This produces a margin of error of 6% for the typical college in the dataset.

Twenty-three percent of students identify as LGBTQ: 16% of men, 28% of women, and virtually all non-binary respondents. The bisexual and 'questioning' sexual orientation categories account for 15% of females but only 6% of males, while the gay/lesbian share is around twice as high among male students (6.1%) as females (2.8%). Non-binary students comprise 3.6% of the 2021 sample, adjusted to 1.1% in the weighted data. In 2022, the question was broadened to 7 categories, leading to 3% of the weighted sample identifying as non-binary. In the HERI data, a lower share of students, 15%, identify as LGBTQ.

Much of this pattern can be accounted for by the share of LGBTQ respondents among young people, with 21% of Gen-Z identifying as other than heterosexual in the most recent Gallup survey. The unweighted Cooperative Congressional Election Study (CCES) finds no difference between students and non-students in LGBTQ share. Regardless, the substantial LGBTQ quotient among the young is a trend that is independent of the effects of college, although LGBTQ individuals appear to be self-selecting into elite higher education institutions in somewhat larger numbers compared to lower-ranked institutions.

Across 159 campuses sampled, three schools contained a weighted majority of students identifying as LGBTQ – Oberlin (51%), Wellesley (61%), and Smith College (70%). Given the 6% margin of error in the data for these colleges and possible noise from any sampling biases, these figures should be treated as indicative rather than definitive estimates. On the other hand, the 38% share of LGBTQ students among the more than 4,000 students in the 23 liberal arts colleges sampled is accurate to within a 1% margin of error. This suggests several liberal arts

CSPI

colleges, such as those listed above, could be majority LGBTQ. At the other end of the scale, LGBTQ students made up no more than 15% of students in the weighted sample at BYU (10%), Utah State (11%), Bucknell (13%), University of Miami (14%), Notre Dame (14%), and Clemson (14%). Importantly, no institution had fewer than 10% LGBTQ students.

There were minimal differences between Ivy League, R1, R2, and R3 schools on this measure, but, as Figure 1 shows, the LGBTQ share across the 23 liberal arts colleges was substantially higher, at 38%. Part of this effect is linked to the strongly liberal ideology at these colleges, where ‘very liberal’ students are 37% LGBTQ compared to just 5% of ‘very conservative’ students. Liberal arts colleges sport a relatively female (56%) and liberal (72%) student body, though these factors alone do not fully explain their exceptionalism on this measure.

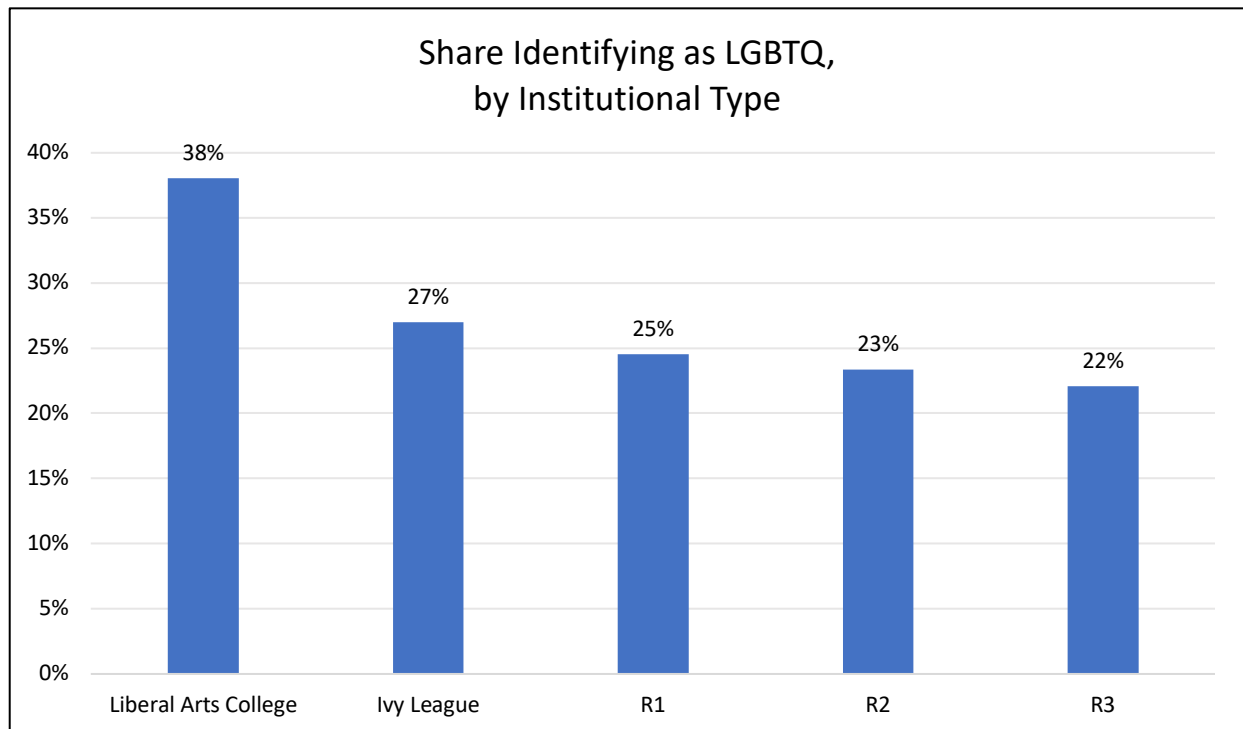


Figure 1. Source: FIRE 2020 and 2021. N= 4,078 Liberal Arts College; 4,515 Ivy League; 27,652 R1; 4,140 R2; 1,122 R3. Survey weights applied.

Religion

Turning to religion, 47% of students identify with a Christian denomination, with 38% stating they have no religion. Among whites, 48% are Christian and 39% have no religion. FIRE surveys do not ask about attendance, belief, or fine-grained sect. Students ticking the Protestant, Catholic, or ‘Just Christian’ box may be only nominally religious. It is unclear how many are evangelical or mainline Protestants, or whether Jews are Orthodox, Reform, or Conservative. Those identifying as ‘Just Christian,’ for instance, are no more conservative or Republican than those who ticked Protestant as their denomination.

Twenty-four campuses had students who were majority nonreligious (identifying as atheist, agnostic, or ‘nothing in particular’), many of which are liberal arts colleges or part of the California state system. At the extreme, 6 in 10 students at Colorado College and 57% at Smith College reported no religious affiliation. On the other side of the ledger, just seven schools had a

CSPI

student body where at least 70% identified with a Christian denomination. These were Pepperdine (71%), Auburn (72%), Mississippi State (74%), Notre Dame (77%), Baylor (78%), Utah State (79%), BYU (89%), and Hillsdale (93%).

Jews averaged 3% of students in the sample, but comprised 15% at Tulane University, 18% at Barnard College, and 39% at Brandeis. All three schools are known to have significant Jewish populations, though these figures suggest the share identifying as Jewish, at least in terms of religious affiliation, is less than some believe. Muslim students made up 2.8% of the total but formed around 10% of the student body at two campuses: the University of Illinois at Chicago (14%) and the University of Texas at Dallas (9%). Again, these figures should be treated as indicative rather than point estimates, given the 6% margin of error in the sample.

Aggregation by institutional type, which is at a higher level than the college, offers more precision, with a margin of error in the 2% range. Figure 2 presents the broad religious patterns by institutional type. Nonreligious students are a near-majority of students in liberal arts colleges and a 43% plurality in the Ivy League, where they outnumber Christians 43% to 37%. In R1 universities, which comprise most of the sample (and include the Ivy League), Christians are only slightly more numerous than those without religion. In R2 and R3 institutions, however, Christians are a majority. In fact, in R3 institutions, the nonreligious share is just half as large as the Christian share. The proportion Protestant (including 'Just Christians'), though not shown in Figure 2, is also much higher in R3 institutions. Among white students, Protestants outnumber Catholics 4:1 in R3 institutions but only between 1:1 and 2:1 in the more elite R1 and R2 institutions.

Finally, Jews make up a mere 3% of R1 students in the sample – little above their share of the population – and only 7% in the Ivy League. This figure is, ironically, lower than the discriminatory quota applied by Ivy League universities in the early-to-mid twentieth century.⁶ The share of Ivy League undergraduates identifying their religious affiliation as Jewish stood at around 20% as recently as the early 2000s but has since declined significantly. These figures confirm similar data collected by universities, but reveal just how advanced this trend is.⁷ It is possible that a larger share of ethnic Jews are choosing to tick 'no religion' rather than Jewish, though one would expect ethnic affiliation to prompt them to select the Jewish box more so than ex-Christians. Precisely which combination of secularization, lower entry qualifications, or the overall decline in the white share of students at top institutions accounts for the lower-than-expected share of Jews is a question for future research.

CSPI

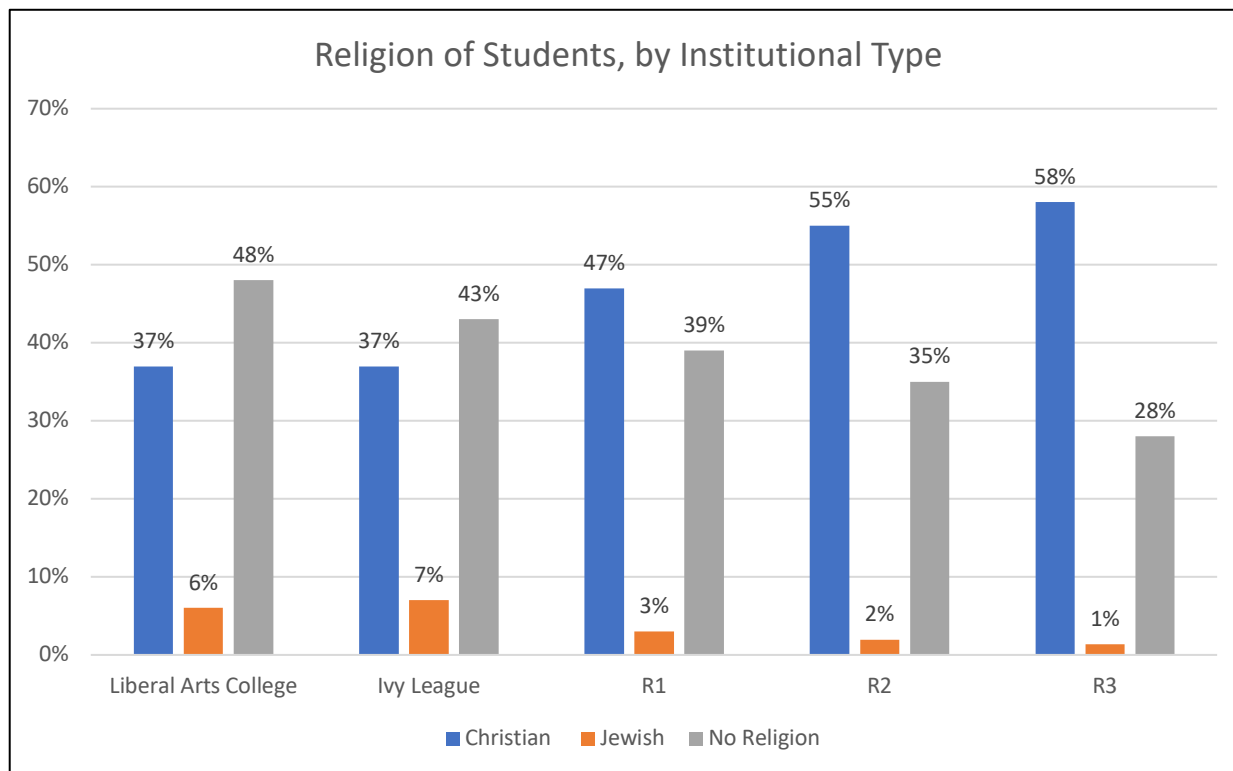


Figure 2. Source: FIRE 2020 and 2021. R1 figures include the Ivy League. N= 4,078 Liberal Arts College; 4,515 Ivy League; 27,652 R1; 4,140 R2; 1,122 R3. Survey weights applied.

Differences by Discipline, and Between Faculty and Students

We also see important distinctions by discipline when we put students' majors into two broad categories, Social Sciences and Humanities (SSH) and Science, Technology, Engineering, and Mathematics (STEM). Figure 3 compiles data from the FIRE surveys as well as a smaller faculty convenience sample I gathered in 2020. The latter is not a random sample, but its political composition matches that of studies that use complete samples and voter registration data, and is thus a reasonable representation of the demographics and political beliefs of faculty in the leading 100 US universities, and also comparable in scope to the FIRE sample.⁸

SSH students are about 3 points whiter, 13 points more LGBTQ, 11 points more far-left, and 7 points less conservative than STEM students. The proportion Christian and No Religion is similar between both disciplines. So-called 'Studies' majors (Women's, African American, Native American, Latino, Ethnic) are 75% non-white and 58% LGBTQ. Interestingly, students in these fields are no less Christian than others, and fewer are nonreligious. They are more far-left (39%) than SSH students are (30%), while being considerably less conservative (5%) than SSH (14%) or STEM (21%) students.

In line with existing findings, faculty are considerably less racially diverse than students. 85% of SSH faculty and 79% of STEM faculty are white, according to my faculty sample. This compares to 60 and 57%, respectively, among SSH and STEM students. The Jewish share is also substantially higher among faculty – 13% in SSH and 10% in STEM – than among students (5% and 3% for SSH students and STEM students, respectively). As with students, the far-left share among faculty is higher among SSH (28%) than STEM (12%). Conservatives are also more numerous in STEM (10%) than SSH (5%) among academics. Disciplinary differences are thereby somewhat more pronounced among faculty than students.

CSPI

Finally, the similarities between staff and students should be noted: conservatives and Christians are greatly underrepresented among both in comparison to the population, while those without religion and far-leftists are heavily overrepresented (except for far-leftism among STEM faculty, which is around the national average). In all cases, the discrepancy between SSH and STEM is more pronounced for faculty than students. In addition, minorities are underrepresented, and Jews overrepresented, among faculty, but both groups come close to their national share among students. Finally, the share of conservatives is 2 to 4 times higher among students compared to their professors. These figures indicate that the culture of the university is more exaggerated among the professoriate than the students, even as both share a distinct religious and political profile in relation to the wider US population.

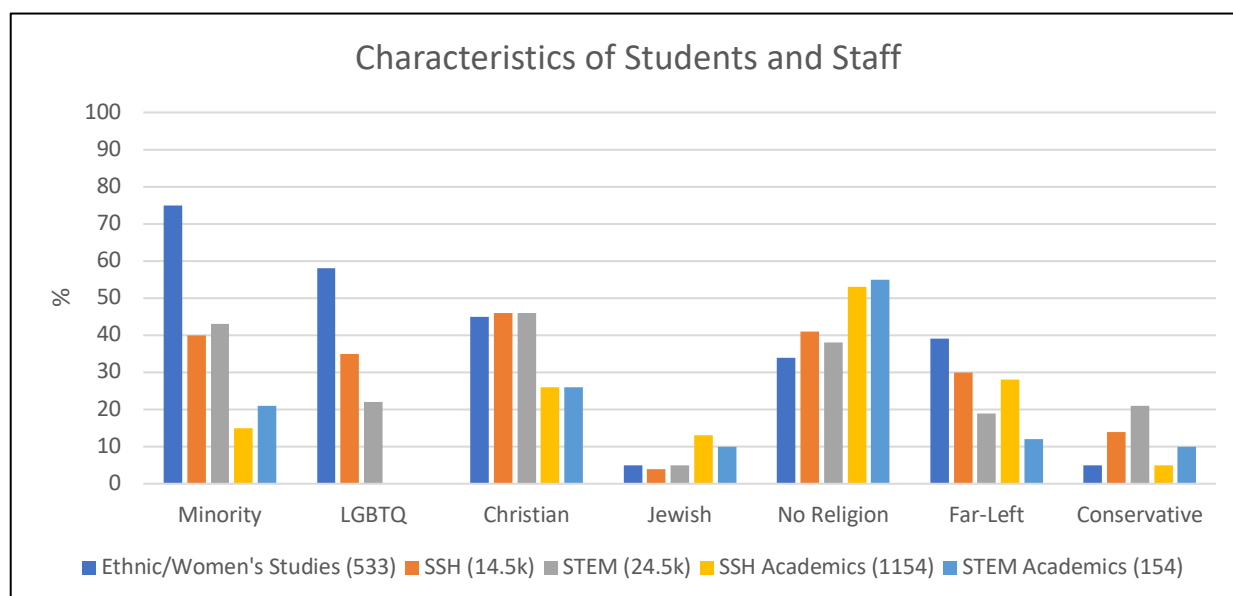


Figure 3. Source: FIRE 2020 and 2021, and Kaufmann 2021, “Academic Freedom in Crisis.” Sample size in brackets. Survey weights applied to FIRE data.

The Politics of Students

American students lean left, but not as heavily as some might believe. Political ideology in the two waves of the FIRE survey revealed 53% to be liberal, 26% moderate or unsure, and 21% conservative. Party identification is 55% Democrat, 22% Independent, and 23% Republican.⁹ This means there are about 2.5 liberals or Democrats for every conservative or Republican among students.

This is similar to other surveys and shows that students differ a good deal from the national average. The 2016 American National Election Study (ANES) reports that in the wider population, there is a roughly even Democrat-to-Republican party identification ratio and a 40-33 conservative-to-liberal lean.¹⁰ Among all Americans with degrees in the ANES, the partisan ratio is 44-34 Democratic-to-Republican and 41-38 liberal-to-conservative. So American students are considerably more liberal and Democratic than the average college-educated American.

But American students are less exceptional when we take their age into account. In the 2020 presidential election, Gen-Z broke 65-31 for Biden, according to the exit polls.¹¹ For party identification, the large-sample CCES shows that among Americans under 25, the (survey-weighted) partisan split in the US population is 30-19 in favor of the Democrats against the

CSPI

Republicans. For Americans under 25 with a degree, the partisan balance in the CCES tilts to 46-20 in favor of the Democrats. This is within 10 points of what we see in the FIRE student surveys and mirrors the 2020 exit polls. Triangulating with other sources, the FIRE student figures match other estimates and indicate that the student body largely, but not fully, mirrors the wider Gen-Z population from which it is drawn.¹² Results from these external election surveys suggest that both age and education skew the D:R ratio from 1:1 in the population to 2:1 in the student population to 2.5:1 in the elite student population, with age a more important influence than education level in explaining students' Democratic tilt.

Moving from party identification to ideology, the FIRE student sample (53% liberal, 26% conservative, 21% moderate) is more liberal than the wider US student average as reported by HERI, which is 37% liberal, 20% conservative, and 43% 'middle of the road.'¹³ Though the moderate share is much larger in the HERI than the FIRE data (43 vs. 26), a 7-point question similar to FIRE's without the 'middle of the road' phrasing may have drawn more leaners to choose one side or the other.

More importantly, the elite nature of the FIRE sample as compared to HERI helps explain the discrepancy. Bracketing differences between the size of the moderate group in both surveys, in HERI the liberal-to-conservative ratio is a bit less than 2-to-1, and in the FIRE surveys it is 2.5 to 1. The fact that R1 schools in the FIRE sample score over 3 to 1 in favor of liberals while R2 and R3 institutions lean just 2.2 to 1 indicates that the elite nature of the FIRE sample likely accounts for most of the discrepancy. Overall, there is more similarity than difference between the two surveys.

The HERI 2-to-1 ratio reflects the young population more generally. Thus 2020 data from the Survey Center on American Life (SCAL) shows that Gen-Z overall leans 42% liberal, 19% conservative, and 39% moderate or other – very similar to the HERI data that includes low-ranking colleges.¹⁴ The ANES shows more of a difference between well-educated and less-educated Gen-Z respondents: the under-25 population with at least some college is 51% liberal and 29% conservative, while the wider under-25 population, including those without any college education, is 40% liberal and 34% conservative. SCAL and ANES have small Gen-Z samples, but they suggest that FIRE's elite sample is somewhat more liberal than the wider student average and, in addition, that elite university students are somewhat more liberal than young people who choose not to attend college.

Segregation

A growing literature points to the geographic sorting of the American electorate, with fewer Americans living in politically mixed places and more in 'landslide counties' where one party wins each election by a large margin. Educated people in particular, who in today's political climate lean left, are far more concentrated in major metropolitan areas than in 1970.¹⁵ The more urban a locale, the more liberal and Democratic, with the reverse holding true in rural areas.¹⁶ In addition to geographic segregation, partisans are increasingly segregated in their social networks, even if they reside in an area not dominated by their political tribe. Thus, around 55% of Republicans and Democrats socialize exclusively with those sharing their partisan inclinations.¹⁷ Highly-educated Democrats are least likely to have politically mixed networks compared to the less-educated or highly-educated Republicans.¹⁸ This hyper-segregation among well-educated Democrats may be relevant for elite American students, though the FIRE study did not specifically ask about this.

Figure 4 uses a standard measure of segregation known as the Index of Dissimilarity (ID) to assess how segregated groups of students are compared to what would occur if students of

CSPI

various characteristics were randomly allocated across universities. The ID in this case is based on comparing each group to those who are not members of the group. The proportion for each group represents the share of each that would have to move university in order to achieve a uniform distribution of the group across all campuses.

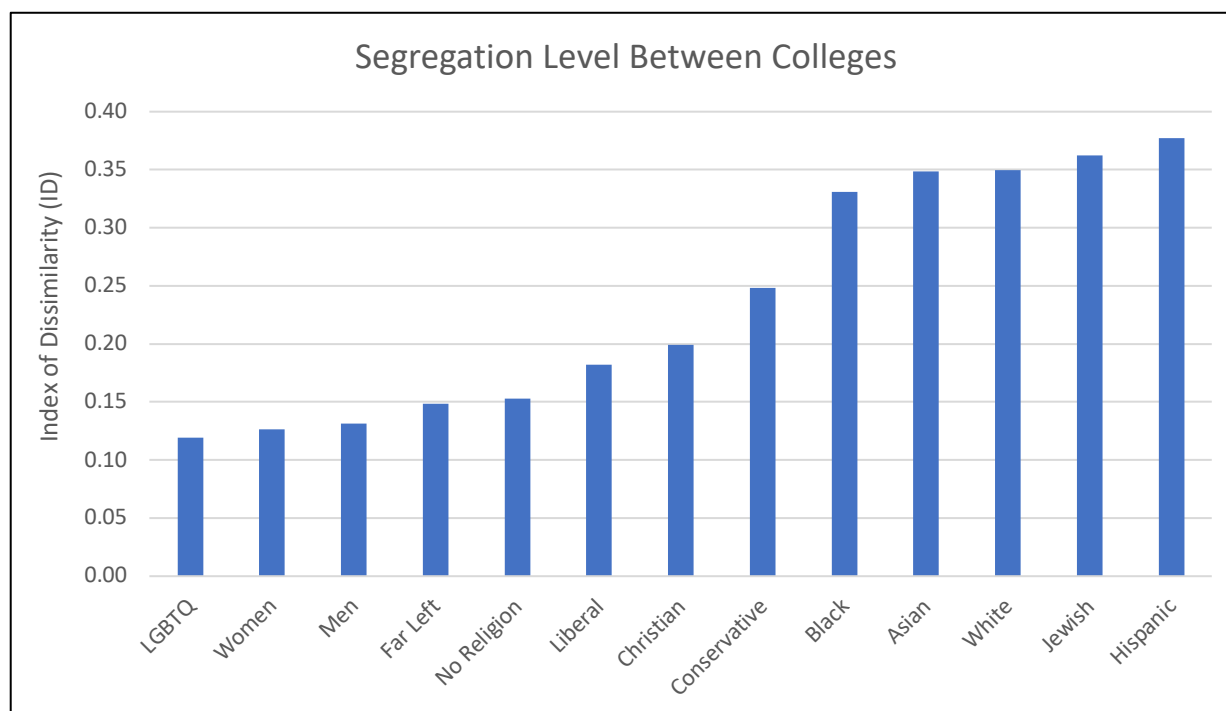


Figure 4. Source: FIRE 2020 and 2021.

The most important form of segregation in the FIRE data is ethnic segregation, with college-level IDs for various groups in the mid-30s. This is followed by political and religious segregation in the .15-.25 range. Conservatives cluster more in certain colleges than liberals or far-leftists do. Sexual orientation and gender are only weakly segregated, with IDs around .12-.13, exhibiting less variation from one campus to the next than ethnic, religious, or ideological characteristics.

Most ethnic groups have a college-level ID in the mid-30s, from .33 for African Americans to .38 for Hispanics. On the one hand, these figures are a fair bit lower than national levels of residential segregation between racial groups at the level of the census tract (geographic units averaging 1,000 to 8,000 people) and would be considered low-to-medium segregation on the Massey-Denton classification scale.¹⁹ For instance, the geographic census tract ID in 2020 is 55 for African Americans, 45 for Hispanics, and 40 for Asians. This means 40 to 55% of these groups would have to move census tracts to achieve a random distribution of groups across tracts, eliminating segregation.²⁰ Interestingly, whereas blacks are the most segregated group in residential terms, when it comes to elite colleges, the white segregation level of .35 is slightly above that of blacks (.33), an inversion of the residential pattern. One takeaway from this is that African Americans are much less segregated between research-intensive universities than they are between American neighborhoods.

Whites' relatively high level of segregation compared to national residential patterns could be the result of whites choosing to attend relatively white schools, but, since they are a large group, may also arise from where they live or the choices made by other groups. For

CSPI

instance, focusing only on the 13 colleges of California in the dataset, where white students are only the third-largest group (23%) after Asians (34%) and Hispanics (26%), shows that the white level of segregation of .20 is considerably lower than that of Asians at .39 or Hispanics at .35. This does not necessarily indicate that whites self-segregate less than other groups, though, because more California whites, compared to other groups, may have opted for colleges outside the state, while more Hispanic students are concentrated in less prestigious large public colleges that are more closely tied to local residential patterns. White students in the state are relatively evenly distributed across the larger public colleges, but the white share is substantially higher in certain smaller institutions like Pepperdine or Claremont, which don't affect the ID scores much.

While collegiate segregation is lower than residential segregation, IDs in the mid-30s do not necessarily indicate that students self-segregate less when choosing a college than adults do when choosing where to live. After all, neighborhoods often reflect inherited patterns among settled communities while a student's choice of college represents a fresh start, and student bodies are constantly turning over so they might be expected to be less segregated. We might further assume that the most elite 15% of colleges (those comprising the FIRE dataset), many of which are residential, would limit the impact of local residential segregation in shaping the student body. The fact that the racial group ID of leading American universities is in the 30s could thereby be viewed as evidence for a relatively high level of inter-collegiate segregation.

In truth, the figures reflect a mix of residential segregation patterns, educational segregation – as people to some extent choose schools that resemble themselves – and de-segregating forces linked to prestige or, in some cases, affirmative action policies. Thus, as Figure 5 shows, students of various backgrounds are fairly evenly distributed between the eight Ivy League schools, a marked contrast to the national picture among (mainly R1) universities in the survey.

While this could simply mean that all Ivy League universities have similarly high levels of segregation (they are, after all, highly liberal outliers with few conservatives and Christians), the fact there are few differences among them is telling. It indicates that local residential segregation in Ivy League communities like Ithaca, NY or New Haven, CT has less of an impact on the composition of the student body than is true of less prestigious institutions. Prestige factors and a high share of out-of-state students thereby override the influence of local geographic patterns. Common affirmative action policies may play a role in reducing racial disparities in representation between Ivy League schools but cannot account for the limited ideological and religious clustering that is also observable between Ivy League institutions. These results suggest that segregation among lower-ranked colleges outside the FIRE dataset is greater, reflecting differences in local residential patterns.

CSPI

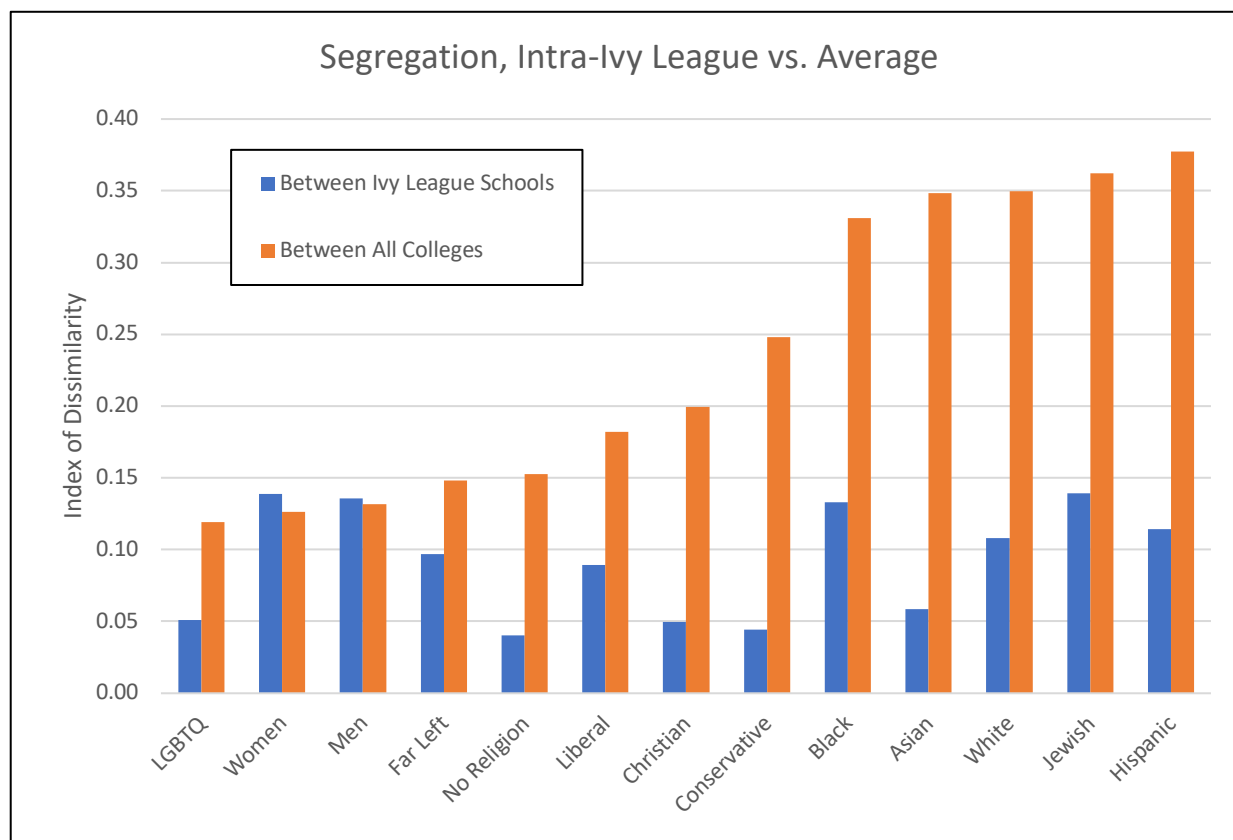


Figure 5. Source: FIRE 2020 and 2021.

How much does geography matter for various forms of inter-collegiate segregation? The degree to which variation in a state's ethnic, ideological, or religious composition affects that of its colleges differs widely depending on the group in question. For instance, in Figure 6, the dot for each college is labeled with the name of the state in which it is located. While there is as much as 50 points variation in white share between universities within states, some states like West Virginia and Hawaii have only one college in the dataset. Moreover, the racial makeup of a state really matters. No campus in Wisconsin is under, and none in California over, 60% white. Sparsely populated, largely white states like Nebraska and Wyoming are represented by one or two flagship universities with more homogeneous university populations. Nearly half (.43) the variation in white share across colleges is explained by the state in which a college is located.²¹

CSPI

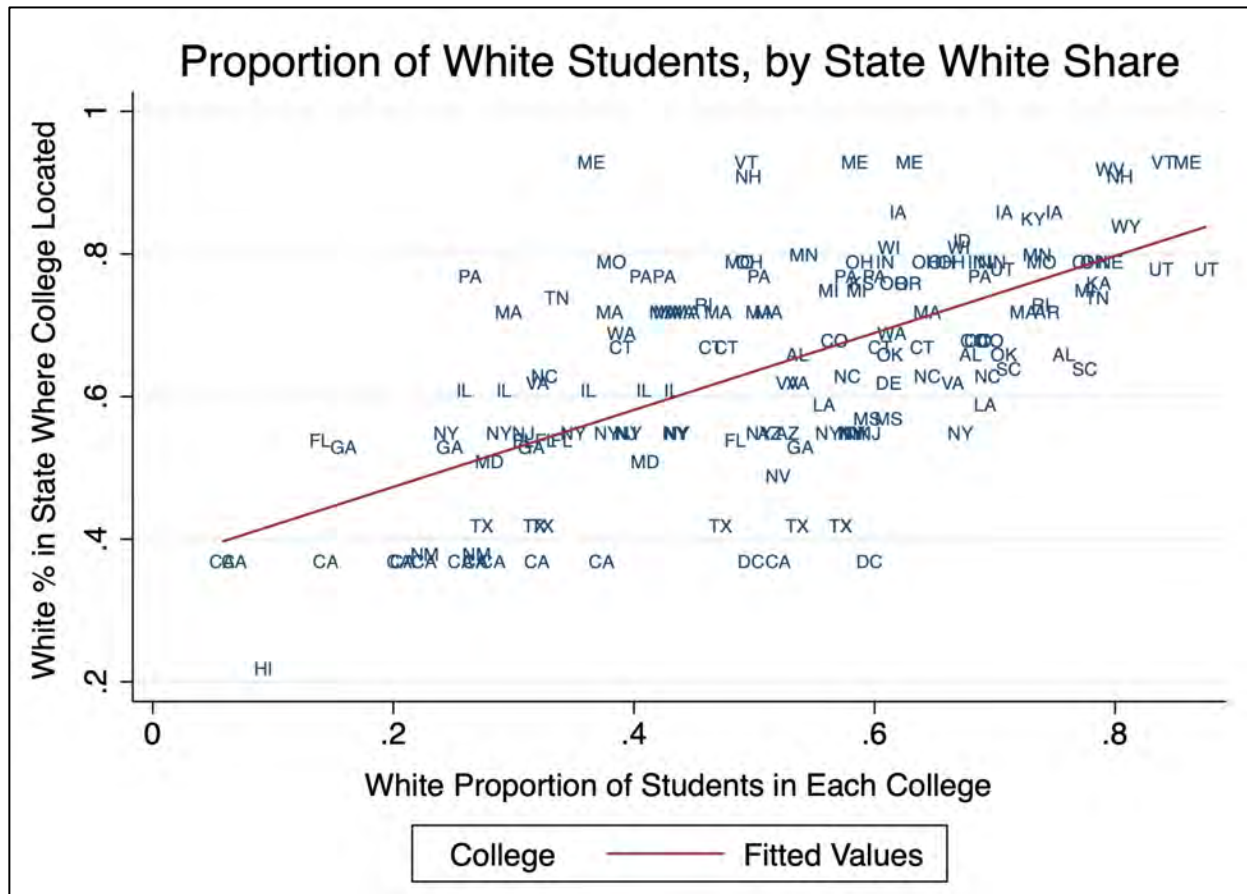


Figure 6. Source: FIRE 2020 and 2021. $R^2=.39$, $N=160$ for 46 states. State white share based on 2017 American Community Survey data.

Using the same method for other characteristics in Figure 7 shows that geographic variation underlies a great deal of the inter-collegiate segregation we find for Hispanics, Whites, and Christians but explains less about the institutional clustering of Blacks, Asians, and Jews. This suggests institutional choice plays considerably more of a role than geographic location in accounting for the clustering of the latter. Notice as well that state-level variation seems to account for more of the variation in White Christian share from one university to another than it does for variation in the overall Christian share.

CSPI

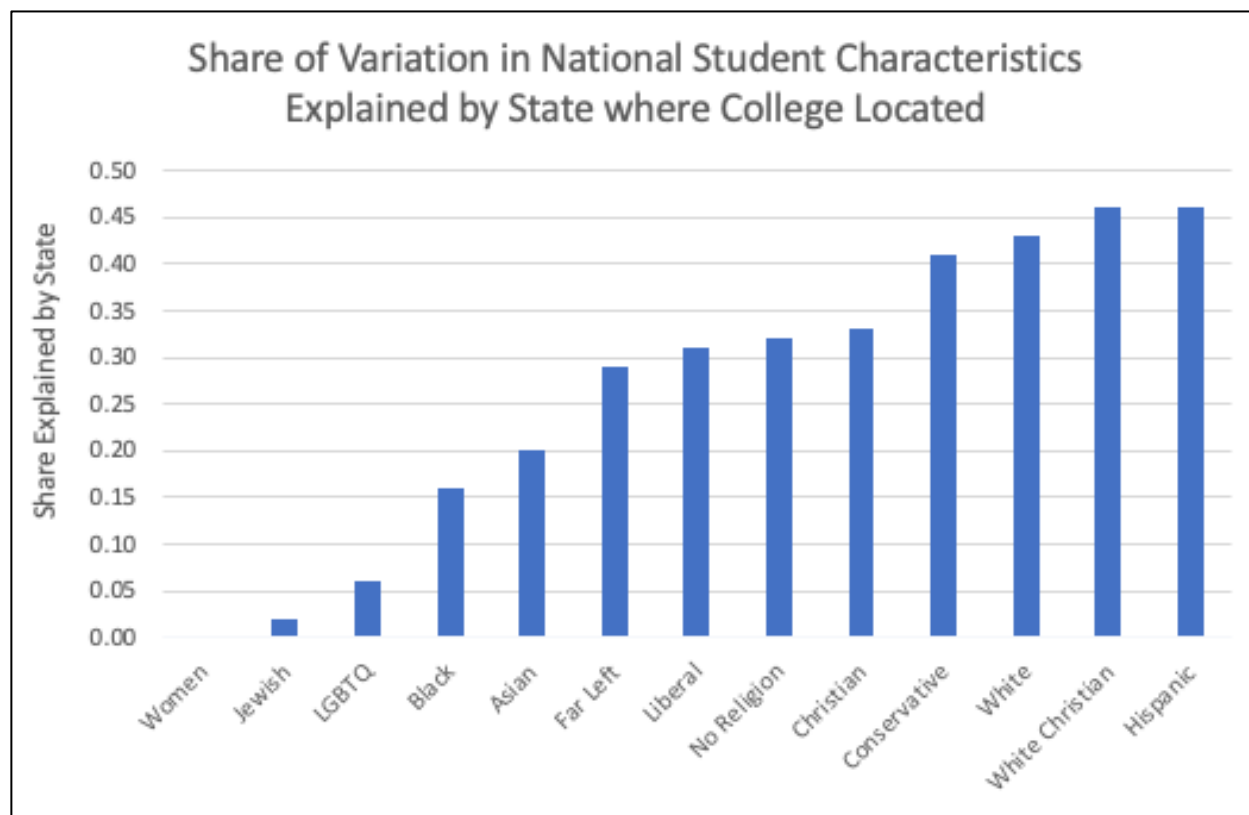


Figure 7. Source: FIRE 2020 and 2021. Based on regression of average proportion of each group across colleges with state dummy variables.

How can this be the case? We might expect that subgroups like minority conservatives would exhibit a level of segregation midway between the larger minority and conservative main groups. Since minorities and whites have a segregation ID of .34 and conservatives are at .25, we should expect something around .29 for both white and minority conservatives. In fact, we see sharp differences compared to what we would expect. Examining subgroups within the main racial, religious, and ideological groups in Figure 8 shows something interesting. Namely, that white Christians, coded in red, are more segregated than non-white Christians, coded in brown, by a margin of .33 to .23, while white conservatives are twice as segregated as minority conservatives, by a .33 to .17 margin.

On the other hand, minority liberals (.29) and far-leftists (.28) are more segregated than white liberals (.21) and far-leftists (.22). It seems that ideological and religious attachments, especially being Christian or conservative, reduce the level of segregation for minorities but do not do so for whites who are Christian or conservative. Liberalism and far-leftism reduce segregation a lot for whites and somewhat for minorities. All of this could be interpreted as indicating that religion and ideology reinforce racial group identity for white conservatives and white Christians but crosscut it for non-white conservatives, non-white Christians, and especially for white liberals. The result is that white conservatives and white Christians cluster more in certain institutions – often those in less populated states like Wyoming or Utah – than minority conservatives and Christians, or white liberals. They appear less willing to move to colleges in more diverse states than their white liberal co-ethnics.

The net result is that the typical white Christian attends a college that is 34% white Christian though the student sample is just 26% white Christian. By contrast, 30% of white

CSPI

liberals' classmates are white liberals, even as this group forms 27% of the elite student total. White conservatives' fellow students, meanwhile, average 22% white conservative though this group comprises only 14% of elite students. Here we have evidence that white Christians and white conservatives are behaving in a more self-conscious manner than whites without religion, white liberals, or non-white conservatives and Christians. That is, their ideology and religion do not moderate their ethnic segregation much, if at all.

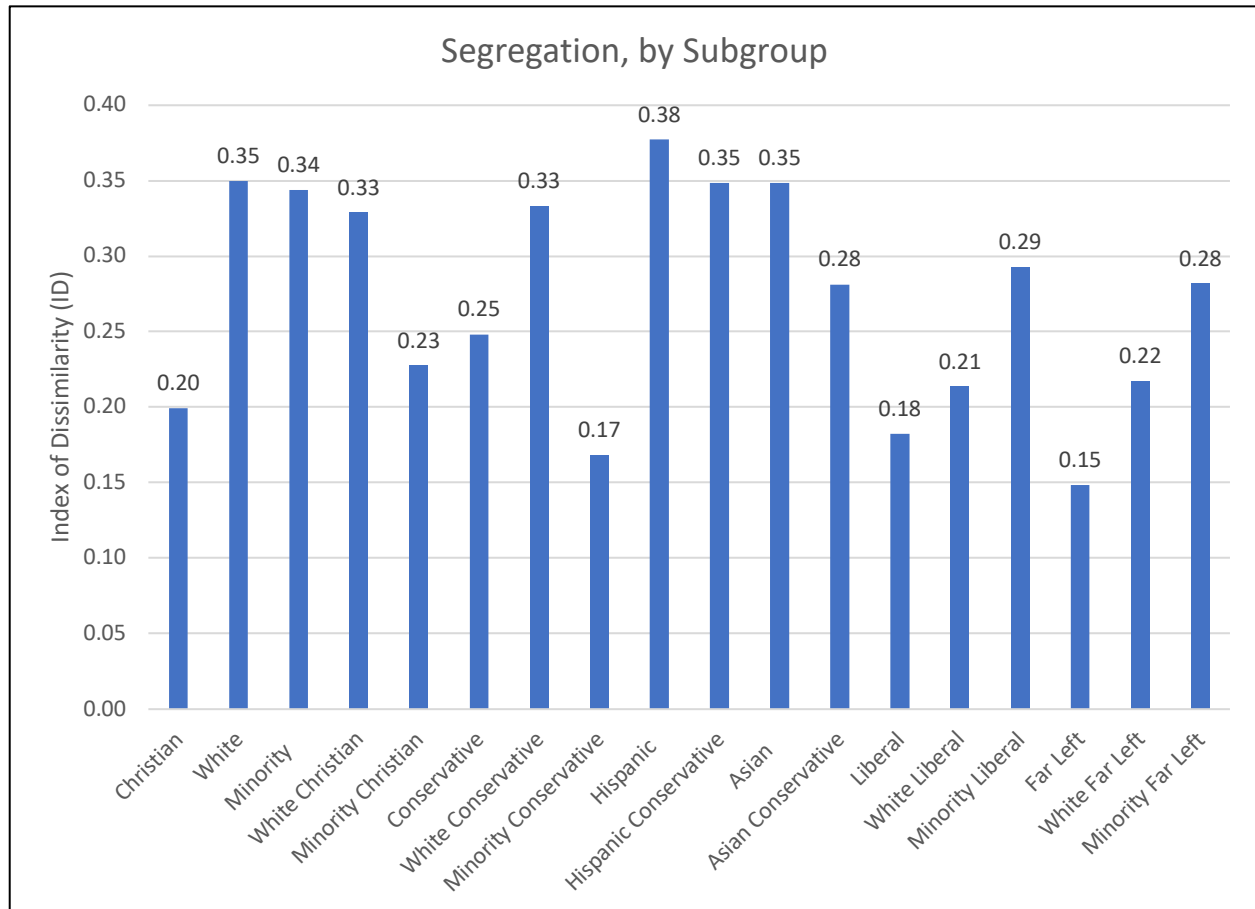


Figure 8. Source: FIRE 2020 and 2021.

Trends Over Time

The large-scale HERI freshman surveys allow us to track change in the ideological composition of undergraduates across a range of institutions representing all 4-year undergraduates over time. As noted, 37% of students in the HERI data in 2019 identify as liberal and 20% as conservative. The figures for the FIRE survey are 53% liberal and 21% conservative, reflecting the smaller share of moderates in the R1 institutions which make up the FIRE sample.

HERI survey trend data in Figure 9 reveals that the freshman population was very liberal in 1970, after the student revolts of the late 1960s. It grew more conservative during the 1970s. By 1981, slightly more students described themselves as conservative or far right than liberal or far left. Since then, the share of liberals has increased steadily, albeit with fluctuation, from 20% in 1980 to 37% in 2019 (not shown in the chart). The proportion of conservatives has, on the other hand, remained flat at around 20% during a period in American politics when ideology became more meaningful and aligned with partisanship. Given national trends, we would have

expected a rise in conservatism among students as well.²² The lack of such a rise means American students are nearly twice as liberal as they were in 1980.

A portion of this may be explained by demographic shifts in the student population, from 20% minority in 1976 to 27% minority in 1997 to 47% today.²³ The share of women has also risen substantially, from 42% in 1970 to 52% in 1985 to nearly 60% in 2021. I estimate that around one point of the 10-point liberal shift since the mid-1980s can be accounted for purely by changes in gender composition. The conservative share, assuming women moved against conservatism in proportion to the rate they moved toward liberalism, would be similar.

Estimates are more difficult for minorities as their doubling since the 1980s has been accompanied by a shift from more liberal black students to somewhat less liberal Hispanic and Asian students. Using the FIRE data, showing that minority students are about 10% more liberal and 50% less conservative than whites, indicates that rising racial diversity barely affects the 10-point liberal increase since the mid-1980s. However, a near-doubling of minority share since 1985 is likely to have reduced the conservative proportion by 1.5 points. Thus, the combined increase in female and minority students may account for 3.5 points of the 15-point increase in the liberal-over-conservative gap since the mid-1980s, nearly a quarter of the effect. While this is important, demographic shifts are not the main driver of student political change. Instead, a left-wing drift caused by the rising prominence of cultural issues in party politics that have a stronger age, gender, sexual orientation, and education gradient may explain the trend.²⁴

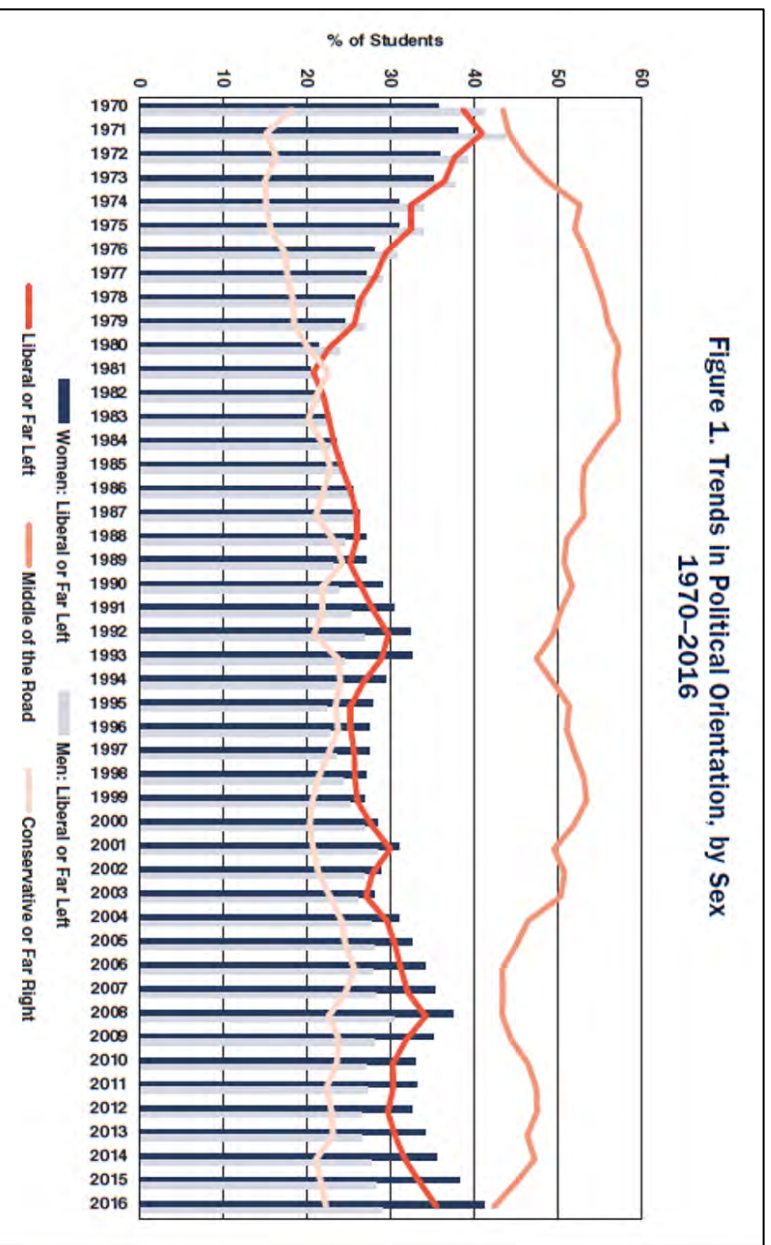


Figure 9. Source: HERI Research Brief, May 2017. For 2016, N=137,456 first-time, full-time freshmen attending 184 colleges, weighted to be representative. Across the entire 1970-2016 series, sample size is over 15 million individuals surveyed.

CSPI

The Gender Gap

Alongside the trend of greater student liberalism over time is a widening gender gap: males have inched up a few points in liberalism since the mid-1980s, but females have risen from around 25% liberal in the mid-1980s to 42% in 2016. The big increase appears to have begun from when George W. Bush took office in 2004. What has emerged is a large gender gap among students, especially elite college students, that is about twice as large as that in the general population.

Student trends appear to be a more intense variation on wider developments in American politics. The gender gap in presidential voting among those of all ages has steadily increased, from zero in 1976 to 11-13 points during 2016-20.²⁵ However, the gap in self-professed ideology has not widened as much. American National Election Study (ANES) data presented in Figure 10, using the entire under-30 population as my comparator pool to increase sample size, shows only a small increase in the gender gap among young people for ideology over the past few decades.

Between 1988 and 1996, the discrepancy changed from women favoring conservatism over liberalism by 5 points to their favoring liberalism by 15 points. Thereafter, the difference among women narrowed to just 5 points in favor of liberalism, holding steady through 2016.²⁶ The ideological gender gap therefore appears to be three times as large within the student population as it is outside it.

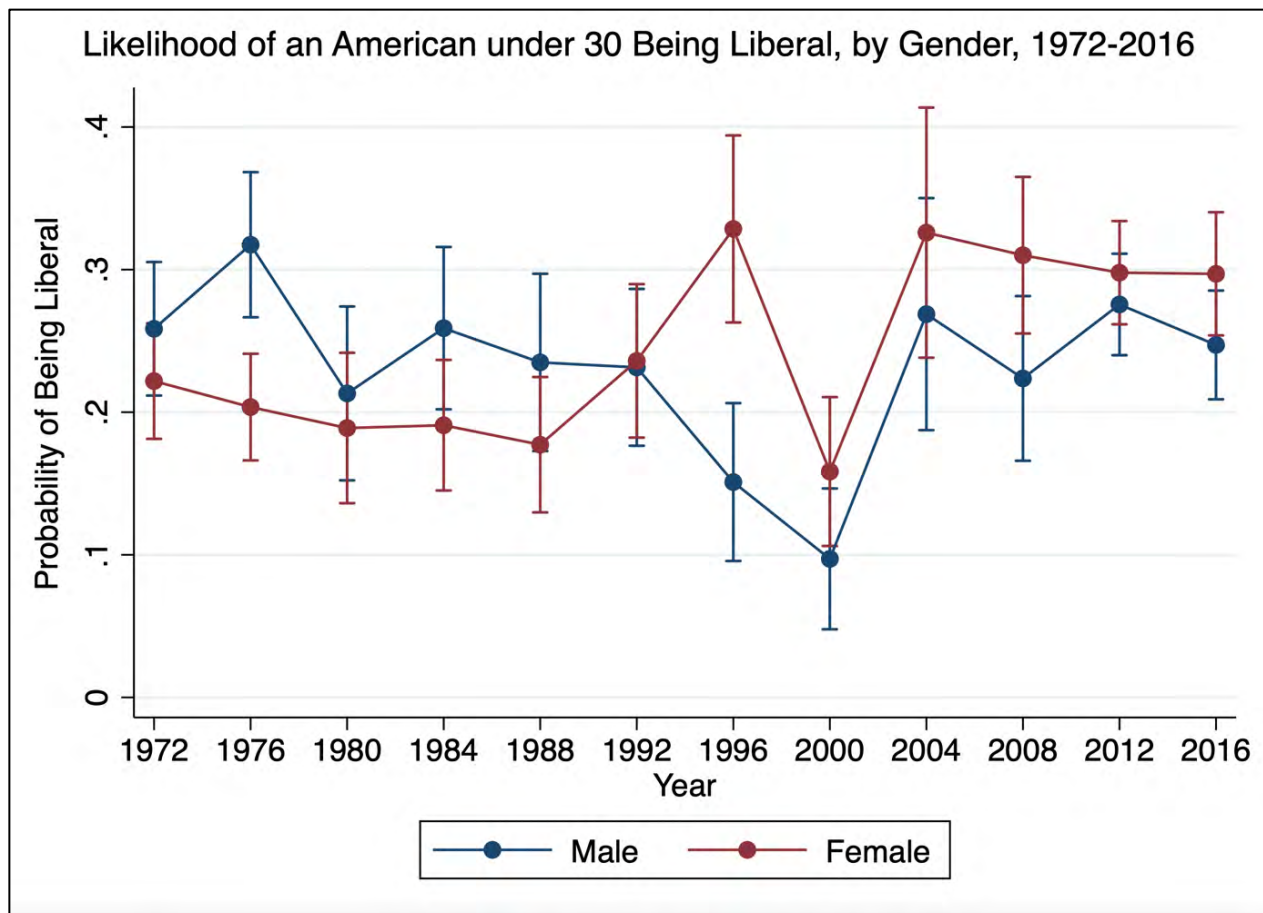


Figure 10. Source: ANES Cumulative File, 1972-2016. Based on all adults under 30, regardless of education level. Models based on logistic regression with year-gender interaction term.

CSPI

Excluding female colleges and taking the share who identify as liberal minus the proportion conservative gives an average gender gap in the FIRE data of 29 points between men (who lean liberal by 44 to 28, or 16 points) and women (who tilt 61-16 liberal, that is, by 45 points). Democrats likewise have an advantage over Republicans of 42 points among women and 13 points among men, again a 29 point difference. The concentrated effects of the new cultural cleavages in American politics on young educated women (a substantial share of whom are LGBTQ) may explain the large gender gap among students.

Going college-by-college, there is a wide range of gender partisan gaps, from Georgia State, where women lean Republican more than men by 8 points, to the University of Maine, where women are 33 points more Democratic than men. These figures are generally subject to a margin of error of around 6% and sampling bias is also a potential issue, so it is difficult to speak precisely about any one institution.

We can have high confidence in the broader patterns, however. Figure 11 plots the gender gap in partisanship by proportion white, since white share appears to be the most important correlate of the gender gap. The gender gap is significantly lower in colleges with fewer white students. This arguably reflects the lower level of political polarization and political mobilization around gender found among minorities.²⁷ The partisan gender gap is not associated with a college's sex ratio or its political slant.

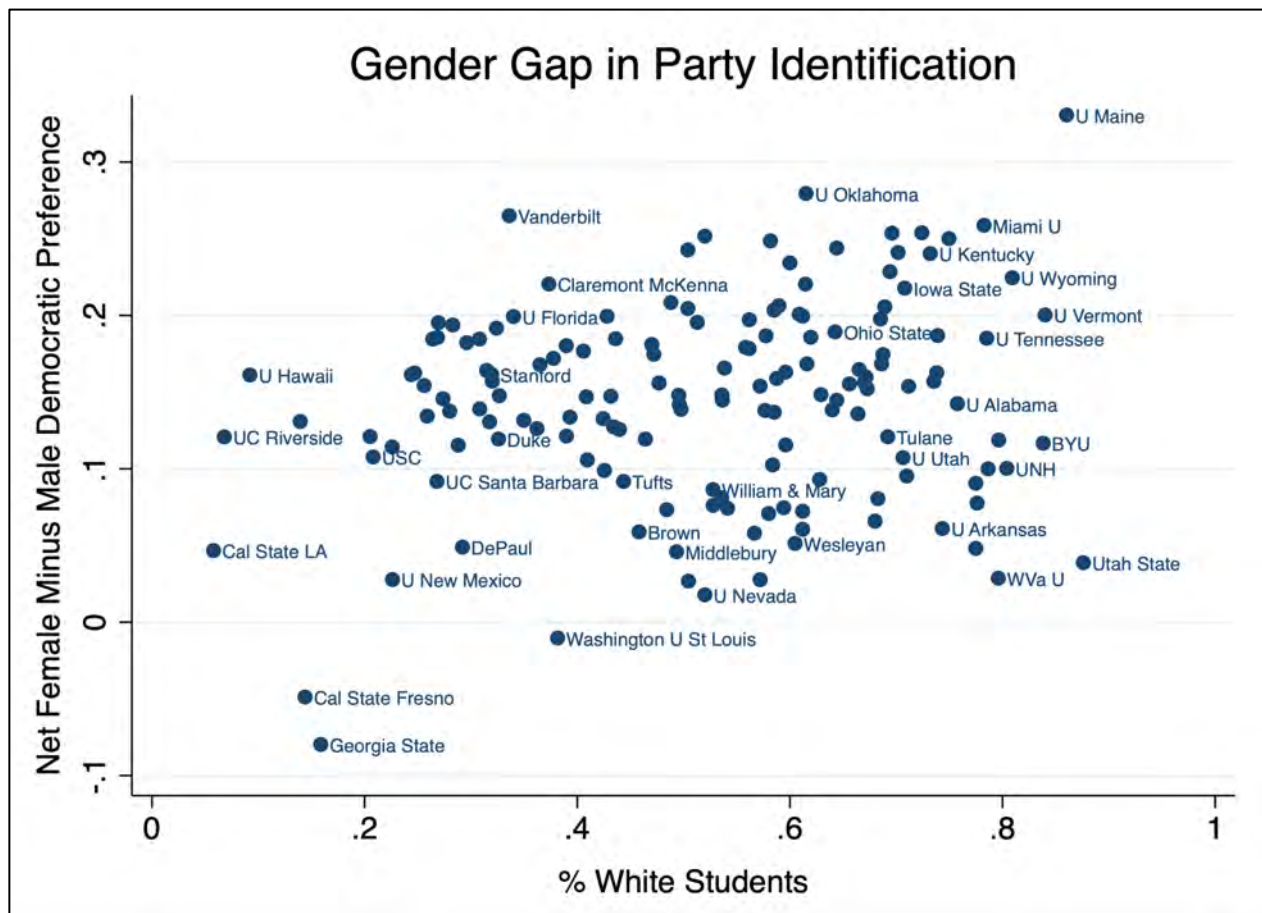


Figure 11. Source: FIRE 2020 and 2021.

CSPI

The American Student Voter

The large sample size in the FIRE surveys allows us to answer a classic question in electoral studies: which characteristics best predict a student's partisanship and ideology? In statistical models, race, gender, sexual orientation, and religion account for 24% of the variation in students' 7-point liberal-conservative ideological identification and 19% of the variation in student responses to a 7-point Democrat-to-Republican party identification scale. Logistic regression models using the same parameters have a model fit (pseudo- R^2) of .21 for predicting a Republican student and .19 for predicting a conservative. These are strong demographic models for political science: the same specification in the 2020 CCES, with a very similar sample size of around 60,000, predicts 12 to 13% of the variation in ideology and partisanship in the general US population. In ANES, albeit with a much smaller national sample, the model predicts just 6 to 10% of the variation. Thus race, gender, sexuality, and the religion/nonreligion distinction seem to matter more for the politics of students than the general population.

The most important sociodemographic predictor of a student's political ideology and party identity is whether they affiliate with a Christian denomination or have no religion. These are two relatively evenly sized groups in the student body at elite colleges, with 44% indicating a Christian denominational affiliation (as Catholic, Protestant, Orthodox, Mormon, or 'Just Christian') and 38% saying that they have no religion. Note that those who identify as Christian may be only nominal Christians who rarely attend church and may not hold religious beliefs. Likewise, some who say they are not religious may hold religious beliefs and even attend a church.²⁸ All else being equal, Christian students are 2.8 times more likely to be Republican than the average. Jewish, Hindu, and Muslim students are, respectively, 2.2, 1.8, and 1.6 times more likely to be Democrats than the typical student.

Race and gender have similar explanatory weight. Whites, who form half the student body, are 2.2 times more likely to be Republican than the typical student, and men are 1.8 times more likely to be so. LGBTQ individuals form a quarter of the student body, an important demographic that renders the heterosexual student population a meaningful category. Straight students are 1.5 times more likely to identify as Republican than the average student.

Seventy-seven percent of students identify as heterosexual, and just 4.6% as gay or lesbian. Fully 10.5% are bisexual, with the remaining 8% roughly spread among pansexual, queer, questioning, or 'other.' Heterosexuals and gays/lesbians account for 90% of men but only 75% of women, showing how prominent the bisexual or other category is among women. When it comes to partisanship, 21% of heterosexual females are Republican compared to under 4% of lesbian, bisexual, or other women. Among men, the share of Republicans is 32% for heterosexuals, 11% for bisexual/other, and 8% for gay men. This indicates that the sexual orientation gap is 5:1 among women and 3:1 among men, and thus accounts for a larger share of partisan variation among women than men. Together with the fact that nearly 30% of women are LGBTQ, this means – in the context of Gen-Z having twice the share of LGBTQ as Millennials, five times that of Gen-X, and eight times that of Boomers²⁹ – that the female sexually-nonconforming group is an important factor that may help explain the leftward drift in the female student population over time.

White Christians are an important subgroup of white students that stand out as especially Republican, considerably more so than either non-white Christians or whites with no religion. Finally, whether a person is in the 62% of students receiving financial aid or the 35% who are not only matters a little. Those not receiving aid are 1.33 times as likely to be Republican as the average student.³⁰

CSPI

Figure 12 shows how partisan identity differs by various demographic and social characteristics. Students without religion or who are LGBTQ break around 70-8 in favor of the Democrats. Christians and men are more Republican, but still lean 44-33 to the Democrats. The only Republican-leaning groups are two tiny demographics, those who have been homeschooled (1% of students), who lean 44-25 for the GOP, and men in fraternities (3%), who are finely balanced at 33-31.

In terms of schooling, results suggest that attending a private or public high school makes little difference for a student's ideology and party identity, while even among parochial, i.e., religious, high school students (over half of them Catholic), Democrats outnumber Republicans 45-33. Interestingly, around a fifth each of homeschool and parochial school students identified as nonreligious, suggesting considerable religious loss among both groups in young adulthood.³¹ One further curious finding is that those who attended parochial school or were homeschooled were at least as likely in 2021, and more likely in 2022, to identify as LGBT. In 2022, for instance, female students from a parochial school background were 11 points more likely, and those from a homeschool background 3 points more likely, to identify as non-heterosexual compared to those from public or private school backgrounds. Non-binary and other forms of unconventional gender identity were also higher among homeschooled and parochial schooled undergraduates.

Majors play some role: among white students, social sciences and humanities (SSH) majors lean 59-19 for the Democrats against the Republicans compared to 48-30 for science, technology, engineering, and mathematics (STEM) majors. There is almost no disciplinary gap among minority students, who lean about 64-11 in favor of the Democrats for both sets of majors. The biggest disciplinary difference is the share of those with far-left ideology: overall, 32% of SSH majors identify as 'very liberal,' the furthest left point on a 7-point ideology scale, compared to 19% of STEM majors. There is a smaller difference when it comes to the share of conservatives (20% in STEM, 13% in SSH). This reflects a similar pattern to what we find among SSH and STEM academics, where the main difference pertains to the share identifying as far left rather than the proportion conservative.³²

CSPI

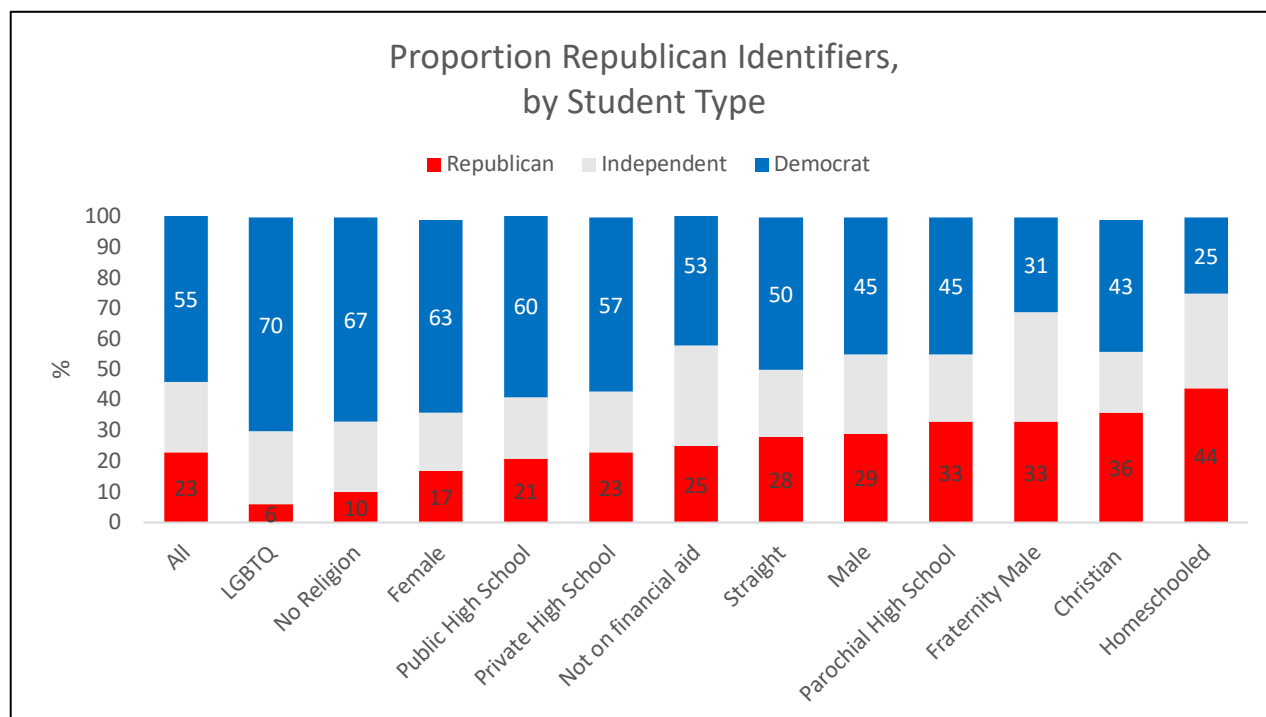


Figure 12. Source: mainly FIRE 2020 and 2021. N=76 fraternity men (sampled only in 2021), 497 parochial schooled, and 778 homeschooled (data from FIRE 2022). N=12,902 for those not on financial aid. Survey weights applied.

Institutions, not just groups of individuals, tend to vary substantially in political composition. Figure 13 reveals that private universities lean more Democratic (62-17) than public ones (51-26). Ivy League campuses are even more left-leaning, with 68% of students identifying as Democrats and just 12% as Republican. By contrast, the less prestigious R2 colleges are a slightly more balanced 48-27. FIRE's free speech rankings code those with good free speech policies green and those with censorious policies red, with those in between labeled yellow. This is associated with some differences in viewpoint diversity: green campuses break 52-25 for the Democrats while red ones are a more pronounced 60-17.

Regionally, southern colleges are more conservative, though their students still lean Democratic by a 49-29 margin. Northeastern universities are the least politically diverse, with just 17% of students identifying as Republican. While I have focused on differences, it is also worth noting that there is at least some political diversity in each type of institution. Students at Ivy League schools, for example, are 14% conservative and 12% Republican-leaning. This means that close to 10,000 Republican undergraduate students graduate from Ivy League colleges each year. Alumni include Republican elites such as Josh Hawley, Ted Cruz, Brett Kavanaugh, and Tom Cotton.

CSPI

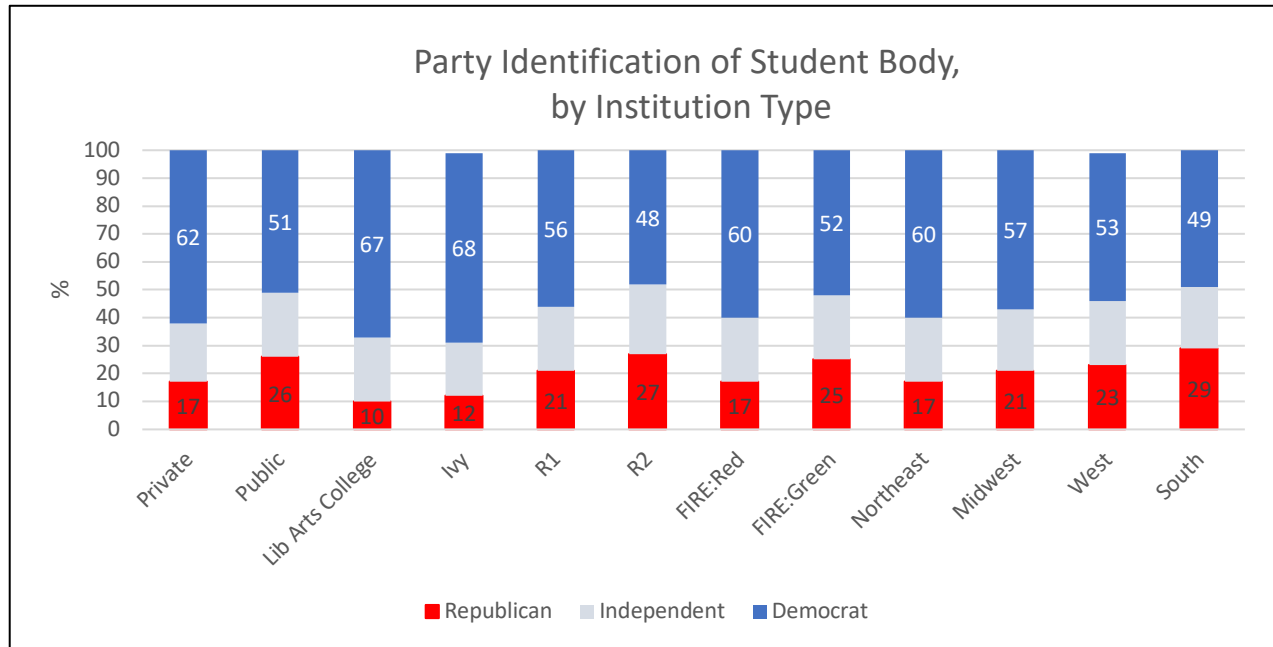


Figure 13. Source: FIRE 2020 and 2021. For smallest categories, N=4,515 Ivy League, 4,078 Liberal Arts College, and 4,140 R2. Data limited to 2021 wave except for figures by region, Ivy League, and public/private which combine 2020 and 2021 data. Survey weights applied.

At the extreme, we can use statistical models to construct subtypes that illustrate the political poles in the student population. For instance, in Figure 14, just 2% of the 425 female LGBTQ Ivy League students are Republican, with 85% identifying as Democrats. Only 2% of 1,586 minority females at Ivy League institutions support the GOP, with 76% identifying as Democratic. At the other extreme, nearly 6 in 10 white heterosexual male Christian students are Republicans, and just 21% are Democrats. The most finely balanced group is white males, who favor the Democrats over the Republicans by a narrow 40 to 36.

CSPI

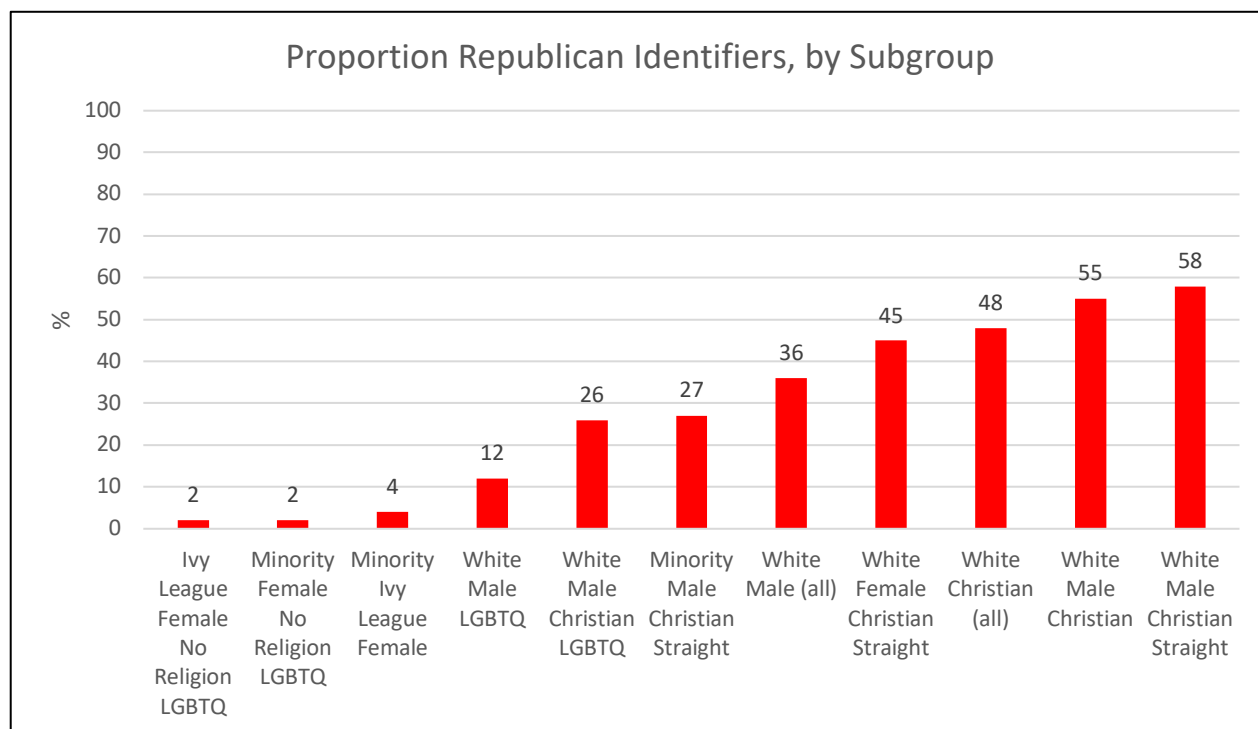


Figure 14. Source: FIRE 2020 and 2021. Note that this is share of 3-party (Rep, Ind, Dem) identity, not 2-party. Smaller sample sizes: N=425 Ivy League female no religion LGBTQ; 1,586 Minority Ivy League female; 450 White male Christian LGBTQ; 1,623 White male LGBTQ. Survey weights applied.

Social Identity Gaps in the Elite Student Population

The pattern that emerges from comparing national election data and FIRE data on elite students is twofold. First, that students are considerably more diverse in terms of sexual orientation and religion than the American public. Second, that gender, and to a lesser degree race, are more important determinants of ideology and party identification among elite students than among the wider public. Religion and sexual orientation have a similar predictive power for both the public and students, but the fact there is a larger share of nonreligious and LGBTQ people among students elevates their importance for predicting the total variation in political attitudes.

In terms of race, what is noticeable when comparing students to the public is how few conservatives there are among minority students compared to the wider minority public. Figure 15 shows that 36% of minorities in the CCES (i.e., the public) identify as conservative compared to just 13% of minority students in the FIRE sample, a nearly threefold difference. By comparison, 26% of white students identify as conservative compared to 47% of white adults, less than a twofold discrepancy.

Comparing students with their corresponding 18-25 age group in the wider population shows that minority elite students are markedly more liberal (24 points more liberal and 24 points less conservative) than their non-elite age cohort while white elite students differ less (20 points more liberal, 10 points less conservative). Moreover, there is only a small difference between white elite students and the white public sample of under-25s in the CCES but a large difference of 13-19 points between elite minority students and young, degree-holding members of the minority public. Minority elite students appear to be distinctively liberal compared to both their own classmates and their racial peers.

CSPI

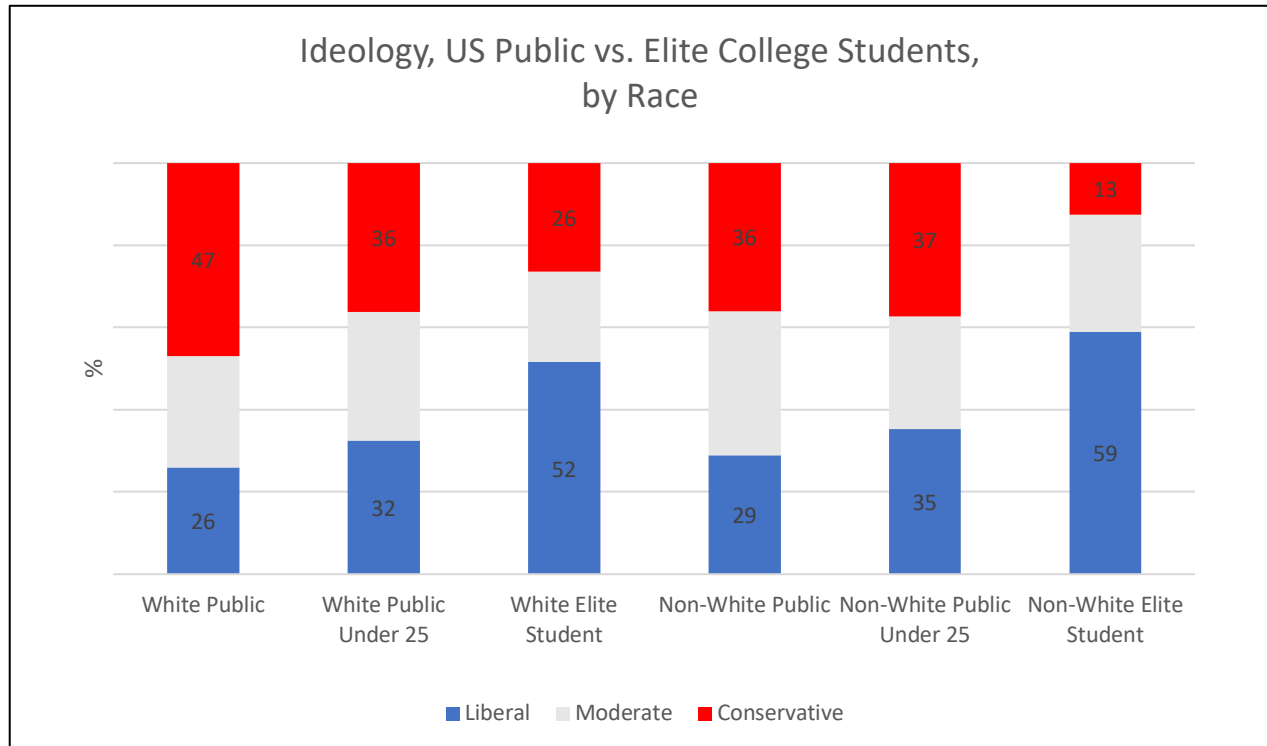


Figure 15. Source: FIRE 2020 and 2021. CCES 2020. Survey weights applied.

Race is also an important variable because sexual orientation, religion, and to some extent gender, tend to split the white population politically more than they do the minority population. Figures 16 and 17 set out the pattern for elite students and the general public respectively. Gaps represent the average of the difference between the conservatism plus the liberalism of contrasting identity groups.

In Figure 16, which examines the student population, white men are 16 points more conservative and less liberal than women, and minority men are 13 points more so than minority women. This is only a modest difference. However, consider the next two sets of bars which show that identity-political dynamics are more intense within the white population. On sexuality, straight whites are 31 points more conservative and less liberal than LGBTQ whites, while the corresponding gap among minority LGBTQ and heterosexuals is 12 points. On religion, white Christians lean right by 37 points more than whites without religion. For minorities, the difference between Christians and those with no religion is only half as large, at 17 points.

CSPI

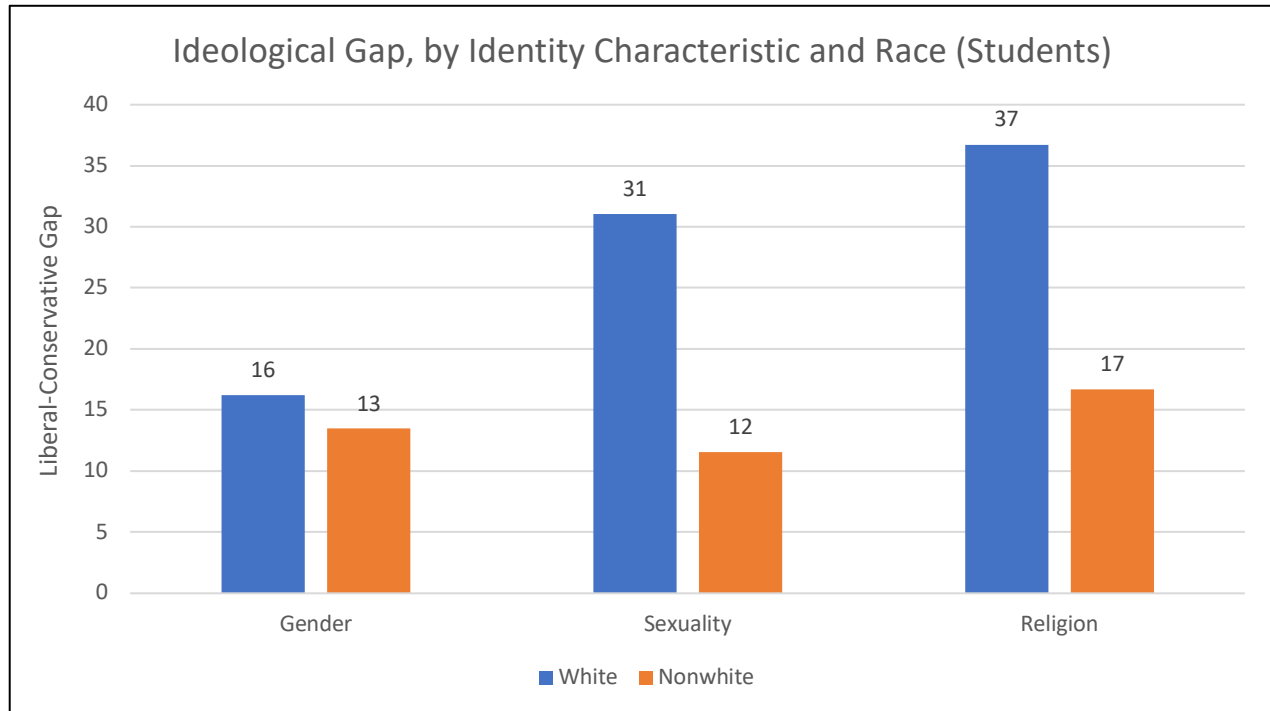


Figure 16. Source: FIRE 2020 and 2021. Survey weights applied. Based on average of conservative and liberal gaps.

Comparing elite students with the wider public in Figure 17 shows one major difference: the gender gap in ideology is a negligible 3 points between men and women, whether white or non-white. Men and women in general do not differ much in their liberalism or conservatism in the wider public. This contrasts with the 16-point difference among white students and 13-point gap among non-white students in Figure 16. Clearly gender is a more salient political divide on campus than off it.

By contrast, the other sets of bars look relatively similar between students and the public. Identity divides around sexuality and religion loom much larger among whites than among minorities, as with the student figures. LGBTQ members of the public who are white are 25 points more liberal than heterosexual whites, and minority LGBTQ citizens are 10 points more liberal than their heterosexual minority counterparts. On religion we find a 25-point gap between white Christians and whites without religion, and a 9-point gap between minority Christians and minority members of the public without religion. These ideological differences are around 10 points smaller among the public than among elite students, but what really stands out in the public sample in Figure 17, compared to students, is how muted the gender gap is.

CSPI

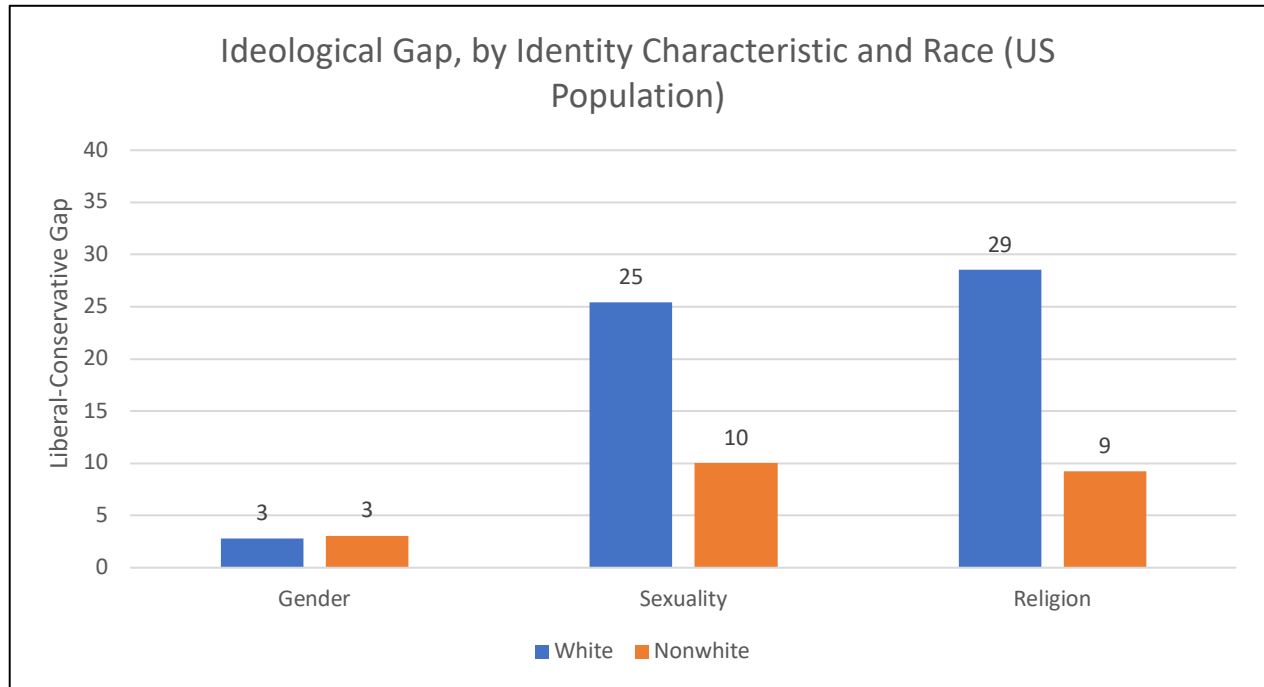


Figure 17. Source: CCES 2020. Survey weights applied. N=61,000.

Could it be that the educated public resembles elite students? Or that things are different with party identification as opposed to ideology? Turning to party identification in Figure 18 and comparing elite students with members of the public that have a degree shows some interesting patterns. First, there is no difference in the partisan race gap between students and the graduate public. In both demographics, whites are around 15 points more Republican and less Democratic than non-whites.

The same is true of religion, the rightmost set of bars, where Christian students and the Christian educated public are around 25 points more Republican and less Democratic than their nonreligious counterparts. LGBTQ citizens differ from straight citizens more among the public (18 points) than among students (13 points), which may reflect the fact that the LGBTQ share is a smaller and perhaps more self-conscious group among the public than among students, where they brook larger. What really stands out, however, is that the 15-point partisan gap between male and female elite students is much larger than the 8-point difference in the educated public. If we compare with the wider public rather than the educated public, the partisan gender gap declines to 4 points. The under-25 public has a gender gap of 6 points. If we compare with the college-educated public under age 25, the partisan gap rises to 10 points.

CSPI

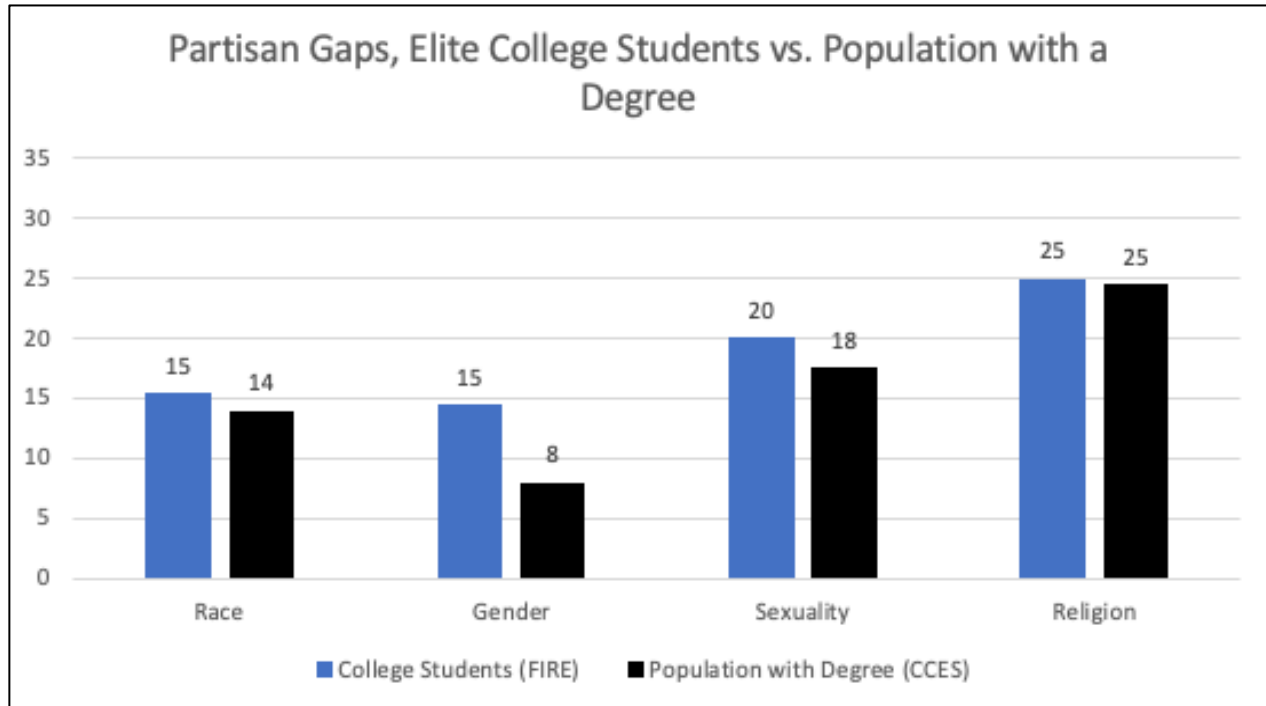


Figure 18. Source: FIRE 2020 and 2021. CCES 2020. Survey weights applied.

Figure 19 shows the same pattern with ideology gaps, though this time students show a larger gap around sexuality and race. So college education and youth are both associated with a larger partisan gender gap, but this appears to be supercharged in elite colleges to produce a student gap of 15 points for both partisanship and ideology. Something about young, elite, educated environments accentuates the importance of gender, and to a lesser degree sexuality and race, for politics in a way less true for older generations of college graduates. This echoes what we saw in the preceding two charts, where the gender gap in ideology was about five times higher among students than the general public.

CSPI

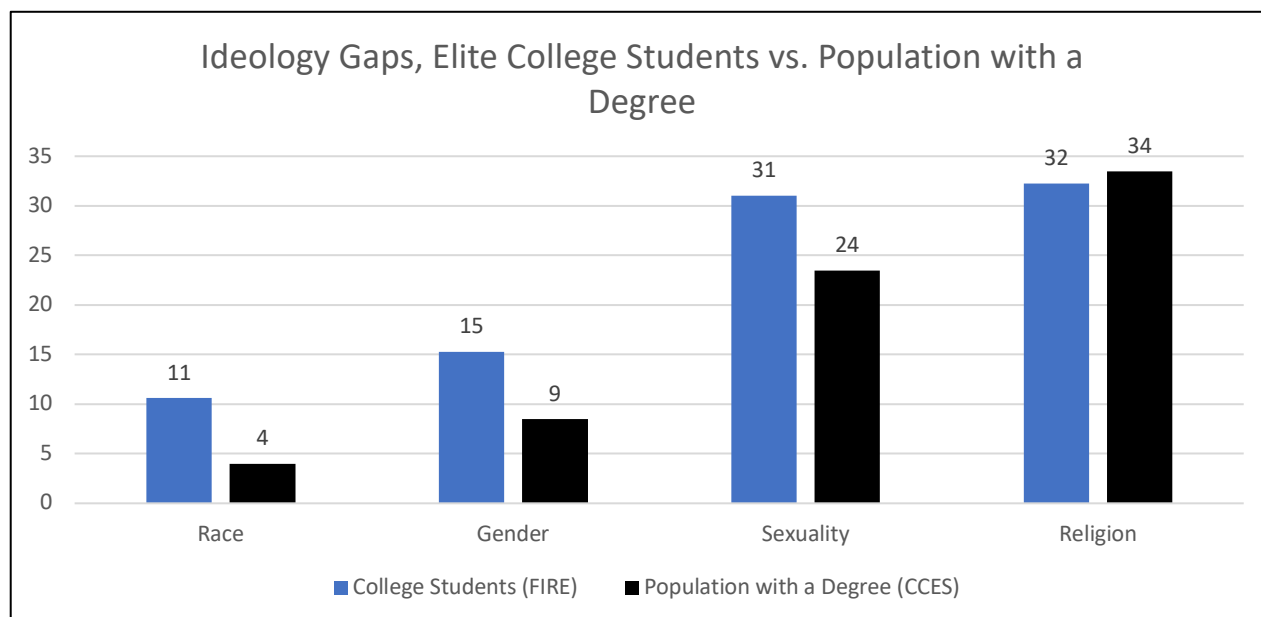


Figure 19. Source: FIRE 2020 and 2021. CCES 2020. Survey weights applied.

Women and minorities are especially likely to lean left on elite campuses compared to their counterparts in the general public. Figure 20 shows that female students are 33 points more liberal and 27 points less conservative than women in the population. Even minority women under 25 with a degree in the public are almost twice as likely as elite student women to identify as conservative. Powerful selection effects, combined with the possible impact of collegiate socialization in elite networks, seem to result in women and minorities in top universities positioning themselves sharply to the left of the public.

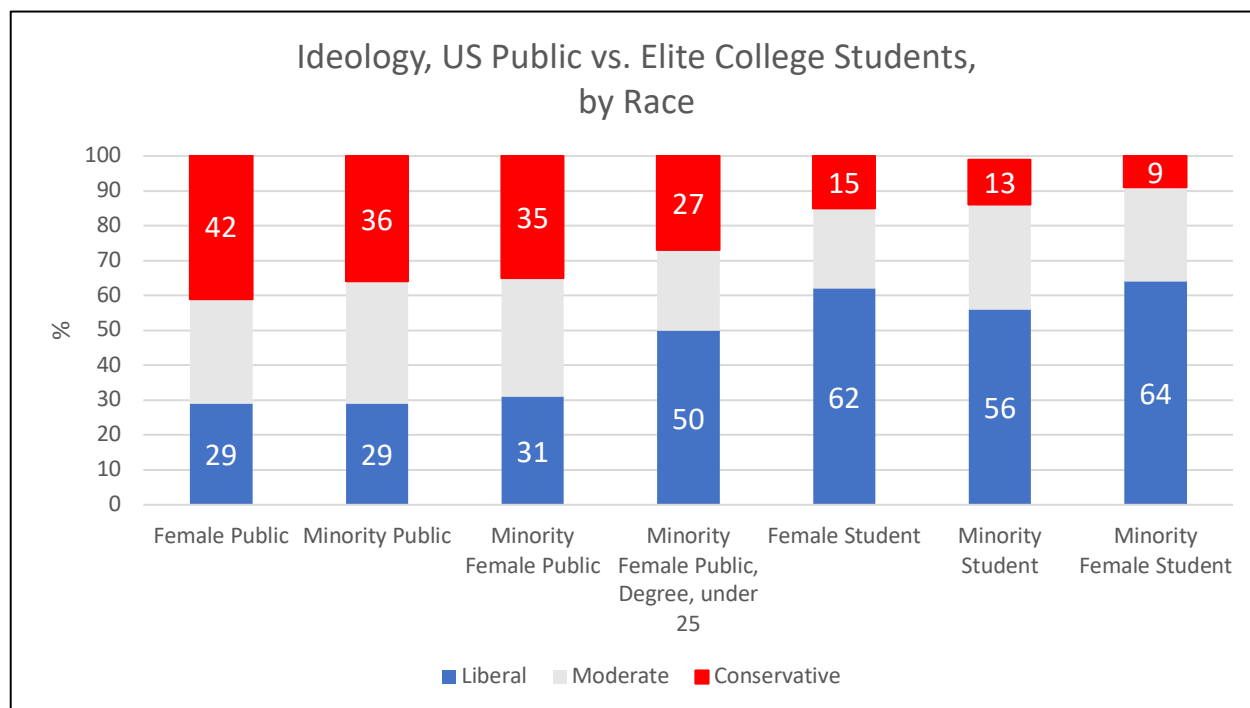


Figure 20. Source: FIRE 2020 and 2021. CCES 2020. Survey weights applied.

CSPI

The same holds for LGBTQ students, who are 30 points more liberal than the LGBTQ population and 14 points more liberal than the LGBTQ under-25 college-educated population. Those without religion are 30 points more liberal than the nonreligious public, though they are only 8 points more liberal than the young, college-educated, nonreligious population.

This does not simply represent a blanket effect of elite college status acting uniformly on all groups via selection or socialization effects, for elite university students who are from stereotypically conservative demographics differ less from the public. By way of illustration, Figure 21 shows that the Republican-Democrat partisanship ratio is relatively similar among white and Christian students compared to their counterparts with degrees off-campus. Indeed, White Christian male elite students are slightly more Republican than the college-educated population of white Christian males. Thus, it is only liberal-leaning demographic groups that seem to exhibit an unusually high liberal Democrat skew on campus – especially women and, with respect to liberalism, minorities.

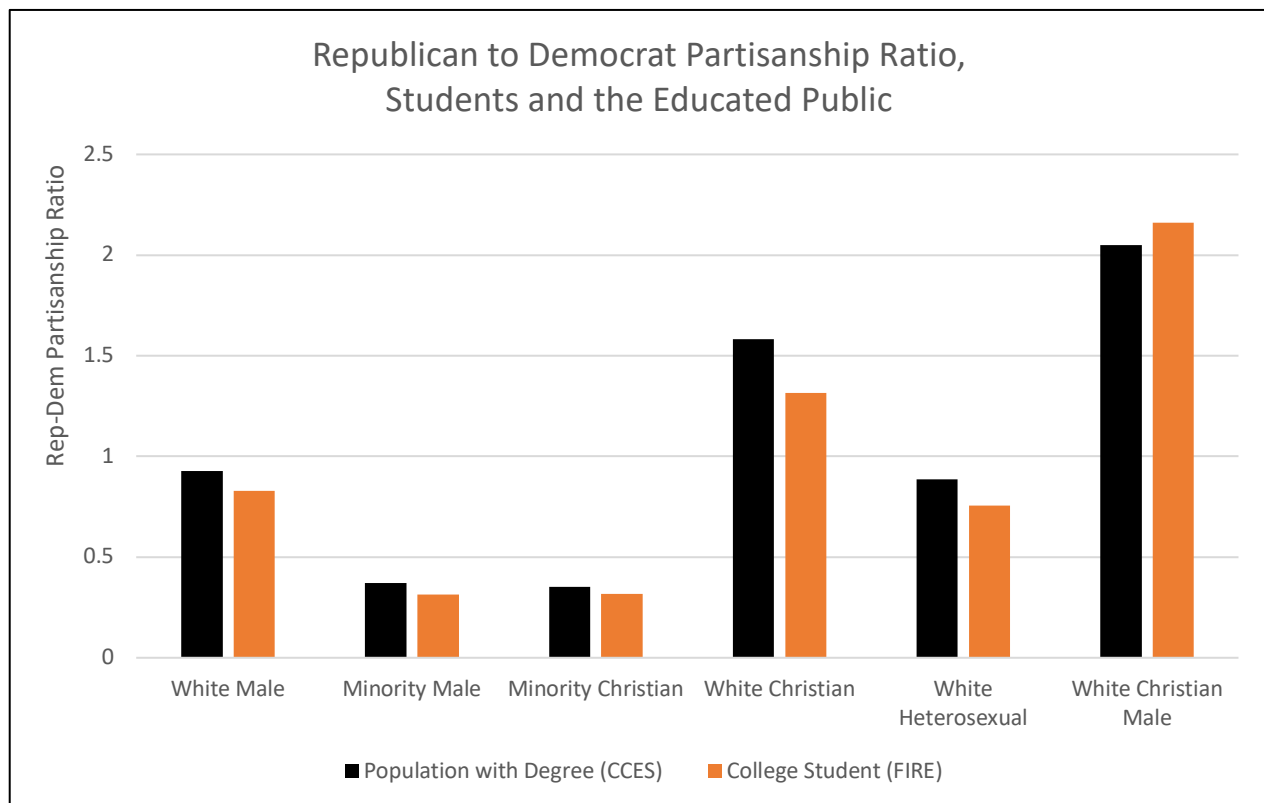


Figure 21. Source: FIRE 2020 and 2021. CCES 2020. Survey weights applied.

Do Economic Factors Matter?

A notable feature of elite student opinion is the relative dominance of group identity in predicting ideology and party affiliation. By contrast, economic factors play a relatively modest role. Figure 22 shows that those not on financial aid (35% of the sample) are 5 points more likely than the 62% of students on financial aid to be Republican identifiers. Those from a private school background are 2 points more Republican than those from public high schools. Those who describe their family's financial situation as upper class or upper-middle class are 6 points more Republican than those from a working-class or lower-class background. On the other hand, those attending more expensive private universities are 6 points less likely to identify as

CSPI

Republican than those attending public universities. Regardless of whether there is a consistent effect, these variables explain only about half a percent of the variation in a 7-point scale of party identification. This is about the same-sized effect as family income in predicting party identification among the wider public, suggesting that material factors tell us very little about partisanship and ideology, whether on- or off-campus. Identity, associated more with cultural than economic cleavages, very much dominates sociodemographic models of political belief.

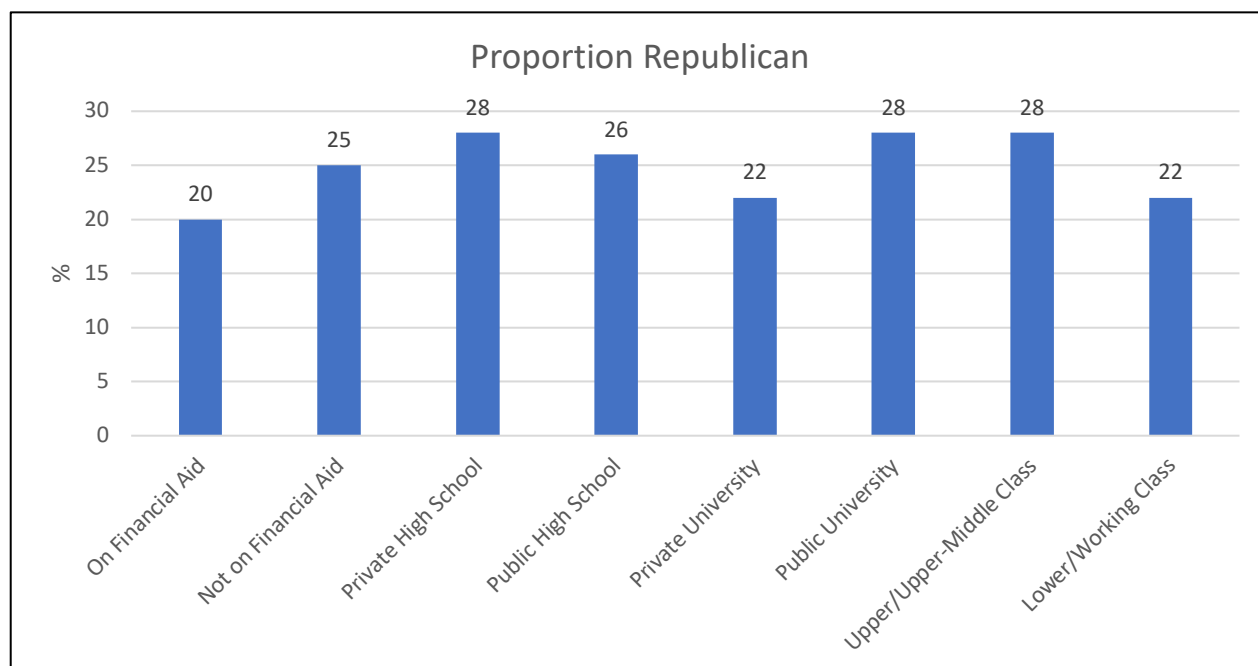


Figure 22. Source: FIRE 2020-2021.

Are Students Influenced by their Peers' Politics?

Given the substantial left skew among students and professors alike, a substantial literature has emerged seeking to ascertain whether university influences the ideology and politics of students. Some claim a university education makes students more liberal while others argue it has no effect.³³ The FIRE data are purely cross-sectional, derived from single snapshots in time. As such, they do not permit us to see whether individual students' views change over their time at college. We can look at different graduating classes to see if those that have been at university longer are more liberal or Democratic. Here the data show no significant difference in liberalism or Democratic voting between older and younger students, indicating that the university experience is probably not having much effect on students' political beliefs. It could be the case that students' politics are liberalized very early in their college experience, or that aging and university socialization counteract each other. Still, these findings seem to reinforce the existing literature that finds little effect of university on students' political attitudes.³⁴

Even if the average effect appears minimal, it may be that concentrations of liberal or conservative students exert a peer effect on individual student attitudes. The FIRE data show apparent evidence for a small effect in which conservative students shift rightward in more conservative universities whereas black, Asian, and LGBTQ students resist moving right in such environments. Dividing colleges into four equal-sized quartiles based on students' average ideology gives three quartiles of left-leaning colleges and a centrist quartile where colleges lean slightly left or right of center. Figure 23 shows that in centrist colleges, net of other key identity

32

CSPI

variables, political moderates who are heterosexual (left chart) or white (right chart) are around 10-12 points more likely to identify as Republican. By contrast, LGBTQ and black moderates on centrist campuses are about as likely to identify as Republican on leftist and centrist campuses. For Hispanic and Asian moderates, centrist campuses are associated with a slightly higher likelihood of identifying as Republican.

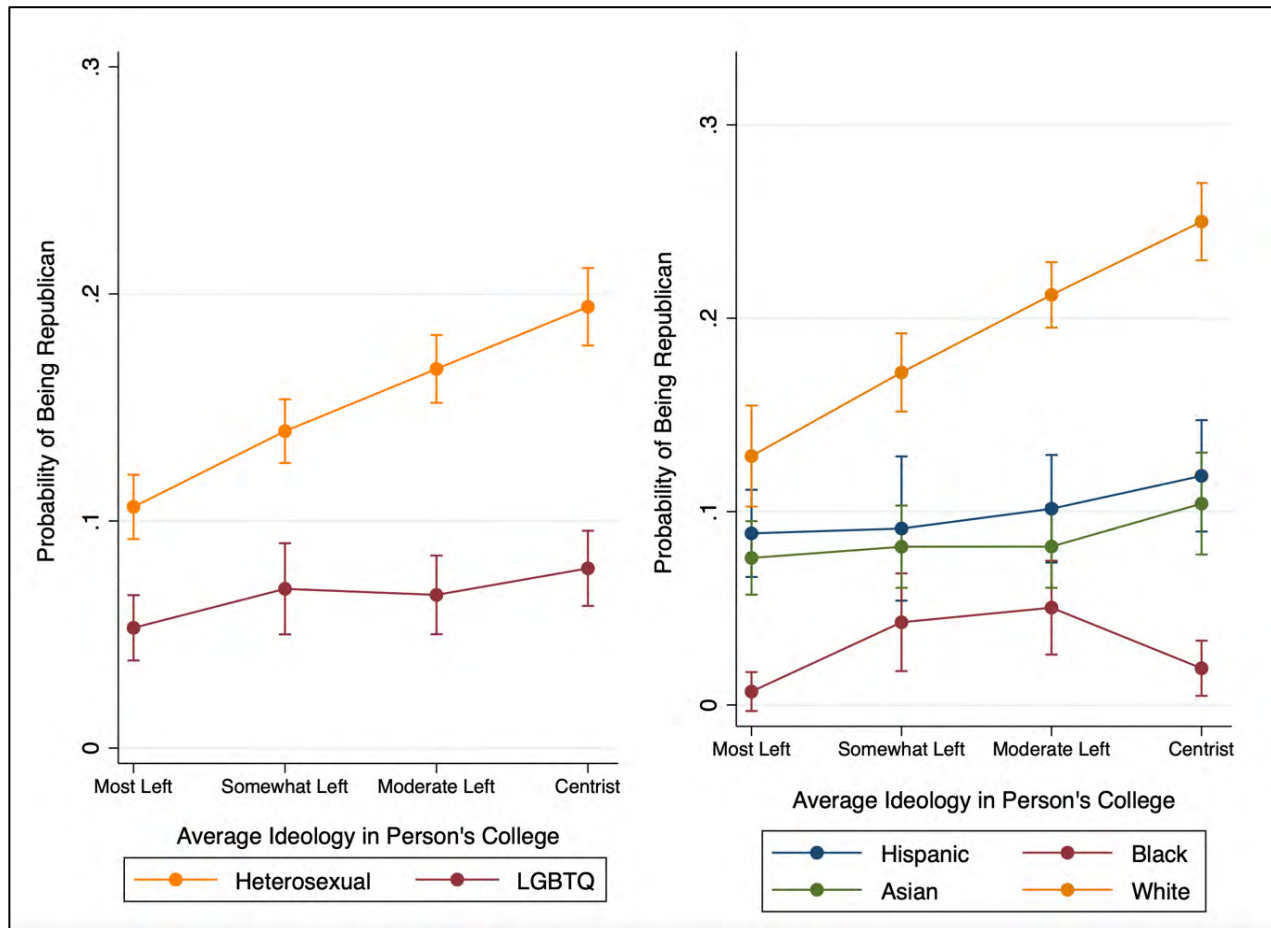


Figure 23. Probability of a moderate student identifying as Republican, based on sexual orientation, gender, and campus ideology. Source: FIRE 2020 and 2021. Left chart N=14,289 moderates with Pseudo- $R^2=.078$. Right chart N=12,336 moderates with Pseudo- $R^2=.095$. Standard errors clustered on school. Controls for gender, year of study, wave, religion, average white share and, where relevant, race or sexuality.

We can similarly observe the relationship between campus political climate and ideology. Figure 24 illustrates how white independents are about 6 points more likely to identify as conservative on a centrist campus than on a highly Democratic one while black independents react to a more right-leaning climate by shifting 4 points away from conservatism. In the right-hand chart, Christian students are about 5 points more likely to be conservatives on centrist campuses than if they attend a college in one of the left-leaning three quartiles. The fact the sample is restricted to independents in this chart and moderates in the previous one, as well as the fact that white, heterosexual, and Christian students display different effects from LGBTQ, nonreligious, and minority students in centrist political environments, suggest that these patterns are more likely to be the result of campus climates than self-selection effects.³⁵

CSPI

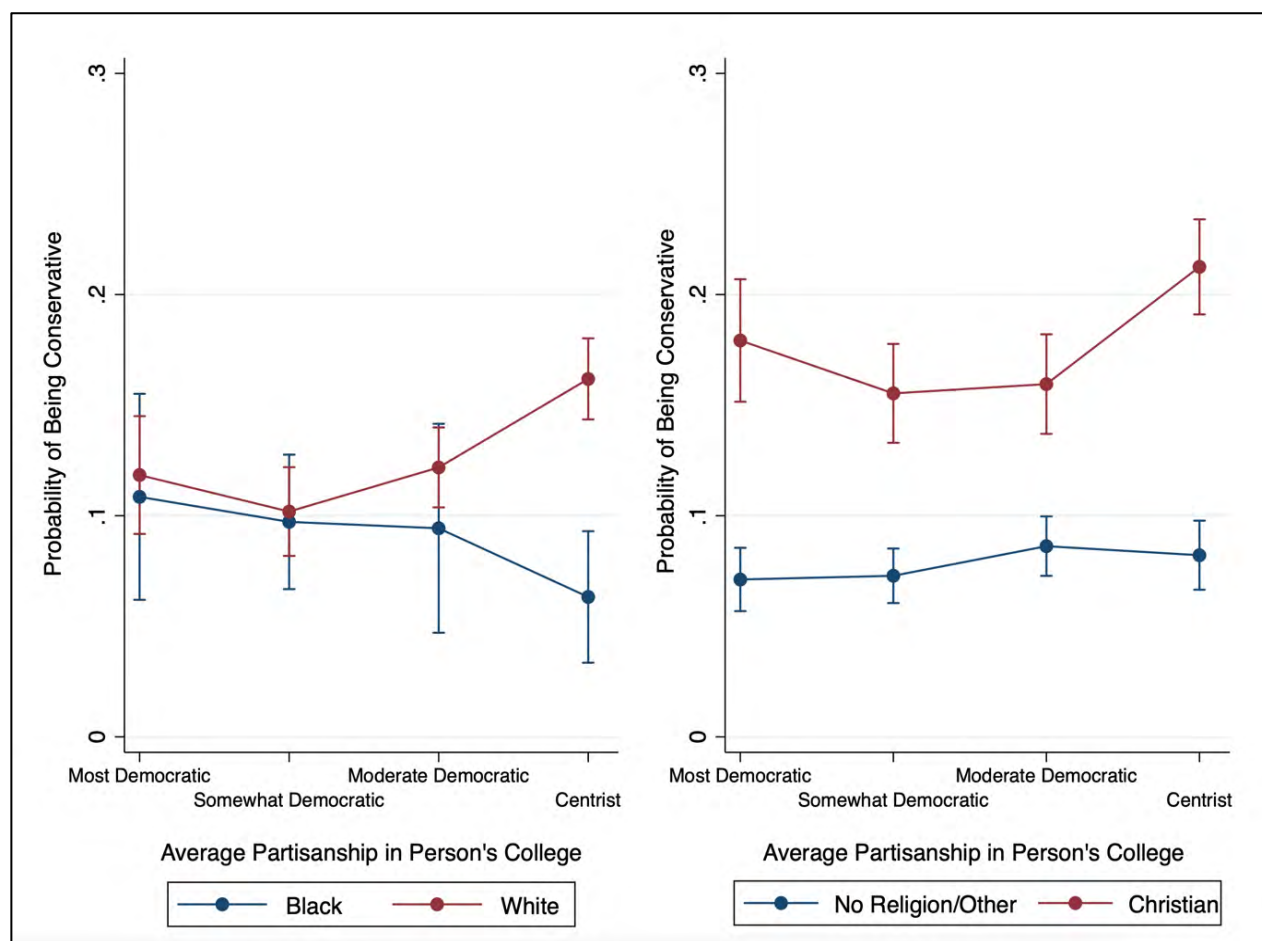


Figure 24. Probability of an independent student identifying as conservative, based on race, religion, and campus ideology. Source: FIRE 2020 and 2021. Left chart N=10,476 Independents with Pseudo- $R^2=.080$. Right chart N=12,285 moderates with Pseudo- $R^2=.069$. Standard errors clustered on school. Controls for gender, year of study, wave, sexuality, average white share, and race or religion where relevant.

Attitudes and Partisanship

In the FIRE data, a 7-point left-right scale accounts for 59% of the variation in a 7-point Strong Democrat to Strong Republican partisanship scale. Using a 5-point ideology scale by collapsing the 7-point scale still predicts 56% of the variation in partisanship. Among the general public, a 5-point liberal to conservative scale predicts 45% of the variation in the same 7-point scale in the CCES overall, but this rises to 55% among the university-educated. Among those who are 25 and under with a degree, ideology explains just 42% of the variation, 14 points less than among elite students in the FIRE survey. The CCES data shows that young people are less likely than their elders to sort ‘correctly’ by pinning the tail of ideology onto the donkey of partisanship. All of which throws the strong association between ideology and partisanship among elite students into relief and indicates a relatively politicized context.

If I examine both group identities and a suite of attitudes toward no-platforming controversial left- and right-wing speakers, as well as attitudes to obstructing speech, it becomes clear that these are powerful predictors of partisanship. Controversial left speakers included those arguing that “Religious liberty is used as an excuse to discriminate against gays,” “White

CSPI

people are collectively responsible for structural racism and use it to protect their privilege,” “The police should be abolished because they are racist,” and “Looting is a justifiable form of protest.” Controversial right-wing speakers were those claiming “Black Lives Matter is a hate group,” “Transgender people have a mental disorder,” and “All abortion should be illegal.” Responses were combined into separate indices through principal components analysis. On speech obstruction, questions on whether it is acceptable to shout down, block or use violence against a speaker were combined into a similar index.

Figure 25 compares the effects from two models. The first contains identity characteristics and the average partisan lean on an individual’s campus. This accounts for 22% of the variation (18% without average partisan lean included). The three indices predict 28% of the variation, rising to 35% when identity characteristics and party lean are added to the model. Support for banning right-wing speakers has by far the strongest predictive power, with a standardized effect size (beta) of over .4 in predicting a Democratic rather than Republican lean. Those who support banning left-wing speakers are significantly more likely to lean toward the GOP, but this parameter is only half as predictive of partisanship as support for banning right-wing speakers. Those who oppose shoutdowns, blocking, and violence lean right, but this is less predictive than the no-platforming variables. This indicates that those on the right have an element of bipartisan free speech consistency while those on the left are somewhat bipartisan in their relatively restrictive stance on speech, even for controversial left-wing speakers.

Comparing the identity and attitudes models shows that adding attitudes to speech restriction to the model greatly erodes the impact of gender. This is largely because women are substantially more restrictive than men on the left no-platforming scales, though much less so on the obstruction of speakers scale. LGBTQ students, by contrast, are much more restrictive than heterosexuals in terms of speech obstruction but less so on no-platforming. The net effect, however, is that the effect size on the sexual minority parameter drops considerably once the speech attitudes are added to the model. White Christians are the most important pro-Republican group, and this is the most important identity variable for predicting partisanship. It retains much of its predictive power even when speech attitudes are included in the groups plus attitudes model.

CSPI

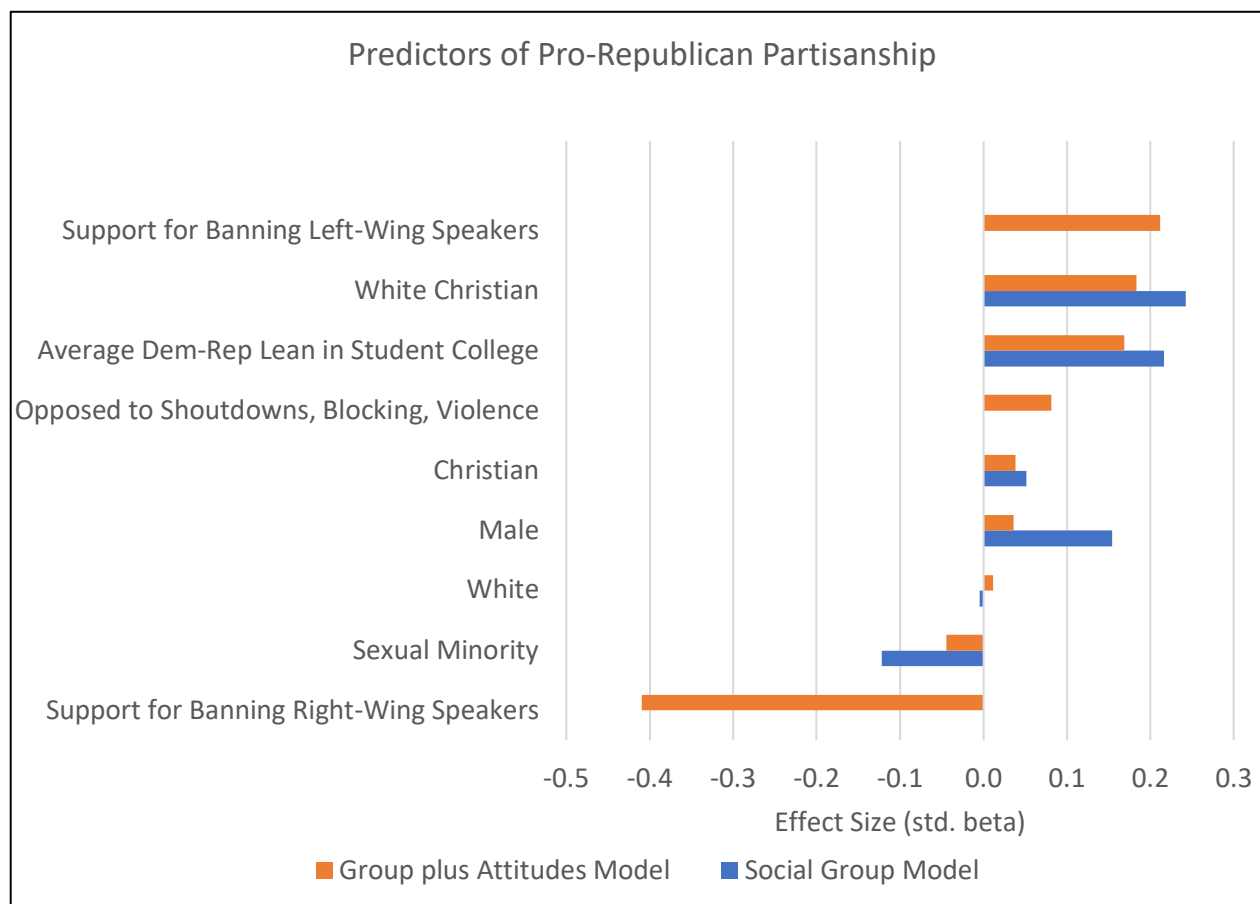


Figure 25. Source: FIRE 2020 and 2021.

Viewpoint Diversity

The foregoing discussion of the political composition of colleges showed that three of four quartiles of elite universities lean left and Democratic. Only the fourth quartile of colleges has a relatively even balance of liberals and conservatives, Democrats and Republicans. Figure 26 plots all 159 colleges by average ideology on a 7-point scale, noting their share of liberals in blue and conservatives in red. Each college has two vertically aligned dots. Were it not for variation in the average share of moderates per college, the two lines would be perfect mirror images of each other.

The first point to note is the strong liberal tilt of most colleges. At the extreme, Wesleyan is less than 1% conservative and 86% liberal. A number of liberal arts colleges are in this extreme range of political homogeneity, with nine institutions containing fewer than 5% conservatives. At the other extreme, Hillsdale College is the only clearly conservative university in the data, at 76% conservative and 11% liberal.

Only 14 institutions contain more conservative than liberal students, a similar number to the colleges in the dataset that contain less than 5% conservatives. Moving from left to right, we encounter a number of Ivy League schools, with Brown the most liberal and Princeton the least – though even Princeton is 64% liberal and just 15% conservative. Despite stereotypes, the University of Kentucky has 2.5 liberals for every conservative student while Arizona State leans liberal by almost a 2-to-1 margin. Only when we arrive at a number of flagship universities in the South or inland West do we encounter politically balanced schools like Texas Tech, the

CSPI

University of Arkansas, Baylor, or the University of Mississippi. Finally, at the right of the chart, we see the only two colleges with anything close to a conservative majority, Utah State (49% conservative), Brigham Young University (BYU) (48%), and Hillsdale College (76%). Plots by party identification show a very similar pattern: thus, only two colleges have a Republican majority: Utah State (51%) and Hillsdale (72%).

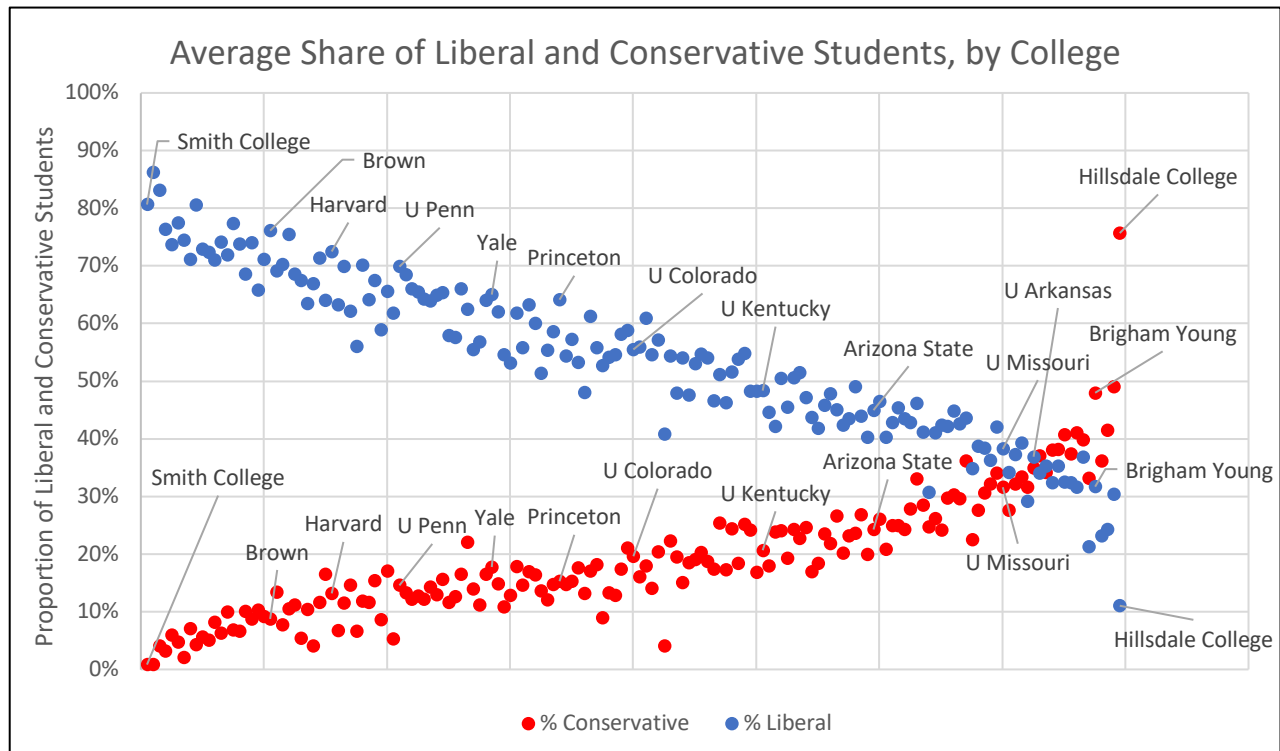


Figure 26. Source: FIRE 2020 and 2021. Survey weights applied.

A list of the ten most right-leaning and left-leaning student bodies appears in figures 27 and 28. The dominance of mainly New England liberal arts colleges among the most liberal institutions at the left of the chart, and of universities in the South and inland West on the right, is evident.

CSPI

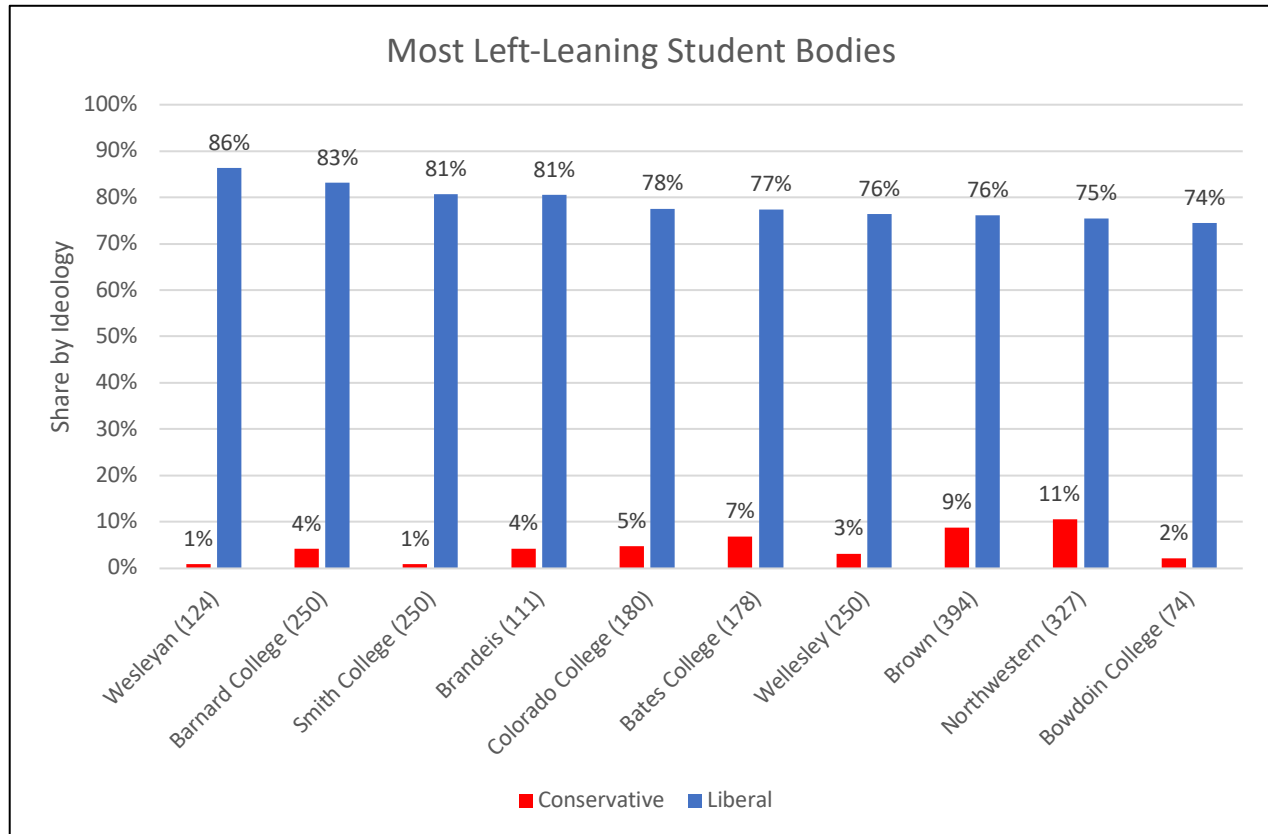


Figure 27. Source: FIRE 2020 and 2021. Survey weights applied. Sample size in brackets, excludes moderates.

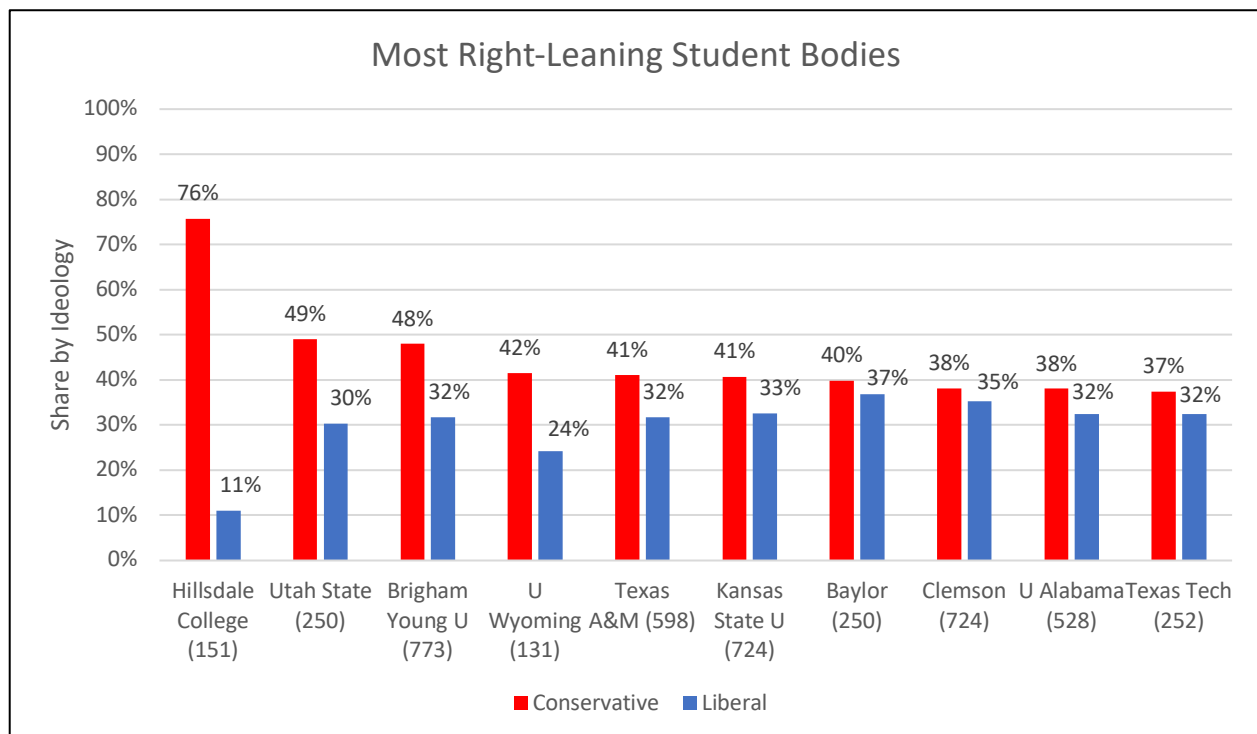


Figure 28. Source: FIRE 2020 and 2021. Survey weights applied. Sample size in brackets, excludes moderates.

CSPI

To derive a measure of viewpoint diversity, I draw on two questions in the FIRE survey data. First, the 7-point ‘very liberal’ to ‘very conservative’ ideology question. Second, the 7-point ‘Strong Democrat’ to ‘Strong Republican’ party identification question. The mid-point in both is 4 (moderate, Independent). My Index of Viewpoint Diversity (IVD) is calculated by adding together the two indices, then subtracting the sum from 8, which represents a sum of the mid-points of the two scales. The absolute value of this figure yields a range from 0 to 6, where the most diverse institutions score a 0, the least diverse a 6. The results, plotted in Figure 29, show that most colleges have at least some viewpoint diversity insofar as their students are not 100% clustered at either the ‘very liberal’/Strong Democrat or ‘very conservative’/Strong Republican pole.

However, it is also evident that high viewpoint diversity scores are generally found in institutions in the highest quartile of conservative students, with those at the optimum score tending to have 3 in 10 students conservative, 3 in 10 liberal, and 4 in 10 moderate. An index score above 2 indicates that students are, on average, more doctrinaire than party leaners or the ‘slightly’ ideological. Using this cutoff point, Hillsdale is the only low viewpoint diversity institution that leans right. Among the 14 right-leaning institutions, all but Hillsdale have high viewpoint diversity: an IVD of 1 or below.

At the other end of the index, 63 left-leaning colleges have low viewpoint diversity (IVD above 2), with quite a few liberal arts colleges in the extreme 3 to 4 range. Twenty-nine colleges with more left- than right-leaning students have a low IVD below 1, but fully 116 have an IVD above 1 – compared to just one of the 14 right-leaning colleges. Importantly, one-third of low viewpoint diversity colleges are lower-ranked R2 or R3 schools and none are liberal arts colleges. By contrast, 83% of very low viewpoint diversity schools (IVD above 3) are liberal arts colleges, and none are R2 or R3 schools. In fact, all but one (Trinity College) of the 23 liberal arts colleges in the survey data have an IVD above 2, indicating low viewpoint diversity.

CSPI

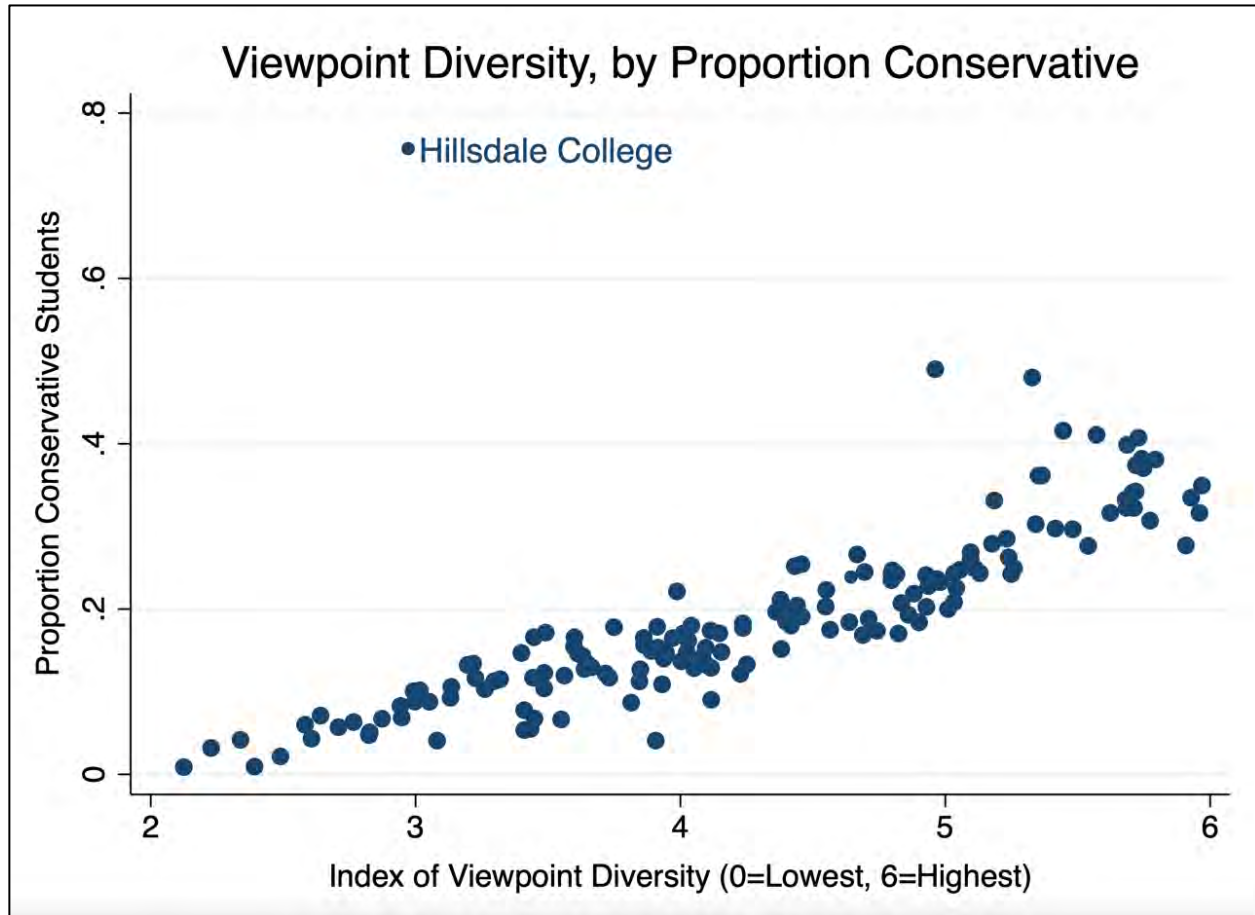


Figure 29. Source: FIRE 2020 and 2021. Survey weights applied. Sample size in brackets, excludes moderates.

Based on the index, the top 10 institutions for viewpoint diversity are given in table 1, and the bottom 10 in table 2. Flagship state universities in the South dominate the top rankings while the bottom 10 consist entirely of liberal arts colleges. The full set of rankings appears in the appendix.

CSPI

Table 1. Top 10 Colleges for Highest Viewpoint Diversity

University	IVD	% Con	% Mod	% Lib	% Rep	% Dem	Avg Lib-Con	Avg Dem-Rep
U Arkansas	0.03	35%	28%	37%	36%	41%	3.96	4.01
U Mississippi	0.04	32%	39%	29%	35%	31%	3.93	4.03
Louisiana State	0.07	33%	27%	39%	35%	38%	3.91	4.01
Pepperdine	0.09	28%	38%	34%	30%	39%	3.88	4.03
U Alabama	0.21	38%	29%	32%	41%	37%	4.03	4.17
U Tennessee	0.23	31%	30%	38%	36%	38%	3.79	3.99
Oklahoma State	0.25	37%	29%	34%	42%	36%	4.00	4.25
Clemson	0.26	38%	26%	35%	40%	39%	4.04	4.21
Kansas State	0.27	41%	26%	33%	40%	38%	4.10	4.17
Texas Tech	0.28	37%	30%	32%	41%	35%	4.12	4.16

Source: FIRE 2020 and 2021. Survey weights applied.

Table 2. Bottom 10 Colleges for Viewpoint Diversity

University	IVD	% Con	% Mod	% Lib	% Rep	% Dem	Avg Lib-Con	Avg Dem-Rep
Smith College	3.88	1%	18%	81%	2%	78%	1.90	2.22
Wellesley	3.77	3%	20%	76%	1%	79%	2.13	2.09
Barnard College	3.66	4%	13%	83%	4%	74%	1.99	2.35
Wesleyan	3.61	1%	13%	86%	2%	76%	1.96	2.43
Bowdoin College	3.51	2%	19%	74%	8%	66%	2.24	2.25
Oberlin	3.42	6%	20%	74%	5%	70%	2.19	2.39
Brandeis	3.39	4%	15%	81%	5%	78%	2.25	2.36
Middlebury	3.36	7%	18%	71%	6%	72%	2.24	2.40
Vassar	3.29	6%	21%	73%	4%	69%	2.31	2.40
Grinnell College	3.23	6%	20%	74%	5%	69%	2.33	2.44

Source: FIRE 2020 and 2021. Survey weights applied.

As of writing, the 2022 data has just been released. The rankings look very similar, even as modest sampling error would be expected to result in some shuffling between institutions. The University of Alabama, Texas Tech, University of Tennessee, University of Arkansas, Texas A&M, Montana State, Bowling Green, Purdue, Penn State and Boise State form the top ten for viewpoint diversity in 2022. Grinnell, Wheaton, Georgia State, Colorado College, Bard College, Hillsdale, NYU, Vassar, Knox and Colorado College score lowest. The data weights make it difficult to achieve pinpoint accuracy in the rankings because the raw partisanship and ideology percentages are adjusted to account for a college's race, gender, voter registration and financial aid composition.

Regardless, the broad patterns by college type are crystal clear. These rankings suggest that those seeking to experience a wide range of political opinions are best advised to attend a flagship state university, R2 or R3 school, and avoid liberal arts colleges. Ivy League schools lean heavily liberal but, in contrast to liberal arts colleges, contain a 10-15 percent conservative

41

CSPI

minority – many of whom do not have conservative parents. In a future report, I will examine the important link between viewpoint diversity and expressive freedom on campus.³⁶

Conclusion

This report has examined the demographic and political composition of 159 leading universities based on surveys of 57,000 undergraduate students. It shows that elite students lean liberal and Democratic by a margin of 2.5 to 1. This places them to the left of the median voter, the young and college-educated public, and students attending lower-ranked colleges.

Today's elite students are substantially more diverse in terms of race, sexuality, and religiosity than elite students of the 1980s and 90s. A quarter identify as LGBTQ, and the share with no religion is nearly as large as the proportion who are Christian. In addition, these identity characteristics matter more for students' political opinions than they do for the public. Consequently, women, minorities, and LGBTQ students at leading universities lean considerably further left than members of their identity groups in the wider population, even compared to those that are young and college-educated.

Only a quarter of students are white, heterosexual, and identify as Christian. White straight Christian men make up little more than 10% of the total. White Christians, white conservatives, and white males, therefore, appear to be increasingly self-conscious minorities on today's liberal and secular elite campuses. The level of segregation of white conservatives and Christians within the elite college system is notably higher than the clustering of white liberals, minority conservatives, and minority Christians among elite universities. In contrast, white Christian, white male, and white heterosexual elite students differ much less from members of their group in the wider public than female, minority, and LGBTQ elite students. Young liberals, especially minority liberals, seem to cluster towards elite universities but are not institutionally segregated among them. Conservatives, especially white conservatives, do not cluster toward elite schools but are relatively institutionally segregated among them.

In the liberal-dominated elite college system, viewpoint diversity is strongly associated with colleges that recruit more conservative students. State flagship universities in the South or inland West have the highest levels of viewpoint diversity. Liberal arts colleges, many in New England, have the lowest levels of viewpoint diversity. Whether the former can capitalize on their political diversity, and the latter take steps to improve theirs, turns on whether university leaders consider viewpoint diversity as important as more conventional forms of diversity.

Far from being a monolithic bloc, students in today's leading universities are diverse and divided. That is, there is more sexual, religious, racial, and gender diversity among elite students than in the past, and these identities are more strongly connected to ideology and partisanship. The gap in party identification between male and female students, for instance, has risen steadily since the early 2000s to the point where female elite students are 18 points more likely to be Democrats and 12 points less likely to be Republicans than their male classmates.

Elite students will supply many of the leaders of tomorrow's America, so it is vital to understand trends among them. The country has polarized substantially since the 1980s, and the profile of cultural issues around identity – race, gender, and sexuality – has risen in the media and national politics. All this as the decline of religion among young people reconfigures society and elevates religious 'nones' to prominence as a political constituency. Elite students furnish leading indicators of what may be emerging and present a more intense, magnified version of national political trends. This portends a politics in which elite women, minorities, gays, and the nonreligious are more left-leaning while elite whites, males, and Christians remain relatively conservative..

CSPI

Appendix

Note: An interactive version of the table below that allows you to search by university can be found at <http://www.sneps.net/viewpoint-diversity-ranking-of-leading-us-colleges>.

University	IVD	% Con	% Mod	% Lib	% Rep	% Dem	Avg Lib-Con	Avg Dem-Rep
U Arkansas	0.03	35%	28%	37%	36%	41%	3.96	4.01
U Mississippi	0.04	32%	39%	29%	35%	31%	3.93	4.03
Louisiana State	0.07	33%	27%	39%	35%	38%	3.91	4.01
Pepperdine	0.09	28%	38%	34%	30%	39%	3.88	4.03
U Alabama	0.21	38%	29%	32%	41%	37%	4.03	4.17
U Tennessee	0.23	31%	30%	38%	36%	38%	3.79	3.99
Oklahoma State	0.25	37%	29%	34%	42%	36%	4.00	4.25
Clemson	0.26	38%	26%	35%	40%	39%	4.04	4.21
Kansas State	0.27	41%	26%	33%	40%	38%	4.10	4.17
Texas Tech	0.28	37%	30%	32%	41%	35%	4.12	4.16
Auburn University	0.28	34%	30%	35%	39%	35%	4.03	4.25
Miami U	0.29	32%	31%	36%	31%	37%	3.83	3.89
U SoCar	0.29	34%	23%	42%	35%	43%	3.83	3.88
Baylor	0.31	40%	23%	37%	41%	45%	4.20	4.12
North Carolina State University	0.32	32%	30%	37%	31%	40%	3.88	3.80
New Mexico State	0.32	33%	45%	21%	32%	28%	4.23	4.09
U Missouri	0.38	32%	29%	38%	34%	48%	3.85	3.77
Texas A&M	0.43	41%	27%	32%	44%	37%	4.18	4.25
Penn State	0.46	28%	33%	39%	30%	46%	3.77	3.77
U Oklahoma	0.52	30%	27%	43%	33%	43%	3.70	3.78
U Wyoming	0.56	42%	34%	24%	41%	39%	4.42	4.14
U Georgia	0.58	30%	27%	42%	32%	44%	3.65	3.77
Mississippi State	0.64	36%	41%	23%	37%	29%	4.41	4.23
Notre Dame	0.65	36%	20%	44%	32%	50%	3.71	3.64
U Nebraska	0.66	30%	25%	45%	30%	49%	3.66	3.68
BYU	0.67	48%	20%	32%	49%	30%	4.28	4.39
Indiana U	0.74	25%	31%	43%	28%	45%	3.57	3.69
Colorado State	0.75	24%	33%	42%	21%	44%	3.64	3.61
U Arizona	0.76	26%	32%	41%	28%	48%	3.63	3.61
U Idaho	0.77	29%	30%	41%	28%	46%	3.62	3.62
Southern Methodist U	0.81	33%	21%	46%	32%	46%	3.61	3.57
Col Sch Mines	0.82	28%	28%	43%	25%	50%	3.61	3.57
Washington SU	0.87	24%	32%	43%	24%	48%	3.59	3.54
Purdue	0.89	25%	30%	45%	27%	51%	3.57	3.54
VA Poly	0.90	26%	27%	46%	27%	52%	3.56	3.54

CSPI

Ohio State	0.90	27%	29%	44%	23%	47%	3.55	3.55
U Maine	0.94	25%	44%	31%	23%	36%	3.63	3.43
Cal State Fresno	0.96	23%	42%	35%	22%	52%	3.75	3.29
Arizona State	0.97	24%	30%	45%	24%	48%	3.55	3.48
U Nevada	0.97	21%	39%	40%	26%	51%	3.56	3.47
U Rhode Island	0.99	20%	40%	40%	21%	47%	3.55	3.46
Kent State	1.02	23%	33%	44%	22%	50%	3.51	3.47
Iowa State	1.03	24%	27%	49%	24%	51%	3.51	3.46
Utah State	1.04	49%	21%	30%	51%	30%	4.50	4.53
U Utah	1.06	23%	26%	51%	24%	49%	3.41	3.52
Ohio U	1.07	20%	37%	42%	24%	50%	3.47	3.46
Wake Forest	1.07	24%	25%	51%	26%	53%	3.39	3.54
WVa U	1.10	18%	40%	42%	21%	46%	3.43	3.47
U Delaware	1.12	22%	30%	48%	25%	57%	3.45	3.43
Rowan U	1.14	19%	35%	46%	24%	47%	3.40	3.46
U Kentucky	1.17	21%	31%	48%	24%	47%	3.35	3.48
RPI	1.18	17%	39%	44%	18%	47%	3.42	3.40
U Cincinnati	1.18	24%	28%	48%	27%	50%	3.34	3.48
Michigan State	1.20	25%	28%	47%	25%	55%	3.41	3.39
U Iowa	1.20	24%	24%	51%	25%	53%	3.41	3.39
Marquette	1.20	23%	31%	46%	26%	55%	3.43	3.37
U Alabama	1.26	17%	36%	46%	28%	48%	3.26	3.48
Central Florida	1.29	19%	27%	54%	25%	52%	3.23	3.48
Bucknell University	1.30	24%	22%	52%	30%	47%	3.28	3.41
U Miami	1.31	17%	35%	48%	21%	51%	3.35	3.34
George Mason	1.33	27%	28%	45%	20%	53%	3.45	3.22
U New Mexico	1.36	24%	32%	42%	24%	47%	3.38	3.26
UT Dallas	1.36	18%	27%	54%	20%	53%	3.30	3.34
UNH	1.44	17%	36%	47%	19%	53%	3.24	3.33
DePauw	1.45	22%	22%	54%	24%	51%	3.20	3.35
UT Austin	1.45	20%	24%	55%	23%	59%	3.22	3.32
U Illinois	1.54	19%	27%	53%	20%	59%	3.22	3.24
U Florida	1.54	25%	23%	51%	25%	58%	3.25	3.21
U Minnesota	1.56	20%	22%	57%	21%	57%	3.19	3.25
Boston College	1.57	25%	20%	55%	18%	59%	3.30	3.13
U Hawaii	1.58	18%	35%	45%	20%	58%	3.36	3.06
Oregon State	1.60	20%	33%	48%	20%	52%	3.21	3.19
U Kansas	1.60	19%	34%	48%	21%	53%	3.22	3.18
Georgia Tech	1.62	15%	31%	54%	22%	61%	3.21	3.17
UNC	1.62	21%	20%	59%	21%	57%	3.12	3.25
U Colorado	1.64	20%	25%	56%	19%	58%	3.14	3.23
Rutgers	1.75	13%	32%	54%	13%	57%	3.10	3.15
St Louis U	1.76	18%	29%	53%	18%	53%	3.04	3.19

CSPI

Florida State	1.76	18%	26%	56%	18%	61%	3.09	3.15
U Pittsburgh	1.77	12%	32%	55%	19%	53%	3.02	3.20
Fordham	1.85	15%	31%	54%	19%	57%	3.03	3.13
U Michigan	1.85	17%	21%	61%	18%	62%	3.08	3.07
U Conn	1.88	9%	38%	53%	12%	60%	3.09	3.02
UI Chicago	1.88	13%	32%	55%	13%	58%	3.11	3.01
UCLA	1.89	17%	24%	58%	16%	64%	3.12	3.00
Florida International	1.90	13%	38%	48%	16%	57%	3.05	3.05
U Mass Amherst	1.90	15%	27%	57%	17%	61%	3.04	3.05
UC Davis	1.92	14%	29%	55%	14%	63%	3.16	2.93
U Buffalo	1.95	13%	34%	53%	14%	57%	2.97	3.08
UVa	1.96	18%	21%	61%	17%	64%	3.15	2.89
Trinity College	1.97	16%	28%	56%	13%	68%	3.15	2.88
MIT	1.98	15%	27%	59%	12%	59%	3.03	3.00
San Diego State	1.99	17%	19%	63%	16%	63%	3.02	2.99
Temple	2.00	14%	35%	51%	14%	56%	3.02	2.98
Vanderbilt	2.01	22%	15%	62%	22%	64%	2.92	3.07
Syracuse U	2.03	16%	23%	60%	17%	63%	3.02	2.95
Johns Hopkins	2.05	15%	29%	56%	14%	63%	3.00	2.95
Stony Brook U	2.06	14%	30%	56%	12%	62%	2.92	3.01
Georgia State	2.07	11%	34%	55%	12%	63%	2.97	2.96
Princeton	2.08	15%	20%	64%	15%	65%	3.03	2.89
Stanford	2.09	18%	20%	62%	16%	64%	2.99	2.92
Cal State LA	2.09	4%	55%	41%	6%	58%	3.20	2.71
Wisconsin	2.11	15%	23%	62%	17%	66%	2.97	2.92
Cornell	2.14	16%	19%	65%	15%	64%	2.88	2.99
Duke	2.14	17%	19%	64%	14%	63%	2.93	2.93
SUNY Binghamton	2.15	13%	30%	58%	14%	60%	2.88	2.97
U Maryland College Pk	2.15	11%	32%	57%	8%	64%	2.93	2.92
DePaul	2.19	9%	32%	59%	9%	59%	2.75	3.07
Yale	2.25	18%	16%	65%	15%	68%	2.97	2.78
UC Riverside	2.27	12%	29%	58%	10%	61%	2.88	2.85
U Oregon	2.28	12%	23%	64%	13%	64%	2.84	2.87
Carnegie Mellon	2.34	13%	22%	65%	11%	60%	2.85	2.81
Dartmouth	2.35	13%	18%	68%	12%	65%	2.79	2.86
Emory	2.36	13%	22%	65%	14%	69%	2.81	2.83
Rice	2.37	14%	21%	64%	15%	70%	2.85	2.78
U Penn	2.39	15%	15%	70%	15%	67%	2.79	2.82
Georgetown	2.40	17%	17%	66%	13%	69%	2.89	2.71
U Chicago	2.40	15%	16%	68%	11%	65%	2.74	2.86
U Washington	2.44	12%	18%	70%	11%	69%	2.73	2.83
Howard	2.45	7%	37%	56%	6%	63%	2.73	2.82

CSPI

Tulane	2.51	17%	17%	66%	14%	70%	2.76	2.73
UC Berkeley	2.51	12%	21%	66%	9%	71%	2.79	2.69
Colby College	2.51	10%	26%	64%	11%	62%	2.63	2.85
U Vermont	2.55	7%	30%	63%	6%	69%	2.69	2.76
George Washington	2.55	17%	19%	64%	14%	63%	2.66	2.79
Hamilton College	2.56	12%	24%	64%	10%	66%	2.74	2.70
UC Santa Cruz	2.57	6%	26%	67%	9%	61%	2.62	2.82
UC Santa Barbara	2.59	8%	22%	70%	9%	71%	2.55	2.86
Boston University	2.59	5%	33%	62%	7%	72%	2.76	2.65
William & Mary	2.60	15%	23%	62%	11%	64%	2.73	2.67
Columbia	2.68	12%	18%	70%	9%	67%	2.69	2.63
Connecticut College	2.70	11%	20%	69%	9%	67%	2.60	2.69
NYU	2.74	10%	24%	66%	9%	57%	2.51	2.75
Williams	2.77	12%	17%	71%	13%	74%	2.65	2.58
Case Western	2.78	13%	17%	69%	16%	70%	2.55	2.67
Harvard	2.80	13%	14%	73%	10%	73%	2.68	2.51
Northwestern	2.87	11%	14%	75%	8%	73%	2.59	2.54
USC	2.87	9%	19%	71%	10%	69%	2.51	2.62
Tufts	2.92	4%	29%	67%	7%	73%	2.64	2.45
Claremont McKenna	2.95	9%	17%	74%	7%	72%	2.51	2.55
Haverford College	2.98	10%	21%	69%	11%	66%	2.41	2.61
Brown	3.00	9%	15%	76%	7%	74%	2.52	2.47
Amherst College	3.01	10%	18%	72%	9%	73%	2.38	2.61
Hillsdale College	3.03	76%	13%	11%	73%	7%	5.67	5.36
Bates College	3.05	7%	16%	77%	7%	70%	2.40	2.55
Bard College	3.06	8%	21%	71%	7%	62%	2.32	2.63
Washington U St Louis	3.13	7%	19%	74%	7%	76%	2.40	2.47
Macalester College	3.17	5%	22%	72%	5%	67%	2.31	2.51
Colorado College	3.18	5%	18%	78%	6%	68%	2.21	2.61
Grinnell College	3.23	6%	20%	74%	5%	69%	2.33	2.44
Vassar	3.29	6%	21%	73%	4%	69%	2.31	2.40
Middlebury	3.36	7%	18%	71%	6%	72%	2.24	2.40
Brandeis	3.39	4%	15%	81%	5%	78%	2.25	2.36
Oberlin	3.42	6%	20%	74%	5%	70%	2.19	2.39
Bowdoin College	3.51	2%	19%	74%	8%	66%	2.24	2.25
Wesleyan	3.61	1%	13%	86%	2%	76%	1.96	2.43
Barnard College	3.66	4%	13%	83%	4%	74%	1.99	2.35
Wellesley	3.77	3%	20%	76%	1%	79%	2.13	2.09
Smith College	3.88	1%	18%	81%	2%	78%	1.90	2.22



References

- ¹ “2020 College Free Speech Rankings.” 2020. *FIRE*. <https://www.thefire.org/research/publications/student-surveys/2020-college-free-speech-rankings/>; “2021 College Free Speech Rankings.” 2021. *FIRE*. <https://www.thefire.org/research/publications/student-surveys/2021-college-free-speech-rankings/>.
- ² Stolzenberg, Ellen Bara, Melissa C. Aragon, Edgar Romo, Victoria Couch, Destiny McLennan, M. Kevin Eagan and Nathaniel Kang. 2020. “The American Freshmen: National Norms, Fall 2019.” *Higher Education Research Institute (HERI)*. <https://www.heri.ucla.edu/monographs/TheAmericanFreshman2019.pdf>.
- ³ For further details on the FIRE survey methodology, see <https://www.thefire.org/research/publications/student-surveys/2021-college-free-speech-rankings/>.
- ⁴ TCM Staff, 2020. “The Demographics of the Ivy League.” *The College Monk*. <https://www.thecollegemonk.com/blog/ivy-league-demographics>.
- ⁵ Frey, William H. 2020. “Less than Half of US Children Under 15 are White, Census Shows.” *The Brookings Institution*. <https://www.brookings.edu/research/less-than-half-of-us-children-under-15-are-white-census-shows/>.
- ⁶ Johnson, Dirk. 1986. “Yale’s Limit on Jewish Enrollment Lasted Until Early 1960’s, Book Says.” *New York Times*. <https://www.nytimes.com/1986/03/04/nyregion/yale-s-limit-on-jewish-enrollment-lasting-until-early-1960-s-book-says.html>.
- ⁷ Telushkin, Shira. 2018. “The Vanishing Ivy League Jew.” *Tablet Magazine*. <https://www.tabletmag.com/sections/news/articles/the-vanishing-ivy-league-jew>.
- ⁸ Langbert, M. 2018 “Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty.” *Academic Questions* 31(2): 186-197.
- ⁹ Those giving uncertain or ‘none of the above’ responses were coded as moderate (for ideology) or Independent (for partisanship).
- ¹⁰ *American National Election Studies (ANES)*. 2020. <https://electionstudies.org>.
- ¹¹ Hess, Abigail Johnson. “The 2020 Election Shows Gen Z’s Voting Power for Years to Come.” *CNBC Make It*. <https://www.cnn.com/2020/11/18/the-2020-election-shows-gen-zs-voting-power-for-years-to-come.html>.
- ¹² Abrams, Sam and Amna Khalid. 2020. “Are Colleges and Universities Too Liberal? What the Research Says About the Political Composition of Campuses and Campus Climate.” *Heterodox Academy*. <https://heterodoxacademy.org/blog/are-colleges-and-universities-too-liberal-what-the-research-says-about-the-political-composition-of-campuses-and-campus-climate/>.
- ¹³ Stolzenberg et al. 2020.
- ¹⁴ Cox, Daniel A., Ryan Streeter, Samuel J. Abrams and Jacqueline Clemence. 2020. “Socially Distant: How our Divided Social Networks Explain our Politics: Findings from the American National Social Network Survey.” *Survey Center on American Life*. <https://www.americansurveycenter.org/research/socially-distant-how-our-divided-social-networks-explain-our-politics/>.
- ¹⁵ Bishop, B. and R. G. Cushing. 2008. “The Big Sort: Why the Clustering of Like-Minded America is Tearing Us Apart.” Houghton Mifflin.
- ¹⁶ Wilkinson, Will. 2019. “The Density Divide: Urbanization, Polarization, and Populist Backlash.” *Niskanen Center*. <https://www.niskanencenter.org/the-density-divide-urbanization-polarization-and-populist-backlash/>.
- ¹⁷ Cox et al. 2020.
- ¹⁸ Yudkin, Daniel, Stephen Hawkins and Tim Dixon. “The Perception Gap: How False Impressions are Pulling Americans Apart.” *More in Common*. <https://psyarxiv.com/r3h5q/download?format=pdf>.
- ¹⁹ Peuquet, Steven W. N.D. “Using the ‘Index of Dissimilarity’ to Measure Residential Racial Segregation.” *Center for Community Research & Service, University of Delaware*. <https://www1.udel.edu/uapp800/Lecture%20Material/Index%20of%20Dissimilarity%20Example.htm>.
- ²⁰ Logan, John R. and Brian J. Stults. 2021. “Metropolitan Segregation: No Breakthrough in Sight.” *Brown.edu*. <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report08122021.pdf>.
- ²¹ Based on a state fixed-effects model of average white share across colleges.
- ²² Abramowitz, A. I. 2018. “The Great Alignment: Race, Party Transformation, and the Rise of Donald Trump.” Yale University Press.
- ²³ “Number of Undergraduate Students Enrolled in the United States from 1976 to 2019, by Ethnicity.” 2021. *Statista*. <https://www.statista.com/statistics/236489/undergraduate-enrollment-by-ethnicity-in-the-us/>; “Higher Education Enrollment Trends by Gender, 1970 to 2025.” 2019. *Educational Policy Institute*. <https://educationalpolicy.org/hello-world/>; “Indicator 20: Undergraduate Enrollment.” 2019. *National Center for Education Statistics*. https://nces.ed.gov/programs/raceindicators/indicator_reb.asp.

CSPI

²⁴ Brint, Steven, Michaela Curran and Matthew C. Mahutga. 2022. "Are US Professionals and Managers More Left Than Blue-Collar Workers? An Analysis of the General Social Survey, 1974 to 2018." *Socius*; Chong, Dennis, Morris Levy and Jack Citrin, "Tolerance of Controversial Political and Social Expression in the United States" Paper presented at 2021 American Political Science Association meetings, Seattle.

²⁵ Burden, Barry C., Evan Crawford and Michael G. DeCrescenzo. 2017. "The Unexpected Gender Gap of 2016." *De Gruyter*. <https://www.degruyter.com/document/doi/10.1515/for-2016-0039/html>; "National Exit Polls: How Different Groups Voted." 2020. *The New York Times*.

<https://www.nytimes.com/interactive/2020/11/03/us/elections/exit-polls-president.html>.

²⁶ Controlling for income. The university-educated ANES sample shows an even smaller gap but is likely too small to base estimates on.

²⁷ Philpot, T. S. 2017. "Conservative but Not Republican." Cambridge University Press; Kaufmann, Eric, "Black Moderation: Why African-Americans are Less Polarized." Paper for 2021 American Political Science Association conference, Seattle.

²⁸ Putnam, R. D. and D. Campbell. 2010. "American Grace: How Religion Unites and Divides Us." Simon and Schuster.

²⁹ Jones 2022.

³⁰ The financial aid measure is not strictly an indicator of wealth. Attendance at private school, for instance, does not predict Republican identity, and is only partially associated with not receiving financial aid. Self-described socioeconomic class (5-point scale from upper to lower) based on the question "thinking about your family's financial situation... how would you describe your social class" also did not predict party identity. Only just over a quarter of those who are not receiving financial aid attended private high school, though this is nearly twice as high a share compared to those receiving financial aid in the form of grants or loans. Exactly why those who are not receiving aid are more Republican while those who attended private school or are upper class are not is a puzzle that merits further investigation.

³¹ Jews only make up 1% of the parochial school sample.

³² Kaufmann, Eric. 2021. "Academic Freedom in Crisis: Punishment, Political Discrimination, and Self-Censorship." Center for the Study of Partisanship and Ideology. <https://www.cspicenter.com/p/academic-freedom-in-crisis-punishment>.

³³ Woessner, M. and A. Kelly-Woessner. 2009. "I Think My Professor is a Democrat: Considering Whether Students Recognize and React to Faculty Politics." *PS: Political Science and Politics* 42(2): 343-352; Surridge, P. 2016. "Education and Liberalism: Pursuing the Link." *Oxford Review of Education* 42(2): 146-164; Lancee, B. and O. Sarasin. 2015. "Educated Preferences or Selection Effects? A Longitudinal Analysis of the Impact of Educational Attainment on Attitudes Towards Immigrants." *European Sociological Review* 31(4): 490-501.

³⁴ See Woessner and Woessner and Lancee and Sarasin papers in previous footnote.

³⁵ It is of course possible that what these show is a rising Republican or conservative effect arising from unenumerated factors not in the FIRE dataset, with a reactive effect among minorities rather than among whites, heterosexuals, and Christians.

³⁶ One finding from the 2021 FIRE Campus Expression Survey was that self-censorship was high in heavily liberal schools like the University of Chicago, despite its top ranking on free speech policies.

June 10, 2022

Catherine E. Lhamon, Assistant Secretary
United States Department of Education
Office for Civil Rights
Lyndon Baines Johnson Department of Education Bldg
400 Maryland Avenue, SW
Washington, DC 20202-1100

RE: La Sierra University
OCR Case No. 09-21-2314
Assertion of Religious Exemption

Dear Assistant Secretary Lhamon:

On May 3, 2022, La Sierra University received the above-referenced complaint. The complaint alleges:

1. The University is discriminating against the Student and other LGBTQ students on the basis of sexual orientation and gender identity by refusing to officially recognize the LGBTQ student group on campus; and
2. The University is discriminating against the Student and other LGBTQ students on the basis of sexual orientation and gender identity because its policies and practices, including its current student handbook, endorse the Seventh-day Adventist doctrine on homosexuality, stating that sexual intimacy belongs only within the marital relationship of a man and a woman.

La Sierra University is a religious institution of higher education, a part of the Seventh-day Adventist system of higher education, that takes seriously anti-discrimination provisions under federal and state law and is committed to providing a learning and living environment that promotes student safety, transparency, personal integrity, civility and mutual respect. La Sierra University seeks to ensure that its campus is a loving, compassionate, and welcoming environment for all students, including its LGBTQ students, while at the same time resolving to live consistently within traditional Christian values and teachings on sexuality in keeping with its mission and heritage as a Seventh-day Adventist university, and in keeping with the tenets of the Seventh-day Adventist Church.

In addition to other exemptions granted by the United States Constitution, La Sierra University is exempt from the provisions of Title IX that could give rise to the alleged violations stated above because La Sierra University is, for purposes of the definition found in 34 CFR §106.12(c)(1) through (6), controlled by a religious organization, and compliance with Title IX, as interpreted in and sought by the above-referenced complaint, would be inconsistent with the religious tenets of the Seventh-day Adventist Church. The Seventh-day Adventist Church is a worldwide “family of Christian believers who are united in mission, purpose, and belief” that “strives to operate as one unified body” and “[works] together

Office of the President
4500 Riverwalk Parkway
Riverside, CA 92515
P 951.785.2020
F 951.785.2019
www.lasierra.edu
president@lasierra.edu

toward the same goal: building up the body of Christ and preparing others for His soon return John 14:3).”¹

“The Seventh-day Adventist Church conducts its activities through ecclesiastical organizations and a wide array of other entities and corporations established for specific functions aligned with the Church’s beliefs, values, and mission.”² These organizations include the Pacific Union Conference of Seventh-day Adventists³ (Pacific Union), which is the primary Seventh-day Adventist Church organization that sponsors and provides significant financial support to La Sierra University. These organizations also include a number of institutions of higher education around the world, such as La Sierra University. The Seventh-day Adventist Church publishes a directory called the Yearbook which presents information on entities and institutions that are recognized as official denominational organizations. Both the Pacific Union⁴ and La Sierra University⁵ are listed in the Yearbook.

La Sierra University’s Articles of Incorporation filed with the State of California are attached as Attachment 1. The Articles set forth that La Sierra University is a religious nonprofit corporation⁶ and that upon dissolution its assets go to the Pacific Union.⁷

La Sierra University’s Bylaws⁸ are attached as Attachment 2 and state that La Sierra University is an institution of higher education sponsored and maintained by the Pacific Union as part of the system of educational institutions established throughout the world by the Seventh-day Adventist Church.⁹ Under its Articles and Bylaws, the university is responsible to a constituency, all members of which must be members of the Seventh-day Adventist Church and almost all of whom serve ex officio due to positions held within the Pacific Union or the university.¹⁰

Moreover, the university is operated by its Board [of Trustees] as an integral part of the Pacific Union.¹¹ The members of the university’s Board of Trustees must be members of the Seventh-day Adventist Church and almost half of the board serve as ex officio members because of positions held within the Pacific Union

¹ Seventh-day Adventist Church, (2022, May 30). *How is the Seventh-day Adventist Church Organized and Structured?* Adventist Church Website. <https://www.adventist.org/world-church/>

² Seventh-day Adventist Church, (2022, May 30). *Yearbook*. Adventist Church Website. <https://www.adventist.org/resources/directories/yearbook/>

³ The Pacific Union Conference is one of nine unions that make up the North American Division of the Seventh-day Adventist Church. Unions coordinate the work of conferences (conferences are another fundamental component of the Seventh-day Adventist Church, usually organized in either a state, part of a large state, or multiple states in the case of smaller states). The Pacific Union covers the territory covered by California, Nevada, Utah, Arizona and Hawaii.

⁴ Seventh-day Adventist Church, (2022, May 30). *Yearbook listing for Pacific Union Conference*. Adventist Church Website. <https://www.adventistyearbook.org/entity?EntityID=18227&highlight=pacificunion>

⁵ Seventh-day Adventist Church, (2022, May 30). *Yearbook listing for La Sierra University*. Adventist Church Website. <https://www.adventistyearbook.org/entity?EntityID=18235&highlight=la|sierra|university>

⁶ La Sierra University Articles of Incorporation, Article II.

⁷ *Ibid.*, Article IV.

⁸ La Sierra University’s Bylaws were amended on May 18, 2022, and are attached as Attachment 2. None of the amendments affected the portions cited herein but the prior version of the Bylaws are provided as well (Attachment 3) for your comparison since the complaint arose prior to May 18 amendments.

⁹ La Sierra University Bylaws, Article Four, lines 15-17.

¹⁰ *Ibid.*, Article Five, Section 5.3.

¹¹ *Ibid.*, Article Four, lines 17-18.



or other regional entities of the Seventh-day Adventist Church.¹² The Board of Trustees manages the affairs of the university and exercises all corporate powers in accordance with the religious principles of the Seventh-day Adventist Church.¹³ The Bylaws instruct the board to guide the university “wisely in fulfilling its mission in higher education in the context of the educational, occupational, moral, spiritual, and social needs and challenges of the Seventh-day Adventist Church and in service to the Pacific Union.”¹⁴ Among others, the Board’s functions include (a) ensuring the university’s mission and policies are aligned with the mission and philosophy of the Seventh-day Adventist Church,¹⁵ (b) charging the president with the task of leading a strategic planning process aligned with the mission and philosophy of the Seventh-day Adventist Church,¹⁶ and (c) exercising all powers consistent with the (religion-based) policies of the Pacific Union.¹⁷ In addition, all university officers must be members of the Seventh-day Adventist Church.¹⁸ Furthermore, the President is expected to fulfill the duties of the office in a manner aligned with the mission and philosophy of the Seventh-day Adventist Church.¹⁹

According to the university’s Board Policy Manual, attached as Attachment 4, La Sierra University’s mission is “rooted in the Christian gospel and Seventh-day Adventist values and ideals”²⁰ and its vision is “[t]o be an Adventist University that inspires the intellect, lives our faith, and changes the world.”²¹ Its Directional Values include, but are not limited to, “[e]mbracing our Seventh-day Adventist beliefs, values, and identity in a spirit of openness, contributing reflectively to their continuing development, and pursuing the integration of faith and learning,”²² “[o]ffering every student a robust liberal arts education, faithful to a Seventh-day Adventist vision of global citizenship, service and diversity,”²³ and “[a]cting in responsible ways with the resources entrusted to us by students, parents, donors, and the Seventh-day Adventist Church.”²⁴

Furthermore, the stakeholders to whom the Board feels primarily accountable include as number one “[t]he Seventh-day Adventist Church of which we are a part and which supports us both financially and spiritually. Our direct contact with our church is both through the leaders who are part of our Board of Trustees and through our constituency.”²⁵ The primary beneficiaries of the university include, among others, “[t]he Seventh-day Adventist Church.”²⁶ The Board of Trustees thus “has a responsibility to the Seventh-day Adventist Church.”²⁷

¹² Ibid., Article Six, Section 6.2

¹³ Ibid., Article Six, Section 6.1.

¹⁴ Ibid., Article Six, Section 6.6, lines 182-185.

¹⁵ Ibid., lines 195-196.

¹⁶ Ibid., lines 201-202.

¹⁷ Ibid., lines 231-233.

¹⁸ Ibid., line 300.

¹⁹ Ibid., Article Seven, Section 7.3, lines 328-333.

²⁰ La Sierra University Board Policy Manual, Section 2.1.

²¹ Ibid., Section 2.2.

²² Ibid., Section 2.3.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid., Section 2.4.

²⁶ Ibid., Section 2.5.

²⁷ Ibid., Section 3.2



As noted in the La Sierra University Faculty Handbook, in harmony with its mission, origins, and affiliation with the Seventh-day Adventist Church, the university endeavors to recruit and appoint full-time faculty who are members of the Seventh-day Adventist Church.²⁸ In the event that a qualified Seventh-day Adventist is not available to fill an advertised full-time faculty position, Christians who demonstrate an understanding of and commitment to the mission of the university will be given preference and may be hired into non-tenure track positions.²⁹ At least 90 percent of full-time faculty must be Seventh-day Adventists. Furthermore, the majority of full-time faculty in any school and/or department shall be Seventh-day Adventists, and all full-time faculty in the Church's divinity school at La Sierra University, H.M.S. Richards Divinity School, shall be members of the Seventh-day Adventist Church.³⁰ Faculty chairs/directors and/or deans are responsible to ascertain candidates' understanding and commitment to the university's mission.³¹ The Faculty Handbook also states that the university does the things most other universities do, but "it does these things as the fruition of its Adventist heritage and commitment" and "its religious orientation provides a perspective for its educational programs and projects" and a "framework for its moral values and lifestyle."³²

The Seventh-day Adventist Church accepts the Bible as its only creed and holds certain fundamental beliefs to be the teaching of the Holy Scriptures.³³ The church has formulated 28 Fundamental Beliefs that constitute the church's understanding and expression of the teaching of Scripture.³⁴ Fundamental Belief Number 23, entitled "Marriage and the Family," expresses the religious tenet that "[m]arriage was divinely established in Eden and affirmed by Jesus to be a lifelong union between a man and a woman in loving companionship."³⁵ The religious tenets of the Seventh-day Adventist Church have been further described in various official statements of the Seventh-day Adventist Church,³⁶ and the church's statement on homosexuality sets forth that "Seventh-day Adventists believe that sexual intimacy belongs only within the marital relationship of a man and a woman" and that "sexual acts outside the circle of a heterosexual marriage are forbidden."³⁷

²⁸ La Sierra University Faculty Handbook, Part III, Section 3.1, A. The faculty handbook can be found online at <https://lasierra.edu/fileadmin/documents/about-la-sierra/provost/faculty-handbook.pdf>

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid., Appendix A, *Aims of the University*

³³ Seventh-day Adventist Church, (2022, May 31) *Official Beliefs of the Seventh-day Adventist Church*. Adventist Church Website. <https://www.adventist.org/beliefs/>

³⁴ Ibid.

³⁵ Ibid.

³⁶ Seventh-day Adventist Church, (2022, May 31) *Official Statements*. Adventist Church Website.

<https://www.adventist.org/official-statements/>

³⁷ Seventh-day Adventist Church, (2022, May 31) *Homosexuality*. Adventist Church Website. <https://www.adventist.org/official-statements/homosexuality/>

La Sierra University's Student Handbook makes clear that the university is a Seventh-day Adventist institution³⁸ and it requires students to attend worship services.³⁹ It states "[s]tudents who choose La Sierra University as their university make a personal commitment to conduct themselves in a manner, [sic] which reflects their sense of responsibility for the honor, integrity, and values of the university and themselves as members of its community. They agree to comply with all university values and policies and own the consequences of their behavior."⁴⁰ In a section entitled "Institutional Values and Community Expectations" within the sexual misconduct policy, the Student Handbook states "[i]n keeping with La Sierra University's mission and its heritage as a Seventh-day Adventist university, we resolve to live consistently within traditional Christian values and teachings on sexuality. We believe that Scripture is the ultimate authority on how to conduct our lives. La Sierra University takes the position that sexuality is a gift from God. Therefore, sexual expression should honor God, self, and others. The University expects that faculty, staff, and students will not engage in sexual intercourse outside of marriage nor engage in any sexual behavior or activity that would violate the values of La Sierra University as a Seventh-day Adventist institution..."⁴¹

The Student Handbook also states, "we resolve to live consistently with traditional Christian values and teaching on sexuality and support the Seventh-day Adventist position on Homosexuality."⁴² In short, OCR's litigating or even accepting the second claim identified in OCR's letter would constitute a direct challenge to core Seventh-day Adventist teachings and beliefs about marriage and human sexuality. For similar reasons, any effort by OCR to require La Sierra to officially recognize a campus LGBTQ group—the focus of the first claim identified in OCR's letter—would likewise challenge Seventh-day Adventist teachings and beliefs on marriage and sexuality and place OCR in the unconstitutional position of seeking to substitute its judgment for the judgment of a religious institution on a matter of religious belief and practice.

To conclude, La Sierra University asserts it is exempt from any provision or interpretation of Title IX that could give rise to the allegations stated in the above-referenced OCR complaint and seeks OCR dismissal of the complaint. The information provided above demonstrates La Sierra University satisfies the religious exemption criteria in 20 U.S.C. §1681(3) and 34 C.F.R. §106.12. La Sierra University is an institution of the Seventh-day Adventist Church and therefore must be exempt from any provision of Title IX that would require the university to abandon, disregard or even compromise the tenets of the Seventh-day Adventist church as they relate to marriage and sexuality.

While we expect and appreciate OCR's prompt dismissal of the OCR complaint, we remain committed to making our campus a welcoming environment for every student. The Seventh-day Adventist Church recognizes that every human being is valuable in the sight of God, including our LGBTQ students, and while every employee and student is called to honor and abide by the Seventh-day Adventist Church values of the

³⁸ La Sierra University Student Handbook, pages 8, 9, 11, 23, 37, 41, 51 most notably, which can be found online at <https://lasierra.edu/fileadmin/documents/sliffe/la-sierra-student-handbook.pdf>

³⁹ Ibid., pages 12, and 23-25.

⁴⁰ Ibid., page 13.

⁴¹ Ibid., page 37.

⁴² Ibid., page 41.



institution while employed or enrolled at La Sierra University, we recognize we serve a diverse student population. La Sierra University will continue to strive to always demonstrate Christ-like compassion when addressing our students' needs and concerns.

Sincerely,

A handwritten signature in black ink that reads "Jay A. Felt". The signature is written in a cursive style with a large, looped initial "J".

President

cc: Anamaria Loya, Chief Attorney, OCR
Blake Thompson, Deputy Chief Attorney, OCR



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

July 20, 2022

Joy A. Fehr, President
La Sierra University
Office of the President
4500 Riverwalk Parkway
Riverside, CA 92515

Dear President Fehr,

I write in response to your June 10, 2022, letter to the U.S. Department of Education's Office for Civil Rights (OCR), in which you requested assurance of a religious exemption from Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, for La Sierra University ("La Sierra") in Riverside, California.

Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. Title IX and its implementing regulations at 34 C.F.R. § 106.12 provide that Title IX does not apply to an educational institution controlled by a religious organization to the extent that the application of Title IX would be inconsistent with the controlling organization's religious tenets. Section 106.12(b) of the Department's Title IX regulations describe the process by which an educational institution may request assurance of a religious exemption. The request must identify the religious organization that controls the educational institution and specify the tenets of that organization and the provisions of the law or regulation that conflict with those tenets. Section 106.12(c) of the Department's Title IX regulations describes the evidence that is sufficient to establish that an educational institution is controlled by a religious organization.

Your letter states that La Sierra "is a religious institution of higher education, a part of the Seventh-day Adventist system of higher education" and that "the Seventh-day Adventist Church conducts its activities through ecclesiastical organizations and a wide array of other entities and corporations established for specific functions aligned with the Church's [beliefs], values, and mission." According to your letter, "these organizations include the Pacific Union Conference of Seventh-day Adventists (Pacific Union)" which "is the primary Seventh-day Adventists Church organization that sponsors and provides significant financial support to La Sierra University." Your letter explains that, according to La Sierra's "Articles and Bylaws," "the university is operated by its Board [of Trustees] as an integral part of the Pacific Union." The letter also states

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100
www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

EXHIBIT H

La Sierra University – page 2

that “the members of [La Sierra’s] Board of Trustees must be members of the Seventh-day Adventist Church and almost half of the board serve as ex officio members because of positions held within the Pacific Union or other regional entities of the Seventh-day Adventist Church.” The letter also explains that “the Board of Trustees manages the affairs of the university and exercises all corporate powers in accordance with the religious principles of the Seventh-day Adventist Church.”

Your letter states that La Sierra’s Faculty Handbook provides that the university “endeavors to recruit and appoint full-time faculty who are members of the Seventh-day Adventist Church. In the event that a qualified Seventh-day Adventist is not available to fill an advertised full-time faculty position, Christians who demonstrate an understanding of and commitment to the mission of the university will be given preference and may be hired into non-tenure track positions.” The letter also states that “at least 90 percent of full-time faculty must be Seventh-day Adventists,” “the majority of full-time faculty in any school and/or department shall be Seventh-day Adventists, and all full-time faculty in the Church’s divinity school [...] shall be members of the Seventh-day Adventist Church.”

The letter also states that “La Sierra’s [...] Student Handbook makes clear that the university is a Seventh-day Adventist institution” that requires its students to “attend worship services,” “make a personal commitment to conduct themselves in a manner which reflects their sense of responsibility for the honor, integrity, and values of the university and themselves as members of its community,” and “agree to comply with all university values and policies.” The letter explains that as provided in the “Institutional Values and Community Expectations” section of La Sierra’s Student Handbook, La Sierra “expects that faculty, staff, and students will not engage in sexual intercourse outside of marriage nor engage in any sexual behavior or activity that would violate the values of La Sierra [...] as a Seventh-day Adventist institution...” Your letter further states that the Student Handbook requires students, faculty, and staff “resolve to live consistently with traditional Christian values and teaching on sexuality and support the Seventh-day Adventist position on Homosexuality.”

According to your letter, La Sierra’s Board Policy Manual provides that the university’s “mission is ‘rooted in the Christian gospel and Seventh-day Adventist values and ideals’ and its vision is ‘[t]o be an Adventist University that inspires the intellect, lives our faith, and changes the world.’” Your letter further states that La Sierra’s “directional values include, but are not limited to, ‘[e]mbracing [...] Seventh-day Adventist beliefs, values, and identity in a spirit of openness, contributing reflectively to their continuing development, and pursuing the integration of faith and learning.’” The letter further explains that “the Seventh-day Adventist Church accepts the Bible as its only creed and holds certain fundamental beliefs to be the teaching of the Holy Scriptures. The church has formulated 28 Fundamental Beliefs that constitute the church’s understanding and expressing of the teaching of Scripture.” Your letter continues, stating that “Fundamental Belief Number 23, entitled ‘Marriage and the Family,’ expresses the religious tenet that ‘[m]arriage was divinely established in Eden and affirmed by Jesus to be a lifelong union between a man and a woman in loving companionship.’” The letter explains that “the religious tenets of the Seventh-day Adventist Church have been further described in various official statements of the Seventh-day Adventist Church, and the church’s statement on homosexuality sets forth that ‘Seventh-day

La Sierra University – page 3

Adventists believe that sexual intimacy belongs only within the marital relationship of a man and a woman’ and that ‘sexual acts outside the circle of a heterosexual marriage are forbidden.’”

For the above reasons, La Sierra requests assurance of its exemption from “any provision or interpretation of Title IX that could give rise to the allegations” identified in an OCR notification letter, including allegations of discrimination against LGBTQ students on the basis of sexual orientation and gender identity by refusing to officially recognize an LGBTQ student group on campus and by adopting policies reflecting religious tenets that “sexual intimacy belongs only within the marital relationship of a man and a woman.” La Sierra has requested assurance of this exemption insofar as Title IX would require La Sierra to “abandon, disregard, or even compromise the tenets of the Seventh-day Adventist church as they relate to marriage and sexuality.” Although La Sierra does not identify a specific provision of the Title IX regulations from which it seeks assurance of its exemption, OCR interprets La Sierra’s letter as a request for assurance of its exemption from 34 C.F.R. § 106.31 (governing education programs or activities) to the extent its application would be inconsistent with tenets of the Seventh-day Adventist church as they relate to marriage and sexuality.

La Sierra is exempt from this provision to the extent that its application would be inconsistent with the tenets of the Seventh-day Adventist church as they relate to marriage and sexuality.

Please note that this letter should not be construed to grant exemption from the requirements of Title IX and the regulations other than as stated above. In the event that OCR receives a complaint against your institution, we are obligated to determine initially whether the allegations fall within the exemption here recognized. Also, in the unlikely event that a complaint alleges that the practices followed by an institution are not based on the religious tenets identified in your request, OCR may contact the controlling organization to verify those tenets. If the organization provides an interpretation of tenets that has a different practical impact than that described by the institution, or if the organization denies that it controls the institution, OCR will not recognize this exemption.

I hope this letter fully responds to your request. If you have any further questions, please do not hesitate to contact me.

Sincerely,



Catherine E. Lhamon
Assistant Secretary for Civil Rights



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

50 UNITED NATIONS PLAZA
MAIL BOX 1200, ROOM 1545
SAN FRANCISCO, CA 94102

November 1, 2022

VIA ELECTRONIC MAIL

Lauren Swain
Paul Southwick Law, LLC
8532 N. Ivanhoe Street, #208
Portland, OR 97203

Re: La Sierra University
OCR Case No. 09-21-2314

Dear Ms. Swain:

On July 27, 2021, the United States Department of Education (Department), Office for Civil Rights (OCR) received your complaint on behalf of a student at La Sierra University, whom we will refer to as the Student, alleging that the University discriminated on the basis of sex. On May 3, 2022, OCR notified you that it was initiating an investigation regarding the following two allegations:

- 1) The University is discriminating against the Student and other LGBTQ students on the basis of sexual orientation and gender identity by refusing to officially recognize the LGBTQ student group on campus (Allegation 1); and
- 2) The University is discriminating against the Student and other LGBTQ students on the basis of sexual orientation and gender identity because its policies and practices, including in its current student handbook, endorse the Seventh-day Adventist doctrine on homosexuality, stating that sexual intimacy belongs only within the marital relationship of a man and a woman (Allegation 2).

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 - 1688, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the University is subject to Title IX. Title IX and its implementing regulations contain several exemptions and exceptions from its coverage. *See* 20 U.S.C. §§ 1681(a)(1)-(9); 34 C.F.R. §§ 106.11-106.15.

OCR has now determined that it is dismissing your complaint. OCR explains its decision in further detail below.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

Pursuant to Section 108(a) of the OCR's *Case Processing Manual*, (CPM),¹ OCR must dismiss a complaint if it determines that it does not have subject matter jurisdiction over the complaint.

By letter to the Assistant Secretary for Civil Rights dated June 10, 2022, the University requested an assurance of exemption from the application of Title IX and its implementing regulations. By letter dated July 20, 2022, the Assistant Secretary for Civil Rights assured the University of its exemption from 34 C.F.R. § 106.31 (governing education programs or activities) to the extent that application of that provision would be inconsistent with tenets of the Seventh-day Adventist church as they relate to marriage and sexuality.

Because the University is exempt from the above-referenced regulatory provision of Title IX to the extent that its application conflicts with the religious tenets of its controlling religious organization, OCR lacks jurisdiction to address the complaint allegations. Accordingly, OCR is dismissing this complaint pursuant to Section 108(a) of the CPM.

OCR would also like to make you aware that individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a separate retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

If you have any questions or concerns, please contact Blake Thompson at Blake.Thompson@ed.gov.

Sincerely,



Anamaria Loya
Chief Attorney

¹ See CPM (July 18, 2022) at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.



COLORADO CHRISTIAN UNIVERSITY

Grace and Truth

May 3, 2022

Catherine E. Lhamon
Assistant Secretary for Civil Rights
United States Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, D.C. 20202-1100

Jennifer Weiser Bezosa
United States Department of Education
Office for Civil Rights – Region VIII
1244 Speer Blvd., Suite 310
Denver, CO 80204

Via USPS Certified Mail.

Also via email to: jennifer.bezosa@ed.gov

**Re: Colorado Christian University
OCR Case No. 08-21-2214
Assertion of Religious Exemption to Title IX**

Dear Ms. Lhamon,

My name is Donald W. Sweeting, and I have the honor of serving as the President of Colorado Christian University (“CCU”). I am reaching out regarding the above-referenced OCR case (“Case”). Specifically, pursuant to 34 C.F.R. Part 106.12, this letter serves as a written notice that CCU is formally asserting a religious exemption to the anti-discrimination provisions of Title IX of the Civil Rights Act of 1964 (“Title IX”) with regard to discrimination on the basis of sexual orientation. Consequently, CCU respectfully requests that this Case be dismissed by OCR accordingly.

According to OCR’s April 8, 2022, letter to me regarding this Case (attached as Exhibit A), OCR received a complaint alleging that CCU—by way of its policies, procedures, Student Handbook, etc.—discriminates against students based on sexual orientation by restricting same-sex romantic relationships and/or disciplining students who engage in same-sex romantic relationships. 20 U.S.C. § 1681(a) states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to



COLORADO CHRISTIAN UNIVERSITY

Grace and Truth

discrimination under any education program or activity receiving Federal financial assistance...” As you know, since June 16, 2021, the U.S. Department of Education (“DE”) has revised its statutory interpretation to state that Title IX’s prohibition against sex-based discrimination extends so far as to bar discrimination on the basis of sexual orientation and/or gender identity.

Without admitting the validity of the DE’s revised interpretation, CCU asserts that it is exempt from Title IX’s prohibition against discrimination on the basis of sexual orientation because CCU qualifies for the religious exemption to Title IX. Specifically, CCU is exempt from Title IX’s prohibition against sex-based discrimination under 20 U.S.C. § 1681(a)(3), which provides that “this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.” CCU is controlled by a religious institution, and the religious tenets of said organization unequivocally prohibit same-sex romantic relationships of any kind. Accordingly, CCU is permitted by Title IX to discriminate on the basis of sex, and therefore sexual orientation, in accordance with its religious tenets.

CCU is Controlled by a Religious Organization

CCU is a nonprofit evangelical Christian university that is controlled by a religious organization. Significantly, OCR has previously acknowledged that CCU is an institution controlled by a religious organization. As detailed in your June 28, 2016, letter to CCU’s former president (attached as Exhibit B), OCR has previously confirmed that CCU qualifies for a religious exemption to Title IX with regard to gender identity. CCU respectfully requests that you confirm your previous recognition of CCU’s exemption with regard to same-sex romantic relationships.

Further, 34 C.F.R. § 106.12(c) provides multiple criteria that are each independently sufficient to establish that an educational institution is controlled by a religious organization. In CCU’s case, the three most relevant criteria of 34 C.F.R. § 106.12(c) are as follows:

(2) That the educational institution requires its faculty, students, or employees to be members of, or otherwise engage in religious practices of, or espouse a personal belief in, the religion of the organization by which it claims to be controlled.

(4) That the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(5) That the educational institution has a published institutional mission that is



COLORADO CHRISTIAN UNIVERSITY

Grace and Truth

approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings.

(6) Other evidence sufficient to establish that an educational institution is controlled by a religious organization, pursuant to 20 U.S.C. 1681(a)(3).

Under each of these criteria, CCU should be classified as an institution controlled by a religious organization. With regard to Criteria #2 and #4, CCU requires all of its faculty and employees to espouse a personal belief in the evangelical Christian faith. Further, every applicant for any employment position at CCU must sign an Application Acknowledgement agreeing to abide by CCU's Statement of Faith (attached as Exhibit C) and Statement of Lifestyle Expectations in addition to agreeing to adhere to traditional biblical values. The prospective employee must sign both of these documents before the hiring process is complete. Finally, if student enrolls at CCU, he or she must sign the Statement of Faith before the enrollment process is complete. Traditional undergraduate students must go one step further by signing CCU's Lifestyle Covenant (attached as Exhibit D).

Regarding Criterion #5, pursuant to a variety of cases including, without limitation, *United States v. Sealy, Inc.*, 388 U.S. 350, 352 (1967); *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1128 (9th Cir. 2015); *Maxon v. Fuller Theological Seminary*, No. 20-56156 (9th Cir. Dec. 13, 2021), the Board of Trustees/Directors of an entity is generally considered by the courts to be the organization that controls said entity. Accordingly, in CCU's case, its governing organization is its Board of Trustees ("Board"). The Board has published a mission for CCU that openly references and relies on religious tenets. Specifically, CCU's mission, as determined and published by its Board, is encapsulated in CCU's mission statement (Exhibit E), Statement of Convictions (Exhibit F), and Strategic Priorities (Exhibit G), all of which make clear and repeated references to the Christian tenets that motivate and guide CCU's actions and policies.

Finally, with regard to Criterion #6, as detailed by CCU's Board of Trustees Standing Policies Manual (select pages attached as Exhibit H), all members of CCU's Board—including any non-Trustee members of Board committees—must sign the Statement of Faith as a condition of their appointment. As a result of this requirement, CCU's Board exclusively admits qualified individuals of a particular religious belief for the furtherance CCU's above-described religious mission. Thus, the institution that wholly controls CCU (see above) is deeply religious.

Ultimately, because CCU satisfies most of the independent criteria for a religiously controlled institution, I respectfully request that OCR reaffirm its prior acknowledgment that CCU is governed by a religious institution for purposes of Title IX.



COLORADO CHRISTIAN UNIVERSITY
Grace and Truth

CCU's Religious Tenets Prohibit Same-Sex Romantic Relationships

Furthermore, the religious tenets of CCU explicitly and unequivocally bar any form of same-sex romantic relationship. Attached as Exhibit I are relevant pages from CCU's 2021-2021 College of Undergraduate Studies Student Handbook ("Handbook") that address the topic of same-sex romantic relationships. As noted in the Handbook, CCU believes "the unambiguous rejection in scripture of same-sex sexual activity remains in force for believers today...[because] God created human beings to show forth God's image as male and female in relationship (Gen 1:26-28), and the biblical ideal is the expression of sexuality within a heterosexual, lifelong, monogamous union (Mk 10:4- 12)." Additional passages of the Bible that compel CCU to restrict same-sex romantic relationships include, without limitation, 1 Timothy 1:10, Leviticus 18:22, 1 Corinthians 6:9-10, Leviticus 20:13, and Romans 1:26-27.

All of these passages prohibit the practice of same-sex romantic relationships. Just as CCU sincerely believes it is directed by the Bible to prohibit its students and employees from practicing many of the other sins named in the above-referenced passages—such as adultery, theft, and idolatry—CCU sincerely believes that it is directed by the Bible to prohibit the practice of same-sex romantic relationships among its students and employees as well. Ultimately, based on biblical precedent, CCU sincerely believes that prohibiting the practice of same-sex romantic relationships among its students and employees is crucial for CCU to achieve its core objectives to "honor Christ and share the love of Christ on campus and around the world...[and to] teach students to trust the Bible [and] live holy lives..." (see CCU's Strategic Priorities, attached as Exhibit G).

In light of CCU's sincere, biblically based religious convictions, if OCR were to compel CCU under 20 U.S.C. § 1681(a) to permit same-sex romantic relationships among its students and employees, OCR would force CCU to either violate sincerely held tenets of its Christian faith or would subject CCU to severe penalties for its inevitable refusal to violate its sincerely held beliefs. Consequently, in the words of Title IX, "the application of this subsection would not be consistent with the religious tenets of such organization [CCU]" and therefore "this section shall not apply to [such] educational institution."

Assertion of Exemption

In light of the foregoing, CCU hereby formally and respectfully asserts that it is exempt from 20 U.S.C. § 1681(a) as a religiously controlled institution pursuant to 20 U.S.C. § 1681(a)(3) and 34 C.F.R. Part 106.12(b). Specifically, insofar as they are interpreted to reach discrimination on the basis of same-sex romantic relationships, CCU requests it be exempted from the following



COLORADO CHRISTIAN UNIVERSITY

Grace and Truth

regulatory provisions and therefore requests that this Case be dismissed:

- 34 C.F.R. § 106.21 (governing admission);
- 34 C.F.R. § 106.22 (governing preference in admission);
- 34 C.F.R. § 106.23 (governing recruitment of students);
- 34 C.F.R. § 106.31 (governing education programs or activities);
- 34 C.F.R. § 106.32 (governing housing);
- 34 C.F.R. § 106.33 (governing comparable facilities such as restrooms and locker rooms);
- 34 C.F.R. § 106.34 (governing access to classes and schools);
- 34 C.F.R. § 106.36 (governing counseling);
- 34 C.F.R. § 106.37 (governing financial assistance);
- 34 C.F.R. § 106.38 (governing employment assistance to students);
- 34 C.F.R. § 106.39 (governing health insurance benefits and services);
- 34 C.F.R. § 106.40 (governing different rules based on marital or parental status of students);
- 34 C.F.R. § 106.41 (governing athletics);
- 34 C.F.R. § 106.43 (governing standards for measuring skill or progress in physical education classes); and
- 34 C.F.R. §§ 106.51-106.61 (governing employment).

In light of its herein asserted exemption to Title IX, CCU respectfully requests the dismissal of this Case. Thank you in advance for your time and consideration of this request. If CCU can provide any additional information to substantiate its eligibility for Title IX's religious exemption, please contact CCU's General Counsel, Thomas N. Scheffel, at tscheffel@ccu.edu or 303-759-5937.

Sincerely,

/s/ Donald W. Sweeting

Donald W. Sweeting, Ph.D.

President

Colorado Christian University

8787 W. Alameda Ave.

Lakewood, CO 80226

Office: 303-963-3350

Fax: 303-963-3351

dsweeting@ccu.edu



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

1244 SPEER BLVD, SUITE 310
DENVER, CO 80204-3582

REGION VIII
ARIZONA
COLORADO
NEW MEXICO
UTAH
WYOMING

April 8, 2022

Dr. Donald W. Sweeting, Ph.D.
President
Colorado Christian University
8787 W. Alameda Ave.
Lakewood, Colorado 80226

By email only to: dsweeting@ccu.edu

Re: Colorado Christian University
OCR Case No. 08-21-2214

Dear President Sweeting:

On August 3, 2021, the United States Department of Education's Office for Civil Rights (OCR) received the above-captioned complaint alleging that Colorado Christian University discriminates against students on the basis of sexual orientation. Specifically, the complaint alleges that the University discriminates against LGBTQ+ students because its policies and practices, including in its current Student Handbook, prohibit students from engaging in behavior that exhibits a same-sex romantic relationship and subject students who engage in same-sex romantic relationships to discipline.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 - 1688, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of federal financial assistance. As a recipient of financial assistance from the Department, the University is subject to Title IX. Title IX and its implementing regulation contain several exemptions and exceptions from its coverage. See 20 U.S.C. §§ 1681(a)(1)-(9); 34 C.F.R. §§ 106.11-106.15; see also OCR's [webpage on exemptions from Title IX](#). If the University intends to claim an exemption from the application of Title IX and its implementing regulation to this complaint, please contact the OCR staff member identified below. The University may do this before responding to the attached data request.

OCR is opening the allegation above for investigation because OCR has jurisdiction, the allegation was timely filed, and it is appropriate for investigation under the laws and regulations enforced by OCR. Please note that opening this allegation for investigation in no way implies that OCR has made a determination with regard to its merits. During the investigation, OCR is a neutral fact-finder, collecting and analyzing relevant evidence from the University, the complainant, and other sources, as appropriate. OCR will ensure that its investigation is legally sufficient and fully responds to the allegation in accordance with the provisions of Article III of OCR's *Case Processing Manual* (CPM), available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrspm.pdf>.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

EXHIBIT A - 0001

Page 2 of 2 – Letter of Notification – Recipient - OCR Case No. 08-21-2214

We intend to conduct a prompt investigation of this complaint. The regulation implementing Title VI, at 34 C.F.R. §§ 100.6(b) and (c), requires that a recipient of federal financial assistance make available to OCR information that may be pertinent to reach a compliance determination. This requirement is incorporated by reference in the Title IX regulations at 34 C.F.R. § 106.81. Pursuant to 34 C.F.R. § 100.6(c) and 34 C.F.R. § 99.31(a)(3)(iii), of the regulation implementing the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, OCR may review personally identifiable records without regard to considerations of privacy or confidentiality.

To reach an efficient and timely resolution of this matter, we are providing you an opportunity to present the University's response to these allegations and to submit supporting documentation. We have also determined that the information itemized in the attached "Data Request" is necessary to investigate the allegation. We request that this information reach our office as soon as possible but no later than **15 days from the date of this letter**. If any of the required items are available to the public on the Internet, you may provide the website address. You also may send documents to us by email to **jennifer.bezoza@ed.gov** or by other electronic means.

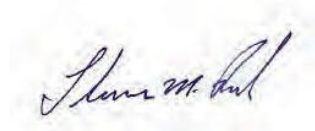
Please notify us of the name, address, and telephone number of the person who will serve as the University's contact person during the resolution of this complaint. We would like to talk with this person as soon as possible regarding this matter. We will continue to address letters to your attention with a courtesy copy to the University's designated contact.

Please be advised that the University must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act (FOIA), it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

We are committed to prompt and effective service. If you have any questions, please contact Jennifer Weiser Bezoza, the attorney assigned to this complaint, at 303-844-3676, or by email at **jennifer.bezoza@ed.gov**.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas M. Rock", is centered below the "Sincerely," text.

Thomas M. Rock
Supervisory General Attorney

Enclosure: Data Request

EXHIBIT A - 0002



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

June 28, 2016

William L. Armstrong
 President
 Colorado Christian University
 8787 West Alameda Avenue
 Lakewood, CO 80226

Dear President Armstrong:

I write to respond to your November 4, 2014, letter to the U.S. Department of Education's Office for Civil Rights (OCR), in which you requested a religious exemption for Colorado Christian University (University or CCU) of Lakewood, Colorado from Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681. In response to a request from OCR on December 5, 2014, you submitted further information on December 22, 2014 about the University's eligibility for an exemption from Title IX. Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance.

Title IX and its implementing regulation at 34 C.F.R. § 106.12 provide that Title IX does not apply to an educational institution controlled by a religious organization to the extent that application of Title IX would be inconsistent with the controlling organization's religious tenets. Therefore, such educational institutions are allowed to request an exemption from Title IX by identifying the provisions of Title IX that conflict with a specific tenet of the religious organization. The request must identify the religious organization that controls the educational institution and specify the tenets of that organization and the provisions of the law or regulation that conflict with those tenets.

Your December letter explains that the University "requires all of its faculty and employees to espouse a personal belief in the evangelical Christian faith. Every applicant for any position at CCU must sign an Application Acknowledgement agreeing to abide by CCU's Statement of Faith and Statement of Lifestyle Expectations, and to adhere to traditional biblical values If an individual is offered a job at CCU, he or she must execute the Statement of Faith and the Statement of Lifestyle Expectations before the hiring process is complete."

As stated in your November letter you request an exemption to the extent that Title IX or its implementing regulations "are interpreted to reach gender identity discrimination." In support of this request, you explain that the University's Employee Lifestyle Expectations include the following: "Members of the CCU community are expected to refrain from engaging in,

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-1100
www.ed.gov

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

EXHIBIT B - 0003

advocating, teaching, supporting, encouraging, defending or excusing homosexuality, transvestitism, transvestite behavior transgenderism and transgender behavior." Your letter also describes an October 2010 policy adopted by the University's Board of Trustees, which states that although some Christians may take other positions concerning transvestitism and/or transgenderism, CCU's position is clear as to both. As a matter of religious faith, conviction and exercise Colorado Christian University adheres to the Biblical admonitions against both transvestitism and transvestite behavior, as set forth in Deuteronomy 22:5 and transgenderism and transgender behavior, as set forth in Genesis 1:27."

You state that, for these reasons the University is requesting an exemption from the following regulatory provisions "to the extent they are interpreted to reach gender identity discrimination:

- 34 C.F.R. § 106.21 (governing admission);
- 34 C.F.R. § 106.22 (governing preference in admission);
- 34 C.F.R. § 106.23 (governing recruitment of students);
- 34 C.F.R. § 106.31 (governing education programs or activities);
- 34 C.F.R. § 106.32 (governing housing);
- 34 C.F.R. § 106.33 (governing comparable facilities such as restrooms and locker rooms);
- 34 C.F.R. § 106.34 (governing access to classes and schools);
- 34 C.F.R. § 106.36 (governing counseling);
- 34 C.F.R. § 106.37 (governing financial assistance);
- 34 C.F.R. § 106.38 (governing employment assistance to students);
- 34 C.F.R. § 106.39 (governing health insurance benefits and services);
- 34 C.F.R. § 106.40 (governing different rules based on marital or parental status of students);
- 34 C.F.R. § 106.41 (governing athletics);
- 34 C.F.R. § 106.43 (governing standards for measuring skill or progress in physical education classes); and
- 34 C.F.R. §§ 106.51-106.61 (governing employment).

The University is exempt from these provisions to the extent that they prohibit discrimination on the basis of gender identity and compliance would conflict with the controlling organization's religious tenets.

Please note that this letter should not be construed to grant exemption from the requirements of Title IX and the regulation other than as stated above. In the event that OCR receives a complaint against your institution we are obligated to determine initially whether the allegations fall within the exemption here granted. Also, in the unlikely event that a complainant alleges that the practices followed by the institution are not based on the religious tenets identified in your request, OCR is obligated to identify a controlling organization to contact to verify those tenets. If the organization provides an interpretation of tenets that has a different practical impact than that described by the institution or if the organization denies that it controls the

William L. Armstrong - page 3

i institution, this exemption will be rescinded.

I I hope this letter responds fully to your request. If you have any questions, please do not hesitate to contact me.

Sincerely,



Catherine E. Lharon
Assistant Secretary for Civil Rights
U.S. Department of Education

EXHIBIT B - 0003



CCU Statement of Faith

Colorado Christian University unites with the broad, historic evangelical faith rather than affiliating with any specific denomination. In this commitment, the University embraces the following declarations of the National Association of Evangelicals:

Colorado Christian University shall:

- We Believe the Bible to be the inspired, the only infallible, authoritative Word of God.
- We Believe that there is one God, eternally existent in three persons: Father, Son and Holy Spirit.
- We Believe in the deity of our Lord Jesus Christ, in His virgin birth, in His sinless life, in His miracles, in His vicarious and atoning death through His shed blood, in His bodily resurrection, in His ascension to the right hand of the Father, and in His personal return in power and glory.
- We Believe that for the salvation of lost and sinful people, regeneration by the Holy Spirit is absolutely essential.
- We Believe in the present ministry of the Holy Spirit by whose indwelling the Christian is enabled to live a godly life.
- We Believe in the resurrection of both the saved and the lost; they that are saved unto the resurrection of life and they that are lost unto the resurrection of damnation.
- We Believe in the spiritual unity of believers in our Lord Jesus Christ.

These declarations do not comprise all that individual Christians may consider important elements of faith; rather, they establish the essential framework within which members of the University both unite in shared beliefs and explore differences.

EXHIBIT C - 0001



CCU LIFESTYLE COVENANT

The CCU community seeks to encourage individuals to understand and use their unique, God-given gifts and abilities. Our hope is to see growth in the areas of spiritual and emotional maturity, interpersonal relationships, social awareness, and intellectual abilities, producing students centered in Jesus Christ. We intend for students to be intellectually prepared to pursue a career where they can individually serve others, live out their faith, and affect change in the world around them.

The Lifestyle Covenant expresses a commitment to educate men and women in the process of integrating their faith and education. This agreement also expresses our commitment to providing an atmosphere for study, personal exploration, involvement in interpersonal relationships, spiritual life, and growth that is conducive to students achieving goals, while enjoying living and learning in community.

Living a Biblical Lifestyle

Central to our foundation is the hope that each student will strive to deepen their relationship with the Lord while deepening their understanding of a particular academic discipline. It is our expectation that each student commit to growing spiritually in the following ways:

- **Chapel Attendance** – Chapel sets the tone for the spiritual atmosphere on campus through the promotion and enrichment of community by teaching the Bible and lifting up the Lord in corporate worship. Since chapel is essential to the total learning process at CCU, it is required. Students are required to obtain 180 chapel credits (or an average of 45 a year for transfer students) in order to graduate.
- **Church Attendance** – The University encourages and expects every student to become involved in a local church or fellowship on a weekly basis while attending CCU.
- **Ministry** – The University is deeply committed to the role that service plays in the Christian life. Just as Christ came to serve, not to be served, CCU feels that service is one of the pillars of our faith. To this end all students are required to complete 180 hours of community service before graduation. Transfer

attend CCU. Ministry hours must be documented with the Office of Service Learning.

Our Responsibilities for Relationships

Living in daily fellowship with others in the Christian community is a privilege and an expression of God's grace. In recognition of this privilege, we place great value on the quality of relationships in our community. We believe the greatest expression of fellowship and the highest principle for relationships is love.

"We should love one another. This is how we know what love is: Jesus Christ laid down His life for us. And we ought to lay down our lives for our brothers ... let us not love with words or tongue, but with actions and in truth. Since God so loved us, we ought to love one another.

Whoever loves God must also love his brothers." 1 John 3:11-16, 18, 4:11, 21

We exemplify this love in the following ways:

- **Through serving one another** – "We who are strong ought to bear the weaknesses of those without strength and not just please ourselves. Let each of us please his neighbor for his good, to build him up." Romans 15:1-2
- **Through supporting one another** – "Clothe yourself with compassion, kindness, humility, gentleness, and patience. Bear with each other and forgive whatever grievances you may have against one another." Colossians 3:12
- **Through healing broken relationships** – "... and He (Christ) has given us the ministry of reconciliation ... and He has committed to us the message of reconciliation." II Corinthians 5:18-19
- **Through mutual accountability** – "Moreover if your brother sins against you, go and tell him his fault between you and him alone. If he hears you, you have gained your brother." Mathew 18:15

CCU realizes that struggles occur in relationships and believes that it is through continual effort and accountability will foster an atmosphere of loving one another enough to forgive, heal, and grow exists.

Responsibilities for Behavior

One of the distinctions of Christian higher education is the pursuit of a community that follows the example of Jesus Christ and the teachings of the Bible. Such a community requires enforceable standards that reflect our institutional mission and provide a framework for student behavior. The Bible teaches the lordship of Jesus Christ over all; the care of our whole being as temples of the Holy Spirit; the careful stewardship of the mind, time, abilities, funds, and opportunities; loving God with all of our being and loving your neighbor as yourself; personal righteousness; the practice of justice; evangelistic outreach through word and life; and the responsible exercise of our freedom.

Students are expected to be aware of and follow the guidelines in the Student Handbook, to act in consideration of others, and to exercise personal restraint when dealing with issues not specifically addressed in the Bible. To this end we have highlighted some of the student expectations found in the Handbook.

- **A commitment to honoring God with the use of our minds and bodies.** CCU students are expected to abstain from the use of illicit or non-medical drugs, narcotics, and other controlled substances. CCU expects that its' students will not be involved in situations where such activities are present. The use of alcohol or tobacco on campus is strictly prohibited, any underage drinking off campus, or public intoxication either on or off campus by any student, is prohibited. Of age students engaged in alcohol consumption off campus are expected to discourage underage drinking in those settings and become role models to underclassmen. It is our hope that students would seek the Lord's leading and be in prayer about how the use of these substances might reflect on their testimony.
- **A commitment to the purity of sexual relationships. Grounded in Christ-centered traditions and principles,** CCU's community values define sexual intercourse and other forms of intensely interpersonal sexual activity as well as cohabitation, as the unique expression of the covenanted love within a heterosexual marriage. Sexual activity outside of marriage is inappropriate for CCU students whether living on or off campus.
- **A commitment to a life that is sensitive to our Christian witness.** It is important that we commit ourselves to expressing Christian values in responsible decisions and actions. CCU asks its students to use good judgment in their entertainment and recreation choices especially in the areas of music, movies, videos, magazines, and access to the Internet. Pornography is strictly prohibited and is not to be used, possessed, distributed, or accessed over the Internet.

- **A commitment to the confrontation of community members when they stray from the values, morals, and commitments** that are set forth by the University and its members in the Student Handbook, as well as a commitment to involve the University when students, after being confronted, continue with inappropriate behavior. This mutual accountability commitment challenges all students to hold each other's behavior accountable within a Christian Community framework that fosters the academic and spiritual growth of its members.
- **A commitment to Academic Integrity.** As a community seeking to live by the truth of Jesus Christ, CCU values personal integrity and academic honesty as vital components of a Christian educational experience. We believe that trust among community members is essential for both scholarship and the effective operations of the university. As members of this community, all students, faculty, staff, and administrators are responsible for ensuring that their behavior is consistent with the highest standards of integrity. As outlined in the academic catalogue and student handbook, academic dishonesty includes, but is not limited to, the following categories: cheating, fabrication, plagiarism, multiple submissions without faculty permission, obtaining unfair advantage, aiding and abetting, and unauthorized access to academic or administrative records or systems.

With this understanding of our benefits and responsibilities as members of the Colorado Christian University community, we covenant together as a body of believer- scholars to pursue the challenge of living out this covenant.

Colossians 3:12-17 provides an appropriate summary of the goals for our community:

"Therefore, as God's chosen people, holy and dearly loved, clothe yourselves with compassion, kindness, humility, gentleness, and patience. Bear with each other and forgive whatever grievances you may have against each other. Forgive as the Lord forgave you. And over all of these virtues, put on love, which binds them all together in perfect unity. Let the peace of Christ rule in your hearts, since as members of one body you were called to peace. And be thankful. Let the word of Christ dwell in you richly as you teach and admonish one another with all wisdom ... with gratitude in your hearts to God. And whatever you do, whether in word or deed, do it all in the name of the Lord Jesus, giving thanks to God the Father."

All students in the College of Undergraduates Studies (CUS) will be required to sign before attending classes.



COLORADO CHRISTIAN UNIVERSITY
Grace and Truth

Colorado Christian University's Mission

Christ-centered higher education transforming students to impact the world with grace and truth.

Colorado Christian University cultivates knowledge and love of God in a Christ-centered community of learners and scholars, with an enduring commitment to the integration of exemplary academics, spiritual formation, and engagement with the world. We envision graduates who think critically and creatively, lead with high ethical and professional standards, embody the character and compassion of Jesus Christ, treasure the gospel, and who thereby are prepared to impact the world in their callings.

Christ-centered community

Our community of interdependent students, faculty, and staff seeks to honor and obey Jesus Christ, who is present in Spirit and speaks in Scripture, in order to advance God's purposes in the lives of every member.

Exemplary academics

Our undergraduate and graduate curriculum integrates faith and learning in a scholarly environment that fosters critical and creative thinking, academic excellence, and professional competence.

Spiritual formation

Our academic and student development programs cultivate a deep and enduring faith that affirms the authority of Scripture and embraces Christ as the authentic center of life.

EXHIBIT E - 0001

Engagement with the world

Our students experience and engage the world in ways that prepare leaders to serve and transform their professions, churches, and communities.

Source: <https://www.ccu.edu/about/mission/>

EXHIBIT E - 0001

Statement of Convictions

CCU is a Christian institution of higher education. Our University rests on a belief system where truth matters and where there is a unifying center (Christ) which holds all things and disciplines together. This has been our conviction since our founding in 1914, and it continues to be our conviction today. But truth is to be held and lived out in love. Hence our motto, "grace and truth." (John 1:14-16; Ephesians 4:15)

1. **Holy Scripture:** We have always believed in the truthfulness of the Bible. We understand the use of the word "infallibility" in our Statement of Faith to mean inerrancy (as articulated in The Chicago Statement of Biblical Inerrancy), that the 66 books of the Bible, in their original manuscripts, are without error in all that they affirm. Scripture is our supreme authority under Christ. (2 Timothy 3:16; 2 Peter 1:21; Psalm 12:6; John 17:17)
2. **The Gospel:** As evangelicals, we believe in Jesus Christ as Lord and Savior. The term "evangelical" comes from the Greek word euangelion, meaning "the good news" or the "gospel." Thus, the evangelical faith focuses on the "good news" of salvation brought to sinners through Jesus Christ. We have a biblical mandate to share this good news everywhere. We also understand the language of being "saved" in our Statement of Faith to mean that we are saved (i.e., justified) by grace alone, through faith alone, in Christ alone, and that true faith will show itself in good works. (Romans 3:21-28; Romans 5:1; Galatians 2:16; Ephesians 2:8-10)
3. **Race and Ethnicity:** Believing in a biblical view of human nature, we affirm that all people are made in the image of God and are consequently worthy of respect. Scripture also states that Christ has "ransomed people for God from every tribe and language and people and nation, and ...made them a kingdom and priests to our God." Therefore, we look at the value of all persons through the lens of biblical truth as image bearers who can have a new identity in Christ. (Genesis 1:26,27; Ephesians 1-2; Revelation 5:9,10)
4. **Sex and Gender:** In affirming "traditional family values" in our Strategic Priorities, we mean what Bible-believing Christians have always meant, and what we have believed as an institution since our founding in 1914, that God created human beings in His image as male and female, that He ordained that marriage is to be between a man (male) and a woman (female) for life, and that sexual intimacy is exclusively for marriage. (Genesis 1:26-27; Genesis 2:24; Matthew 19:4-6; Ephesians 5:22-33; Revelation 19:7-9)

EXHIBIT F - 0001

5. The Church and its Ministries: When we claim to be "servants of the church," we mean what we have always believed since our founding that all our employees — administration, faculty, staff, and also Trustees — should be committed Bible-believing Christians and true disciples of Jesus (see No. 2). While we recognize the vital role of pastors and teachers, we also believe in the priesthood of all believers, where God calls every believer to active ministry as a member of His body, the church, so we hold that every Christian at CCU (i.e., all employees, from office staff to facilities, to faculty, to the president) should see their jobs as ministries to our students, and that all should live lives of obedience to Christ and His Word. (Matthew 16:18; 28:18-20; Ephesians 4:11-13; 1 Peter 2:9)
6. Christ-centered Higher Education and Truth: In its central convictions, CCU stands in the great tradition of Christian higher education in which education must begin with the "fear of the Lord," must be rooted in the Scriptures and Jesus Christ ("in whom are hidden all the treasures of wisdom and knowledge"), and must affirm the truthfulness of truth and the reality of God's created order. (Proverbs 1:7; 9:10; Colossians 2:3)



MISSION

Christ-centered higher education transforming students to impact the world with grace and truth.

STRATEGIC PRIORITIES

Our Strategic Priorities were adopted by the CCU Board of Trustees to serve as a guiding compass for the University. They direct the implementation of CCU's Mission and provide context for our first priority — an enduring commitment to Jesus Christ and His kingdom. The Strategic Priorities provide a point of convergence for every member of the CCU community and for every aspect of life at CCU, from how we teach and learn in the classroom to how we live with and serve others.

- Honor Christ and share the love of Christ on campus and around the world
- Teach students to trust the Bible, live holy lives, and be evangelists
- Be a magnet for outstanding students and prepare them for positions of significant leadership in the church, business, government, and professions by offering an excellent education in strategic disciplines
- Teach students how to learn
- Teach students how to think for themselves
- Teach students how to speak and write clearly and effectively
- Give students significant opportunities to serve our Lord while they are at CCU and to help them develop a lifetime habit of such service
- Impact our culture in support of traditional family values, sanctity of life, compassion for the poor, Biblical view of human nature, limited government, personal freedom, free markets, natural law, original intent of the Constitution, and Western civilization
- Be seekers of truth
- Debunk “spent ideas” and those who traffic in them
- Ask God to multiply our time and ability to the glory of His great name
- Be a servant of the Church
- Become a great university

EXHIBIT G - 0001

**Colorado Christian University
Board of Trustees
Standing Policies Manual**

Version Date: February 21, 2020

Introduction

This Standing Policies Manual contains all of the standing policies adopted by the Board of Trustees of Colorado Christian University as of the Version Date noted above.

A. *Purposes for this Manual.* The purposes for this manual include:

- Efficiency of having all Board policies in one place
- Ability to quickly orient Board members to current policies
- Elimination of redundant or conflicting policies
- Ease of review of existing policy
- Necessity of clear, pro-active policies to guide the President and Administration

B. *Consistency.* Each policy must be consistent with the Articles of Incorporation and Board Bylaws. The President is held accountable by the Board for developing policies and procedures consistent with this manual.

C. *Change in Policies.* Changes to this manual are permissible at every Board meeting. Except for time-limited or procedural actions (approval of minutes, election of officers, etc.), which are recorded in regular Board minutes, all “standing policies” approved by the Board will be included in this manual. Recommendations for revisions may come from any committee, trustee, or the President. In advance of each Board meeting, the President shall send a copy of the current policies to the Board, showing any changes recommended for consideration at the next meeting. Those proposed changes will show words to be deleted by ~~use of the strike-through~~ and words to be added using underlines. Changes are approved by the majority vote of the Board and are effective thereafter upon the review and approval of General Counsel.

EXHIBIT H - 0001

D. Specificity. Each new policy will be drafted to fit within the most logical policy section listed below. Each set of policies should be drafted from the broadest policy statement to the next broadest, etc. The policy should allow sufficient latitude to permit efficient implementation by the administration. Over time, the Board can *either* reduce *or* increase the specificity of its policies.

E. Oversight Responsibility. Trustees exert the final authority of University business, but their role is to offer guidance and support, not to manage operations. Oversight is provided via committees of the Board. The following table lists the chapters in this Standing Policies Manual, the Board committee responsible for the chapter content, and the individuals given authority to implement the relevant policies:

<u>CHAPTER</u>	<u>OVERSIGHT COMMITTEE</u>	<u>AUTHORITY</u>
1. Board-President/Administration Relationship	Executive	Chair/President
2. Executive Limitations	Executive	Board Chair
3. Academic Affairs	Academic Affairs	President
4. Business Affairs	Business Affairs	President
5. Student Affairs	Student Affairs	President
6. Admissions and Enrollment	Admissions and Enrollment	President
7. External Affairs	External Affairs	President
8. Centennial Institute	Centennial Institute	President
9. Campus Development	Campus Development	President
10. Trustee Affairs	Trustee Affairs	Committee Chair
11. Miscellaneous	Executive	President

F. Maintenance of Policies. The Corporate Secretary will oversee the recording and publication of these standing policies. The President (or designee) will maintain the policies in electronic format and provide updated copies to the Board following each meeting. Only electronic copies will be distributed, except when a trustee specifically requests a paper copy. This Manual may refer to other policies (e.g., the CCU Faculty Manual) that are maintained by the Administration and/or kept in the Board Reference Book.

G. Incorporated Documents.

The Strategic Statements referred to by this document are incorporated herein by reference as the document titled “Strategic Statements,” adopted by the Board of Trustees on August 25, 2000.

The operation of the Board, its committee structure and its duties and responsibilities, are

EXHIBIT H- 0002

incorporated herein by reference as the document titled “Amended and Restated Bylaws of Colorado Christian University,” adopted by the Board on October 13, 2006.

EXHIBIT H - 0003

H. Composition of the Committees of the Board

Per Article XII of the University's Bylaws, the Chair of the Board of Trustees shall appoint committee chairs, vice chairs, and committee members, and determine the composition of all Board committees with the exception of the Executive Committee.

Although non-Trustees may serve on a committee, the majority of committee members shall be members of the Board of Trustees, and the committee Chair and Vice-Chair must be a member of the University's Board of Trustees. As with Trustees, non-Trustees participating on a committee must also sign a Statement of Faith and be in full support of the Strategic Priorities of the University.

The Chair and Vice-Chair of the Board of Trustees shall serve as ex-officio members of each standing committee.

The Chair of each standing committee will also serve as a member of the Executive Committee.

Committees should not exceed ten (10) persons.

Trustees may participate in any standing committee meeting, but unless they are a recognized member of the committee, will not be allowed to vote.

I. Committee Meeting Frequency and Requirements

Committees will meet at least three times each year.

Although committees are not required to keep minutes, they will provide an update to the full Board of Trustees at each of the three regular annual meetings of the board.

J. Responsibilities of the Committee Chair

The Committee Chair shall:

- Organize the agenda of the Committee meetings;
- Provide a summarized report to the Board of Trustees;
- Forward any motions to be voted upon by the Board of Trustees.

Chapter 3. Academic Affairs

3.1 Purpose

- 3.1.1 The Academic Affairs Committee shall provide oversight, perspective, and support in all matters pertaining to the University's educational offerings by monitoring general and specialized accreditation for the University and its programs, and the quality and effectiveness of teaching, learning, and academic standards and requirements.
- 3.1.2 Primary University leadership reporting to the Committee will be the Vice-Presidents of Academic Affairs for CUS and for CAGS.

3.2 Principles

- 3.2.1 The Board delegates the responsibility to the administration to establish, in cooperation with the faculty, policies related to faculty appointments as well as all matters related to teaching and scholarship.
- 3.2.2 The Board of Trustees retains final approval authority for the initiation of new major academic programs and degrees, as well as the termination of existing ones. All changes in academic programs should include meaningful faculty participation and should be reported to the Board prior to implementation, and all new appointments of full-time faculty members communicated to the Academic Affairs committee.
- 3.2.3 Because the quality of the faculty vitally impacts the University's ability to fulfill its academic mission, the hiring of faculty will be one of the most careful and deliberative processes undertaken by the University. CCU will hire, develop, and maintain a competent and qualified faculty who adhere wholeheartedly to CCU's Lifestyle Expectations, Statement of Faith, and support and promote the Strategic Priorities; maintain the highest spiritual, ethical, and professional standards; promote critical thinking in the classroom; and consistently strive to integrate all academic disciplines with a Christian worldview as reflected in CCU's Statement of Faith and Strategic Priorities.
- 3.2.4 The administration will maintain a Faculty Handbook, developed in collaboration with the faculty, which (1) implements academic policies adopted by the Board of Trustees and (2) addresses matters of faculty interest such as conditions of academic appointment, committees, contracts, evaluation, and promotion.
- 3.2.5 Notification to full-time faculty members of the University's intention NOT to renew a faculty member's contract for the next academic year should occur not later than March 15th of the year of the current contract, except in the circumstance of financial exigency.
- 3.2.6 CCU will follow defined and stated criteria to evaluate faculty members' academic performance at regular intervals, and to promote faculty in academic rank in a just and equitable manner in accordance with a process and procedure published in the Faculty Handbook.
- 3.2.7 Faculty members are responsible for maintaining and enforcing the highest standards of academic integrity, acting upon every instance of cheating or plagiarism in accordance with procedures set forth in the Faculty Handbook.
- 3.2.8 CCU is an "At Will" employer and does not offer faculty tenure. Rather, CCU seeks to reward successful faculty members with employment security by offering instructional agreements for multiple years of service.

EXHIBIT H - 0005



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

July 20, 2022

Donald W. Sweeting, Ph.D., President
Colorado Christian University
8787 W. Alameda Ave.
Lakewood, CO 80226

Dear President Sweeting:

I write in response to your May 3, 2022, letter to the U.S. Department of Education's Office for Civil Rights (OCR), in which you requested assurance of a religious exemption from Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, for Colorado Christian University ("CCU") in Lakewood, Colorado.

Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. Title IX and its implementing regulations at 34 C.F.R. § 106.12 provide that Title IX does not apply to an educational institution controlled by a religious organization to the extent that the application of Title IX would be inconsistent with the controlling organization's religious tenets. Section 106.12(b) of the Department's Title IX regulations describe the process by which an educational institution may request assurance of a religious exemption. The request must identify the religious organization that controls the educational institution and specify the tenets of that organization and the provisions of the law or regulation that conflict with those tenets. Section 106.12(c) of the Department's Title IX regulations describes the evidence that is sufficient to establish that an educational institution is controlled by a religious organization.

Your letter accurately recognizes that OCR has previously confirmed that CCU qualifies for a religious exemption to Title IX with regard to gender identity" and requests confirmation now of that exemption "with regard to same-sex romantic relationships." In support of that request, your letter states that "CCU is a nonprofit evangelical Christian university that is controlled by a religious organization" and explains that CCU's governing organization is its Board of Trustees, which "has published a mission for CCU that openly references and relies on religious tenets." Specifically, "CCU's mission, as determined and published by its Board, is encapsulated in CCU's mission statement, Statement of Convictions, and Strategic Priorities, all of which make clear and repeated references to the Christian tenants that motivate and guide CCU's actions and policies." (Internal citations omitted.). According to your letter, "all members of CCU's Board—including

any non-Trustee members of Board committees—must sign the Statement of Faith as a condition of their appointment.”

Your letter explains that CCU “requires all of its faculty and employees to espouse a personal belief in the evangelical Christian faith. Further, every applicant for any employment position at CCU must sign an Application Acknowledgement agreeing to abide by CCU’s Statement of Faith...and Statement of Lifestyle Expectations in addition to agreeing to adhere to traditional biblical values.” The letter also states that “prospective employees must sign both of these documents before the hiring process is complete,” students who enroll at CCU “must sign the Statement of Faith before the enrollment process is complete,” and that “traditional undergraduate students must go one step further by signing CCU’s Lifestyle Covenant.”

Your letter states that “the religious tenets of CCU explicitly and unequivocally bar any form of same-sex romantic relationship” and that, as noted in CCU’s College of Undergraduate Studies Student Handbook, “CCU believes ‘the unambiguous rejection in scripture of same-sex sexual activity remains in force for believers today...[because] God created human beings to show forth God’s image as male and female in relationship (Gen 1:26-28), and the biblical ideal is the expression of sexuality within a heterosexual, lifelong, monogamous union (Mk 10:4-12).’” The letter further explains that “CCU sincerely believes that it is directed by the Bible to prohibit the practice of same-sex romantic relationships among its students and employees” and that “CCU sincerely believes that prohibiting the practice of same-sex romantic relationships among its students and employees is crucial for CCU to achieve its core objectives to ‘honor Christ and share the love of Christ on campus and around the world...[and to] teach students to trust the Bible [and] live holy lives...’” According to your letter, to “permit same-sex romantic relationships among its students and employees” would “not be consistent with the religious tenets of [CCU].”

For the above reasons, CCU requests assurance of its exemption from the following regulatory provisions “insofar as they are interpreted to reach discrimination on the basis of same-sex romantic relationships”:

- 34 C.F.R. § 106.21 (governing admission);
- 34 C.F.R. § 106.22 (governing preference in admission);
- 34 C.F.R. § 106.23 (governing recruitment of students);
- 34 C.F.R. § 106.31 (governing education programs or activities);
- 34 C.F.R. § 106.32 (governing housing);
- 34 C.F.R. § 106.33 (governing comparable facilities such as restrooms and locker rooms);
- 34 C.F.R. § 106.34 (governing access to classes and schools);
- 34 C.F.R. § 106.36 (governing counseling);
- 34 C.F.R. § 106.37 (governing financial assistance);
- 34 C.F.R. § 106.38 (governing employment assistance to students);
- 34 C.F.R. § 106.39 (governing health and insurance benefits and services);
- 34 C.F.R. § 106.40 (governing different rules based on marital or parental status of students);
- 34 C.F.R. § 106.41 (governing athletics);

- 34 C.F.R. § 106.43 (governing standards for measuring skill or progress in physical education classes); and
- 34 C.F.R. §§ 106.51-61 (governing employment).

CCU is exempt from these provisions to the extent that application of these provisions would conflict with the religious tenets of its controlling religious organization “insofar as they are interpreted to reach discrimination on the basis of same-sex romantic relationships.”

Please note that this letter should not be construed to grant exemption from the requirements of Title IX and the regulations other than as stated above. In the event that OCR receives a complaint against your institution, we are obligated to determine initially whether the allegations fall within the exemption here recognized.

I hope this letter fully responds to your request. If you have any further questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Lhamon', with a stylized, flowing script.

Catherine E. Lhamon
Assistant Secretary for Civil Rights

August 25, 2022

VIA COMMENT PORTAL

Alejandro Reyes, Program Legal Director
Office of the Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-0001

**Re: Comment on the Enforcement of Title IX of the Educational Amendments of 1972,
Respectfully Submitted by Interfaith Alliance Foundation**

To Mr. Reyes:

Interfaith Alliance Foundation provides the following comments on the proposed amendment of the regulations implementing Title IX of the Education Amendments of 1972 (“Title IX”), pursuant to the proposed rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” published in the Federal Register on July 12, 2022, at 87 Fed. Reg. 41390.

Interfaith Alliance Foundation (“IAF”) is a national policy and advocacy organization committed to advancing true religious freedom for all Americans. The only national interfaith organization dedicated to protecting the integrity of both religion and democracy, IAF’s membership is made up of individuals rather than institutions, in all 50 states and serving overseas in the U.S. military, and adhering to more than 75 faith traditions and belief systems.

While the notion of religious freedom has been used – and misused – by various groups over the course of our history, IAF’s work remains true to the foundational promise of the U.S. Constitution: that every American has the right to believe as we choose, with the secure knowledge that our government will not play favorites or favor religion over non-religion. IAF champions an inclusive vision of religious freedom, where all are free to embrace matters of personal conscience without fear of government intrusion or discrimination.

Our schools and universities are entrusted with the wellbeing of students from diverse backgrounds and experiences. The protections offered by Title IX are essential for creating safer, more equitable environments for women and LGBTQ+ students by ensuring schools are proactive in combating sexual harassment and sex discrimination.

We commend the Department of Education for expanding definitions to better address discrimination based on sex stereotypes and pregnancy, and urge the Department to provide training procedures and clear guidelines to allow Title IX recipients to address sex discrimination

and support students. We also urge the Department to ensure religious exemptions are appropriately implemented by outlining consistent and transparent guidelines, thereby protecting the right of all students to have equal access to education by strengthening Title IX protections.

I. Expanded Definitions Better Address Discrimination Based on Sex Stereotypes and Pregnancy

By clarifying that “sex discrimination” encompasses discrimination on the basis of sex stereotypes, sexual orientation, and gender identity, the proposed rule equips educational institutions to support students of all backgrounds and beliefs. It is essential that schools that receive federal financial assistance have clear guidelines to follow when assessing cases of discrimination. The expanded definitions in the proposed regulations are a positive step towards ensuring all instances of discrimination based on sex stereotypes and pregnancy are taken seriously.

LGBTQ+ students have been insufficiently protected under Title IX, as many schools fail to adequately respond to cases of harassment, violence, unequal discipline, and discrimination.¹ Insufficient Title IX protections for LGBTQ+ individuals prevent those students from receiving equal access to education by allowing discriminatory practices and policies to remain in place, leaving students with few ways to remedy instances of harassment and discrimination. We commend the Department for offering distinctions, such as acknowledging the hostile environment created when students are ostracized by others for failing to conform to traditional gender stereotypes,² that extend necessary protections to LGBTQ+ students and provide processes to report and remedy harassment. Similarly, clarifying sex discrimination as it relates to pregnancy to include current, past, and potential related conditions more comprehensively meets the needs of students.

Ensuring LGBTQ+ students and those with the ability to become pregnant are protected is essential to the promise of religious freedom; any institution that received public funding must use that funding to ensure all students are supported, not just some. The expanded definitions not only better define the type of discrimination students face, but will also better protect each student’s right to equal access to education by providing schools with guidance to deal with discrimination cases.

II. Schools Must Provide Prompt and Meaningful Support to Students and Employees Affected by Sex-Based Discrimination or Harassment

Title IX facilitates equal access to education for all students, regardless of sex. That mandate includes ensuring that all students feel safe and supported. The Department acknowledged this necessity by requiring recipients to train employees in the school’s obligation to support students

¹ Kosciw et al., The 2019 National School Climate Survey, 35 (2020)

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 28 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R pt.106)

who are pregnant or with pregnancy-related conditions,³ but more can and should be done. We respectfully ask the Department to outline training procedures for school employees to create standards that would best help students through all forms of sex-based discrimination or harassment.

The Department also acknowledged that current guidelines do not adequately outline the breadth of recipients' responsibilities to students. Guidance should clarify recipient responsibility to support students dealing with pregnancy or related conditions and extend their duty beyond medical and hospital benefits to day-to-day and academic accommodations.⁴

While the Department's proposed rule posits a requirement to take prompt and effective action against sex discrimination, it fails to clarify how that standard should be met. Religious freedom and non-discrimination are rooted in the same values: equality, justice, and the right to self-determination. Expanding definitions of sex-based discrimination or harassment is a first step in realizing our inclusive vision of religious freedom; the Department must also provide clear guidelines to hold schools accountable to procedure.

III. Religious Exemptions to Title IX Should Be Consistent and Transparent

As an organization committed to protecting religious freedom, we recognize that some educational institutions may face a conflict between religious doctrine and the Department's interpretation of Title IX. Religious exemptions to Title IX have an important role in ensuring that religious institutions can operate in a manner consistent with their religious beliefs. Transparency and consistent application, however, are necessary to communicate institutional procedures and expectations to members of their community and the public.

Prior notice of Title IX exemptions allows students to make informed choices about their education and safety. Without it, students will not know whether they may be treated differently than their peers because of their sexual orientation, their gender identity, their reproductive history, or their personal beliefs. Appropriate implementation of religious exemptions also protects schools, who would otherwise be unclear as to what actions would put them at risk for legal challenges or complaints. However, the proposed rule provides little further guidance to institutions and students beyond the acknowledgement that religious exemptions are allowed under Title IX.⁵ We urge the Department to clarify this process for institutions seeking religious exemptions to allow them to act in accordance with their beliefs and to ensure students are supported through cases of discrimination.

As a matter of religious freedom, religiously affiliated universities are able to operate in a manner consistent with their religious doctrine. But students should be afforded the same ability to make education decisions based on their own personal beliefs. We urge the Department to

³ Fed. Reg. 41390 *supra* note 2, at 124

⁴ Fed. Reg. 41390 *supra* note 2, at 134

⁵ Fed. Reg. 41390 *supra* note 2, at 139

clarify religious exemptions and exercise transparency to ensure all personal beliefs are protected.

IV. Conclusion

As a national organization committed to advancing true religion freedom for all Americans, Interfaith Alliance Foundation applauds the Department's restoration of Title IX protections for student survivors of sexual harassment and violence and expansion of protections for LGBTQ+ students. We urge the Department of Education to ensure religious exemptions are appropriately implemented by outlining consistent and transparent guidelines, thereby protecting the right of all students to have equal access to education by strengthening Title IX protections. We also call on the Department to clearly define schools' responsibilities to students who are pregnant or with pregnancy-related conditions and establish training procedures to best-equip employees to support students through cases of discrimination.

Students seeking higher education are often away from home for the first time. They are encountering new people, having new experiences, and discovering their own identity. Schools should nurture students throughout this process and ensure that community members of all beliefs, experiences, and identities can thrive. Through the proposed rule and further guidance, the Biden administration can continue to rightfully use Title IX as a powerful tool to ensure all students are treated with dignity and respect.

Submitted via 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 for Civil Rights
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202*

Re: Docket ID ED-2021-OCR-0166, RIN1870-AA16 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

**COMMENTS TO THE DEPARTMENT OF EDUCATION
NOTICE OF PROPOSED RULE MAKING TO AMEND THE REGULATIONS
IMPLEMENTING TITLE IX OF THE EDUCATION AMENDMENTS OF 1972
CFR PART 106**

Dear Secretary Cardona and Assistant secretary Lhamon:

I submit these comments on behalf of myself as a former Acting Assistant Secretary for Civil Rights (1992-93 and 2000-01) and also the Deputy Assistant Secretary in the Department of Education's (ED) Office of Elementary and Secondary Education from 2002-2007. I support the Notice of Proposed Rule Making (NPRM) and the overturning and clarification of components established by the former administration's 2020 sexual harassment regulation. The following are comments on specific legal matters that the NPRM addresses, changes or clarifies.

TITLE IX JURISDICTION

Restoring the standards and broad mandate established by previous administrations by clarifying that Title IX covers harassment that occurs "off-campus" including at off-campus housing, a fraternity or sorority event, harassment or stalking on line, and studies abroad as long as the harassment denies the ability to participate in or benefit from the education program or activity. This is a long awaited and much needed clarification.

DEFINITION OF SEX-BASED HARASSMENT

Clarifying that a "hostile environment" is shown when it is proven "sufficiently severe or pervasive" both "objectively" and "subjectively" considering frequency of contact when

the hostile environment denies or limits a person's ability to participate in or benefit from the education program or activity or have access to the learning environment. Also a much needed and appreciated clarification.

STANDING to FILE a COMPLAINT

Establishing that a former student or a former employee or a visitor, or prospective student may file a Title IX complaint so long as the harassment or discrimination was experienced while the survivor was participating or attempting to participate in the federal fund recipient's program or activity is a needed clarification.

TITLE IX COORDINATORS

Adding effectiveness to the Title IX Coordinator position with the option of assigning one or more designees to carry out some of the recipient's responsibilities, as long as one Title IX coordinator retains ultimate oversight over those responsibilities (§106.8(a)(1)(2)) is an effective addition to the regulation. In the elementary and secondary school settings, a school district could designate a Title IX Coordinator and authorize that person to appoint or oversee building-level coordinators for each school building within the district. This proposal provides a way for the Title IX Coordinator to identify trends within the recipient, coordinate training programs responsive to those trends and to efficiently monitor barriers to address those barriers consistent with proposed §106.44(b). These changes indicate the need to reissue TIX Coordinator Guidance to clarify responsibilities reflecting the final Title IX regulations after a full review and consideration of the NPRM comments and changes to 34 CFR §106.34.

While I support the majority of the proposals in the NPRM, following are subject areas with which I have suggestions and concerns.

ACTUAL KNOWLEDGE

The standard for a recipient to have "actual knowledge" and respond to a complaint requires that a sexual harassment complaint be reported to a Title IX coordinator or official with the authority to institute corrective measures. The list of recipient employees who are not confidential employees and are required to notify the Title IX Coordinator when the employee has information about conduct that may constitute Title IX discrimination is too limiting. In the elementary or secondary context the list should include school bus drivers, street guides, entrance monitors, maintenance workers and other support staff. In the college and university context identification of employees with this responsibility should include residence assistants, science lab monitors, tech lab monitors, athletic and workout facility workers. These employees also should receive

training to be informed of their responsibilities to report conduct that may constitute sex discrimination to the Title IX Coordinator. See Fed Reg 41572-41573; 34 CFR §106.44.

FLEXIBILITY

I support the flexibility provided in the NPRM to choose and tailor effective and fair procedures to address complaints of sex discrimination and other forms of discrimination (such as race, disability, age, etc.) that are consistent with the institution's education environment. The complaint procedure options allow institutions of higher education investigating sex-based harassment involving one or more students to have parties meet separately in individual meetings with a decision maker or to hold a live hearing with a decision maker and answer questions including those submitted by the other party. In all processes all parties would be provided with the right to prepare and to review all relevant information and have the right to due process. My concern is with the option to hold a live hearing which should be limited as this requirement under the 2020 regulation has been shown to inhibit complaints of sexual harassment and violence being filed and investigated. I have spoken to representatives of Universities who have expressed concern that courtroom-like processes are not necessarily conducive to an educational environment and should be used in special cases.

I have similar concerns with the proposal to permit an educational institution to keep and maintain policies and procedures adopted in reliance on the 2020 regulation requirements as long as they meet current Title IX requirements. However, this flexibility should be viewed carefully for the chilling effect that has been noted on the willingness for survivors to file a complaint when institutions implemented the 2020 sexual harassment guidance. For both of these matters (investigative processes and maintaining 2020 guidance policies) I suggest requiring the recipient to review the Clery data information pre- and post- the 2020 regulations as a self-evaluation component for those wishing to maintain 2020 regulation procedural requirements.

RELIGIOUS EXEMPTIONS

The NPRM does not address Title IX's religious exemption which under the 2020 regulation was inappropriately expanded. First, although the Title IX statute only allows religious exemptions for schools that are "controlled by a religious organization" (20 U.S.C. §1681(a)(3)). Current §106.12© 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, there is a need to correct and clarify the process for a

recipient to claim a religious exemption. The current controlling 2020 regulation provides that a recipient may claim a religious exemption with no prior notification as a defense to a complaint even after they are under a Title IX investigation. The Title IX statute recognizes a school controlled by a religious organization and governed by religious tenets may be unable to comply with certain Title IX requirements (20 USC §1681). Under the 1975 regulation (34 CFR §106.12(a) and OCR policy memoranda (Singleton 1985 and Smith 1989) a procedure was established requiring a religiously controlled educational institution seeking a religious exemption to notify ED/OCR of their specific religious tenant that prohibits their following a specific Title IX requirement. Upon receipt of the request OCR would review and respond to the religious institution. When there is agreement and typically there was, OCR would notify the religiously controlled institution that they have a religious exemption from a specific Title IX requirement. This policy provided a way for a religiously controlled educational institution and OCR to have an agreement that can be readily understood and known by applicants for admission and employment, students, employees, unions and professional organizations. Reestablishing the former religious exemption policy avoids factual inaccuracy to the Notice of Nondiscrimination that all recipients including religiously controlled recipient educational institutions are required to post and file (34 CFR §106.8.)

COORDINATION with OTHER ED PROGRAMS

I support the proposed inclusion in 34 CFR §106.2 of the definition of “sex-based harassment” and “sexual assault” in the Clery Act, and “dating violence” and “stalking” in the Violence Against Women Act 2022 instead of merely cross-references to the applicable provisions of the respective Acts. In addition I suggest establishing a formal coordination in ED of Title IX with these other departmental programs with similar and overlapping purposes including but not limited to the VAWA 2022, the Clery Act and the Safe Schools Improvement Act. Establishing a coordinating body would provide a much-needed consistency of policies for these important overlapping programs and lead to a more efficient and robust implementation of these programs. Many of these programs have data reporting requirements from educational institutions regarding violence and unsafe activities and sharing these data maintained by each of the programs would add to more efficient enforcement.

LGBTQI ISSUES and ATHLETICS

Additional regulatory and policy guidance are needed in these two areas of Title IX enforcement. OCR provided in a 1997 Sexual Harassment Guidance and

reinforced in 2001 that Title IX covered harassment of a sexual nature directed at gay or lesbian students. OCR also issued guidance in 2016 specifically protecting transgender students from discrimination. The previous administration rescinded that coverage in 2020. In response OCR clarified in a Notice of Interpretation 86 FR 32637 (6/22/2021) that Title IX's prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity consistent with the Supreme Court's reasoning in **Bostock v. Clayton County**. The reinstatement of this Title IX coverage needs to be supplemented with guidance on issues that continue to be raised in court cases and civil rights complaints.

With respect to athletics participation and Title IX requirements, I note the trans athletes issue has received considerable attention. State Laws have been passed limiting or prohibiting participation in the women's and girl's athletics program raising the possibility of a Title IX violation. The issue of trans athletes participation especially requires further research and thoughtful discussion in order to provide Title IX guidance on this controversial issue. I suggest initially identifying the scope and actual numbers of trans athletes, holding listening sessions and looking into how athletic organizations have developed accommodations for trans athletes. These actions and research will lead to a better understanding of this complex participation issue and can inform OCR guidance.

I would be happy to meet with representatives of the Department to discuss my concerns and suggestions for further action.

Again thank you for the opportunity to comment on the NPRM.

Jeanette Lim Esbrook

Phone: (H) 703-548-6498 © 202-664-0558

Email: jeanette.esbrook@comcast.net

**Clearinghouse on Women's Issues Comments to The Department of Education
Notice of Proposed Rule Making to Amend the Regulations Implementing Title IX
of The Education Amendments Of 1972
34 Cfr Part 106 Nondiscrimination on the Basis of Sex in Education Programs or
Activities Receiving Federal Financial Assistance
Docket ID ED-2021-OCR-0166 RIN1870-AA16**

The Clearinghouse on Women's Issues (CWI) submits these comments. CWI, a national nonprofit organization, was established in 1974 to improve the status of women and girls nationally and internationally. We address economic, social, political, and legal issues facing women and girls. CWI works to eliminate discrimination including sex, age, ethnicity, LGBTQIA or marital status. We are CWI's Co-Presidents and both of us have extensive experience in education equity.

**HIGHLIGHTING THE IMPROVEMENTS IN PROPOSED TITLE IX
RULES/REGULATIONS**

These improvements include:

- **Broadening coverage to include all forms of sex discrimination, not just sexual harassment and sexual assault which was emphasized in the 2020 Rules.**

We approve specifying that rights and responsibilities and subsequent implementation procedures for Title IX apply to all forms of sex discrimination not just to sexual harassment and assault which were the primary focus of the 2020 regulations, especially the grievance procedures. One example is the difference between the previous and the new definition of respondent. (Section 106.2, page 41420 column 1). The previous definition for respondent was a perpetrator of conduct that could constitute **sexual harassment**. The proposed definition is an individual who is alleged to have violated the recipients' **prohibition on sex discrimination**. Similarly, grievance procedures should apply to all complaints of sex discrimination including sex-based harassment. (Section 106.45 (b), page 41461.)

- **Eliminating sections of the 1975 Title IX Rules which are outdated because of previously specified end dates.**

These self-evaluation procedures (Section 106.3 (c) and (d). and transition plans from a single sex institution to coed institutions (Section 106.16 and 106.17) expired in 1979. However, similar provisions for self-evaluation and transition to coed institutions are still important options for future Title IX Rules or guidance documents.

- **Eliminating provisions of the 2020 Title IX Rules which inappropriately limit protections for sex discrimination especially related to sexual harassment and assault.**

The details of these improvements are well documented by others and will not be covered in these CWI comments. CWI has signed on to multi organizational comments led by the National Women's Law Center and the Leadership Conference on Civil and

Human Rights which correct the many weakening provisions in the DeVos 2020 Title IX regulations.

- **Adding more specific instructions on protections against pregnancy and parental status related discrimination, LGBTQI+ discrimination, and sex stereotyping.**

CWI supports adding details on these important issues which weren't covered in the previous Title IX regulations.

NEEDED IMPROVEMENTS IN THE 2022 PROPOSED TITLE IX RULES ON THE APPOINTMENT OF TITLE IX COORDINATORS

In attempting to provide some detailed guidance on the appointment of Title IX Coordinators, the 2022 proposed Rule probably unintentionally weakened the previous Title IX Rules by adding an exception to the requirement that each recipient, especially local elementary and secondary schools, employ at least one Title IX Coordinator.

Parts of page 41424 of the proposed Rules in the July 12, 2022, Federal Register about designation of a Title IX Coordinator are quoted in italics:

Current longstanding regulations: Section 106.8(a) requires each recipient to designate at least one employee as the Title IX Coordinator to coordinate its efforts to comply with Title IX's statutory and regulatory requirements.

The proposed 2022 Rule has two parts. *"Title IX Coordinator" 106.8(a)(1) page 41424 a recipient must designate and authorize at least one employee as the "Title IX Coordinator", to coordinate its efforts to comply with the recipient's responsibilities under the Department's Title IX regulations. [The same as before and is fine with CWI.]*

However, there is a problem with the interpretation of the new Section 106.8(a)(2) under *"Delegation to designees"*. It proposes *that the (school district) Title IX Coordinator may assign one or more designees to carry out some of the recipient's responsibilities, but that one Title IX Coordinator must retain ultimate oversight over those responsibilities.* We agree with ED's reason that the assignment of designees/helpers is an effective way for a recipient that enrolls large numbers of students, employs large numbers of employees, provides services in multiple location, or engages in a large variety of activities to carry out the various Title IX responsibilities. However, the example (on the 3rd column of p.41424) that *For example, in the elementary school and secondary school setting, a school district could designate the Title IX Coordinator and authorize that person to appoint or oversee building-level coordinators for each school building within the district.* **needs to be changed to ensure that each school must have its own Title IX Coordinator whose contact information is listed as specified in (Section 106.8(c)(1).**

We understand and support that Title IX Coordinators can have designees to help them with certain Title IX responsibilities. But each recipient should still comply

with 106.8(a)(1) and have their own school level Title IX Coordinator. The school district Title IX Coordinator could still provide leadership, training and coordination to the individual P-12 school level Title IX Coordinators.

This proposed weakening of the appointment of a least one Title IX Coordinator in each recipient responsible for implementing Title IX can be fixed by:

- Eliminating the proposed change in the appointment of Title IX Coordinators and keeping 106.8(a)
OR
- Retaining the proposed changes 106.8(a)(1) and 106.8(a)(2), but changing 106.8(a)(2) to read:
the Title IX Coordinator may assign one or more designees to carry out some of the recipient's responsibilities, but that ~~one~~ the recipient's Title IX Coordinator must retain ultimate oversight over those responsibilities.

(The **Title IX Coordinator** refers to the implementing school's Title IX Coordinator. The **recipient** refers to the individual P-12 school or other institution implementing Title IX.)

Additionally, eliminate the sentences in the top of the third column p. 41424 starting with *For example, in the elementary school and secondary school setting, a school district could designate the Title IX Coordinator and authorize that person to appoint or oversee building-level coordinators for each school building within the district. These building-level coordinators could carry out some of the Title IX Coordinator's duties, such as providing training or ensuring that grievance procedures are administered correctly in that school building.* **TO** *Similarly, a Title IX Coordinator could have designees that oversee compliance with different aspects of the recipient's Title IX.....*

Revisions of these sections on the appointment of Title IX Coordinators should make it clear that each and all recipients (including sub-recipients such as local schools) should designate their own official Title IX Coordinator to ensure the full implementation of Title IX in their school or other organization.

Also, ED needs to reissue Title IX Coordinator guidance since the previous 2015 guidance was rescinded in 2020. That guidance can clarify that recipients do not need to employ Coordinators with full-time Title IX Coordinator responsibilities and that they can assign current staff, Title IX Coordinator responsibilities.

Justifications for making sure that recipients responsible for implementing Title IX employ their own Title IX Coordinator(s) including in individual schools at the P-12 level.

1. **Past poor implementation of the requirement to have a trained Title IX Coordinator in each recipient organization is no reason to weaken the requirement for some Title IX Coordinators.**

It is true that over the past 50 years, despite the consistent requirement in the Title IX Regulation, there have been inadequate appointments of Title IX Coordinators at all levels ranging from state education agencies to school districts to local elementary and secondary schools. Research by the Feminist Majority Foundation, the American Association of University Women and the recent report, [Title IX at 50, A Report by the National Coalition of Women and Girls in Education](#), June 2022 (p. 54) have advocated that Title IX implementation would be strengthened if the actual number of well-trained Title IX Coordinators was expanded to all relevant recipient institutions charged with implementing Title IX such as the 98,000 P-12 public schools. Unfortunately, the proposed rule 106.8(a)(2), would exempt some P-12 schools from appointing their own Title IX Coordinator by allowing the school district to instead designate persons who could assume some, but not all Title IX Coordinator responsibilities in these local schools. This would allow the school district Title IX Coordinator to have final authority in these local P-12 schools which would not have their own Title IX Coordinator.

Based on ED estimates there are around 98,000 public P-12 schools. This should establish 98,000 Title IX Coordinators who should receive training in implementing the Title IX Rule. Some recent court rulings have also suggested that private P-12 schools that are tax exempt are also supposed to implement Title IX. This would add another 20,000 schools to the 98,000 public P-12 schools, 17,000 public school districts, 50+ state education agencies, and 7,000 postsecondary institutions, and easily total over 100,000 required Title IX Coordinators.

If Section 106.8(a)(2) is retained, without other effective interventions and more resources, it is unlikely that many of the 17,000 school district Title IX Coordinators would be appointed and trained themselves, or that they would designate school level Title IX Coordinators and provide all 98,000 schools with adequate designees, oversight, and training to prevent and address sex discrimination in education.

2. Past and proposed Title IX Regulations have given many responsibilities to Title IX Coordinators as they interact with their school's, students, staff, and community members.

The example given to have School District Title IX Coordinators appoint P-12 school level designees/helpers instead of at least one Title IX Coordinator for each school/recipient is flawed. Each school needs their own official Title IX Coordinator to properly comply with all the responsibilities outlined in the Title IX regulation from the provision of contact information on their website (which is proposed for Section 106.8 (c)(1)) to proper handling of grievance procedures and supporting those who have suffered sex discrimination. Title IX Coordinators would also receive recognition and training for their Title IX work as specified in the proposed Gender Equity in Education Act (GEEA). Additionally, it would be difficult for the school community to identify and work directly with a school district Title IX Coordinator instead of their own school level Title IX Coordinator.

ED has not been clear and consistent that although desired, P-12 Title IX Coordinators are required in each school even though the Title IX regulations have always described Title IX Coordinator responsibilities at the school level. It is especially detrimental that the proposed regulation (106.8 (a)(2) exempts some elementary and secondary schools from having their own Title IX Coordinator as this is a place where all need to learn what sex discrimination is, and how to avoid it.

One clarification that may be helpful is that Title IX Coordinators need not be full time in that position but that they should be continuously trained to provide proactive as well as responsive responsibilities to end sex discrimination in their institution. (This clarification should probably be in the guidance document, not the regulation.)

3. Full implementation of Title IX is an important goal and trained Title IX Coordinators are essential in its accomplishment.

Despite its 50-year anniversary, many students and school community members are unaware of their rights and responsibilities under Title IX to end sex discrimination in education. Trained and effective Title IX Coordinators are needed to proactively educate all on ways to end sex discrimination and to prevent it or stop it with appropriate enforcement. Even elementary school children need to learn to avoid sex and gender discrimination. It is especially detrimental that the proposed regulation 106.8 (a)(2) exempts some elementary and secondary schools from having their own Title IX Coordinator as this is an age where all need to learn what sex discrimination is, and how to avoid it.

Title IX Coordinators in their schools can play an active role in identifying and preventing this discrimination. We suspect that except in Connecticut, few P-12 schools have their own Title IX Coordinators but are encouraged by the recent information on postsecondary Title IX Coordinators.

4. There is no evidence of effectiveness of the proposed example of having school district Title IX Coordinators designate people to carry out some Title IX functions in the individual P-12 schools, while the district level Title IX Coordinator would retain ultimate authority and oversight over these school level designees/helpers.

Often school districts have hundreds of schools and do not have any history of providing training or technical assistance to help implement Title IX. Also, even if there is no school district Title IX Coordinator, the individual schools are still responsible for implementing Title IX. Additionally, one of the ways to build effective Title IX implementation is to give Title IX Coordinators recognition and resources. This won't happen if they are not listed on the school website and easily available to the school community.

CWI is pleased that the proposed regulations are paying some attention to helping Title IX Coordinators accomplish their work at ending sex discrimination in their recipient institutions by mentioning that they can designate others to help them. However, this practice of assigning various staff to help Title IX Coordinators has been common and accepted at all education governance levels. Some of these roles (lawyers, counselors, etc.) are even mentioned in the old and proposed Title IX Regulations.

5. Accountability and visibility are keyways that ED and Gender Equity Activists throughout the nation can facilitate the widespread effective use of Title IX Coordinators.

In recent years ED has done more to identify and publicly list Title IX Coordinators so that they can be more easily contacted. The Civil Rights Data Collection (CRDC) now collects contact information on Title IX Coordinators at the school district level. Postsecondary Title IX Coordinators were added to the Clery Act survey requirements. To our knowledge ED has not consistently requested information or contacted Title IX Coordinators at State Education Agencies or in P-12 individual schools expected to implement Title IX.

Connecticut has led the way in collecting information on P-12 school Title IX Coordinators and Title IX Coordinators in many other institutions. Here is a description by Dr. William Howe, the innovative former CT state Title IX Coordinator, that shows that having P-12 school level Title IX Coordinators are possible and advantageous. It is included with his permission.



Bill Howe

Sun, Aug 28, 2022

Maybe I can add some perspective to this discussion. For approximately 17 years I was the State of Connecticut Title IX Coordinator. When I assumed the role I found that many school districts did not know who the Title IX Coordinators were and most often they were not trained at all. When it was made known that I was the SEA Title IX Coordinator I started getting about 10 calls a week - either complaints or requests for technical assistance. I convinced the Education Commissioner to issue an annual letter to all school districts requiring them to identify not only their district Title IX Coordinator but also a Title IX Coordinator in every building. We provided training each fall for persons designated as Title IX coordinators.

Eventually, the Office for Civil Rights informed me that one of their major concerns was the poor quality of investigation done by school districts. We then added on a separate workshop on conducting an investigation and writing the report. The letter from the Commissioner to the school districts went out every June and the survey had to be completed by 1 September. We followed up to make sure that every district and public school building had an identified Title IX Coordinator and that they were trained. It dramatically affected the number of complaints that I would receive. Nearing the end of

my tenure most of the calls I received were actually requests for technical assistance by Title IX Coordinators. Furthermore, we trained Title IX Coordinators, as well as coordinators for Title VI, Title VII, Sec 504, ADA and the state bullying regulations. We wanted to ensure that Title IX Coordinators could identify civil rights violations and help process them according to district procedures.

I can certainly attest to the fact that it has had a profound impact on sexual harassment and discrimination in the state. Parents, guardians, school personnel were very supportive of this practice. The SDE education website lists every public school district - the District and the Title IX Coordinators at the local buildings. The latest data is from 2019. The pandemic has had a profound effect on the ability to collect the data. I am hoping that it will be up-to-date within the next year. I strongly support having a person in every building identified as being knowledgeable about Title IX and knowing how to conduct a proper investigation.

<https://portal.ct.gov/SDE/Title-IX/Title-IX-Coordinators>

Bill Howe

6. Title IX Regulations or Policy Directives have done little to foster relationships among governmental entities responsible for implementing Title IX, but the specific example we have objected to about the relationship between school district and school building Title IX Coordinators starts to address this topic.

Starting with the relationship between school district and their P-12 schools, these relationships should be addressed broadly in the revised Title IX Coordinator Guidance. Research by the Feminist Majority Foundation, [Reinvigorating the Role of the Title IX Coordinator: A Requirement and Resource](#), recommended vertical and horizontal coordination among Title IX Coordinators at the various governmental levels. Vertical coordination would be with state Title IX Coordinators, school district Title IX Coordinators, and individual PK-12 public school Title IX Coordinators. Horizontal coordination would be among Title IX Coordinators with similar responsibilities and with other gender and equity experts and advocates. Thus, leadership by state and school district Title IX Coordinators would still be desired and could achieve the coordination, information sharing, and oversight functions suggested in the example of the school district oversight of school level designees only at the P-12 level. As a reminder, all types of recipients are welcome to employ more than one Title IX Coordinator or designate others to assist Title IX Coordinators. Where multiple people are involved, it is advisable to create teams with different specialties (athletics, academics, employment, sexual harassment, etc.) and appoint a lead Title IX Coordinator. This and many other valuable practices were suggested in the Title IX Coordinator guidance rescinded in 2020.

Full reinstatement of the current delegation of at least one Title IX Coordinator for each recipient expected to fully implement Title IX and ED guidance on the roles and responsibilities of all Title IX Coordinators is badly needed to clarify years of confusing guidance and inadequate employment and accountability information on Title IX Coordinators. It will also provide guidance in forthcoming federal funding legislation such as the Gender Equity Education Act (GEEA) which has been strongly supported

by FMF, NCWGE and many others and would help pay for the training and federal resources to support Title IX Coordinators, their constituents, and allies.

IMPORTANT TOPICS THAT SHOULD BE INCLUDED IN THE 2022 TITLE IX OR THE NEXT TITLE IX REGULATIONS

Religious Exemptions

The proposed 2022 Title IX Rule failed to correct the inappropriate process for a recipient to claim a religious exemption in the 2020 DeVos regulation. Under that regulation a recipient may claim a religious exemption with no prior notice as a defense even after they are under a Title IX investigation. This process fails the Title IX statute requirement (20 USC §1681) and the 1975 regulation (34 CFR 106.12(a) and policy memoranda (Singleton 1985 and Smith 1989) requiring a religiously controlled educational institution seeking a religious exemption to notify ED/OCR of the religious tenets that prohibit their following a Title IX requirement. While lacking transparency, the pre-2020 agreements between the recipient and OCR at least documented a religious exemption. That process should be restored, but one more step is necessary to protect students and employees who may be vulnerable to discrimination.

Students and parents should be informed of the specifics of any religious exemptions claimed by an educational institution before applying or enrolling. Consequently, assertions of specific religious exemptions should accompany any and all notices of nondiscrimination required pursuant to 34 C.F.R. § 106.8(b). Without such a disclosure, those notices of nondiscrimination are inherently deceptive and lure unsuspecting students and employees to the school who are unaware that the school asserts that it may discriminate against them.

Dress Codes

Prohibitions against discrimination in codes of personal appearance on the basis of sex were included in the original HEW 1975 Title IX Regulations, which were reviewed by Congress. However, this regulation was rescinded during the Reagan administration's efforts to eliminate federal regulations. Discrimination in codes of personal appearance such as dress and grooming codes obviously violate the plain language of Title IX itself as well as the Department's general prohibition of discrimination and the proposed regulation prohibiting discrimination based on stereotypes. The Fourth Circuit recently stated that Title IX applies to dress codes. See *Peltier v Charter Day School, Inc.* 37 F.4th 104, 128 (4th Cir. 2022) (en banc)

<https://www.ca4.uscourts.gov/opinions/201001A.p.pdf>. This case showed that requiring girls to wear dresses instead of pants is sex discriminatory under Title IX. We think this nondiscrimination based on appearance should be clearly set forth in this 2022 or near future Title IX Regulations so that recipients are aware of their obligations.

Single Sex Education

The 1975 Title IX regulations also prohibited most single sex classes and schools, but this prohibition was substantially weakened in the 2006 Title IX regulations. Unjustifiable single-sex classes rooted in sex stereotypes developed across the country. Although

the increased sex segregation was partially curtailed by court rulings and detailed OCR guidance on Questions about Single Sex education, (<https://www2.ed.gov/about/offices/list/ocr/docs/fags-title-ix-single-sex-201412.pdf>). The 2006 regulations continue to be misinterpreted by school districts and treated as blanket permission to have single-sex classes. Consequently, CWI requests that the 2006 regulations be rescinded.

We would be happy to meet with representatives of the Department to discuss our concerns and suggestions for further action.

Thank you for the opportunity to comment on these proposed Title IX Rules to improve them beyond the 2022 proposed version.

Sue Klein, Ed.D. and Connie Cordovilla, Clearinghouse on Women's Issues, (CWI)
Co-Presidents



**New York City Alliance
Against Sexual Assault**

RE: Office of Civil Rights NPRM Proposed Title IX Regulations, Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity

Document ID: ED-2021-OCR-0166-0001

Federal Register Number: 2022-13734

The New York City Alliance Against Sexual Assault and the below New York City ‘Enough is Enough’ programs respectfully submit this comment as testimony to inform the Department of Education’s review of regulations, guidance, and other agency actions under Title IX, and to respectfully request changes to the rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.”

The New York City Alliance Against Sexual Assault (the Alliance) has taken every opportunity to participate in the national discourse surrounding Title IX. The mission of the New York City Alliance Against Sexual Assault is to prevent sexual violence and reduce the harm it causes. Through public education, prevention programming, advocacy for survivors, and the pursuit of legal and policy changes, the Alliance works to disrupt systems and institutions that, unfortunately, can retraumatize survivors when they most need our support. Since New York State Education Law 129B became law, the Alliance has worked with between 12-17 New York City post secondary education institutions in providing campus sexual violence prevention programming to thousands of students, faculty, and staff.

We are pleased that the current Department has moved to draft new regulations that aim to reinstate the purpose of Title IX, gender equity in education. In that spirit we’d like to submit our feedback, informed by the student survivors, campus partners, and communities we strive to serve.

Our comment focuses on the following areas of the proposed rule:

- Ensuring protections for trans students
- Disciplinary versus criminality
- Supporting the inclusion of explicit protections for pregnant students and students with pregnancy related conditions
- Clarifying how institutions use religious exemptions to Title IX

Ensuring Protections for Trans Students:

We vehemently disagree with the DOE’s position to create a separate rule related specifically to gendered athletic eligibility. The rights of trans athletes to an education free from gendered discrimination should not be made separate from Title IX. Collegiate trans athletes are still students and therefore have the right to the same protection as non-collegiate athletes.

In recent years we have watched a stark increase in violence against trans and non-binary students. [71% of trans and nonbinary youth report experiencing discrimination based on their gender identity and 37% have reported experiencing physical violence based their gender identity.](#) Interconnected to the increase in violence against trans and non-binary students is a flurry of anti-trans legislation across this country. [More than 300 anti-trans bills have been proposed in 2022 alone and since 2020 18 states have proposed specific legislation targeting collegiate trans athletes.](#)

The prevailing focus on collegiate trans athletes skews the discourse around trans justice and equity toward a small subset of individuals. According to Inside Higher Ed, there are reportedly [32 total trans athletes in the U.S openly competing in college athletics](#) making up [0.00000167% of the post secondary education student population.](#) The public and political transphobic scrutiny of victorious collegiate trans athletes dominates news cycles and tells the [1.6 million reported trans youth and adults](#), many of whom attend educational institutions protected by Title IX, that their trans identity has enormous limitations if they choose to pursue collegiate athletics. It is transphobic to separate collegiate trans athletes from Title IX and therefore we strongly ask the DOE to not create a separate rule. Title IX was founded in athletics equity and should remain consistent to its origin.

Disciplinary versus Criminality:

We believe the DOE should remove the option for live cross examination during Title IX hearings, proposed 106.46. Requiring live cross-examination during hearings for Title IX cases, and not other student disciplinary proceedings, mimics the criminal justice system more than a campus conduct system. Campus conduct systems exist separately from the criminal justice system and have different goals. [The Clery Act](#), as amended by VAWA, requires institutions to notify victims (1) of their right to contact law enforcement and (2) the right not to notify law enforcement. Anecdotally speaking, the majority of students we work with, particularly those from historically marginalized communities, feel unsafe interacting with the criminal justice system and reporting to the police. We see students choose Title IX reporting options more often than police reporting options, as they share they have felt more likely to be believed by a Title IX coordinator over the NYPD. Title IX is not a criminal court process and should not have the option to operate like one.

Supporting the Inclusion of Explicit Protections for Pregnant Students and Students with Pregnancy Related Conditions:

We are in strong support of the department's explicit inclusion of protections for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, as well as sex-based distinctions based on parental, family, or marital status. Specifically, we support the proposed 34 CFR 106.21(c)(1)-(2), 106.40(a), 106.40(b)(1), 106.57(a)(1), and 106.57(b). While very little research has been conducted regarding discrimination against pregnant, parenting, and/or students with pregnancy related conditions over the last 20 years, we can say anecdotally that discrimination toward this community remains a massive barrier to equitable education. Furthermore, [the attacks on reproductive justice leading up to and as a result of the overturning of Roe v. Wade has created a dangerous landscape for students navigating pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.](#) While Title IX has historically implied the protections for pregnant students and students with pregnancy related conditions, we are pleased to have this codified in the final version of the regulations.

Clarifying How Institutions Use Religious Exemptions to Title IX

Since 1979, religious exemption to Title IX has been an option for schools throughout the country and has been routinely weaponized in ways that discriminate and deny rights to pregnant students, non-binary students, transgender students, and LGBTQ+ students. [Joe Baxton of the Religious Exemption Accountability Project \(REAP\) cites the origins of religious exemption to Title IX have historically been rooted in discrimination against women who had had abortions or had children out of wedlock.](#)

While we are in support of the constitutional right to religious freedom, we do not support the weaponization of that freedom to absolve educational institution's accountability to provide equitable education to all students. Between 2013 and 2021, especially [after the 2014 \(rescinded in 2017\) guidance outlining protections for LGBTQ+ students under Title IX](#), more than 120 educational institutions claimed exemption from Title IX on the basis of religion. In the 50 years since enactment of Title IX, the Office for Civil Rights has never denied a claim to religious exemption.

The 2020 Title IX Regulations expand the criteria that an institution must meet to be considered controlled by a religious organization. We believe the current proposed rule does not adequately address the ways in which religious exemptions to Title IX have been historically utilized to discriminate against LGBTQ+ students, pregnant students, and students with pregnancy related conditions. We urge the department's final regulations to include narrower criteria for institutions to claim religious exemption to Title IX and eliminate the ability for institutions to retroactively claim a religious exemption to Title IX.

In closing, on behalf the NYC Alliance Against Sexual Assault and those we strive to serve, we strongly encourage the current DOE to ensure that the diverse needs and experiences of students enrolled at city schools are considered in the review to the current regulations. We also welcome any opportunity to provide additional input and information toward this effort. Thank you for your time.

Sincerely,



Sam Skaller, Senior Campus Coordinator, The New York City Alliance Against Sexual Assault



Nicole Maiorano, Enough is Enough and Restorative Justice Coordinator, Kingsbridge Heights Community Center



Shan Huang, Associate Director of Special Programs, Womankind



11 DUPONT CIRCLE NW
SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

September 12, 2022

Submitted via 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: 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").¹

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 counsel² 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 50th 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,

¹ 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>.

² *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,³ and one in five girls ages 14–18 have been kissed or touched without their consent.⁴ About 10 percent of PK–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.⁵ Furthermore, in a given year, one in 11 high school girls and one in 14 high school boys experience physical dating violence,⁶ and more than a quarter of a million people ages 16–19 are victims of stalking.⁷ About 10 percent of PK–12 students will experience sexual misconduct by a school employee by the time they graduate from high school.⁸ In college, more than 60 percent of

³ Catherine Hill & Holly Kearn, 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>.

⁴ 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].

⁵ 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>.

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

⁷ 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>.

⁸ Grant et al., *supra* note 5.

women and men experience sexual harassment.⁹ 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.¹⁰ 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.¹¹ 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.¹²

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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.¹⁷ Student survivors are also often disciplined because at the time they were

⁹ 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>.

¹⁰ 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/aaucampus-climate-survey-2019> [hereinafter AAU Report].

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

¹² 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).

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

¹⁴ 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].

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

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

¹⁷ 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; 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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

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.²² 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.²³ Over half of LGBTQ girls (52%) report surviving sexual or other violence.²⁴ 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.²⁵

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%

¹⁸ 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://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf.

¹⁹ 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>.

²⁰ 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 [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; 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].

²¹ 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>.

²² GLSEN Survey, *supra* note 12, at 28.

²³ *Id.* at 29.

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

²⁵ 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.²⁶ 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.²⁷ 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.²⁸

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.²⁹ In another report, over 40 percent of LGBTQ girls reported absences from school due to feeling unsafe or uncomfortable.³⁰ 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.³¹

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.”³² 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.³³ 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.³⁴

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

²⁶ GLSEN Survey, *supra* note 12, at 34.

²⁷ Williams Institute Report, *supra* note 25, at 41-42.

²⁸ *Id.* at 55-56.

²⁹ GLSEN Survey, *supra* note 12, at 47-48.

³⁰ NWLC LGBTQ Girls Report, *supra* note 24, at 2.

³¹ GLSEN Survey, *supra* note 12, at xvii.

³² NWLC Pregnant or Parenting Students Report, *supra* note 12, at 11.

³³ 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>.

³⁴ 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.³⁵

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 identity³⁶—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.³⁷ 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.

³⁵ 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-ro-are-we-prepared-to-support-them>.

³⁶ 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).

³⁷ 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.³⁸

(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,³⁹ 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 1997-2020.⁴⁰ 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.⁴¹ 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

³⁸ See *id.* at 41413.

³⁹ 34 C.F.R. § 106.45(b)(3)(i).

⁴⁰ 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].

⁴¹ 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.⁴² 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.”⁴³ 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.⁴⁴ 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),⁴⁵ the Department’s proposed definition at § 106.2(3)(iii) should include the following from VAWA 2022’s definition in defining “domestic violence”:

⁴² 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>.

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

⁴⁴ 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.

⁴⁵ 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.*”⁴⁶

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.”⁴⁷ 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.⁴⁸ 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.⁴⁹ 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 disbursements⁵⁰—was reported as a common control tactic.⁵¹ Accordingly, to account for the

⁴⁶ 34 U.S.C. 1221(a)(12) (emphasis added).

⁴⁷ 87 Fed. Reg. at 41418.

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

⁴⁹ 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.

⁵⁰ 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>.

⁵¹ 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.”⁵²

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 Collection⁵³):

“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.”

⁵² 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.

⁵³ 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://nwlc.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.”⁵⁴ 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.⁵⁵ 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.”⁵⁶ 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,⁵⁷ 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

⁵⁴ 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>.

⁵⁵ 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>.

⁵⁶ 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).

⁵⁷ 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.⁵⁸ 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."⁵⁹ 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,⁶⁰ and 41 percent of college sexual assaults involve off-campus parties.⁶¹

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."⁶² 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.⁶³ 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.⁶⁴ 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."⁶⁵ 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.⁶⁶ 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

⁵⁸ 87 Fed. Reg. at 41403-04.

⁵⁹ 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].

⁶⁰ 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).

⁶¹ 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.

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

⁶³ 87 Fed. Reg. at 41402.

⁶⁴ 87 Fed. Reg. at 41403.

⁶⁵ 87 Fed. Reg. at 41403.

⁶⁶ 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.”⁶⁷ 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.⁶⁸ 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.⁶⁹ 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

⁶⁷ 87 Fed. Reg. at 41417-18.

⁶⁸ 87 Fed. Reg. at 41446-47.

⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷² 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.⁷³ 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.”⁷⁴ 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.”⁷⁵ Moreover, preserving survivor

⁷⁰ 87 Fed. Reg. at 41476.

⁷¹ 87 Fed. Reg. at 41476.

⁷² 87 Fed. Reg. at 41432, 41437-38.

⁷³ 87 Fed. Reg. at 41432, 41437-38.

⁷⁴ 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).

⁷⁵ 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.⁷⁶ 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.⁷⁷ 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 discrimination⁷⁸ 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,⁷⁹ 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).

⁷⁶ 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].

⁷⁷ 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/jff/campus/SmithRosenthalFreydGSU22-24October2014.pdf>.

⁷⁸ 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.

⁷⁹ 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*.”⁸⁰ 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.⁸¹

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

⁸⁰ 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.

⁸¹ 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.⁸² 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.⁸³ (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.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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

⁸² Weiner Comment, *supra* note 76, at 14.

⁸³ *Id.* at 13-14.

⁸⁴ 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).

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

⁸⁶ 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 assistants⁸⁷ and other student-employees,⁸⁸ 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”⁸⁹ 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.⁹⁰ 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.⁹¹ 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

⁸⁷ 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.

⁸⁸ 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.

⁸⁹ 87 Fed. Reg. at 41432, 41437-38.

⁹⁰ 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)).

⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴ If the Department does not adopt this recommendation, we at least ask the Department to revert

⁹² 87 Fed. Reg. at 41436.

⁹³ 2001 Guidance, *supra* note 40, at 10, 12-13, 18.

⁹⁴ 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).”⁹⁵

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.⁹⁶

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 §106.30.⁹⁷ We support removing the requirement that individuals sign their complaints to facilitate the

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.

⁹⁵ 2014 Guidance, *supra* note 40, at 4.

⁹⁶ 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.

⁹⁷ *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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.”¹⁰¹

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.”¹⁰² At times, the proposed rule and its preamble suggest that schools only have obligations to students and employees.¹⁰³ However, as the Department recognized in the preamble,¹⁰⁴ 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.¹⁰⁵ For

⁹⁸ See 87 Fed. Reg. at 41445.

⁹⁹ 87 Fed. Reg. at 41445.

¹⁰⁰ *Id.*

¹⁰¹ 85 Fed. Reg. at 30131.

¹⁰² 20 U.S.C. § 1681(a).

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

¹⁰⁴ 87 Fed. Reg. at 41540.

¹⁰⁵ 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,¹⁰⁶ campus visitors, and other “[m]embers of the public” who “are either taking part or trying to take part of a funding recipient.”¹⁰⁷ 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 harassment¹⁰⁸ 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.¹⁰⁹ This is especially important, as the preamble noted,¹¹⁰ 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,¹¹¹ 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

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”).

¹⁰⁶ 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-Opinion-to-MTD.pdf>.

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

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

¹⁰⁹ 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.

¹¹⁰ 87 Fed. Reg. at 41433.

¹¹¹ *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.¹¹² 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.¹¹³

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.¹¹⁴ 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).¹¹⁵ 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.¹¹⁶ This would be consistent with decades of expert consensus that mutual no-contact orders are harmful to victims, as the preamble acknowledged,¹¹⁷ because abusers often manipulate their victims into violating the mutual order,¹¹⁸ 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

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

¹¹³ 2014 Guidance, *supra* note 40, at 33; 2011 Guidance, *supra* note 40, at 15-16;

¹¹⁴ 87 Fed. Reg. at 41450.

¹¹⁵ 87 Fed. Reg. at 41449, 41450.

¹¹⁶ 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.

¹¹⁷ 87 Fed. Reg. at 41450.

¹¹⁸ *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.”¹¹⁹

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.¹²⁰ 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.”¹²¹

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

¹¹⁹ 34 U.S.C. § 10461(c)(1)(C).

¹²⁰ 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).

¹²¹ 87 Fed. Reg. at 41423.

supportive measures complainants can request and schools can offer.¹²² 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.¹²³

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.¹²⁴ 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

¹²² 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.

¹²³ 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].

¹²⁴ 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.”¹²⁵ 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.¹²⁶ This would be consistent with VAWA’s definition of “restorative practice,” which states that it is “initiated by a victim of the harm.”¹²⁷

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.¹²⁸

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

¹²⁵ 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>.

¹²⁶ 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.

¹²⁷ 34 U.S.C. § 12291(a)(31)(B).

¹²⁸ 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.¹²⁹ 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,¹³⁰ the Department of Justice's National Center on Restorative Justice,¹³¹ 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).¹³² 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.¹³³ As the preamble to the proposed rules acknowledges, students "will not typically have access to information" about how their school enforces its code of

¹²⁹ 87 Fed. Reg. at 41454.

¹³⁰ 34 U.S.C. § 12291(a)(31)(B), (b).

¹³¹ 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.

¹³² 87 Fed. Reg. at 41436.

¹³³ 85 Fed. Reg. at 30536.

conduct to know whether they are being punished as part of a zero-tolerance policy or experiencing unlawful retaliation.¹³⁴ 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.¹³⁵ 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.¹³⁶ 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.”¹³⁷

¹³⁴ 87 Fed. Reg. at 41542.

¹³⁵ 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.

¹³⁶ 87 Fed. Reg. at 41490.

¹³⁷ 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."¹³⁸
- 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.¹³⁹ (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.¹⁴⁰)

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.¹⁴¹ 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.

¹³⁸ 87 Fed. Reg. at 41453.

¹³⁹ 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>.

¹⁴⁰ 87 Fed. Reg. at 41453.

¹⁴¹ 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.¹⁴² 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.¹⁴³ For example, all Title IX materials should be accessible in Plain Language,¹⁴⁴ 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.¹⁴⁵ 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

¹⁴² 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://nwlc.org/resource/survivor-justice-is-disability-justice>.

¹⁴³ *Id.* at 2-3.

¹⁴⁴ 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>.

¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸ This is especially important to prevent schools from relying on negative stereotypes and implicit bias that cast Black and brown girls and women,¹⁴⁹ LGBTQI+ survivors,¹⁵⁰ pregnant and parenting survivors,¹⁵¹ and disabled survivors¹⁵² 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

¹⁴⁶ See also 87 Fed. Reg. at 41429.

¹⁴⁷ 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).

¹⁴⁸ 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).

¹⁴⁹ 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).

¹⁵⁰ 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).

¹⁵¹ 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).

¹⁵² 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.¹⁵³

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.¹⁵⁴

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

¹⁵³ 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.

¹⁵⁴ 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,"¹⁵⁵ 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),¹⁵⁶ 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 18.¹⁵⁷

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."¹⁵⁸ 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.¹⁵⁹

¹⁵⁵ 87 Fed. Reg. at 41431; 85 Fed. Reg. at 30411.

¹⁵⁶ Statutes of Limitations, *Negligence / Personal Injury* (last visited Sept. 9, 2022), https://www.statutes-of-limitations.com/case_type/negligence-personal-injury.

¹⁵⁷ 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).

¹⁵⁸ 87 Fed. Reg. at 41462 (emphasis added).

¹⁵⁹ 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,¹⁶⁰ 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.¹⁶¹ 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.¹⁶² 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,¹⁶³ dating and domestic violence victims are often most vulnerable to violence, including lethal violence, when they attempt to leave their abusers,¹⁶⁴ 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.

¹⁶⁰ 87 Fed. Reg. at 41466.

¹⁶¹ 87 Fed. Reg. at 41494.

¹⁶² *Id.*

¹⁶³ 87 Fed. Reg. at 41493.

¹⁶⁴ 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.¹⁶⁵ 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."¹⁶⁶ 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."¹⁶⁷ 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."¹⁶⁸ 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."¹⁶⁹ 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,¹⁷⁰ 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.

¹⁶⁵ 87 Fed. Reg. at 41467-68.

¹⁶⁶ *In re Winship*, 397 U.S. 358, 363 (1970).

¹⁶⁷ *Clark v. Arizona*, 548 U.S. 735, 738 (2006).

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

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

¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

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.”¹⁷³

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.¹⁷⁴ 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).¹⁷⁵

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

¹⁷¹ 87 Fed. Reg. at 41457.

¹⁷² 2014 Guidance, *supra* note 40, at 32; 2011 Guidance, *supra* note 40, at 12.

¹⁷³ 2001 Guidance, *supra* note 40, at 21.

¹⁷⁴ Student Advocates Comment, *supra* note 123, at 25.

¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ 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.¹⁷⁹ Third, we ask the Department to add that consent is not

¹⁷⁶ 87 Fed. Reg. at 41496-97.

¹⁷⁷ 85 Fed. Reg. at 30351.

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

¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹

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.¹⁸² 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.¹⁸³ 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.¹⁸⁴ 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).¹⁸⁵ Courts have upheld these rules¹⁸⁶ and

¹⁸⁰ 85 Fed. Reg. at 30350 n.1343.

¹⁸¹ 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.

¹⁸² David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 78 (2002).
¹⁸³ 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>.

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

¹⁸⁵ Fed. R. Evid. 415.

¹⁸⁶ 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.¹⁸⁷

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.¹⁸⁸

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-

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

¹⁸⁸ 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.¹⁸⁹ We agree with the Department that cross-examination is not required to satisfy either Title IX, constitutional due process requirements, or fundamental fairness,¹⁹⁰ 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.¹⁹¹ 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.¹⁹² 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.¹⁹³ 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

¹⁸⁹ *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).

¹⁹⁰ 87 Fed. Reg. at 41505.

¹⁹¹ 87 Fed. Reg. at 41458.

¹⁹² 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.

¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵ 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

¹⁹⁴ 87 Fed. Reg. 41467.

¹⁹⁵ 87 Fed. Reg. at 41458.

employees again in their classes and activities.¹⁹⁶ 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.¹⁹⁷

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").¹⁹⁸ 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 investigation¹⁹⁹ (as the Department itself recognizes²⁰⁰), and it is the same standard used by courts in all civil rights and other civil proceedings.²⁰¹ 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"

¹⁹⁶ 87 Fed. Reg. at 41467.

¹⁹⁷ *Id.*

¹⁹⁸ 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").

¹⁹⁹ 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>.

²⁰⁰ 87 Fed. Reg. at 41485.

²⁰¹ 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,²⁰² 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.

²⁰² 20 U.S.C. § 1232g(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,”²⁰³ 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.”²⁰⁴ 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.

²⁰³ 87 Fed. Reg. at 41489.

²⁰⁴ *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.²⁰⁵ 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.²⁰⁶

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.²⁰⁷

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;²⁰⁸ and almost a quarter were prevented from starting or promoting participation in a gay-straight alliance club.²⁰⁹

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.²¹⁰ As the Department has recognized in its recent publications,²¹¹ this is crucial to fully

²⁰⁵ GLSEN Survey, *supra* note 12, at 41.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ 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.

²⁰⁹ GLSEN Survey, *supra* note 12, at 41.

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

²¹¹ 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*.²¹² *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."²¹³ 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.²¹⁴ 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*.²¹⁵

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.¹¹⁵

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);²¹⁶ 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);²¹⁷ 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;²¹⁸ and 30 percent of the LGBTQ population now live in states with laws that ban transgender and nonbinary students from participating in school sports.²¹⁹ 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

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*).

²¹² *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731 (2020).

²¹³ *Id.* at 1737.

²¹⁴ 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).

²¹⁵ *Bostock*, 140 S.Ct. at 1747.

²¹⁶ 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. Although this comment uses the acronym LGBTQI+ throughout, where citing data that does not explicitly study intersex populations, we use more granular labels.

²¹⁷ Movement Advancement Project, *Safe School Laws: Anti-Bullying*, https://www.lgbtmap.org/equality-maps/safe_school_laws (last visited Sept. 9, 2022).

²¹⁸ Movement Advancement Project, *Safe School Laws: Nondiscrimination*, https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination (last visited Sept. 9, 2022).

²¹⁹ Movement Advancement Project, *Safe School Laws: Bans on Transgender Youth Participation in Sports*, 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.²²⁰ 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.²²¹ 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.²²²) 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.²²³ 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.²²⁴ 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.”²²⁵ 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

²²⁰ 87 Fed. Reg. at 41536.

²²¹ *Grimm*, 972 F.3d at 628.

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

²²³ 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).

²²⁴ GLSEN Survey, *supra* note 12, at 40.

²²⁵ 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.²²⁶ CDC data shows that where states adopted transgender-inclusive policies, from 2011-2019 there was no change in girls’ participation in high school sports.²²⁷ On the other hand, girls’ participation decreased in states with trans-exclusive policies.²²⁸ 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.²²⁹

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

²²⁶ 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>.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ 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.²³⁰ 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.²³¹ 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.²³² 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

²³⁰ 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].

²³¹ 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).

²³² 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. 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.²³³

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,²³⁴ but is also with Title VII caselaw recognizing that misgendering and/or

²³³ 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>.

²³⁴ 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.²³⁵ 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.²³⁶

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.²³⁷ In addition, 33 percent of Black teen mothers and 54 percent of Latina teen mothers never obtain a diploma or GED,²³⁸ and fewer than 2% of all teen mothers graduate college by age 30 leading to decreased opportunities for continuing education and employment.²³⁹ 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.²⁴⁰ Despite this trend, LGBTQI+ pregnant and parenting students' experiences of intersectional discrimination and their unique needs are largely ignored by educational institutions.²⁴¹

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

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").

²³⁵ 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).

²³⁶ 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; 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-Gender-noncon>.

²³⁷ 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.

²³⁸ *Id.*

²³⁹ 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>.

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

²⁴¹ *Id.*

²⁴² 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.²⁴³ Despite earning higher GPAs than their non-parenting students,²⁴⁴ parenting college students are less likely to graduate.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷

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.²⁴⁸

The Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization*²⁴⁹ 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.²⁵⁰

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ 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>.

²⁴⁶ 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>.

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

²⁴⁸ NWLC Pregnant or Parenting Students Report, *supra* note 12, at 1.

²⁴⁹ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___ (2022).

²⁵⁰ 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.²⁵¹

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.²⁵² 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

²⁵¹ 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>.

²⁵² 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.²⁵³

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.²⁵⁴ Becoming a parent is a primary reason young girls do not complete high school²⁵⁵ and women account for 72 percent of students who are parents of children living in their household.²⁵⁶ 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,²⁵⁷ and only 11.3 percent of young women who are parents are in school.²⁵⁸

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

²⁵³ 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").

²⁵⁴ 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>.

²⁵⁵ NWLC Pregnant or Parenting Students Report, *supra* note 12, at 1.

²⁵⁶ 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>.

²⁵⁷ 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.

²⁵⁸ *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.²⁵⁹ 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.²⁶⁰

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.²⁶¹ 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

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

²⁶⁰ *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>.

²⁶¹ 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.²⁶² 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.

²⁶² 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 workers²⁶³ 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

²⁶³ See *supra* notes 102-107 and accompanying text.

504.²⁶⁴ 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 employees²⁶⁵ 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.²⁶⁶ 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,

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

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

²⁶⁶ 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,²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

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.²⁷⁰ 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

²⁶⁷ 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].

²⁶⁸ 29 U.S.C. 207(r)(1).

²⁶⁹ NYC Lactation Accommodations FAQ at #21.

²⁷⁰ 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.”²⁷¹ 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.²⁷² And they often force transgender, nonbinary, and gender-nonconforming students to conform narrowly to traditional gender norms.²⁷³ In addition, dress and grooming codes are often rooted in Eurocentric standards and treat common Black protective hairstyles—

²⁷¹ 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].

²⁷² *Id.* at 1, 20, 27.

²⁷³ *Id.* at 12, 27.

such as braids, locs, hair wraps, Bantu knots,²⁷⁴ or bandanas²⁷⁵—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.²⁷⁶ 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.²⁷⁷

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.²⁷⁸

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.²⁷⁹ 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.²⁸⁰ 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.²⁸¹ The United States also has more than 130 all-girl or all-boy public schools, including public charter and magnet schools.²⁸² Although recent single-sex programs for Black boys have

²⁷⁴ *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>.

²⁷⁵ 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.

²⁷⁶ 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>.

²⁷⁷ 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>.

²⁷⁸ 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.”

²⁷⁹ NCWGE Report, *supra* note 230, at 44.

²⁸⁰ 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>.

²⁸¹ 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>.

²⁸² *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.²⁸³

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.²⁸⁴

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,”²⁸⁵ 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.

²⁸³ 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>.

²⁸⁴ 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).

²⁸⁵ 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.²⁸⁶ 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

²⁸⁶ 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 student²⁸⁷ 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).

²⁸⁷ 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,
National Women's Law Center



Emily J. Martin
Vice President for Education & Workplace Justice
emartin@nwlc.org



Shiwali Patel
Director of Justice for Student Survivors
spatel@nwlc.org



Elizabeth Tang
Senior Counsel
etang@nwlc.org

/s/ Auden Perino
Auden Perino
Senior Counsel
aperino@nwlc.org

/s/ Cass Mensah
Cass Mensah
Counsel
cmensah@nwlc.org

/s/ Hunter Iannucci
Hunter Iannucci
Fellow
hiannucci@nwlc.org



September 12, 2022

Alejandro Reyes

U.S. Department of Education

400 Maryland Ave. SW, PCP-6125

Washington, DC 20202

Autistic Self Advocacy Network Comments 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

The Autistic Self Advocacy Network (ASAN)¹ appreciates the opportunity to provide recommendations for the U.S. Department of Education's (Department) Notice of Proposed Rulemaking (NPRM)² on proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

ASAN strongly supports the administration's commitment to enforcing Title IX. We particularly support the extension of Title IX's protections to discrimination due to sexual orientation, sex stereotypes, intersex characteristics, pregnancy,³ and gender identity.⁴

The NPRM also does much to rectify the 2020 rule's harmful treatment of sexual harassment.⁵ Specific provisions ensure people with disabilities' access to appropriate auxiliary aids and services.⁶ The NPRM is consistent with President Biden's executive

¹ For more information on ASAN, visit <https://autisticadvocacy.org/>.

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41390 (Jul. 12, 2022) (to be codified at 34 C.F.R. § 106).

³ Pregnancy has been protected by Title IX since 1975, but the Department's regulations on pregnancy have not been updated nor clarified since that time. 87 Fed. Reg. at 41394.

⁴ 87 Fed. Reg. at 41571.

⁵ 87 Fed. Reg. at 41459-513.

⁶ 87 Fed. Reg. at 41466, 41497, 41500, 41509, 41570, 41574.

orders, which advance an ambitious agenda addressing both sex discrimination and racial equity.⁷

The Department's improvements to Title IX's treatment of sexual orientation and gender identity are important to ASAN. Autistic people are much more likely to be LGBTQ than non-autistic people.⁸ We are more likely to have our trans identity dismissed or disbelieved.⁹ We may be denied appropriate access to sex education.¹⁰ We are bullied and harassed for our LGBTQ status more often, and experience a more hostile school climate.¹¹ Autistic people are also *three times* more likely than the general population to experience sexual violence.¹²

While the new NPRM represents a strong step in the right direction, it is not perfect. For example, while the proposed rule does add a definition for "student with a disability," it does not go far enough to address the disproportionate sex-based discrimination and harassment faced by students with disabilities. The disproportionate sexual abuse, violence, harassment and discrimination experienced by children, youth, and young adults with disabilities across all educational settings has been well documented.¹³

ASAN's comments make recommendations to improve the rule's treatment of students with disabilities, students who are LGBTQ, and students who are both.

⁷ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021); Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan 25, 2021) Exec. Order No. 14021 86 Fed. Reg. 13803 (Mar 11, 2021).

⁸ R. George and M.A. Stokual, *Orientation in Autism Spectrum Disorder*, 11 *Autism Research* 1, 133-141 (2018), <https://pubmed.ncbi.nlm.nih.gov/29159906/>; Emily Stembridge, *Children with autism report greater gender diversity: study*, Assoc. Univ. Ctrs. on Disabilities (Aug. 29, 2022), https://www.aucd.org/template/news.cfm?news_id=16118

⁹ This is more likely to happen in a psychiatric context. There is little reason to believe that school counselors and psychologists are different. See Bryony White, *The Link Between Autism and Trans Identity*, *The Atlantic* (Nov. 15, 2016) ("Clarke's therapist, for example, the statement says, 'would not approve his starting on hormones until after his autism spectrum disorder—which she referred to as a 'disease'—was 'cured'").

¹⁰ Autistic Self Advocacy Network & Nat'l Partnership for Women & Families, Access, Autonomy, and Dignity: Comprehensive Sexuality Education for People with Disabilities 4-11 (Sept. 2021), available at <https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-sexed.pdf>.

¹¹ Joseph G. Kosciw, Emily A. Greytak, Adrian D. Zongrone, Caitlin M. Clark, Nhan L. Truong & GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* at 90, 91 (2018), available at <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

¹² Cazalis Fabienne, Reyes Elisabeth, Leduc Séverine, Gourion David, *Evidence That Nine Autistic Women Out of Ten Have Been Victims of Sexual Violence*, 16 *Frontiers in Behavioral Neuroscience* 13-14(2022), <https://www.frontiersin.org/articles/10.3389/fnbeh.2022.852203/full>

¹³ There are also challenges for some students with disabilities whose behaviors related to their disability may be misunderstood and misconstrued as sexually threatening. Consortium for Constituents with Disabilities, CCD Comments at the Title IX Public Hearing (June, 2021), available at https://www.c-c-d.org/fichiers/CCD-Comments-on-Title-IX-hearing-6_11_2021_FINAL.pdf

Recommendations for Complaint Procedures

Accommodations for complaint procedures may be necessary whether a student with a disability is reporting sexual harassment or responding to allegations of sexual harassment against them. ASAN supports the proposed rule's requirement that the Title IX Coordinator(s) work with a student's Individualized Education Plan (IEP) team when a student with a disability is involved in a sex-based discrimination or harassment investigation.¹⁴

We urge the Department to *require* that Title IX Coordinators in colleges consult with its disability services office or office in charge of implementing Section 504 of the Rehabilitation Act of 1973 whenever an involved student has a disability, rather than recommending it. We understand that sometimes a student with a disability has not established a formal relationship with this office.¹⁵ Nonetheless, if the Title IX Coordinator has a reasonable belief that an involved student has a disability, there is little justification for treating postsecondary students differently.

We additionally urge the Department to include, in its provisions at §106.8(e) concerning consultation with the IEP team, a specific requirement that reasonable accommodations be provided.¹⁶ Reasonable accommodations must be a component of any investigation or proceeding involving a person with a disability. These can include general universal design and accessibility principles such as the use of plain language, physically accessible settings, clearly defined informed consent, and trauma-informed practices. There may also be specific access needs and accommodations based on an individual's specific disability. These can include for autistic people but are not limited to: access to ASL translators, captions for virtual hearings, use of Augmentative and Alternative Communication (AAC) devices, the availability of visual aids and Easy Read materials, and/or a Direct Support Professional (DSP).

Live Hearings

ASAN appreciates that the Department has made live hearings with direct cross-examination optional rather than mandatory.¹⁷ Formal hearings may present issues for people with disabilities, sexual harassment and assault survivors, and survivors with disabilities. People with IDD- including autistic people- often have difficulty testifying,¹⁸ and these difficulties are likely to be more prevalent during a sexual harassment investigation. Mandatory live hearings with cross-examination may also cause needless retraumatization.

¹⁴ 87 Fed. Reg. at 41570.

¹⁵ 87 Fed. Reg. at 41430.

¹⁶ 87 Fed. Reg. at 41466, 41497.

¹⁷ 87 Fed. Reg. at 41503.

¹⁸ Joanne Morrison, Jill Bradshaw & Glynis Murphy, *Reported communication challenges for adult witnesses with intellectual disabilities giving evidence in court*, 25 The International J. Evidence & Proof 244, 244-45, 256-58 (2021) (describing the typical communication challenges faced by adults with ID in

Sexual Harassment Investigations

ASAN opposes the Department's proposed rule stating that if any party "does not respond to questions related to their credibility," *all* of that party's statements supporting their position must be discounted.¹⁹ The Department did not explain which questions relate "to credibility," meaning that the rule could be applied to any question.²⁰ A school could, therefore, exclude all the statements of a sexual assault victim because they refused to answer a single question.

ASAN recommends that the Department remove this exclusionary rule from the NPRM. We are particularly concerned in light of the difficulties people with IDD, including autistic people, have giving testimony.²¹ These difficulties are likely to be more frequent during the high-stress context of a sexual harassment investigation - even during an informal investigation. ASAN emphasizes its recommendation that the Department require schools to provide any reasonable accommodations necessary for people with IDD to participate fully, including extra time to answer questions or a particular way of answering questions if necessary.

Supportive Measures

We appreciate the proposed rule's requirement that supportive measures be provided to all people who report that they have experienced sexual harassment, even if their complaint is ultimately dismissed.²² We strongly support the requirement that the Title IX Coordinator, when providing supportive services, is required to consult with a student with a disability's IEP team in public school.²³

Sex-Segregated Programs or Activities

ASAN supports the proposed rule's clarification that preventing a student from participating in an education program or activity consistent with their gender identity violates Title IX.²⁴ Specifically, any sex-based exclusion that causes the specific person

the United Kingdom, but applicable elsewhere); Katie Maras, Dermot M. Bowler, *Eyewitness Testimony in Autism Spectrum Disorder: A Review*, 44 J. Autism & Developmental Disorders 2682, 2682-697 (2014) (describing both the memory difficulties that characterize autistic people and how this impacts our testimony in a literature review).

¹⁹ 87 Fed. Reg. at 41578.

²⁰ 87 Fed. Reg. at 41503, 509 (describing the Department's reasoning for including this provision).

²¹ *Supra* note 17.

²² 87 Fed. Reg. at 41422.

²³ 87 Fed. Reg. at 41574.

²⁴ 87 Fed. Reg. at 41534-537.

more than *de minimis* harm violates Title IX.²⁵ However, the Department should clarify that the *de minimis* harm standard applies to all sex-separated programs and activities such as bathrooms, locker rooms, housing, and other programs and activities.

In most situations, Title IX requires treatment in sex-specific facilities consistent with the person's gender identity. The Department's definition of "sex" is not dependent on biological sex, meaning that these standards allow for the participation of transgender students.²⁶ However, in certain situations, it is not clear from the rule what would happen when a transgender student wishes to participate. The rule states both that any treatment inconsistent with gender identity causes more than *de minimis* harm, and that there are specific situations - such as sex-segregated housing - where a school may cause more than *de minimis* harm regardless.²⁷

This lack of clarity may disproportionately impact students with intellectual and developmental disabilities, particularly autistic students, who are more likely to be transgender²⁸ and may have support needs relating to stability in housing, accessibility, and proximity to the school. ASAN therefore urges the Department to clarify its position when it comes to how the *de minimis* harm standard impacts transgender individuals in sex-specific facilities.

Athletics

The Department proposes to issue a separate rule concerning sex-specific athletics, including on whether or not an individual student (including a transgender student) may participate in a particular sex-segregated athletics team.²⁹

ASAN opposes the proposed rule's treatment of athletics separately. State legislatures have specifically targeted LGBTQI+ students over the past few years, with most laws focused on excluding transgender student athletes from participating in athletic activities that match their gender identity.³⁰

The lack of clarity may disproportionately impact students with intellectual and developmental disabilities, particularly autistic students, who are more likely to be transgender. Students with IDD may also have disability specific support needs relating to their athletics participation, such as the need for consistency in the team they participate in. If the Department fails to preempt state or local laws with clarity on athletics in its final rule, an Autistic student may be forced to change teams, or may be

²⁵ *Id.*

²⁶ 87 Fed. Reg. at 41537.

²⁷ 87 Fed. Reg. at 41534-536.

²⁸ Emily Stenbridge, *supra* note 8.

²⁹ 87 Fed. Reg. at 41537-538.

³⁰ Am. Civ. Liberties Union, *Legislation Affecting LGBTQ Rights Across The Country*, ACLU.org (July 1, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

banned from joining a sex-specific team in college that they were involved in in high school, causing needless trauma and disruption.

ASAN therefore urges the Department to clarify that transgender, nonbinary, and intersex students have the right to participate in sports consistent with their gender identity and that bans against transgender and intersex students participating in sex-specific sports teams by state or local laws are forms of impermissible sex-based discrimination.

ASAN recognizes the Department's intent to provide a separate NPRM focused on athletics. We therefore urge the Department not to engage in a completely separate rulemaking and to undergo a simultaneous rulemaking that includes athletics in the final Title IX rule.

Religious Exemption

The previous administration made two changes to the Title IX regulations that allow some schools to use a "religious exemption" as pretext for sex-based discrimination. These so-called "religious exemptions" disproportionately harm women, girls and nonmasculine presenting students; pregnant and parenting students or students who may become pregnant; students seek or need access to abortion or birth control or who require other forms of reproductive health care, LGBTQI+ students, and students with disabilities.

The 2020 regulations allow schools that are not actually "controlled by a religious organization" to claim a religious exemption from Title IX. The 2020 regulations also allow schools to assert a religious exemption *after* they are already under investigation for a Title IX violation by the Department. This can prevent students and employees from receiving prior notice of sex-based discrimination even though Title IX's regulations require a school to notify students, their families, employees, and applicants of the school's anti-sex discrimination policies.

This lack of proper notice may disproportionately impact students with intellectual and developmental disabilities, particularly Autistic students, who are more likely to be transgender, or have other kinds of gender diversity. Additionally, Autistic students may be more likely, due to cognitive aspects of the disability, to be unaware that a school has such a religious exemption.

The proposed rules do not address this problem. ASAN urges the Department to address this issue through proposed Title IX regulations by rescinding the expansion of eligibility for religious exemptions to institutions that are not controlled by a religious organization. Additionally, the Department should require schools to provide notice of any religious exemption claims to the Department while also requiring schools to make any religious exemptions clear in the required nondiscrimination notices provided to students, families, employees, and applicants.

ASAN thanks the Department for the opportunity to provide comments, which will further its development of robust, effective regulations on Title IX. For more information on ASAN's positions on Title IX, please contact Larkin Taylor-Parker at ltaylorparker@autisticadvocacy.org.



Planned Parenthood Federation of America, Inc.

September 12, 2022

VIA ELECTRONIC TRANSMISSION

Secretary Miguel Cardona
Office of the Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

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

**Re: Nondiscrimination on the Basis of Sex in Education Programs or Activities
Receiving Federal Financial Assistance**

Docket Number: ED-2021-OCR-0166; RIN: 1870-AA16

Dear Secretary Cardona and Assistant Secretary Lhamon,

Planned Parenthood Federation of America (Planned Parenthood) submits these comments in response to the proposed rule issued by the U.S. Department of Education (ED or the Department) entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.”¹ As a trusted health care provider, educator, and advocate, Planned Parenthood appreciates the opportunity to provide input on policy proposals that affect the health of the communities we serve especially at a time of extreme hostility towards sexual and reproductive health.

Planned Parenthood is the nation’s leading sexual and reproductive health care provider and advocate, and a trusted nonprofit source of primary and preventive care for people of all genders in communities across the United States. Each year, Planned Parenthood health centers provide affordable birth control, lifesaving cancer screenings, testing and treatment for sexually transmitted infections, and other essential care to 2.4 million patients. Planned Parenthood health centers also provide abortion services and ensure that all people have accurate information about all of their reproductive health care options. One in five women in the United States has visited a Planned Parenthood health center and the majority of those patients have incomes at or below 150% of the federal poverty level.

¹ 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>.

As the nation's largest sex educator and provider of information on healthy relationships, Planned Parenthood is a critical point of access to care for young people and students. Planned Parenthood is also an expert on meeting people where they are, through innovative apps, chat programs, and culturally responsive care for young people, LGBTQI+ patients, and patients of color. Planned Parenthood health centers ensure that people have accurate information about all of their reproductive health care options, and seek to create a safe environment in which all individuals, including students and young people, are able to access the services and information they need to live full and healthy lives. That includes making critical post-sexual assault care available in many health centers across the country. Additionally, through our Planned Parenthood Generation Action program, our Action Fund organizes young people with over 350 campus groups across the country.

Title IX of the Education Amendments of 1972 (Title IX) states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."² Its critical legacy ensures that schools must be equitable in addressing recruitment, admission, financial assistance, sex-based harassment and assault, treatment of pregnant and parenting students, and other key areas that directly impact a student's meaningful access to education. In the 50 years since its passage, Title IX has played a critical role in preventing sex discrimination in educational institutions and protecting equitable access to education.

Since 1972, Title IX has significantly expanded educational opportunities for girls and women. However, much work remains to be done to fully realize Title IX's aims. Sex-based harassment, especially sexual harassment, is widely prevalent in school settings. LGBTQI+ students also face harassment and discrimination, not only from teachers, administrators, and peers,³ but increasingly from state policies.⁴ Pregnant and parenting students face pronounced barriers to education, compounded by discrimination. The recent Supreme Court decision eliminating the constitutional right to abortion has already made seeking health care more challenging for people who are or who can become pregnant because of overly narrow and vague health exceptions, including limiting medications used for a variety of health conditions and reduced access to abortion.⁵ Title IX has significantly further to go to guarantee all students equal educational opportunities free from sex discrimination.

This letter supports the administration's proposal to restore key provisions of the Title IX regulations and advocates for improvements to better meet the moment students are facing nationwide.

² 20 U.S.C. § 1681(a)

³ J. G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, (2020).

⁴ American Civil Liberties Union, *Legislation Affecting LGBTQ Rights Across the Country*, (2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

⁵ Jared Gans. AMA warns 'patient health is at risk' post-Roe, calls for 'clear guidance' on state abortion laws. The Hill. <https://thehill.com/policy/healthcare/3635227-ama-warns-patient-health-is-at-risk-post-roe-calls-for-clear-guidance-on-state-abortion-laws/>

I. Planned Parenthood supports the restoration of a faithful understanding of Title IX's protections for survivors of sexual harassment

Sex-based harassment remains widespread in education

Despite Title IX's protections, sex-based harassment remains a widespread barrier to equality in education. Such harassment takes the form of sexual harassment, sexual assault, dating violence, domestic violence, stalking, and other harassment or discrimination based on sexual orientation, gender identity, sex characteristics, sex stereotypes, and pregnancy or related conditions. The statistics documenting such harassment are staggering—and yet, they do not fully capture the scope of sex-based discrimination, because sex-based harassment is chronically underreported at all levels of education.

- **Experiences with harassment:** During college, 62% of women and 61% of men experience sexual harassment. In grades 7–12, more than half of girls and 40% of boys are sexually harassed in any given school year.⁶
- **Underreporting:** Only 12% of college survivors⁷ report sexual assault to their schools or the police, a number that will only go up if students cannot report unless they go to someone they may not trust.
- **Reliance on schools:** Some students—especially students of color, undocumented students, LGBTQ students, and students with disabilities—are less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation. For these students, schools are often the only avenue for relief.
- **All students:** When survivors come forward, they are often ignored or punished by their schools. Too many survivors end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma. For example, 34% of college survivors drop out of college.⁸
- **Women and girls of color:** Schools are more likely to ignore or punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as “promiscuous.”⁹ Schools are also more likely to punish Black women and girls by labeling them as the “aggressor” when they defend themselves against their harassers or when they respond to trauma because of harmful stereotypes that they are “angry” and “aggressive.”¹⁰

⁶ National Coalition for Women and Girls in Education, Title IX at 40: Ending Sexual Harassment, <https://www.ncwge.org/TitleIX40/Harassment.pdf>

⁷ US Department of Justice, Raising Awareness About Sexual Abuse: Facts and Statistics, <https://www.nsopw.gov/as/education/factsstatistics> (Accessed January 28, 2019).

⁸ Advocates and Survivors of Sexual Assault Urge Secretary DeVos to Withdraw Title IX Rule, Urge Students and Survivors to Make Their Voices Heard | The U.S. Senate Committee on Health, Education, Labor & Pensions, About | The U.S. Senate Committee on Health, Education, Labor & Pensions (2018), <https://www.help.senate.gov/ranking/newsroom/press/murray-hassan-advocates-and-survivors-of-sexual-assault-urge-e-secretary-devos-to-withdraw-title-ix-rule-urge-students-and-survivors-to-make-their-voices-heard> (last visited Jan 24, 2019).

⁹ Tanya Serisier, *Sex Crimes and the Media*, Oxf. Res. Encycl. Criminol. Crim. Justice (2017), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-118>.

¹⁰ Why Race Stereotypes Hurt Sexual Assault Survivors. Sexual Trauma Services. <https://www.stsm.org/blogs/stsm/why-race-stereotypes-hurt-sexual-assault-survivors> (2017).

- **Pregnant or parenting students:** Schools are more likely to ignore or punish pregnant or parenting students who report sexual harassment due to harmful stereotypes that label them as “promiscuous.”¹¹ 56% of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.¹²
- **LGBTQI+ students:** Schools are more likely to ignore or punish LGBTQI+ students who report sexual harassment due to harmful stereotypes that they are “promiscuous” or draw “attention” to themselves.¹³ Nearly 1 in 4 transgender and gender-nonconforming students are sexually assaulted during college.¹⁴
- **Students with disabilities:** Schools are more likely to ignore or punish students with disabilities who report sexual harassment due to harmful stereotypes that they are “asexual” and due to the fact that they can have greater difficulty describing the harassment they experience.¹⁵ Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.¹⁶

The Trump administration’s Title IX rule gutted protections for survivors

Since its inception in 1972, the Department of Education has issued multiple guidance documents clarifying Title IX obligations. The Trump administration rescinded many of them that focused on sexual assault and harassment, replacing them instead with a 2020 regulation that required schools to ignore many reports and to apply unfair, burdensome procedures for sexual harassment investigations that did not apply to any other type of school investigation of student or staff misconduct.¹⁷

The Trump administration’s narrowing of the definition of sexual harassment led to drastic drops in complaints reported to and investigated by Title IX offices. For example, the University of Michigan reported that their number of Title IX complaints dropped from more than 1,300 in 2019 to 56 in 2021.¹⁸ At the University of Nevada, Las Vegas, 204 Title IX complaints were filed in 2019, compared to 12 in 2021, and the number of cases that met the criteria for formal investigations fell from 27 to zero in the same period.¹⁹ There is no indication the drastic drop in Title IX complaints and investigations was due to a decrease in the occurrence of these incidents, but rather, appear to be the direct result of the Trump-era rule, which limited the

¹¹ Preventing and Responding to Sexual Assault in Schools. Pitt.edu.

<https://tristate.pitt.edu/wordpress/wp-content/uploads/2018/10/Preventing-and-Responding-to-Sexual-Harassment.pdf>

¹² Preventing and Responding to Sexual Assault in Schools. Pitt.edu.

<https://tristate.pitt.edu/wordpress/wp-content/uploads/2018/10/Preventing-and-Responding-to-Sexual-Harassment.pdf>

¹³ Id.

¹⁴ End Rape on Campus. Prevalence Rates: Trans, Gender Non Conforming, Non Binary Survivors.

<http://endrapeoncampus.org/tngb/>

¹⁵ Id.

¹⁶ World Health Organization. Violence Against Adults and Children with Disabilities.

<https://www.who.int/disabilities/violence/en/>

¹⁷ National Women’s Law Center, DeVos’s New Title IX Sexual Harassment Rule, Explained (May 12, 2020),

<https://nwlc.org/resource/devos-new-title-ix-sexual-harassment-rule-explained>.

¹⁸ Hollingsworth, Heather. “Campus Sex Assault Rules Fall Short, Prompting Overhaul Call.” Associated Press, 16 June 2022,

<https://apnews.com/article/politics-sports-donald-trump-education-5ae8d4c03863cf98072e810c5de37048>.

¹⁹ Hollingsworth, Heather. “Campus Sex Assault Rules Fall Short, Prompting Overhaul Call.” Associated Press, 16 June 2022,

<https://apnews.com/article/politics-sports-donald-trump-education-5ae8d4c03863cf98072e810c5de37048>.

definition of sexual harassment and debilitated the process for proper reporting and accountability.

The Department's proposed rule is a promising step to restoring protections for survivors

We are encouraged that the Department's proposed rule seeks to return to the original intent of the Title IX statute with regards to protections against sex-based harassment. Specifically, we support:

- Defining sex-based harassment to include sexual harassment and other harassment on the basis of sex (including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity) when this harassment takes the form of “quid pro quo harassment,” “hostile environment harassment,” sexual assault, dating violence, domestic violence, or stalking.²⁰
- Requiring schools to respond to all sex-based harassment (or other sex discrimination) “occurring under [their] education program or activity,” which includes conduct that a school has disciplinary control over or that occurs in a building owned or controlled by an officially recognized student organization at a college or university.²¹
- Removing the 2020 rules' mandatory dismissal provisions, which, among other things, currently require schools to dismiss Title IX complaints of sexual harassment by individuals who were not participating in or attempting to participate in a school program or activity at the time they filed their complaint.²²
- Requiring schools to take “prompt and effective action” to end sex-based harassment (or other sex discrimination), prevent it from recurring, and remedy its effects on all people harmed.²³
- Requiring schools to offer supportive measures at no cost to individuals who report sex-based harassment (or other sex discrimination), regardless of whether they request an investigation or an informal resolution,²⁴ and even if their complaint is dismissed.²⁵
- Prohibiting any school or person from retaliating against anyone because they reported sex-based harassment (or other sex discrimination) or participated or refused to participate in an investigation or informal resolution of such incidents.²⁶

In addition, we recommend:

- Expanding the list of examples of supportive measures available for students and employees to continue to maintain their participation in educational activities and stay physically and mentally safe.
- Changing the provision that allows schools to designate certain employees as “confidential employees” who can guide students from an option to a requirement.

²⁰ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2), 41571 (proposed 34 C.F.R. § 106.10).

²¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).

²² 34 C.F.R. § 106.30(a) (defining “formal complaint”); 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2). While the 2020 rules make an exception if an individual filing a complaint was an applicant who intended to enroll in the school, and for an alumnus who intended to stay involved in alumni programs, this mandatory dismissal provision still currently leaves scores of individuals without protections under Title IX in the wake of sex-based harassment.

²³ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

²⁴ 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.44(g)).

²⁵ 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)).

²⁶ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2 (“retaliation”).

- Removing the provision from the 2020 regulation that requires schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption.²⁷ This presumption and its notice 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.

II. The administration must expand protections for pregnant and parenting students and employees in light of the loss of the constitutional right to abortion

The Department of Education released the proposed rule the day before the U.S. Supreme Court revoked the constitutional right to abortion. At the time of writing, 16 states have banned abortion. Strengthened protections for pregnant and parenting people in education programs and activities are critical because, as a result of the fall of *Roe v. Wade*, more students and employees will likely be pregnant or parenting due to being unable to access an abortion. Strengthened protections are also needed for students and school employees who have abortions. Students or school employees in states that have banned abortion will need (1) accommodations to be able to access out-of-state abortions and (2) protections to ensure privacy regarding potential harassment based on pregnancy or related conditions. In light of this health care crisis, it is vital that the Department incorporate additional protections for students and employees in the final Title IX regulations.

A robust definition of pregnancy or related conditions is needed to protect pregnant students and employees and those seeking an abortion

We strongly support that the Department explicitly defines “pregnancy or related conditions” in the proposed rule to include:

1. Pregnancy, childbirth, termination of pregnancy, or lactation;
2. Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
3. Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.²⁸

A robust definition of pregnancy or related conditions is especially important in a post-*Roe* era. First, as a result of states banning abortion, students and employees who would have otherwise received an abortion may now be forced to carry a pregnancy while participating in educational activities or be forced to seek abortion care out of state, if possible. Strong protections against discrimination on the basis of pregnancy or related conditions is vital to protect this group, whose numbers are expected to grow as abortion steadily becomes less accessible nationwide. Second, enrolled students or employees who work at schools in states that have banned

²⁷ 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(3), 106.46(c)(2)(i)). See also 34 C.F.R. §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B).

²⁸ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”).

abortion may now be at higher risk of discrimination than those in states that allow the provision of abortion.

Relatedly, it is important to include explicit privacy protections to ensure that students are not put at greater risk of investigation or legal liability. The proposed rule would require employees who know of a student's pregnancy or related condition to give them the Title IX coordinator's contact information and would require the Title IX coordinator to notify the student of their rights.

²⁹ While we support students being informed of their rights while pregnant, we are concerned that this requirement could pose risks to students who have an abortion or have a miscarriage. We urge the Department to clarify in the final rule that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy, or suspected termination of pregnancy. We also ask the Department to issue supplemental guidance on how to protect student privacy (e.g., school records and health records) and clarify that schools may not use documentation of a referral of a pregnant student to the Title IX coordinator in referral to law enforcement.

We ask the Department to clarify in the final rule that the definition of pregnancy or related conditions is not exhaustive and we support the Department's proposed addition of lactation as a pregnancy related condition.

The inclusion of nondiscrimination protections for perceived and expected pregnancy will better protect students and employees

The proposed rule prohibit schools from discriminating against any "person" (including students and employees) based on "current, potential, or past" pregnancy or related conditions.³⁰ We suggest that the Department include "perceived" and "expected" to this list.

Supplemental guidance on reporting requirements to protect the privacy and safety of pregnant students and employees is needed.

Pregnant students and employees may be at risk of criminalization if they seek an abortion or have a miscarriage).

Stronger protections are needed for parenting students

The proposed rule, like the current rules, would not include discrimination based solely on parental, family, or marital status as a type of sex discrimination.³¹ Rather, schools would be prohibited from adopting a policy, practice, or procedure for students, employees, or applicants concerning their current, potential, or past parental, family, or marital status—but only if the school does so in a way that "treats persons differently on the basis of sex."³²

This means that, for example, school administrators could discriminate against parenting students (versus non-parenting students), as long as they do so equally across genders.

²⁹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(2)).

³⁰ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(ii), 106.40(b)(1)), 41579 (proposed 34 C.F.R. § 106.57(b)).

³¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

³² 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(i), 106.40(a), 41579 (proposed 34 C.F.R. § 106.57(a)(1))).

However, we know that discrimination against parenting students is likely to have a disparate impact on mothers and birthing people and is often based on sex stereotypes. Therefore, the proposed rule is not sufficient to protect mothers and birthing people. The proposed rule could also create scenarios where school staff refrain from supporting mothers and birthing people, because they are concerned that they are not similarly accommodating fathers and non-birthing people and would be in violation of Title IX. We urge the Department to state that schools may not discriminate based on a person's "current, potential, perceived, expected, or past parental, family, marital, or caregiver status."

Absences

We support that the rule requires schools to allow students who are pregnant or who have a related condition to take a voluntary leave of absence for as long as deemed medically necessary by their health care provider (or, if longer, the school's leave policy), and after the student returns, requires the school to reinstate them to their prior academic and extracurricular status.³³ This policy helps accommodate students who, for example, take a leave of absence to recover after childbirth.

The proposed rule does not go far enough, however, to accommodate students who require time away from school to have an abortion or recover from an abortion. Such an intermittent absence would be considered a "reasonable modification" under the proposed rule and, unlike the above described leave of absence, would be approved or denied at the discretion of the Title IX coordinator.³⁴

Differentiating between medical care that qualifies for a voluntary leave of absence versus a reasonable modification is unnecessary and has harmful effects. We urge the Department to make medically necessary absences available to all students who are pregnant or have a related condition, and explicitly include any necessary travel time. As states continue to ban abortion, students will have to travel increasing distances to access abortion. It is vital that schools accommodate the lengths that students will have to take to access needed medical care.

Planned Parenthood Generation Action Network is a network of young organizers and activists across the country who organize events on their campuses and in their communities to mobilize advocates for reproductive freedom. In January 2021 the Planned Parenthood Generation Network, a group of over 100,000 volunteer student activists fighting to make their communities safer and healthier, held a meeting about the impending abortion access crisis. Over 70 student leaders from across the 300 associated campuses met to discuss issues impacting student's access to abortion. These leaders named attendance policies a key obstacle in accessing abortion care. It is critical that the Department listen to student activists and make medically necessary absences available to all students who are pregnant or have a related condition.

Accommodations

The proposed rule would require schools to "promptly" make "voluntary and reasonable

³³ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).

³⁴ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)(i), (iii)).

modifications”³⁵ 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.³⁶ Such an accommodation could include a student requesting an extension of time for coursework or rescheduling of examinations to accommodate an intermittent absence for an abortion appointment. The “essential nature” qualifier is too vague and could be used to deny such a request. We urge the final rule to state that if a student requests a certain modification and it is “reasonably available,” then the school must provide it.

III. Planned Parenthood supports the proposed protections for LGBTQI+ students

The proposed rule importantly codifies that sex discrimination encompasses anti-LGBTQI+ discrimination

We strongly support that the proposed rule clearly names anti-LGBTQI+ discrimination as sex discrimination. We applaud the Department for including nondiscrimination protections on the basis of sex stereotypes, sex characteristics (including intersex traits), sexual orientation, and gender identity.³⁷ This is a critical step to protect LGBTQI+ students in the face of increasing pervasive anti-LGBTQI+ violence and anti-LGBTQI+ state legislation,³⁸ and necessary to implement the Supreme Court’s decision in *Bostock v. Clayton County*.³⁹

Supplemental guidance on reporting requirements to protect the privacy and safety of students is needed for LGBTQI+ students and employees.

LGBTQI+ students and employees may not wish to be outed to their parents or the school.

A Title IX athletics rule is urgently needed to protect trans and intersex women and girls in sports

We urge the Department to quickly release a Title IX athletics rule that would ensure all students, including transgender, non-binary, and intersex students, can participate fully and equally in school sports. This is especially critical as LGBTQI+ students face pervasive discrimination in school, including sexual and verbal harassment, violence, and excessive discipline by faculty. Compounding this is the barrage of vicious legislative attacks on LGBTQI+ students by state lawmakers across the country, including through recently passed state laws that ban transgender, non-binary, and intersex students from participating in sports.

Any such rule must affirm transgender, non-binary, and intersex students’ rights under Title IX to participate in sports consistent with their gender identity and clarify that state sports bans against transgender, intersex, and non-binary students constitute impermissible sex-based discrimination. We urge that the Department finalize a Title IX athletics rule no later than the beginning of 2023.

³⁵ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

³⁶ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

³⁷ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

³⁸ American Civil Liberties Union, *supra* note 4.

³⁹ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020)

IV. The proposed rule fails to remove Trump-era religious exemptions that disproportionately impact

The Trump administration's Title IX rules allowed 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. The 2020 rules expanded religious exemptions in the following ways:

- Although the Title IX statute allows religious exemptions for schools that are "controlled by a religious organization,"⁴⁰ the 2020 regulations allow schools that are not actually controlled by a religious organization to claim a religious exemption from Title IX if, for example, they are a divinity school, they require students to follow certain religious practices, or their mission statement refers to religious beliefs.⁴¹
- The 2020 regulations enable schools to assert a religious exemption *after* they are already under investigation by the Department for violating Title IX.⁴² This means students and employees are not entitled to any prior notice of a school's intent to discriminate based on sex despite the Title IX regulations requiring schools to notify students, their families, employees, and applicants of schools' anti-sex discrimination policies.⁴³

It is vital that the Department remove these expanded religious exemptions in the final rule to adequately protect students from sex-based discrimination.

* * * * *

Thank you for your consideration of our recommendations. If you have any questions, please contact Katrina Kinsolving, Public Policy Manager, at katrina.kinsolving@ppfa.org.

Respectfully,



Laurel Sakai
National Director of Public Policy and Government Affairs
Planned Parenthood Federation of America
1110 Vermont Avenue NW, Suite 300
Washington, DC 20005

⁴⁰ 20 U.S.C. § 1681(a)(3).

⁴¹ 34 C.F.R. § 106.12(c).

⁴² 34 C.F.R. § 106.12(b).

⁴³ 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).



Officers
Chair
Judith L. Lichtman
National Partnership for
Women and Families
Vice Chairs
Derrick Johnson
NAACP
Thomas A. Saenz
Mexican American Legal
Defense and Educational Fund
Secretary
Fatima Goss Graves
National Women's Law Center
Treasurer
Lee A. Saunders
American Federation of State,
County and Municipal Employees

Board of Directors
Gloria L. Blackwell
AAUW
Ray Curry
International Union, UAW
Jocelyn Frye
National Partnership for
Women and Families
Jonathan Greenblatt
Anti-Defamation League
Mary Kay Henry
Service Employees International Union
Damon Hewitt
Lawyers' Committee for
Civil Rights Under Law
Janai Nelson
NAACP Legal Defense and
Educational Fund, Inc.
David H. Inoue
Japanese American Citizens League
Benjamin Jealous
People for the American Way
Virginia Kase Solomon
League of Women Voters of the
United States
Samer E. Khalaf
American-Arab
Anti-Discrimination Committee
Joni Madison
Human Rights Campaign
Marc Morial
National Urban League
Janet Murguia
UnidosUS
Christian F. Nunes
National Organization for Women
Rabbi Jonah Pesner
Religious Action Center
of Reform Judaism
Rebecca Pringle
National Education Association
Lisa Rice
National Fair Housing Alliance
Anthony Romero
American Civil Liberties Union
Liz Shuler
AFL-CIO
Fawn Sharp
National Congress of American Indians
Maria Town
American Association of
People with Disabilities
Randi Weingarten
American Federation of Teachers
John C. Yang
Asian Americans Advancing Justice |
AAJC

President and CEO
Maya Wiley

September 12, 2022

Alejandro Reyes
US Department of Education
400 Maryland Ave. SW,
PCP-6125
Washington, DC 20202

RE: Docket ID ED-2021-OCR-0166

Dear Mr. Reyes:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 230 national organizations to promote and protect the civil and human rights of all persons in the United States, and the 43 undersigned organizations, we write in response to the Department of Education's notice of proposed rulemaking published in the Federal Register on July 12, 2022 to amend the regulations implementing Title IX of the Education Amendments of 1972. We urge the department to ensure an educational environment free from discrimination on the basis of sex (including sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics, or pregnancy and related conditions). We are writing to urge the department to effectuate Title IX's broad purpose by restoring and strengthening protections against sex-based harassment (including sexual harassment), develop robust protections against retaliation, ensure fair disciplinary procedures, clarify and strengthen the role of Title IX coordinators, and ensure appropriate implementation of Title IX's religious exemption.

We appreciate President Biden's 2021 executive order affirming the administration's commitment to enforcing Title IX's protections against all forms of sex discrimination,¹ and the department's subsequent efforts to update the Title IX rule. President Biden's executive orders on racial equity and underserved communities, implementing the landmark *Bostock* ruling, and advancing gender equity and equality collectively called for an "ambitious whole-of-government equity agenda," including through enforcing Title IX's protections for all students "to the fullest extent permissible under law."² The executive orders also called

¹ Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity). Federal Register 86. Mar 11, 2021. 13803. <http://federalregister.gov/d/2021-05200>.

² Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government). Federal Register 86(14). Jan 25, 2021. <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government> ; Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). Federal Register 86(14). Jan 25, 2021. <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf> ; Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination

September 12, 2022
Page 2 of 18



for including LGBTQ+* students in the department's efforts to eliminate sex discrimination, consistent with the requirements of Title IX and the *Bostock* ruling. As a civil rights agency responsible for protecting students from discrimination on the basis of race, color, national origin (including language status), sex (including sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics, or pregnancy and related conditions), disability, and age, the department must restore and strengthen civil rights protections under Title IX to make schools safer for all students and vigorously enforce Title IX requirements that the department has relied on for decades. Under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Age Discrimination Act of 1975, the department is responsible for enforcing these laws in response to complaints of discrimination and through proactive compliance reviews, data collection, and technical assistance. The department has an obligation to ensure that all students have equal educational opportunities.

The civil and human rights community provides the following recommendations to restore and strengthen Title IX to ensure an educational environment free from discrimination, protect against sex-based harassment (including sexual harassment), protect against retaliation, ensure fair disciplinary procedures, clarify and strengthen the role of Title IX coordinators, and ensure appropriate implementation of Title IX's religious exemption.

Ensure an Educational Environment Free From All Forms of Sex Discrimination

The department must make clear that under Title IX, schools are required to provide all students an educational environment that is free from all forms of sex discrimination, including discrimination based on sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics (including intersex traits), and pregnancy and related conditions.

Sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes

We support the department recognizing that prohibitions on sex discrimination necessarily include prohibitions on discrimination based on sexual orientation and gender identity. Compared to LGBTQ students who did not experience LGBTQ-related discrimination at school, those who experienced such discrimination at school are almost three times as likely to have missed school in the past month because they felt unsafe or uncomfortable, report lower grade point averages, lower self-esteem, higher levels of depression, and higher rates of school discipline that are indicative of anti-LGBTQ policies that, intentionally or unintentionally, make it effectively "against the rules" to be themselves.³ Research on adolescent health suggests that the harm of bias-motivated harassment and bullying is especially severe in

on the Basis of Sex, Including Sexual Orientation or Gender Identity). Federal Register 86(46). Mar 11, 2021.
<https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

* We use the term "LGBTQI+" throughout this comment to be inclusive of intersex people, unless referring to a specific document or study. In such instances, we use the terminology that is used in the referred source. For example, President Biden's executive orders refer to the "LGBTQ+" community; as such, we used the same term in this sentence.

³ Kosciw, J.G., Clark, C.M., Truong, N.L., & Zongrone, A.D. *The 2019 National School Climate Survey*. 2020.
<https://www.glsen.org/research/2019-national-school-climate-survey>.

September 12, 2022
Page 3 of 18



its effects on student well-being and success.⁴ Anti-LGBTQ harassment is associated with a range of adverse educational outcomes on LGBTQ students, including increased absences, lowered grade point averages, and a decreased likelihood of pursuing post-secondary education.⁵ Anti-LGBTQ discrimination, including harassment and assault, is also associated with lower self-esteem and higher levels of depression,⁶ and The Trevor Project's 2022 national survey found that 45 percent of LGBTQ youth seriously considered attempting suicide in the past year, including more than half (53 percent) of transgender and nonbinary youth.⁷ Students who hold multiple marginalized identities experience starker and often unique disparities. LGBTQ youth who are Asian American or Pacific Islander (AAPI), Black, Latino, or Native and Indigenous experience both race-based and anti-LGBTQ discrimination, and they were most likely to skip school due to feeling unsafe, report the lowest levels of school belonging, and experience the highest levels of depression compared to those who experience one or neither form of marginalization.⁸

In addition to verbal and physical harassment, violence, and excessive discipline, LGBTQI+ students experience intentional misgendering and misnaming, refusal to update names and gender markers on records and school systems, denial of access to single-sex spaces and activities, and penalties under dress and grooming codes for failure to conform to sex stereotypes. All forms of such discrimination both deleteriously impact LGBTQI+ students' well-being and academic success and violate their rights under Title IX.

LGBTQI+ youth of color and LGBTQI+ youth with disabilities may be more likely to be disciplined for reporting discrimination given racial disparities and other disparities in disciplinary action: Black, Native American/Alaska Native, Latino, Arab American/Middle Eastern/North African, and multiracial LGBTQ youth experience more school disciplinary action than white LGBTQ youth,⁹ and LGBTQ youth with

⁴ Russell, S.T., Sinclair, K.O., Poteat, V.P., & Koenig, B.W. "Adolescent health and harassment based on discriminatory bias." *American Journal of Public Health*, 102(3): 493–495. 2012. 493-495. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3487669/>; Birkett, M., Newcomb, M.E., & Mustanski, B. "Does it get better? A longitudinal analysis of psychological distress and victimization in lesbian, gay, bisexual, transgender, and questioning youth." *Journal of Adolescent Health*, 56(3). 2015. 280–285. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4339410/>.

⁵ Kosciw, J.G., et al. *The 2019 National School Climate Survey*. 2020.

⁶ Ibid.

⁷ The Trevor Project. *2022 National Survey on LGBTQ Youth Mental Health*. 2022. <https://www.thetrevorproject.org/survey-2022/>.

⁸ Truong, N.L., Zongrone, A.D., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Asian American and Pacific Islander LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-AAPI-2020.pdf>; Truong, N.L., Zongrone, A.D., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Black LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-ResilienceBlack-2020.pdf>; Zongrone, A.D., Truong, N.L., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Latinx LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-ResilienceLatinx-2020.pdf>; Zongrone, A.D., Truong, N.L., & Kosciw, J.G. *Erasure and resilience: The experiences of LGBTQ students of color, Native and Indigenous LGBTQ youth in U.S. Schools*. 2020. <https://www.glsen.org/sites/default/files/2020-06/Erasure-andResilience-Native-2020.pdf>.

⁹ Kosciw, J.G., et al. *The 2019 National School Climate Survey*. 2020.

September 12, 2022
Page 4 of 18



disabilities are more likely to experience disciplinary action than LGBTQ youth without disabilities and more likely to be referred to law enforcement as a result.¹⁰

President Biden's executive orders clearly demand the inclusion of LGBTQ students in the department's efforts to eliminate sex discrimination, consistent with the requirements of Title IX, the *Bostock* ruling, and other relevant case law.¹¹ We therefore appreciate that the department proposes to create a new section (§106.10 in the proposed regulations) that clarifies the scope of Title IX to define "on the basis of sex" to include all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. We also support the following changes and recommend that the department preserves them in the final rule:

- Specification of investigation requirements for all forms of sex-based discrimination, including discrimination based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes.
- Application of harassment protections to all forms of sex-based harassment, including harassment based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes.
- Requirement of schools to monitor sex-based discrimination.
- Requirement of schools to publish a nondiscrimination policy and notify students, families, educators, and other school staff of the policy at least annually.

However, we urge the department to require that the forms of sex-based discrimination expressly prohibited under Title IX in proposed §106.10 be fully enumerated in the nondiscrimination policy and required annual notifications thereof.

We further urge the department to use plain language to communicate that preventing a student from accessing or participating in separate gender classes, restrooms, locker rooms, dress or appearance codes, school housing, and overnight accommodations for school trips consistent with their gender identity constitutes prohibited discrimination based on sex. Transgender and nonbinary students commonly face barriers to accessing separate gender programs, activities, and school facilities and recent state actions have exacerbated, encouraged, and even mandated such discrimination. For example, two states have enacted laws barring transgender students from using the bathroom and locker room consistent with their gender identity and others have recently considered legislating discrimination in this area.¹²

Additionally, we were disappointed that the proposed rules were silent on the issue of misgendering and deadnaming transgender and nonbinary students. As explained above, intentional misgendering and/or

¹⁰ Palmer, N.A., Greytak, E.A., Kosciw, J.G. *Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth*. 2016. https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.

¹¹ Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). ; Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity).

¹² Alabama (H.B. 322, 2022) and Oklahoma (S.B. 615, 2022) have enacted anti-trans school bathroom laws. Arizona (H.B.2314, 2022), South Dakota (H.B. 1005, 2002), and West Virginia (H.B. 3199, 2021) recently considered similar bills.

September 12, 2022
Page 5 of 18



deadnaming are common forms of sex-based harassment experienced by transgender and nonbinary students. In a 2019 survey of LGBTQ students, 45 percent of transgender students and 36 percent of nonbinary students reported that they were prevented from using their chosen name and pronouns.¹³ Misgendering and deadnaming of transgender and nonbinary students denies them a safe and supportive learning environment; we therefore urge the department to make explicit in the final rule that the persistent, intentional misuse of a name, personal pronouns, or a gendered title constitutes a form of impermissible sex-based discrimination that can create a hostile environment under Title IX.¹⁴

We are also disappointed that the proposed changes do not address participation in athletics. Furthermore, the language the department uses to explain this decision could be misinterpreted as potentially permitting a categorical ban on the participation of transgender students on separate gender sports teams consistent with their gender identity. State lawmakers have been increasingly emboldened in their violent attacks against LGBTQI+ students. Twenty-nine states as of July 1, 2022 have introduced bills that exclude transgender youth from athletics.¹⁵ Eighteen states have enacted such laws, and many others impose discriminatory barriers to participation in school sports consistent with a student's gender identity.¹⁶ The department must ensure that all students, including transgender, nonbinary, and intersex students, can enjoy the benefits of sports. We urge the department to move forward with urgency on a concurrent rulemaking related to athletics so that a single, consolidated final rule may be published in early 2023. Title IX athletics regulations should include the following:

- Clarification that transgender, nonbinary, and intersex students have rights under Title IX to participate in sports consistent with their gender identity.
- Clarification that state sports bans against transgender, intersex, and non-binary students constitute impermissible sex-based discrimination.
- Clarification that sports bans encourage dangerous and unscientific sex verification practices, which especially harm intersex youth and Black and Brown girls.
- Clarification that Title IX preempts any state law or policy that categorically bans transgender, nonbinary, and intersex students from playing sports or their ability to play sports consistent with their gender identity.

¹³ GLSEN. *Improving School Climate for Transgender and Nonbinary Youth*. 2021.

https://www.glsen.org/sites/default/files/2021-11/GLSEN_Trans%26Nonbinary_ResearchBrief.pdf.

¹⁴ Title VII caselaw indicates that mocking or ridiculing a transgender or nonbinary person by intentionally misgendering or deadnaming can create a hostile environment in violation of Title VII. See *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020) (citing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (applying *Bostock*, the court held that, “in addition to being misgendered,” an employer deadnaming a transgender woman “was sufficiently severe or pervasive to support her [hostile work environment] claim.”).

¹⁵ ACLU. “Legislation Affecting LGBTQ Rights Across The Country.” *ACLU.org*. July 1, 2022.

<https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

¹⁶ GLSEN and TransAthlete.com (2022). Navigator: Trans and Nonbinary Athletic Inclusion Policies.

<https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

September 12, 2022
Page 6 of 18



With these changes, the department must make it undeniably clear to states that sports bans on the basis of gender identity is a violation of civil rights law, and that there are consequences to such bans, including the loss of federal funding.

Pregnancy and related conditions

We support the department's efforts to ensure that students will not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the basis of current, past, or potential pregnancy or any conditions related to pregnancy. These include pregnancy, childbirth, termination of pregnancy, lactation, recovery from any of these conditions, and any medical condition related to these conditions.

It is important to remove the barriers that make it difficult for pregnant and parenting students to complete their education. Among teens ages 15 to 19, 2.2 percent give birth to a child.¹⁷ Nearly a third of girls who do not complete high school report that becoming pregnant was a primary factor in their decision to leave school.¹⁸ Only half of teenage mothers earn a high school diploma by age 22, compared with 89 percent of girls who do not have a child during their teenage years.¹⁹ One-third of young mothers never obtain a diploma or GED,²⁰ and fewer than 2 percent of teenage mothers graduate from college by age 30.²¹ Systemic barriers and lack of inclusive policies can lead to student parents having lower levels of college enrollment and completion, higher levels of unmet financial need, and higher levels of debt upon graduation.²² However, research shows that parenting college students can thrive when given the support they need to succeed. For example, 22 percent of college students are parents, 44 percent of student parents work full time while enrolled, and 23 percent of student parents are single parents and working full time while enrolled.²³ Despite these additional responsibilities, parenting college students tend to have higher grade point averages than their non-parenting peers.²⁴

These inequities are the result of institutional barriers and a preventable lack of support for pregnant or parenting students that Title IX must amend. Under current regulations, schools can push out pregnant or parenting students if they miss classes for medical appointments, medical recovery, caretaking responsibilities, or to pump breast milk — thus punishing students for the school's actions to deny

¹⁷ 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. <https://www.cdc.gov/nchs/data/databriefs/db259.pdf>.

¹⁸ Perper, K., Peterson, K., & Manlove, J. *Diploma Attainment Among Teen Mothers*. *Child Trends*. Jan 2010. <https://www.childtrends.org/publications/diplomaattainment-among-teen-mothers>. See also: Tang, E., et al. *Title IX At 50*. June 2022. <https://nwlc.org/wp-content/uploads/2022/06/NCWGE-Title-IX-At-50-6.2.22-vF.pdf>.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Costello, C.B. "Pathways to postsecondary education for pregnant and parenting teens." *Institute for Women's Policy Research*. 2017. <https://files.eric.ed.gov/fulltext/ED556724.pdf>.

²² Pillow, W.S. *Unfit Subjects: Educational Policy & the Teen Mother*. 2004 ; Perper, K., et al. *Diploma Attainment Among Teen Mothers*.

²³ U.S. Government Accountability Office. *Higher Education: More Information Could Help Student Parents Access Additional Federal Student Aid*. Aug 2019. <https://www.gao.gov/assets/gao-19-522.pdf>.

²⁴ Institute for Women's Policy Research. *Parents in College: By the Numbers*. Apr. 2019. <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers>.

September 12, 2022
Page 7 of 18



pregnant or parenting students accommodations.²⁵ We appreciate that the proposed regulations include further protections against discrimination based on “current, potential, or past” pregnancy or related conditions, including termination of pregnancy, childbirth, lactation, or recovery from any of these conditions, and we urge the department to preserve them in the final rule. These changes include:

- Requiring schools to provide students with the option of reasonable modifications to policies, practices, or procedures due to pregnancy or related conditions; to allow voluntary leaves of absence beyond the medically necessary minimum; and to ensure access to a private and sanitary lactation space that is not a bathroom.
- Clarifying that any leave of absence must be voluntary.
- Prohibiting schools from requiring students who are pregnant or have a related condition to provide certification from a healthcare provider about their ability to participate in an educational activity, unless all students must provide such certification.
- Describing specific actions that the Title IX coordinator must take to prevent discrimination upon learning that a student is pregnant or experiencing related conditions. These actions include informing the student of the school’s obligation to prevent sex discrimination, and maintaining grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination.

However, we oppose the department’s proposals that restrict certain rights for pregnant and parenting students and employees, and we urge you to do the following instead:

- Require schools to grant modifications to students and employees who are pregnant or have a related condition if the modification is requested by the individual and is “reasonably available.” The proposed rules do not adequately protect students and employees: They would allow schools to deny a pregnant student’s requested modification if it is deemed to “alter the essential nature” of the school’s program, which is too broad and vague of a standard.²⁶ And the proposed rules would only require schools to grant a pregnant employee’s requested modification if a similar modification is available to employees with temporary disabilities, which improperly makes pregnant employees’ Title IX rights contingent upon other civil rights laws.
- Prohibit discrimination based *solely* on parental, family, or marital status. The proposed rule would not prohibit schools from making a rule based on parental, family, or marital status unless the rule “treats persons differently based on sex.”²⁷ Schools would therefore believe that they could discriminate against parenting students, as long as they do so equally across genders, or that they are barred from offering accommodations to young mothers simply because they do not offer similar accommodations to young fathers and other non-birthing parents.

In addition, we ask the department to strengthen protections for pregnant and parenting students:

²⁵ Tang, E., et al. *Title IX At 50*.

²⁶ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

²⁷ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.21(c)(2)(i), 106.40(a), 41579 (proposed 34 C.F.R. § 106.57(a)(1)).

September 12, 2022
Page 8 of 18



- Prohibit discrimination based on “perceived” or “expected” pregnancy or related conditions, as well as parental, family, marital, or “caregiver” status.
- Prohibit schools from requiring students who are pregnant or have a related condition to participate separately, given that many of these students are pushed by their schools into inferior alternative programs.
- Make medically necessary “absences” available to pregnant and parenting students. The proposed rule would only require schools to grant “leaves of absence” that are medically necessary (e.g., for recovery from pregnancy) but not shorter absences or breaks that are medically necessary (e.g., for lactation breaks, abortion, or recovery therefrom) — which could be approved or denied subject to a Title IX coordinator’s discretion.²⁸
- Clarify that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy.
- Instruct schools on how to protect student privacy to ensure that, in states where abortion is criminalized, school records, including school health records, are not used to prosecute students who have been documented as being pregnant in the past but are not currently pregnant.

Restore and Strengthen Protections Against Sex-based Harassment, Including Sexual Harassment

Sexual harassment of students is widely prevalent in K-12 schools and higher education, but most students do not report it to their schools. One in five girls ages 14 to 18 have been kissed or touched without their consent,²⁹ 58 percent of LGBTQ youth ages 13 to 21 are sexually harassed,³⁰ and children with disabilities are 2.9 times more likely than their peers to be sexually assaulted.³¹ In college, one in four women; one in 15 men; and one in four transgender, nonbinary, and gender-nonconforming students are sexually assaulted during their time as undergraduates.³² College students with disabilities are also more likely to experience sexual assault, as evidenced by a 2018 study where 31.6 percent of undergraduate women with disabilities reported nonconsensual sexual contact involving physical force or incapacitation, compared to 18.4 percent of undergraduate women without a disability.³³ This means that one of every three undergraduate women with a disability had been sexually assaulted during their time at college. Students with disabilities, however, are less likely to be believed when they report and often have greater difficulty describing the harassment they experience.³⁴ CDC data also suggest that LGBTQI+

²⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)(i), (iii)).

²⁹ National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence*. 2017. <https://nwl.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>.

³⁰ Kosciw, J.G., et al. *The 2019 National School Climate Survey*.

³¹ National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls With Disabilities*. 2017. <https://nwl.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

³² Association of American Universities. *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*. Oct. 15, 2019. <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

³³ National Council on Disability. *Not on the Radar: Sexual Assault of College Students with Disabilities*. Jan 2018. <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

³⁴ National Institute of Justice. “The Many Challenges Facing Sexual Assault Survivors With Disabilities.” *National Institute of Justice*. July 2017. <https://nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>; National Council on Disability. *Mental Health on College Campuses: Investments, Accommodations Needed to Address Student Needs*. July 21, 2017. https://www.ncd.gov/sites/default/files/NCD_Mental_Health_Report_508.pdf.

September 12, 2022
Page 9 of 18



people experience elevated rates of sexual violence across their lifespan, including in K-12 and post-secondary educational settings.³⁵

However, few students report these incidents to their schools, often because of shame, fear of retaliation, fear of being ignored or disciplined, and/or fear of police or immigration officials. For instance, only 2 percent of girls ages 14 to 18³⁶ and only 12 percent of college women³⁷ who are sexually assaulted report the incident to their schools. The 2019 National School Climate Survey also found that a majority of LGBTQ students who faced harassment or assault did not report it, most commonly because they feared it would not help.³⁸ When student survivors do come forward, they are often ignored or punished by their schools instead of receiving support.³⁹ This is especially common for women and girls of color (particularly Black women and girls), LGBTQI+ students, pregnant and parenting students, and disabled students due to stereotypes that label them as more “promiscuous,” less credible, and/or less deserving of protection. When schools fail to protect survivors, they suffer in the form of lower grades, lost scholarships, and lost degrees. One in three college survivors end up dropping out altogether.⁴⁰

The Trump administration’s Title IX rule in 2020 aimed to silence sexual assault survivors and deny them educational opportunities, and it has allowed schools to do even less to prevent and respond to sexual violence and harassment.⁴¹ Under the current rule, schools are currently required to ignore many reports of sexual harassment because of the overly restrictive definition of sexual harassment. The 2020 rule requires complainants to show that the harassment they experienced was so “severe, pervasive, and objectively offensive” that it “effectively *denies*” a complainant access to a school program or activity,⁴² where the previous longstanding definition only required a showing that the harassment was “severe or pervasive” that it “effectively denies or *limits*” a complainant from accessing a school program or activity.⁴³ The 2020 rules also require that schools use uniquely burdensome procedures for sexual

³⁵ Chen, J., Walters, M.L., Gilbert, L.K., & Patel, N. “Sexual Violence, Stalking, and Intimate Partner Violence by Sexual Orientation, United States.” *Psychol. Violence*, 10(1). 2020. 110–119. <https://pubmed.ncbi.nlm.nih.gov/32064141/>; Johns, M.M., et al. “Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017.” *MMWR Morb. Mortal Wkly. Rep.*, 68. 2019. 67–71. <https://pubmed.ncbi.nlm.nih.gov/30677012/>; Kann L., et al. “Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12 — United States and Selected Sites, 2015.” *MMWR Surveill. Summ.*, 65(SS-9). 2016. 1–202. <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf>.

³⁶ National Women’s Law Center. *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence*.

³⁷ Association of American Universities. *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*.

³⁸ Kosciw, J.G., et al. *The 2019 National School Climate Survey*.

³⁹ Nesbitt, S., & Carson, S. “The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout.” *Know Your IX*. 2021. <https://www.knowyourix.org/thecostofreporting>.

⁴⁰ Mengo, C., & Black, B.M. “Violence Victimization on a College Campus: Impact on GPA and School Dropout.” *Journal of College Student Retention Research Theory and Practice*, 18(2). 2015. 234–244. <https://doi.org/10.1177/1521025115584750>.

⁴¹ See: Civil and Human Rights Community Joint Comment on Title IX NPRM. Jan 2019. <https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm/>.

⁴² 34 C.F.R. § 106.30(a) (defining “sexual harassment”).

⁴³ See, e.g., Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed.

September 12, 2022
Page 10 of 18



harassment that are not required for any other type of student or staff misconduct, including tilting the process in favor of harassers by requiring schools to presume⁴⁴ that the harassment did not occur.⁴⁵

This rule has reinforced unsafe school environments, made it harder for survivors to report abuse,⁴⁶ deprived students of their right to an education, and denied students equal protection of the law. When the Trump rule was proposed, nearly 125,000 members of the public spoke out through public comments, with the overwhelming majority registering their strong opposition. Nonetheless, the Trump administration finalized its dangerous rule, which has been challenged in multiple lawsuits filed on behalf of individual student survivors, a student organization, survivor advocacy organizations, and 18 states and the District of Columbia.⁴⁷ Students deserve, and the law requires, a department that works to protect all students from discrimination.

The proposed rules do much to restore and strengthen protections for survivors of sexual harassment and violence and ensure fair and equitable processes for all students, employees, and members of campus communities. We support the following changes and recommend that they are retained in the final rule:

- The definition of sexual harassment (proposed §106.2) that includes “quid pro quo” harassment and sexual assault, dating violence, and domestic violence, and aligns “hostile environment” harassment to be consistent with the Title IX standard that existed prior to the 2020 rule. The proposed rule would require that students show that harassment is “sufficiently severe *or* pervasive” both “objectively and subjectively” such that it “denies or *limits* a person’s ability to participate in or benefit from...the education program or activity” (italics added for emphasis). These changes will require schools to respond to all forms of sex-based harassment and help more students affected by sex-based harassment get support, compared to the current 2020 standards that are overly restrictive and force students to endure repeated and escalating levels of abuse before their complaints can be investigated.
- The requirement that schools respond to sex-based hostile environment under its education program or activity, regardless of where sex-based harassment contributing to the hostile environment occurred, including off campus or abroad (proposed §106.11).

Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

⁴⁴ 34 C.F.R. §§ 106.45(b)(1)(iv), (b)(2)(i)(B).

⁴⁵ The Trump Title IX rule included dating violence, domestic violence, and stalking in its definition of “sexual harassment.” 34 C.F.R. § 106.30(a). The Trump rule also purports to allow schools to address sexual harassment that must be dismissed under Title IX using a “non-Title IX” school policy instead. See: 34 C.F.R. § 106.45(b)(3)(i) ; Federal Register 85. May 19, 2020. 30283, 30289, 30037-38. Still, the mandatory dismissal of certain Title IX sexual harassment complaints distorts the purpose and effect of Title IX. The statute does not grant schools authority to address sexual harassment—an authority that schools inherently possess—but rather requires them to do so in certain circumstances. The mandatory dismissal rule also promotes confusion. And as a practical matter, it creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct is challenged by either party.

⁴⁶ The 2020 rules’ unprecedented narrowing of the definition of “sexual harassment” has been especially harmful to students with disabilities by making it harder to report sexual misconduct, as many of these students already experience challenges that make communicating their victimization difficult. Moreover, this compounds the already high risk of sexual misconduct that students with disabilities face.

⁴⁷ Young, E. *The 2020 Title IX Regulations and the Lawsuits Against Them: An Analysis and Comparison*. 2020. <https://feminist.org/wp-content/uploads/2020/08/Title-IX-Lawsuits-Article-1.pdf>.

September 12, 2022
Page 11 of 18



- The inclusion of complaints by those other than students or employees who were participating or attempting to participate in an education program or activity at the time they experienced sex-based harassment (proposed §106.2).
- The requirement for schools to offer supportive measures to individuals who report sex-based harassment (or other sex discrimination), such as changes to the respondent’s schedule or a “one-way no-contact order” against a respondent — regardless of whether the individual requests an investigation or an informal resolution, and even if their complaint is dismissed (proposed §§ 106.2, 106.44(g)-(g)(1), 106.45(d)(4)(i)).
- The removal of the current provision that prevents schools from complying with a state or local law that conflicts with the Title IX regulations and provides greater protections against sex discrimination, including harassment (§ 106.6(h)).

The proposed changes regarding sex-based harassment will protect students better than current regulations by expanding the scope for what counts as sex-based harassment. Furthermore, we urge the department to go further to strengthen protections against sex-based harassment (and other sex discrimination):

- Require (rather than simply allow) schools to designate some employees as “confidential employees,” who are not obligated to report possible sex-based harassment (or other sex discrimination) to the Title IX coordinator but must offer confidential support to the reporting individual, including telling them how to contact the Title IX coordinator (proposed § 106.2 (“confidential employee”), 106.44(d)).
- Clarify that when a school chooses to dismiss a complaint because the respondent has left the school, it must take “steps” (proposed § 106.44(f)(6), 106.45(d)(4)(iii)) that include determining whether there were other victims and whether school staff knew about the incident(s) but ignored it, or took steps to cover it up.
- Clarify that if a party requests a certain supportive measure and it is “reasonably available,” then the school must provide it (proposed § 106.2 (“supportive measures”); and that if the school is aware that the supportive measure offered are ineffective, then the school must modify it or offer additional supportive measures.⁴⁸

Develop Robust Protections Against Retaliation

Title IX prohibits retaliation against those who complain of sex discrimination, in addition to ensuring that schools respond effectively to sex-based harassment (including sexual harassment), including by having “prompt and equitable” grievance procedures.⁴⁹ Unfortunately, we know too well how student survivors who summon the courage to report — especially survivors of color, survivors with disabilities,

⁴⁸ *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

⁴⁹ 34 C.F.R. § 106.71 (2021); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action.”).

September 12, 2022
Page 12 of 18



LGBTQI+ survivors, and pregnant or parenting survivors — are often punished when they turn to their schools for help. Students of color, LGBTQI+ students, students with disabilities, and pregnant and parenting students, who face additional discrimination also based on these identities, are most likely to be retaliated against after reporting sexual harassment. Some are disciplined for physically defending themselves against their harassers, acting out in age-appropriate ways in response to trauma, violating nondisclosure agreements imposed by the school by talking to friends about their harassment, and missing school to avoid seeing their harasser.⁵⁰ Others are punished for sexual contact on school grounds, based on administrators' conclusions that the contact was "consensual," premarital, or that the accusations of assault were false — meaning these students are punished for their own sexual assaults.⁵¹ Student survivors in college have also increasingly faced retaliation from their assailants, who seek to weaponize school disciplinary proceedings by filing baseless cross-complaints in an effort to silence and punish victims.⁵²

The changes that the Trump administration made to the Title IX rule in 2020 utterly failed to create safe and supportive school environments. For example, the 2020 rule allows schools to discipline student survivors for making a "materially false statement in bad faith" without it being considered retaliation under Title IX, as long as the decision to discipline is not based solely on the outcome of an investigation. The threat of discipline if a school determines an accusation is "false" deters many student survivors from coming forward to ask for help or initiate an investigation. Like other changes to the rule, this change also especially harms women and girls of color (particularly Black girls who already face disproportionate, discriminatory discipline),⁵³ pregnant and parenting student survivors, LGBTQI+ student survivors, and student survivors with disabilities who are harassed because they are more likely to have their trauma minimized, be disbelieved, and be blamed due to rape myths and stereotypes that label them as more promiscuous, aggressive, and/or less credible. Even before the 2020 rule, student survivors were being discouraged from reporting in the first place, met with unfair skepticism, blamed, and wrongly disciplined. The current regulations only make it harder for people like them to come forward, and it denies them fair treatment under a system that is supposed to protect them. Title IX has long been

⁵⁰ National Women's Law Center. *100 School Districts: A Call to Action for School Districts Across the Country to Address Sexual Harassment Through Inclusive Policies and Practices*. 2021. <https://nwlc.org/wp-content/uploads/2021/04/100SD-report-5.3.21-vF.pdf>; Cauterucci, C. "BYU's Honor Code Sometimes Punishes Survivors Who Report Their Rapes." *Slate*. Apr 15, 2016. <https://slate.com/human-interest/2016/04/byu-s-honor-code-sometimes-punishes-survivors-who-report-their-rapes.html>.

⁵¹ See: *S.M. v. Sealy Ind. Sch. Dist.*, No. CV H-20-705, 2021 WL 1599388, at *2-*3 (S.D. Tex. Apr. 23, 2021); National Women's Law Center. *100 School Districts*.; Entin, B. "Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom." *WSVN-TV*. Feb 8, 2018. <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Caplan-Bricker, N. "My School Punished Me." *Slate*. Sept 19, 2016. <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Stahl, A. "'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.

⁵² Nesbitt, S., & Carson, S. "The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout."

⁵³ See: Kingkade, T. "Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It." *The 74 Million*. 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/>; Kingkade, T. "NYC Schools Suspended Sexual Assault Victims Because They're Black: Attorney." *The Huffington Post*. Jun 13, 2016. https://www.huffpost.com/entry/nyc-schools-sexual-assault-victims_n_575ebf51e4b00f97fba8d405.

September 12, 2022
Page 13 of 18



understood to require a wide range of supportive measures to protect complainants from retaliation,⁵⁴ and the department must make clear that complainants are entitled to a wide range of supportive measures, remedies, and protections against retaliation.

We support the department's proposals to strengthen protections against retaliation:

- Prohibiting schools from disciplining someone for non-harassing conduct that “arises out of the same facts and circumstances” as the reported incident (e.g., alcohol or drug use, self-defense) (proposed § 106.71(a)).
- 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 (proposed § 106.45(h)(5)).
- Requiring schools to offer supportive measures to individuals who report retaliation and, if requested, to investigate complaints of retaliation (proposed § 106.71(a)).

And we urge the department to go further by clarifying in the regulations that retaliation includes:

- Disciplining a complainant for conduct that the school knows or should know “results from” the harassment or other discrimination (e.g., missing school, expressing trauma, telling others about being harassed).
- Disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g., a respondent who has been disciplined for sexual assault or dating violence files a counter-complaint against their victim alleging the victim was the actual harasser).
- Requiring a complainant to leave an education program (e.g., to take leave, transfer, enroll in “alternative school”) after reporting sex-based harassment (or other sex discrimination).
- Requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, an informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations.⁵⁵

Ensure Fair Disciplinary Procedures

As the department's guidance has long made clear, schools must investigate allegations of sexual harassment using disciplinary procedures that are fair to all parties. For example, combined sex and race stereotypes lead school educators and administrators to “adultify” Black girls, seeing them as more

⁵⁴ See: U.S. Department of Education. “Questions and Answers on Title IX and Sexual Violence.” (Rescinded.) Apr 29, 2014. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Department of Education. “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.” (Rescinded.) Jan 2001. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁵⁵ 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>.

September 12, 2022
Page 14 of 18



promiscuous and less deserving of protection and care than their peers.⁵⁶ These stereotypes cause schools to view the sexual harassment reports of Black girls and other girls of color as less serious and to ignore, blame, or punish them instead of launching an investigation. Similarly, schools are less likely to believe LGBTQI+ student survivors due to reliance on stereotypes that they are “hypersexual,” “deviant,” or bring the “attention” upon themselves.⁵⁷ These biases fuel discriminatory responses to reports of harassment or assault and unjust disciplinary practices. For example, a national survey of LGBTQ youth found that 7.3 percent were disciplined after reporting their own victimization to school staff.⁵⁸ Black and Indigenous LGBTQ youth were almost twice as likely to report experiencing out-of-school disciplinary action (suspension or expulsion), compared to their white LGBTQ peers.⁵⁹ When LGBTQ student survivors don’t report being harassed or assaulted — and most don’t because they doubt an effective response — they may nonetheless be disciplined for it.⁶⁰ Student survivors with disabilities also face challenges when reporting sexual harassment based on schools’ reliance on stereotypes that students with disabilities are less credible⁶¹ and because they may have difficulty describing or communicating about the harassment they experienced, especially if they have a developmental or cognitive disability.⁶²

Most fundamentally, and contrary to the claims of the previous administration, there is no conflict between protecting student survivors' educational opportunities and ensuring fair disciplinary procedures. There was simply no reason for the department to provide special protections to people accused of sexual harassment that are unavailable to others who face similar sanctions for analogous forms of misconduct. Furthermore, such exceptional treatment of sexual allegations is both rooted in and reinforces exactly the sort of sex stereotyping Title IX forbids.

We support many of the department’s proposed changes to the Title IX grievance procedures and urge you to go further:

- Provide further guidance as to how institutions of higher education can conduct questioning while minimizing reliance on cross-examination and live hearings (e.g., having a decision-maker ask

⁵⁶ Georgetown Law Center on Poverty and Inequality. *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*. 2017. <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>; McClellan, C. *Our Girls, Our Future: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*. 2018. https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf; Smith-Evans, L., & George, J. *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity*. 2014. https://www.naacpldf.org/wp-content/uploads/Unlocking-Opportunity-for-African-American_Girls_0_Education.pdf.

⁵⁷ See: Chadwick, G.R. “Reorienting the Rules of Evidence.” *Cardozo Law Review*, 39(6). 2018. <http://cardozolawreview.com/heterosexism-rules-evidence>; Dorwart, L. “The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women.” *Medium*. Dec 3, 2017. <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexualassault-against-bisexual-women-95fe76c3330a>.

⁵⁸ Kosciw, J.G., et al. *The 2019 National School Climate Survey*.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ Davis, L.A. *People with Intellectual Disabilities and Sexual Violence*. *The Arc*. Mar 2011. <https://www.thearc.org/document.doc?id=3657>.

⁶² Browne, A., Agha, A., Demyan, A., & Beatriz, E. “Examining Criminal Justice Responses To and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities.” *U.S. Department of Justice*. 2016. <https://www.ojp.gov/pdffiles1/nij/grants/250196.pdf>.

September 12, 2022
Page 15 of 18



questions of parties and witnesses in individual meetings, including questions submitted by the other party).

- Ensure that students in K-12 schools are afforded the same appeal rights that the department would grant to students at institutions of higher education (proposed § 106.46(i)).

However, we oppose the department’s proposals that would create unfair grievance procedures and urge you to do the following instead:

- Require the preponderance standard in all Title IX investigations, as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation,⁶³ and it is the same standard used by courts in all civil rights and other civil proceedings.⁶⁴ Alternatively, at a minimum, clarify that “comparable” investigations include investigations of non-sexual physical assault, so that schools do not use the clear and convincing evidence standard to investigate *sexual* assault and other sex, race, and disability discrimination while using the preponderance standard to investigate non-sexual *physical* assault.
- Remove the requirement for schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption (proposed §§ 106.45(b)(3), 106.46(c)(2)(i)). This 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.
- Remove the proposed exclusionary rule, which would require that, if a party or witness at an institution of higher education does not respond to a question “related to their credibility,” the school would have to ignore any statement they make that “supports their position” (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.

Clarify and Strengthen the Role of Title IX Coordinators

We agree that the new Title IX regulation should clarify the role of Title IX coordinators in all recipient organizations responsible for implementing Title IX. The new Section 106.8(a)(2) under “Delegation to designee” proposes that the Title IX coordinator may assign one or more designees to carry out some of the recipient’s responsibilities, but one Title IX coordinator must retain ultimate oversight over those responsibilities. We agree with the department’s reason that this is an effective way for a recipient that enrolls large numbers of students, employs large numbers of employees, provides services in multiple locations, or engages in a large variety of activities to carry out the various Title IX responsibilities. We also encourage the department to affirm that elementary and secondary schools ideally should have their

⁶³ 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>.

⁶⁴ 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>.

September 12, 2022
Page 16 of 18



own Title IX coordinators and to encourage the appointment of such school-level coordinators. The school district Title IX coordinator could still provide leadership, training, and coordination to the individual P-12 school level Title IX coordinators. We recognize this provides a way for the school district Title IX coordinator to identify trends among the recipients and coordinate training responsive to the trends identified and to efficiently monitor and address barriers.

These and other changes indicate the need to reissue Title IX coordinator guidance (which was rescinded in 2020) to clarify responsibilities reflecting the final Title IX regulations after a full review and consideration of the NPRM comments. This guidance can clarify that the Title IX coordinator does not need to be assigned full time Title IX coordinator responsibilities.

Ensure Appropriate Implementation of Title IX's Religious Exemption

In order to enforce Title IX's broad mandate to prevent sex-based discrimination in education, we urge the department to reconsider the two 2020 rules that made it easier for schools to discriminate in the name of religion. Prior to the 2020 rules, to claim a religious exemption to Title IX, the department required that a school be "controlled by" a religious organization; the 2020 rules greatly expanded this already broad requirement, expanding the ability of schools to claim an exemption to Title IX even if they were not "controlled by" a religious organization.⁶⁵ In addition, the 2020 rules explicitly assured schools that they would not have to submit advance notice to the department of their intent to discriminate. This change assured schools that they may opt out of Title IX's requirements at any time, including during an Office for Civil Rights (OCR) investigation, and without notice or warning to the department, students, their families, or the public of their intent to rely on the religious exemption in advance of discriminating against them.⁶⁶ This rule allows schools to conceal their intent to discriminate against students, exposing them to harm — especially women and girls, LGBTQI+ students, pregnant or parenting students (including those who are unmarried), and students who access or attempt to access birth control or abortion services.⁶⁷ By allowing schools to claim exemptions during investigations, schools may use religion as a pretext for their unlawful discrimination.

Many LGBTQI+ people are people of faith, and many seek out a religiously affiliated education.⁶⁸ All denominations and traditions have internally varied views on gender and sexuality, so knowing a school's faith tradition is not adequate notice of a school's intention to discriminate. A notice that the institution intends to engage in a practice that would, but for the conflict with a specific tenet of a religious faith, be otherwise unlawful is essential both as a moral and practical matter for students making decisions about their futures, and as a legal matter to ensure consistency with the requirement that all students, applicants, and employees receive notice of a school's Title IX obligations and policies.⁶⁹ The department can and

⁶⁵ 34 C.F.R. § 106.12(c).

⁶⁶ 34 C.F.R. § 106.12(b) ; National Women's Law Center. *DeVos's New Title IX Sexual Harassment Rule, Explained*. May 2020. <https://nwlc.org/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.28.20-v3.pdf>

⁶⁷ Green, E. "'Transgender' Could Be Defined Out of Existence Under Trump Administration." *The New York Times*. Oct 21, 2018. <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

⁶⁸ Conron, K.J., Goldberg, S.K., & O'Neill, K. "Religiosity Among LGBT Adults." *UCLA School of Law Williams Institute*. Oct 2020. <https://williamsinstitute.law.ucla.edu/publications/lgbt-religiosity-us/>.

⁶⁹ 34 C.F.R. § 106.8.

September 12, 2022
Page 17 of 18



should require advance notice as an independent procedural requirement. This notice requirement imposes negligible burdens compared with the potential for fundamentally unfair surprises and harms to students who may be disciplined, expelled, or denied a degree on the basis of sex. Moreover, allowing schools to not disclose their religious exemption is inconsistent with the Title IX rule that requires recipients to provide notice of its nondiscrimination policies.⁷⁰ So too is the addition of sweeping criteria that significantly broadened the “controlled by” a religious institution requirement inconsistent with the text and OCR’s longstanding enforcement of Title IX. Thus, consistent with the purpose of Title IX, the department must give the exemption a narrow interpretation in order to effectuate Title IX’s remedial purpose.⁷¹

By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the department created a system that enables schools to actively mislead students. Women, LGBTQI+ students, married or unmarried pregnant and parenting students, and students who access or attempt to access birth control or abortion services could be subject to discrimination or expulsion from school without any notice, thereby affecting their ability to make an informed decision about where to go to school and ensure that they choose a college that will treat them fairly. Students should not have to avoid attending religious colleges and universities simply because of a lack of transparency regarding the institution’s intentions to protect their civil rights under Title IX.

Students deserve — and the law requires — that the U.S. Department of Education fulfills its responsibility to protect the civil rights of all students to safeguard equal educational opportunities. Ensuring that all our students are safe and welcomed in schools is incredibly important to our organizations, our partners, and the communities we represent. The administration must make clear that the fundamental American values of fairness and equality will not be abandoned and that schools will provide all students an educational environment free from sex discrimination and violence. If you have any questions, please reach out to Anna Byon (they/them), higher education senior program manager at The Leadership Conference on Civil and Human Rights, at byon@civilrights.org.

Sincerely,

National Organizations:

The Leadership Conference on Civil and Human Rights

The Leadership Conference Education Fund

American Association of University Women

American Atheists

American Humanist Association

Asian Americans Advancing Justice | AAJC

⁷⁰ 34 C.F.R. § 106.8(b).

⁷¹ National Women’s Law Center. *Re: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program (RIN 1840-AD45)*. Feb 18, 2020. <https://nwlc.org/wp-content/uploads/2020/03/NWLC-Comment-on-ED-FBO-and-Religious-Exemption-Rule.pdf>.

September 12, 2022
Page 18 of 18

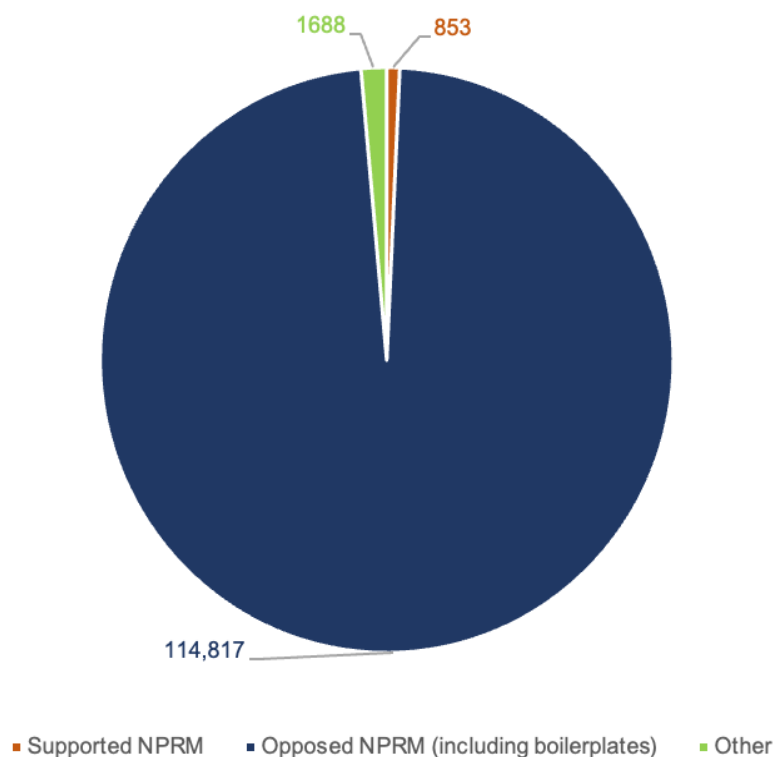


Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Learner Equity
Clearinghouse on Women's Issues
Committee for Children
Council of Parent Attorneys and Advocates (COPAA)
Disability Rights Education & Defense Fund
Equal Justice Society
Family Equality
Feminist Majority Foundation
Girls Inc.
GLSEN
Hispanic Federation
Japanese American Citizens League
Lawyers' Committee for Civil Rights Under Law
NAACP Legal Defense and Educational Fund, Inc. (LDF)
National Action Network Washington Bureau
National Center for Learning Disabilities
National Council of Asian Pacific Americans (NCAPA)
National Council of Jewish Women
National Disability Rights Network (NDRN)
National Employment Lawyers Association
National Women's Law Center
OCA-Asian Pacific American Advocates
Secular Coalition for America
Sojourners
SOSSI- Saving Our Sons & Sisters International
Southeast Asia Resource Action Center
Speak Up! Special Education Advocacy
The Advocacy Institute
The Education Trust
Union for Reform Judaism
Women of Reform Judaism

State & Local Organizations:

Agency for Humanity
Education Law Center-PA
Michigan Alliance for Special Education
Michigan Developmental Disabilities Council
The Parents' Place of MD
Wyman

OVERWHELMING OPPOSITION: THE AMERICAN PUBLIC’S VIEWS ON THE DeVOS TITLE IX RULEMAKING OF 2018-2020



By Thomas Dircks, Lindsey LaForest, Timothy O’Shea,
Alice Park, Brittany Van Ryder, & Nancy Chi Cantalupo

EXECUTIVE SUMMARY

On November 29, 2018, then Secretary of Education Betsy DeVos and the U.S. Department of Education (“ED”) published a notice of proposed rulemaking (“NPRM”) regarding Title IX of the Education Amendment of 1972, 20 U.S.C. §§1681 *et seq.* (“Title IX”), particularly ED enforcement regarding sexual harassment and gender-based violence (“SH-GBV”). This report will discuss data collected by a crowd-research project in which hundreds of volunteers read and collected information from 117,358 of the 124,000+ comments filed in response to the NPRM into a “Big Comment Catalog” (“Catalog”). First, the report reviews the number and percentage of comments that supported or opposed the NPRM’s proposals, including by identified subgroup and topic. It then analyzes the themes of the comments filed, first the common concerns of the less than one percent of commenters who supported the NPRM and next of the more than 99 percent who opposed it. The Catalog is available as Appendix B here: https://docs.google.com/spreadsheets/d/14BqFvmExd5NgokLVU_keo0OGSD4lwdSKSWKXEZBDZjo/edit?usp=sharing.

Of the 117,358 cataloged, organized, and examined by the research team (see the Methodology section for an explanation of why the Catalog does not include all 124,000+ comments that ED says were filed in the proceeding), 115,670 comments took a definitive position on the proposals. Of those comments that took a definitive position, more than 99 percent (n: 114,817) opposed the proposed rules while less than one percent (n: 853) supported them.

The predominant theme in the 853 supporters’ comments was the belief that ED’s Title IX enforcement methods for SH-GBV should imitate the criminal law. These comments favored the NPRM for correcting what supporters alleged were biased procedures that had been tolerated by ED in the past and approved of the NPRM’s requirements for live hearings with cross-examination, a heightened evidentiary standard, and protection of the accused’s—but not the victim’s—“due process” rights.

In part due to how many more commenters opposed the NPRM than supported it, the list of objections was also significantly longer. First, opposers objected to the NPRM’s narrowed scope of Title IX protections, including those limiting the types of SH-GBV that would qualify as violating Title IX, reducing the number and type of employees obligated under Title IX to assist a victim-survivor, and decreasing the obligations on funding recipients to address reports in an efficient manner. Of particular concern to opposers were the NPRM’s narrowed definitions for various terms, as well as the elimination of Title IX protections with regard to online harassment and off-campus SH-GBV. Second, those who opposed the NPRM addressed the potential harm to survivors, educational institutions, and students’ rights caused by the NPRM’s criminal law-imitative requirements for internal investigations, disciplinary systems, and a higher standard of evidence. Third, opposers objected to the NPRM’s adoption of broad religious exemptions from Title IX and for its disparate impacts on student populations already vulnerable to discrimination, including K-12 students and students who face intersectional discrimination.

This report’s authors thank the many volunteers who participated in this project over the last three years (see the Methodology section and Appendix A for a list of volunteers). Without their efforts, the Catalog and this report would not have been possible.

I. INTRODUCTION

This proposed rule could not come at a worse time, as instances of sexual harassment and assault are rising in our elementary and secondary schools, and institutions of higher education.

- Congresswomen Madeleine Dean and Ilhan Omar¹

Title IX of the Education Amendment of 1972, 20 U.S.C. §§1681 *et seq.* (“Title IX”), and its implementing regulations, 34 C.F.R. part 106, prohibit discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. The Office for Civil Rights (“OCR”) in the U.S. Department of Education (“ED”) enforces Title IX and provides guidance to these entities regarding their obligations under Title IX. On November 29, 2018, under the leadership of Secretary of Education Betsy DeVos, ED published in the Federal Register a notice of proposed rulemaking (“NPRM”) to amend the Title IX regulations, with a focus on OCR’s enforcement of Title IX with regard to sexual harassment and gender-based violence (“SH-GBV”). The NPRM established a 60-day comment period from November 29, 2018, through January 28, 2019, later extended for two days, until January 30, 2019,² due to technical difficulties resulting from the 35-day federal government shutdown in December 2018 and January 2019. By the time the comment period had closed, DeVos’ ED had received 124,000+ comments filed by the public in response to the NPRM, which were made available on regulations.gov.

In June 2019, after it appeared that the DeVos ED had uploaded all of the 124,000+ comments to regulations.gov, an interdisciplinary research team launched the “crowd-research” project that this report details. Over the next three years, approximately 500 volunteers read and cataloged as many of the comments as the research team could access (over 117,000). Once the catalog was complete, the members of the research team who authored this report organized, examined, and wrote this account of the data aggregated by the catalog.

The catalog indisputably demonstrates that the majority of the comments filed in response to the DeVos NPRM *overwhelmingly opposed* the proposed regulations in the NPRM. Of the 117,358 comments cataloged, 115,670 of the commenters definitively took a position in opposition or in support of the proposed rule. Of those 115,670 comments, 114,817 commenters opposed the proposed rules. Less than one percent—only 853 comments—supported the NPRM’s proposals. However, tens of thousands of commenters expressed more than simply their opposition or support of the NPRM’s proposed regulations. This report thus reviews, in addition to which comments supported and opposed the DeVos NPRM, the particular topics and provisions of the NPRM that were at the forefront of commenters’ minds.

The remainder of this report will discuss this crowd-research project’s methodology and the authors’ analysis of the data gathered by what the research team nicknamed “the Big Comment Catalog” (“Catalog”). First, this report will review the number and percentage of comments that either supported or opposed the NPRM’s proposals, including by identified subgroup and topic. It will then analyze the themes of the comments filed, beginning with a review of the common concerns expressed

¹ Congresswoman Madeleine Dean, Comment [ED-2018-OCR-0064-11537](#) (Jan. 29, 2019); and Congresswoman Ilhan Omar, Comment [ED-2018-OCR-0064-11606](#) (Jan. 29, 2019).

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (Nov. 29, 2018).

by the 853 NPRM supporters, and moving next to the themes in the opposers' comments. The Catalog itself is available as Appendix B.³

II. METHODOLOGY

The first step in the Big Comment Catalog project's crowd-research effort was to gather into a organized and sortable database several common categories of information about each comment filed. Volunteers willing to read and catalog comments were asked to go to a google site where they could use a series of google forms to: (1) sign up to catalog a certain number of comments, the regulations.gov urls for which the research team would email to them, then (2) answer a series of questions about each comment. As each comment was cataloged, the information was sent into a google spreadsheet that organized the common categories of information for all of the comments into columns. Over the next two and a half years, approximately 500 volunteers, as well as six law student Research Assistants,⁴ would "hand-catalog" at least 35,741 comments.

Within approximately two months of the project's launch, volunteers started telling the research team that they were getting the same comment over and over again, just with different commenters' names attached. The research team determined that these were "boilerplate" comments: comments in which a group of commenters all use the same or highly similar text to express their opinion on the DeVos NPRM to the agency. Concerned that the tediousness of cataloging the boilerplate comments would bore and annoy volunteers enough to cease volunteering, research team members Julianna Burchett, Mariko Cool, and Brooke Mascagni devised and implemented a method for identifying the regulations.gov urls for as many boilerplate comments as possible so they could be lifted out of the list of comment urls being sent to volunteers for hand-cataloging.

To catalog these boilerplate comments, the Steptoe & Johnson law firm, which had agreed to act as the project's *pro bono* counsel, made artificial intelligence software available to the research team to electronically catalog them. Volunteer cataloger and computer science professor at the University of Maine, Kenneth R. Bundy, joined the research team and wrote a webscraping program that he then ran on multiple computers for over a month to download about 90,000 comments in a form that could be analyzed using the AI software. Comments with attachments could not be downloaded due to their size and the time and expense they would require to download (Steptoe & Johnson estimated that vendors would charge approximately \$100,000 to download all of the comments, those with attachments included). The firm's experts in the AI software⁵ then used it to identify over 80,000 comments downloaded by Professor Bundy's webscraping program that repeated one of five different sets of boilerplate language.

Because of the all-volunteer nature of the Big Comment Catalog project and the lack of funds to guarantee that all of the comments were downloaded, the data that the research team was able to collect has several gaps. First, the final spreadsheet that constitutes the Catalog—created by research team member Alice Park, who merged the data gathered from the hand-cataloging with the data from

³ Appendix B is available and downloadable as a google sheet at https://docs.google.com/spreadsheets/d/14BqFvmExd5NgokLVU_keo0OGSD4lwdSKSWKXEZBDZjo/edit?usp=sharing.

⁴ See Appendix A for a list of volunteers, excluding those who requested anonymity.

⁵ Special thanks to Matthew Guiland, Kate Bauer, Emily Liu, and Paul Lee from the Steptoe team. Mr. Guiland, in particular, has our gratitude for running specialized analyses for the research team.

the AI software cataloging, includes 117,421 comments, a difference of about 6800 from the 124,160 regulations.gov indicates were filed and/or available on regulations.gov. Those 6800 may be available through regulations.gov because of inconsistencies in how comments—especially if hand-written—were uploaded to regulations.gov by the DeVos ED. For instance, 17,121 rows of the Catalog indicate that hand-written postcards mailed to ED in response to the DeVos NPRM were mainly uploaded to regulations.gov in PDFs consisting of a single scanned postcard, but occasionally the PDF included two scanned postcards. When the research team went back, it found that PDFs including multiple scanned postcards added at least six comments to those cataloged.

Alternatively, the 6800 missing comments may not be available on regulations.gov. Regulations.gov in fact provides conflicting information about the number of comments filed. On the one hand, Regulations.gov indicates 124,160 files associated with the rulemaking. On the other hand, an excel spreadsheet available for download from Regulations.gov, which includes (1) the commenter's name and the url of the comment, (2) whether the comment was filed on behalf of an organization, and (3) whether it included an attachment, only lists about 105,000 comments. The near 20,000 comment difference between these numbers questions the accuracy of both numbers. Ultimately, the research team could not determine if some error, either on the DeVos ED's or the research team's part, led to the discrepancy, or if the missing comments were deliberately withheld by DeVos's ED and, if so, why.

Second, with regard to the boilerplate comments, some commenters may have added individualized, substantive points to the boilerplate language they incorporated into their comments. It was impossible to reliably determine how many of such "boilerplate-plus" comments may exist because the boilerplate comments were cataloged via the AI software, and there was no way to reliably measure the addition of substantive points via the software. The most we could do was determine that approximately 14,000 comments had added language to the boilerplate comment language, but we could not determine how substantive that additional language is without hand-cataloging each of those 14,000+ comments.

Third, the AI software identified 2,648 comments as using language identifying it as one of the five boilerplate comments. However, when the research team looked at some of these comments, they appear to be the result of an online template of some sort that malfunctioned. Because these comments apparently lost specific information that commenters entered into the template and that they intended to be included in their comments, these comments look like boilerplate comments but probably were not intended to be. They are also devoid of any content beyond opposition to the proposed rules. Such comments are identifiable because they include the directions from the template (e.g.: "In particular, I am concerned about [PICK TWO - THREE POINTS FROM THE RULE YOU WANT TO ADDRESS...]").⁶ Some catalogers reported that some of these malfunctioning template comments included one part where the template malfunctioned and a second part where the personalized information that the commenter had put into the template was captured. Because the research team did not anticipate that some comments might have lost information due to such a malfunction, the google form did not ask catalogers to identify malfunctioning template emails; therefore, the research team could only determine that up to 2,648 comments appear to have lost some amount of substantive information due to this problem and to categorize them for cataloging purposes as boilerplates.

Fourth, to the extent that some comments were joint comments filed by multiple individual or organizational commenters, the Catalog does not capture that information consistently. For two

⁶ See, e.g., Individual, Comment [ED-2018-OCR-0064-66436](#) (Jan. 22, 2019).

examples of this undetermined number, a group of 73 law professors filed a comment objecting to the enormous number of legal questions created and left unanswered by the DeVos NPRM,⁷ and 902 mental health professionals signed onto a comment in opposition to the NPRM.⁸ The google form created by the research team that enabled volunteer catalogers to gather specified categories of data as consistently as possible from each comment cataloged did not include a question asking if a comment included multiple commenters. As a result, the Catalog almost certainly undercounts the number of commenters.

III. THE QUANTITATIVE ANALYSIS OF THE COMMENTS

Despite the aforementioned gaps, the Catalog managed to review the comments filed completely enough to confirm what circumstantial evidence had indicated throughout the comment period and via less comprehensive reviews of the comments conducted prior to completion of the Catalog⁹: the American public was almost unanimously opposed to the proposals in DeVos's NPRM. Of the 117,358 comments cataloged, nearly 114,817 opposed the proposed rules. Only 853 comments—less than one percent—of the cataloged-comments supported the DeVos NPRM's proposals. For 1688 of the comments, catalogers did not identify whether the commenter supported or opposed the proposals. Even if all of the 6802 comments that may be missing from the Catalog all supported the proposed regulations, this speculative level of support would still only add five percent (6802 / 124,160).

This overwhelming opposition was also true for every subgroup that catalogers tracked. Although the AI software that cataloged the 81,617 boilerplate comments only tracked whether the comment supported or opposed the DeVos proposals (and all 81,617 uniformly opposed the DeVos proposals), the 35,741 comments that volunteers hand-cataloged collected other information. This information included whether, to the best that the cataloger could determine, the commenter was a Business, Educational Administrator, Educational Institution, Local Government, Non-Governmental Organization, Parent, Student, State or National Governmental Agency, Teacher or Professor, other (unspecified) organization, or other (unspecified) individual. Catalogers did not identify the subgroups to which about 2230 of the commenters belonged, but of the 33,511 comments in which a subgroup was identified, catalogers tracked the following tiny-miniscule percentages of NPRM supporters:

- Other/unspecified individuals: 1.7% in support (439 supporters / 25,389 total)
- Students: 2.7% in support (91 supporters / 3389 total)
- Parents: 10.2% (135 / 1,322 total)
- Teachers/Professors: 4.4% (53 / 1,216)
- Non-governmental organizations: 2.4% (16 / 678)
- Educational institutions: 3.7% (18 / 482)
- Educational Administrators: 3.3% in support (15 supporters / 453 total)
- Other organizations: 6.9% (27 / 393)
- State/National governmental agencies: 3.0% (3 / 101)
- Businesses: 17.6% (9 / 51)
- Local governments: 2.7% (1 / 37)

⁷ 93 Law Professors, Comment [ED-2018-OCR-0064-17567](#) (Feb. 15, 2019).

⁸ 902 Mental Health Professionals and Trauma Specialists, Comment [ED-2018-OCR-0064-104088](#) (Jan. 30, 2019).

⁹ *E.g.*, Amended Complaint for Declaratory and Injunctive Relief, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv- 11104 (D. Mass filed July 20, 2020).

Th opposition was also true for the common subjects in the comments that were tracked by the catalog and discussed in greater detail in Section IV below:

- Of the 9,495 comments that addressed and took a position on off-campus or online SH-GBV, 9,432 comments (99.3%) opposed the NPRM proposals whereas 63 comments (0.7%) supported them.
- Of the 9,195 comments that addressed and took a position on the NPRM's changes to key definitions, 9,039 comments (98%) opposed the NPRM proposals whereas 156 comments (2%) supported them.
- Of the 5,632 comments that addressed and took a position on live hearings, mediation, and cross-examination, 5,409 comments (96%) opposed the NPRM proposals whereas 223 comments (4%) supported them.
- Of the 4,362 comments that addressed and took a position on the standard of evidence, 4,118 comments (94%) opposed the NPRM proposals whereas 244 comments (6%) supported them.
- Of the 5,460 comments that addressed and took a position on supportive, protective, and/or interim measures or accommodations, 5,355 comments (98.1%) opposed the NPRM proposals whereas 105 comments (1.9%) supported them.
- Of the 2,898 comments that addressed and took a position on religious exemptions, 2,825 comments (97%) opposed the NPRM proposals whereas 73 comments (2.5%) supported them.
- Of the 2,164 comments that addressed and took a position on K-12 education, 2,148 comments (99.3%) opposed the NPRM proposals whereas 16 comments (0.7%) supported them.

These counts do not include the topics that were addressed in the boilerplate comments. Other than the malfunctioning template comment addressed in the Methodology section above, the catalog identified four distinct boilerplate comments. The first, used in part or in full by 43,456 commenters, provided three slightly different versions of the following statement:

I am writing to express my outrage and opposition to the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance proposed rule. This proposed rule will make schools less safe. *[one of three options for varying language inserted here]* More than 1 in 5 women, nearly 1 in 18 men, and more than 1 in 4 transgender and gender-nonconforming students are sexually assaulted in college. During college, 62% of women and 61% of men experience sexual harassment. In grades 7-12, 56% of girls and 40% of boys are sexually harassed in any given school year. Given this epidemic our government should be working to ensure student survivors have more rights and access to resources to continue to pursue their education, not doing everything in its power to intimidate and silence survivors of sexual assault. I implore you to change this rule and to instead center the rights and needs of student survivors in our Title IX process, including considering the additional challenges and barriers faced by students of color, undocumented students, low-income students LGBTQ students, and students with disabilities.

Where the paragraph above notes “[one of three options for varying language inserted here],” the catalog tracked the following three variations:

- “I am particularly concerned that schools will only have to intervene when they deem the abuse is pervasive and severe enough, leaving many survivors in the position to prove their abuse is worthy of their school’s attention and action.”
- “I am particularly concerned that schools will be allowed to ignore sexual violence that happens off-campus even if the survivor is forced to see their abuser in class every day.”
- “I am particularly concerned that these rules allow intimidating practices like cross examination that may deter students from reporting.”

The catalog tracked five variations of this boilerplate comment total, including the aforementioned three variations for optional language, a variation in which the “particularly concerned” sentence included unique language written by the commenter, and a variation where the commenter did not including a sentence indicating the commenter’s particular concerns. These five variations were fairly evenly distributed among the 43,456 comments filed using the common language noted above.

A second boilerplate comment was filed by 33,848 commenters. Its substantive portion read:

I am writing in response to the Department of Educations (ED) Notice of Proposed Rulemaking (NPRM or proposed rules) to express my strong opposition to the proposed rules relating to sexual harassment as published in the Federal Register on November 29, 2018. Sexual harassment should never be the end of anyone’s education. Yet these proposed rules would make schools more dangerous for all students. Schools would be allowed and, in many cases required, to ignore students who report sexual harassment. In many instances, schools would not be responsible for addressing sexual harassment, even when school employees knew about the harassment. Schools would be required to ignore harassment that happens outside of school activities or off school grounds, even if the victim has to see their harasser(s) in class every day, and would be required to ignore all harassment on school grounds until it becomes so severe that it costs students important learning opportunities. And in the rare cases when schools would be required to respond they would be allowed and sometimes required to deny harassment victims due process. If implemented, these rules would allow schools to subject survivors to biased, retraumatizing investigations or mediations that favor named harassers over their victims and would let schools delay even these sham investigations indefinitely at the expense of the affected student’s education. ED should immediately withdraw its current proposal and dedicate its efforts to advancing policies that ensure equal access to education for all students, including students who experience sexual harassment.

Finally, two boilerplate comments numbered less than 1000 commenters each. The first, filed by 949 commenters, stated:

I submit this comment in response to the The Secretary of Education's proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 in regard to the remedies available to victims of sexual assault. Rather than making it easier for victims to report and receive the justice they deserve, the amendments instead roll back the rights of students who have been sexually assaulted. This is

unacceptable. These amendments to regulations should be rejected.

The second, numbering 716 comments, includes a bracketed direction to “[Customize your comment],” but it is not clear how many commenters followed that direction. The comment reads:

I am writing to you to oppose the draft rules that would change how schools handle sexual harassment and assault. All students deserve an education free from discrimination and fear. These proposed changes would make schools less safe and welcoming for ALL students and undermine the purpose of our civil rights laws. STUDENTS DESERVE BETTER! I urge you to change course and protect students’ civil rights. Changing the definition of sexual harassment, limiting access to employees who are required to act, ignoring off-campus conduct, and allowing schools to hide their plans to discriminate is unfair and irresponsible [Customize your comment] The job of the Department of Education is to protect students from discrimination. STUDENTS DESERVE BETTER and it is time that you do your job!

The four boilerplate comments discussed above together number 78,969 comments, whereas the AI software identified a total of 81,617 boilerplate comments total. This larger number includes the 2,648 comments discussed above that appear to be the result of a malfunctioning online template. Due to the malfunction, these comments were cataloged by the AI software, which only able to capture these comments’ general antipathy to the DeVos NPRM. Therefore, regardless of whether they are “counted” as a boilerplate comment or not, they are included in the over 99 percent (114,817 / 115,670) of the comments that expressed the American public’s overwhelming opposition to the DeVos NPRM.

IV. THEMES FROM THE COMMENTS

Because volunteers were able to hand-catalog 35,741 comments and the hand-cataloging google form asked volunteers to gather more information than only the commenter’s support or opposition for the NPRM, the remainder of this report will provide more details about various themes on which commenters focused. First, this Section will discuss the number of commenters who referenced research studies, employed legal arguments, and/or shared personal stories to support their position on the DeVos NPRM.

A. Methods Used to Support Comments and Who Used Them

The hand-cataloging form asked volunteer catalogers to identify—to the extent possible—which commenters included references to research studies, used legal arguments, and shared personal stories. Recall that of the 35,741 hand-cataloged comments, 853 comments were cataloged as supporting the DeVos NPRM, whereas 33,200 opposed the DeVos NPRM. Of these hand-cataloged comments, a greater percentage of the 853 NPRM-supporters relied on personal stories (220) and legal arguments (159) than they did research (79). In contrast, nearly a third of the 33,200 NPRM-opposers (10,077) cited to research whereas a little under ten percent (3,217) included personal stories and closer to six percent used legal arguments (2,050).

However, it is important to note that, when raw numbers of NPRM-opposers are compared to the raw numbers of NPRM-supporters, because so many more commenters opposed than supported the NPRM, exponentially more opposers relied on all three forms of support for their comments than

supporters. Indeed, nearly 13 times as many opposers used legal arguments as supporters did (2050/159 = 12.89) and over 14.5 times as many opposers shared personal stories as did supporters (3217/220 = 14.62).

When compared to other supporters, 220 out of 853 DeVos NPRM supporters (25.79%) shared personal stories regarding themselves or someone they know, in contrast to the 9.7 percent of opposers whose comments contained personal stories (3,217 comments) when compared with the full number of NPRM opposers (33,200) whose comments were hand-cataloged. Even fewer commenters, 159 out of 853 supporters (18.6%) and 2,050 out of 33,200 opposers (6.2%), used legal arguments in their comments. Finally, even when compared to other NPRM-supporters, the percentage of supporters using research was very small: only 9.3% (79 / 853) of supporters cited research, whereas 30.4% (10,077 / 33,200) of opposers cited research. As a result, *over 127 times* (10,077 / 79 = 127.56) as many DeVos NPRM-opposers cited research as did NPRM-supporters.

The seeming extreme reticence of DeVos NPRM-supporters to support their comments with research has two significant implications. First, it suggests that there is in fact very little research supporting NPRM-supporters' position (and therefore the legal and policy choices made in the NPRM itself). Second, because legal arguments are generally strengthened by research-based support, the fact that so few of the NPRM-supporting comments that advanced legal arguments appear to have supported those arguments with research calls into question the strength and accuracy of those arguments. This implication is bolstered by the fundamental misunderstandings of Title IX as a civil rights statute found in many supporters' legal arguments, one aspect of the substantive themes to which the next section turns.

B. Themes in DeVos NPRM-Supporters' Comments

I support reforms to the Title IX/Clery processes to remedy the failure to provide due process to persons accused of sexual harassment . . . The university Title IX/Clery Coordinator [at redacted's school] precipitously and unnecessarily imposed a no-contact and stay away order... The coordinator . . . refused his request for a hearing since she asserted that no penalty had been imposed . . . it stigmatized [redacted] and adversely colored his college experience.

-Parent¹⁰

Supporters of the DeVos NPRM expressed their approval in several variations on an overall belief held by supporters that reports of sexual harassment and gender-based violence should not be handled by schools, although these commenters often conflated the schools that were responding to and investigating such reports with the students making the reports.¹¹ Some NPRM-supporters objected to schools' involvement in responding to SH-GBV on the basis that schools are not a part of the criminal legal system. Others argued that schools mishandled such cases—particularly by violating the “due

¹⁰ Parent, Comment [ED-2018-OCR-0064-18511](#) (Jan. 29, 2019); Parent, Comment [ED-2018-OCR-0064-9422](#) (Dec. 2, 2018). Student, Comment [ED-2018-OCR-0064-10490](#) (Jan. 28, 2019).

¹¹ Some commenters also registered their support for the NPRM's approach to religious exemptions. See, e.g., Individual, Comment [ED-2018-OCR-0064-103800](#) (Jan. 25, 2019) (“[U]nder the current regulations an educational institution otherwise entitled to the exemption may lose it simply by failing... to affirmatively seek the exemption to which it is entitled. The proposed revised regulations remedy that harsh and unfair consequence,”); Jewish Coalition for Religious Liberty, Comment [ED-2018-OCR-0064-10275](#) (Jan. 28, 2019).

process” rights of those who the comments said were “falsely accused” of committing SH-GBV—because schools failed to use the same standards for dealing with reports of SH-GBV as the criminal legal system uses. In keeping with the overall patterns noted above, supporters rarely cited to empirical research or data-based studies to support their points. Lastly, to the extent that supporting comments made legal arguments to support of their assertion, those legal arguments often appeared to misunderstand fundamental aspects of Title IX and the differences between civil rights and criminal laws.

Of the comments supporting the NPRM—some even pushing ED to go further to protect the accused party—many came from parents or relatives of someone who the commenter said was falsely accused of sexual misconduct or from accused students themselves. Although many such commenters used the term “falsely accused,” their objections did not generally discuss the content of the accusations or seek to show why they were false. The research team also did not find comments that offered explanations regarding why, if the accusations the commenter characterized as false were indeed false, those investigating the case had nevertheless found the accusations to be substantiated and supported by evidence. Instead, these NPRM supporters often spoke interchangeably about the falsity of SH-GBV accusations and the bias of those investigating the accusations, bias which these commenters alleged had significantly impacted the outcome of the case.¹² For instance, one parent complained that: “The adjudicator did not ask the questions my son submitted. The adjudicator was judge and jury. The adjudicator had pre-determined my son guilty.”¹³ Thus, these comments appear to conflate—without explanation as to why they do so—victim-survivors’ accusations with the investigations’ conclusions and to view any investigator’s conclusion that a victim-survivor’s accusation is true as automatic evidence of the investigator’s bias.

Commenters in support of the NPRM were also very concerned about the impact that being investigated for committing SH-GBV had—usually on their sons. Several parents of accused students discussed their sons’ emotional struggles, although their comments do not give specific examples of school mistreatment leading to those struggles, and they imply that these struggles occurred regardless of the investigation’s outcome:

In spite of the favorable outcome, my son has been devastated by the entire process. He chose not to go back to the school and today (three years later) he can not bring himself to leave the house. He has cut himself off from all social interaction for fear of being unjustly accused of any misdeed based on this experience.¹⁴

His reputation was destroyed, with false information passed on to future campuses through unofficial means . . . Vindicated in the courts but he was so vilified by public opinion he still has to live like a fugitive to avoid reliving the nightmare of an allegation is all it takes to ruin one's life.¹⁵

The heartbreak, emotional devastation, crushed hopes, and persistent fear of being slandered and shamed is a pervasive shadow that follows my son and our family with

¹² See Student, Comment [ED-2018-OCR-0064-6140](#) (Jan. 5, 2019); Parent, Comment [ED-2018-OCR-0064-8639](#) (Jan. 26, 2019); Parent, Comment [ED-2018-OCR-0064-11725](#) (Jan. 29, 2019); Parent, [Comment ED-2018-OCR-0064-31978](#) (Jan. 30, 2019).

¹³ Parent, Comment [ED-2018-OCR-0064-11725](#) (Jan. 29, 2019).

¹⁴ Parent, Comment [ED-2018-OCR-0064-8639](#) (Jan. 26, 2019).

¹⁵ Individual, Comment [ED-2018-OCR-0064-104807](#) (Jan. 29, 2019).

every breath we take. It is the main reason that I am scared to comment even now. I am deathly afraid to say which college my son attended.¹⁶

Some parents stated that schools providing support for accused students would make a difference, although whether the “support” contemplated was emotional or oriented towards defending the accused student against SH-GBV allegations was often unclear. For instance, a parent stated that: “There were little to no support [sic] ... after the accusations. The staff rallied around the accuser and immediately treated [redacted] as if he were guilty. There was no mindset of ‘innocent until proven guilty.’ . . . The lack of support led to the trauma he experienced and still experiences. He has felt unheard and unimportant.”¹⁷

This parent’s comment touched on another variation of the central theme of NPRM-supporters’ comments (that SH-GBV investigations belong in the criminal legal system, not in schools): that schools should respond to SH-GBV in a manner as close to how the criminal system responds to SH-GBV as possible. Many NPRM-supporting comments thus argued that the proposals “fixed” pre-NPRM Title IX procedures that were tipped too heavily in favor of accusers, including by: (1) requiring schools to conduct live hearings with cross-examination, (2) pushing schools to adopt quasi-criminal standards of proof, and (3) providing those accused of committing SH-GBV with the “due process” rights of criminal defendants.¹⁸ As noted at the end of this section, these comments did not address the long- and widely-held view that imitating criminal procedures is not only inappropriate under Title IX and similar civil rights laws, but would actually violate Title IX itself.

With regard to live hearings and cross-examination, several commenters—again dominated by parents of accused students—asserted that such criminal trial elements are “critical to a fair hearing.”¹⁹ One parent stated that her son was falsely accused of sexual misconduct and that the school’s live hearing was necessary because denying a live hearing “denies the right of the accused to be heard.”²⁰ Another argued that cross-examination is integral to gathering all of the facts and determining the honesty of parties.²¹ Many of these commenters shared the sentiment that without these standard trial elements, there is no “due process.”²²

Although live hearings and cross-examination can occur in civil legal system trials as well as criminal ones, the references by this group of commenters to due process rights, “not guilty” findings, and other criminal-trial-related procedural rules, such as exculpatory evidence disclosure requirements, make clear that they are referencing criminal procedures, not civil ones. For example, one parent stated:

The failure to allow cross-examination by his lawyer, and particularly, the outright dismissal of exculpatory evidence by the Title IX investigators was an egregious violation of his due process rights . . .

¹⁶ Parent, Comment [ED-2018-OCR-0064-11725](#) (Jan. 29, 2019).

¹⁷ Parent, Comment [ED-2018-OCR-0064-32065](#) (Jan. 29, 2019).

¹⁸ See Parent, Comment [ED-2018-OCR-0064-31101](#) (Jan. 30, 2019); Parent, Comment [ED-2018-OCR-0064-8639](#) (Jan. 26, 2019); Individual, Comment [ED-2018-OCR-0064-31206](#) (Jan. 30, 2019).

¹⁹ Parent, Comment [ED-2018-OCR-0064-10613](#) (Jan. 28, 2019).

²⁰ Parent, Comment [ED-2018-OCR-0064-10719](#) (Jan. 28, 2019).

²¹ Parent, Comment [ED-2018-OCR-0064-11072](#) (Jan. 29, 2019).

²² Parent, Comment [ED-2018-OCR-0064-12005](#) (Jan. 30, 2019).

Had my son been tried in an authentic court of law in the US, I have not the slightest doubt that all of the exculpatory evidence available - and presented to the Title IX investigators - would have guaranteed his swiftly being found not guilty.²³

A similar reference point can be seen in comments supporting how the NPRM pushed schools to adopt the quasi-criminal “clear and convincing evidence” standard of proof in investigating SH-GBV reports instead of the standard required by at least three previous administrations from both political parties (i.e., the Obama, George W. Bush, and Clinton administrations): the preponderance of the evidence.²⁴ First, many commenters referred to the evidentiary standard when supporting the NPRM’s adoption of a “presumption of innocence,” which is another way of identifying the criminal evidentiary standard of “beyond a reasonable doubt”—a standard which puts an even heavier burden on the victim than the “clear and convincing evidence” standard that the DeVos NPRM purports to support. These commentors often took the stance that in their situation, the accused party was “presumed guilty,”²⁵ and explicitly referenced criminal legal standards: “Imagine if our criminal justice system operated that way... without the presumption of innocence and without due process.”²⁶

NPRM-supporters also urged that a clear and convincing evidence standard would avoid the “grave damage that would be done” to the accused’s life.²⁷ One further suggested that the preponderance *had already* done great harm to respondents, but did not provide any actual examples of such harm.²⁸ These comments also did not address how the quasi-criminal “clear and convincing evidence” standard was appropriate for a civil rights law, or how it compared to the preponderance standard, which is used in enforcing other civil rights statutes.

Although they did not explicitly support the NPRM, another group of commenters’ views were consistent with NPRM-supporters’ views because they insisted that all SH-GBV reports should be dealt with by criminal law enforcement, not by schools. Instead of seeking to import criminal law-based concepts into Title IX enforcement as NPRM-supporters did, these commenters took the position that investigating campus SH-GBV is beyond the scope of school administrators,²⁹ who lack proper

²³ Parent, Comment [ED-2018-OCR-0064-17945](#) (Jan. 30, 2019). The exculpatory evidence rule comes from *Brady v. Maryland*, 373 U.S. 83 (1963), which requires *prosecutors* in *criminal* court to disclose material evidence tending to prove a defendant’s innocence, to the defendant. As this indicates, the *Brady* rule applies only to criminal cases and therefore is inapplicable to civil rights and administrative proceedings such as those which would occur under Title IX and be governed by ED’s regulations.

²⁴ Other themes regarding procedures and standards included that the accused should have access to supportive measures and advisors, the accused should be able to cross examine the accuser, and that the collection of evidence should be done more thoroughly and uniformly. See Parent, Comment [ED-2018-OCR-0064-11725](#) (Jan. 29, 2019); Parent, Comment [ED-2018-OCR-0064-8639](#) (Jan. 26, 2019); Parent, Comment [ED-2018-OCR-0064-32065](#) (Jan. 29, 2019); Parent, Comment [ED-2018-OCR-0064-10875](#) (Jan. 28, 2019); Parent, Comment [ED-2018-OCR-0064-31978](#) (Jan. 30, 2019).

²⁵ See Parent, Comment [ED-2018-OCR-0064-11725](#) (Jan. 29, 2019); Student, Comment [ED-2018-OCR-0064-6140](#) (Jan. 5, 2019); Parent, Comment [ED-2018-OCR-0064-8639](#) (Jan. 26, 2019); Parent, Comment [ED-2018-OCR-0064-32065](#) (Jan. 29, 2019); Individual, Comment [ED-2018-OCR-0064-104807](#) (Jan. 29, 2019); Parent, Comment [ED-2018-OCR-0064-10875](#) (Jan. 28, 2019).

²⁶ Individual, Comment [ED-2018-OCR-0064-31206](#) (Jan. 30, 2019).

²⁷ Parent, Comment [ED-2018-OCR-0064-9037](#) (Jan. 21, 2019); Individual, Comment [ED-2018-OCR-0064-6983](#) (Jan. 20, 2019). Parent, Comment [ED-2018-OCR-0064-9422](#) (Dec. 2, 2018). Student, Comment [ED-2018-OCR-0064-10490](#) (Jan. 28, 2019).

²⁸ Academic, Comment [ED-2018-OCR-0064-0409](#) (Nov. 30, 2018).

²⁹ See Individual, Comment [ED-2018-OCR-0064-7961](#) (Jan. 24, 2019).

qualifications and training to handle sexual misconduct claims.³⁰

In engaging in this comparison, many of these commenters seemed to assume that police and prosecutors would handle SH-GBV reports better than school officials. For instance, one commenter stated: “Campus administrators and coordinators are not qualified to do the work of the police department.”³¹ Others objected that schools do not have enough authority to properly conduct an investigation and therefore should focus on helping students report to police.³² Still others expressed concern that schools cover up and keep reports from reaching law enforcement in order to protect the school’s reputation,³³ asserting that reporting to law enforcement will prevent universities from dismissing claims without accountability, “allow[ing] schools and churches to hide from justice.”³⁴ Finally, several commenters working on or with campuses argued that campuses are failing to serve accused harassers and student victims alike:

The perpetrator gets the message that it's a disciplinary matter--that they have behaved badly and will be punished—child and parent type stuff. What they need to learn is that it's a felony and in the world outside their parents' home where they will live the rest of their lives, felonies carry serious consequences like prison sentences . . . And [the victims] need to know that the authorities--on and off campus--take what happened seriously and that they will seek legal remedies to secure justice.³⁵

As demonstrated by this quote, many of the comments in this group expressed high levels of confidence in law enforcement to handle SH-GBV properly and well, but neither provided actual evidence of such competence nor countered ample evidence of criminal law enforcement’s mistreatment of SH-GBV victims. These assumptions contrasted starkly with the thirty-percent of NPRM-opposers’ comments that cited to research, including studies showing law enforcement failures in responding to SH-GBV reports.³⁶

A similar common omission from DeVos NPRM-supporters’ comments was any acknowledgement of Title IX’s purpose and the fact that Title IX, as interpreted by both courts and ED, has for decades required schools receiving federal funds to prevent and remedy SH-GBV. Even commenters who neither supported nor opposed the NPRM often did not acknowledge this legal fact. They instead urged ED to require schools to outsource all SH-GBV reports to criminal law enforcement, actions that schools cannot take and still comply with Title IX.³⁷ Likewise, NPRM-supporting comments did not attempt to show how the NPRM’s importing criminal procedures into Title IX would help and not hinder schools’ compliance with their civil rights law-based obligations to prevent and remedy discrimination against

³⁰ Individual, Comment [ED-2018-OCR-0064-11610](#) (Jan. 29, 2019).

³¹ Individual, Comment [ED-2018-OCR-0064-11610](#) (Jan. 29, 2019).

³² Individual, Comment [ED-2018-OCR-0064-11669](#) (Jan. 29, 2019).

³³ Former Professor and Assistant District Attorney, Comment [ED-2018-OCR-0064-12008](#) (Jan. 30, 2019); Teacher, Comment [ED-2018-OCR-0064-0033](#) (Nov. 29, 2018).

³⁴ Individual, Comment [ED-2018-OCR-0064-6185](#) (Jan. 7, 2019).

³⁵ Teacher, Comment [ED-2018-OCR-0064-0033](#) (Nov. 29, 2018).

³⁶ *E.g.*, Individual, Comment [ED-2018-OCR-0064-1035](#) (Dec. 3, 2018) (“Did you know that 69% of survivors reported police officers discouraged them from filing a report and one-third of survivors had police refuse to take their reports? (Campbell, 2005). This is unacceptable!”)

³⁷ Student, Comment [ED-2018-OCR-0064-0755](#) (Dec. 2, 2018) (attaching article by Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations & Cautions*, 125 YALE L.J. F. 281 (2016), which makes this point at pp. 291-296).

their students in the form of SH-GBV. This lack of evidence differs sharply from the comments filed by those who opposed the NPRM, to which this report now turns.

C. Themes in DeVos NPRM-Opposers' Comments

Because the number of comments that opposed the DeVos NPRM was over 135 times the number of comments that supported the NPRM (114,817 / 853), NPRM-opposers' comments addressed more, as well as more diverse, themes. The following discussion is therefore organized into several thematic categories, including commenters' opposition to how the NPRM's proposed rules would: (1) reduce the scope of Title IX so as to protect many fewer students; (2) change the manner in which some federal-funding recipients were required to investigate and resolve reports of SH-GBV using their internal disciplinary systems; (3) reduce the obligations of federal-funding recipients to provide accommodations or supportive, protective, and/or interim measures to students who experience SH-GBV; (4) allow religious schools to claim an exemption from Title IX after a student or other interested party files a Title IX complaint against the school; and (5) increase and exacerbate discrimination and inequality for K-12 students and student populations that experience intersectional disadvantages based on race, lesser access to economic or other resources, having a disability, being LGBTQIA, etc.

i. Reducing the Scope of Title IX protections from SH-GBV

Many of those who opposed the proposals announced by the DeVos NPRM expressed concerns about the ways in which they would shrink the scope of the protections from sexual harassment and gender-based violence that Title IX would provide to students. Commenters pointed in particular to two methods by which they saw the proposed rules accomplishing this task: first by allowing funding recipients not to address SH-GBV that occurred off-site, such as off-campus, in a study abroad program, and/or online; and second by adopting analytical terms and frameworks so as to narrow as much as possible the "sexual harassment" prohibited by Title IX.

a) Opposing the NPRM's Proposals Regarding Off-Campus and/or Online SH-GBV

Our rape crisis center worked with a student this past year who was sexual[ly] assaulted by a fellow student in her study abroad program. The student chose to report to local police, and after a frustrating experience with law enforcement, ultimately returned early to the US from her program. She contacted our agency when she was back in the US and she was able to report the incident to the school, and accessed supportive measures which allowed her to maintain her classwork and reintegrate from her abroad program . . . Under the new regulations, this case would no longer fall within the scope of Title IX . . .

-Individual³⁸

During the public comment period, there were 9,495 comments written and filed by members of the public that addressed off-campus or online sexual harassment, violence, and/or misconduct. Of the 9,495 comments written and filed, 9,432 comments (99.3%) opposed the DeVos NPRM. The Catalog tracked 63 comments (0.7%) in support of the NPRM.

Comments that opposed the NPRM proposals relating to off-campus and/or online SH-GBV expressed concern that the NPRM proposals would fail to protect students participating in an

³⁸ Individual, Comment [ED-2018-OCR-0064-10651](#) (Jan. 28, 2019).

“education program or activity” (Title IX’s language designating which entities must comply with the statute) if the reported SH-GBV occurred off-site (such as off-campus, in a study abroad program, and/or online). These opposers worried that the NPRM would allow schools to avoid investigating or remediating such off-site incidents despite both how common they are and how they affect students’ ability to continue with and succeed (at the same level as they did prior to the SH-GBV) in their education.

For instance, a law professor expressed a common concern that the NPRM’s shrinking of Title IX protections was particularly disturbing due to the amount of SH-GBV in education that occurs off-campus and/or online, noting that “The Department itself acknowledges many sexual assaults occur off campus. The Department cites a report that 41% of all rapes of students at institutions of higher education occur off campus, and observes that the proportion is even higher at smaller institutions.”³⁹ Moreover, when considering online harassment, this commenter pointed out how arbitrary application of the NPRM proposals would likely be: “Applying the proposed limitation to cyber harassment, via emails, text messages, or social media platforms, will raise vexing issues, and may turn on fortuitous circumstances such as where the harasser was when he or she sent or posted a message, or whether the cables or any server or WIFI hub involved were on campus.”⁴⁰

Opposers expressed even greater concerns regarding the arbitrary, unfair, and harmful effects of the NPRM on all involved, especially victims of SH-GBV. One student commenter pointed out that:

The proposed regulation’s requirement that schools only investigate conduct that occurred within an educational program misses the relevant inquiry of whether a student is deprived of an equal education because of an educational institution’s failure to rectify sex-based discrimination. In fact, it fails to protect victims who are harassed or assaulted outside of an educational program but who are impacted within it.⁴¹

The law professor quoted above agreed, noting the implications of the DeVos NPRM’s position with a hypothetical whereby “a victim who had been raped by a fellow student” off-campus would not be able to rely on Title IX’s protections “even if there was compelling evidence of responsibility (e.g., the alleged assailant was arrested and facing prosecution),” and “the school knew about the sexual assault (e.g., the victim had complained to an official authorized to take corrective action, and the assailant’s father was on the school board),” but “school officials had done nothing to protect or assist the victim” and ultimately “the assailant’s continued presence in her classes had forced the victim to withdraw from school.”⁴² The rape crisis center staff member whose quote leads this section summed up the unfair and harmful results to which commenters concerned about the off-campus and online harassment limitations objected: “By excluding study abroad programs from the scope of Title IX, the regulations are doing a significant disservice to students, and is taking away resources from students when they are most vulnerable - in an unfamiliar country, far from home, and without a student’s typical safety networks.”⁴³

³⁹ Law Professor, Comment [ED-2018-OCR-0064-11751](#) at 2 (Jan. 29, 2019) (citing 83 Red. Reg. 61487 n. 27, 61493). This commenter also criticized the complexity of drawing such distinctions.

⁴⁰ Law Professor, Comment [ED-2018-OCR-0064-11751](#) at 3 (Jan. 29, 2019).

⁴¹ Student, Comment [ED-2018-OCR-0064-0011](#) (Nov. 29, 2018).

⁴² Law Professor, Comment [ED-2018-OCR-0064-11751](#) at 1 (Jan. 29, 2019).

⁴³ Individual, Comment [ED-2018-OCR-0064-10651](#) (Jan. 28, 2019).

b) Opposing the NPRM's Definitions of "Sexual Harassment," "Prompt," "Responsible Employee," "Notice," "Actual Notice," and "Deliberate Indifference"

By narrowing the definition of "sexual harassment" with respect to Title IX, DeVos would be making it more difficult for students in schools, including K-12 schools, to be protected from sexual harassment. The proposed rules send the message that students should be forced to put up with sexual violence and that some level of sexual harassment is acceptable.

- Individual⁴⁴

Commentary on changes to definitions within the regulations was almost entirely confined to opponents of the NPRM. Out of 9,195 comments mentioning this issue, 9,039, or over 98%, were in opposition to the proposed changes. These commenters argued on several fronts that the regulations thinned the definition of sexual harassment to exclude otherwise objectionable conduct, limited the number of employees who would enforce the protections of Title IX, and lowered the standards applied to schools when evaluating their responses to sexual assault and misconduct.

First and most significantly, opponents of the rule argued that the definition of sexual harassment was significantly narrowed. Previous guidance issued in 2001 defined sexual harassment as "unwelcome conduct of a sexual nature . . . includ[ing] unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."⁴⁵ The new regulations raised the bar by requiring a sexual harassment claim to detail "conduct on the basis of sex that satisfies" one of three categories:

- quid pro quo sexual harassment, where "an employee of the recipient [school] conditions the provision of an aid, benefit, or service of the recipient [school] on an individual's participation in unwelcome sexual conduct,"
- hostile educational environment harassment, featuring "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient[] [school's] education program or activity," or
- Clery Act violations such as stalking, sexual assault, or domestic violence.⁴⁶

Second, NPRM-opposers made note of the change of "or" to "and" in the phrase defining the type of SH-GBV that required an institutional response: from harassment that was "sufficiently severe, persistent, *or* pervasive to limit a student's ability to participate in or benefit from an education program or activity," to conduct that is "severe, pervasive, *and* objectively offensive."⁴⁷ One anonymous commenter asserted that this double requirement renders the definition "under-inclusive" because a single rape may be "severe" but not "pervasive," and the receipt of hundreds of text messages from a stalker may be "pervasive" but not "severe."⁴⁸ This under-inclusiveness was not acceptable to many

⁴⁴ Individual, Comment [ED-2018-OCR-0064-31639](#) (Jan. 30, 2019).

⁴⁵ *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; See also, American Association of School Administrators, The School Superintendent's Association, Comment [ED-2018-OCR-0064-7411](#) (Jan. 23, 2019).

⁴⁶ See Law Professor, Comment [ED-2018-OCR-0064-11752](#) (Jan. 29, 2019).

⁴⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020).

⁴⁸ Individual, Comment [ED-2018-OCR-0064-104560](#) (Jan. 30, 2019).

commenters: one teacher commented that “One experience of harassment or violence of any kind is one too many and can derail a person from the path they were meant to walk. It can change you forever.”⁴⁹ The Victim Rights Law Center discussed several harassment scenarios, including ones set forth as harassment by ED itself, in ED’s previous guidance documents, as well as scenarios involving young K-12 students (e.g. a middle school student being verbally taunted repeatedly by high schools students about her breasts or genital area), which, even though quite disturbing, might not rise to the “severe and pervasive” level permitting action under the NPRM proposed rules.⁵⁰

Commenters also took issue with changes to several critical terms in the chain of reporting and institutional response, arguing that they similarly narrowed protections and created greater risk of harm to students. Specifically, these commenters opposed the NPRM definitions of “responsible employees,” “actual notice,” “prompt” and “deliberate indifference.”

Many opposing commenters characterized changes modifying the status and obligations of employees deemed “responsible employees” as stripping away protections from survivors by reducing the number and type of funding recipient employees who are obligated under Title IX to assist a victim who reports SH-GBV to them.⁵¹ A survivor argued that this narrowed definition would force survivors to face “extra burden[s] of re-experiencing their trauma while reporting to an unfamiliar office instead of a trusted faculty member who can report for them.”⁵² The survivor stated that the mandatory report that facilitated the survivor’s accessing mental health services would no longer be covered under the updated regulations.⁵³ Another survivor, parent, and social worker pointed out the particular problems this narrow definition presents for K-12 students: “Expecting young students to know who to go to with what concerns is unrealistic, and the fact that schools will be protected from liability if children choose the “wrong” adult to disclose sexual harassment and abuse to is egregious.”⁵⁴

Moreover, NPRM-opposers objected to how the proposed regulations raise the notice requirements for reporting SH-GBV from “constructive notice” to “actual knowledge,” once again reducing the obligations of funding recipients to respond to SH-GBV by narrowing the number of school employees who must assist a survivor. For example, one commenter argued that this change would foreclose previously common pathways of reporting, such as coaches, resident advisors, or professors who happen to overhear details of sexual misconduct from the survivor or the perpetrator.⁵⁵

Commenters also took issue with how the DeVos NPRM weakened the meaning of “prompt” by creating a carve-out whereby a funding recipient could delay an SH-GBV investigation “for good cause... [which] may include... concurrent law enforcement activity,”⁵⁶ potentially allowing extensions that effectively curtail a sufficient response by the school:

⁴⁹ Teacher, Comment [ED-2018-OCR-0064-7464](#) (Jan. 23, 2019).

⁵⁰ Victim Rights Law Center, Comment [ED-2018-OCR-0064-6471](#), (Jan. 14, 2019).

⁵¹ Student, Comment [ED-2018-OCR-0064-104745](#) (Jan. 29, 2019); Student, Comment [ED-2018-OCR-0064-102991](#) (Dec. 11, 2018); Victim Advocate, Comment [ED-2018-OCR-0064-11157](#) (Jan. 29, 2019).

⁵² Survivor, Comment [ED-2018-OCR-0064-10215](#) (Jan. 28, 2019).

⁵³ Survivor, Comment [ED-2018-OCR-0064-10215](#), (Jan. 28, 2019).

⁵⁴ Survivor, Comment [ED-2018-OCR-0064-6848](#) (Jan. 18, 2019).

⁵⁵ Victim Advocate, Comment [ED-2018-OCR-0064-11157](#) (Jan. 29, 2019); Eleven Former Career Office of Civil Rights Employees, Comment [ED-2018-OCR-0064-8911](#) at 6 (Jan 28, 2019).

⁵⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61472, 61497 (Nov. 29, 2018).

Under the proposed rules, if there is an ongoing criminal investigation, the school would be allowed to delay its Title IX investigation for an unspecified length of time. While criminal investigations seek to punish an abuser for their conduct, Title IX investigations should seek to ensure that complainants are able to access educational opportunities that became inaccessible due to harassment. Students should not be forced to wait months or years until after a criminal investigation is completed in order to seek resolution from their schools.⁵⁷

Finally, commenters opposed the adoption of the “deliberate indifference” standard from the Supreme Court’s 1999 finding in *Davis v. Monroe County Board of Education*,⁵⁸ often objecting both to the standard itself and to its use outside of its original context: civil lawsuit for money damages against the schools. One commenter asserted that, in the context of OCR’s broader powers of Title IX administrative enforcement:

Anti-discrimination law imposes the obligation on those it regulates not to discriminate. It is not enough to hold them responsible only when they engage in egregious institutional misconduct. The deliberate indifference standard must be abandoned and the Department must affirm its commitment to robust nondiscrimination in federally funded educational institutions.⁵⁹

ii. Recipient Internal Investigation and Disciplinary Systems and Procedures

Many of those who opposed the proposals announced in the NPRM expressed concerns about the ways they would impact the funding recipient’s internal investigation obligations and disciplinary systems and procedures. Commenters pointed in particular to four ways in which they saw the DeVos NPRM harming survivors, educational institutions, and student rights protected under Title IX, including by: (1) re-traumatizing survivors through requiring them to undergo live hearings, mediation, and/or cross-examinations by their harassers; (2) adopting a “clear and convincing” standard of evidence; (3) making it more difficult for survivors to access supportive, protective, and/or interim measures or accommodations; and (4) allowing schools to claim broad religious exemptions from Title IX without prior written notice to ED, students, and parents.

a) Opposing the DeVos NPRM’s Proposals Regarding Live Hearings, Mediation, and Cross-examination

I know how gut-wrenching it is to have to see your assaulter’s face after the traumatic ordeal. I could not imagine having to endure being cross-examined by him and trying to convince a rapist that what he did was not ok.

- Survivor⁶⁰

Of the 5,632 comments that addressed and took a position on live hearings, mediation, and cross-examination, 5,409 comments (96%) opposed the NPRM proposals. The concerns expressed most frequently by opposing commenters on this theme include those regarding how the NPRM proposals

⁵⁷ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 13 (Jan. 29, 2019).

⁵⁸ *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 119 S.Ct. 1661 (1999).

⁵⁹ Individual, Comment [ED-2018-OCR-0064-104560](#) (Jan. 30, 2019).

⁶⁰ Individual, Comment [ED-2018-OCR-0064-1065](#), (Dec. 3, 2018)

would lead to re-traumatization of survivors and related deterrence of victim reporting. Commenters also often discussed the impracticality and administrative burdens of the NPRM's complex standards and procedures, which they noted with disapproval imitate criminal court rules—except that they provide even fewer protections to victims than victims would get in a criminal trial—and in doing so depart from procedures used to investigate and resolve other civil rights cases as well as school student conduct procedures.

The concern about re-traumatization of survivors was shared by many commenters who opposed the proposed changes, including teachers,⁶¹ students,⁶² and parents.⁶³ A comment from Healthy Women, a medical-based national advocacy organization, was typical of such comments when it expressed concern that the use of live hearings and cross-examination could lead an accused's advisors, such as attorneys, to "grill the survivor about the traumatic details of the assault" given the adversarial and contentious nature of cross-examination.⁶⁴ Similarly, a survivor who pursued criminal charges for a sexual assault shared that "knowing that cross-examination was going to happen delayed my willingness to report and almost prevented me from following through with the hearing process."⁶⁵ The survivor went on to state that when being cross-examined, "fear, intimidation, and terror were [my] only feelings."⁶⁶

Many NPRM-opposers who discussed re-traumatization cited research studies to support their comments, with two particular studies coming up frequently. First, commenters noted a 2005 report which found that women who are sexually assaulted or abused are over twice as likely to have PTSD, depression, and chronic pain following the violence as non-abused women are.⁶⁷ Second, commenters discussed research findings that approximately 40% of rape victims suffer from severe emotional distress, often requiring mental health treatment.⁶⁸ Commenters noted their acute concern, in light of such information, that the proposed procedural changes are likely to re-traumatize victims.⁶⁹

In addition, a comment by students at Yale Law School noted the "arbitrary and capricious" nature of the distinction drawn in the NPRM that makes live cross-examination optional for elementary and secondary schools—due to the "sensitivities associated with age and developmental ability" for younger students—but mandatory for colleges. The commenters asserted that, by making this distinction, the Department itself recognized the harms of cross-examination and pointed to research about brain development continuing through college to show that similar harms to those the Department acknowledged as harming K-12 students may also affect college students.⁷⁰

⁶¹ Teacher, Comment [ED-2018-OCR-0064-11673](#) (Jan. 29, 2019).

⁶² Student, Comment [ED-2018-OCR-0064-6165](#) (Jan. 7, 2019).

⁶³ Parent, Comment [ED-2018-OCR-0064-0017](#) (Nov. 29, 2018).

⁶⁴ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 11 (Jan. 30, 2019).

⁶⁵ Survivor, Comment [ED-2018-OCR-0064-7458](#) (Jan. 23, 2019).

⁶⁶ Survivor, Comment [ED-2018-OCR-0064-7458](#) (Jan. 23, 2019).

⁶⁷ E.g., Academic Advisor, Comment [ED-2018-OCR-0064-2216](#) (Dec. 5, 2018) (citing SJ Woods, *Intimate Partner Violence and Post-Traumatic Stress Disorder Symptoms in Women: What We Know and Need to Know*, [20(4)] J. OF INTERPERSONAL VIOLENCE, 394 (2005)).

⁶⁸ E.g., Academic Advisor, Comment [ED-2018-OCR-0064-2216](#) (Dec. 5, 2018) (citing Ted R. Miller, Mark A. Cohen & Shelli B. Rossman, *Victim Costs of Violent Crime and Resulting Injuries*, [12(4)] HEALTH AFF. 186 (1993)).

⁶⁹ Academic Advisor, Comment [ED-2018-OCR-0064-2216](#) (Dec. 11, 2018) ((citing Ted R. Miller, Mark A. Cohen & Shelli B. Rossman, *Victim Costs of Violent Crime and Resulting Injuries*, [12(4)] HEALTH AFF. 186 (1993)).

⁷⁰ 49 Yale Law School Students, Comment [ED-2018-OCR-0064-31321](#) at 23 (Jan. 30, 2019) (citing Heidi Ledford, *Who exactly counts as an adolescent?*, NATURE (Feb. 21, 2018),

Commenters who opposed the NPRM often linked victim re-traumatization with a tendency to chill victim reporting, as the survivor who pursued criminal charges quoted above confirmed when noting that fear of cross-examination delayed and almost kept the survivor from reporting altogether.⁷¹ Educational institutions and Title IX Coordinators shared similar worries about the proposed changes “chilling effect on a party’s willingness to report.”⁷² The medical-based national advocacy organization’s comment elaborated on this point and explained how the NPRM was even less protective than criminal court procedures are:

Being asked detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced would understandably discourage many students – parties and witnesses – from participating in a Title IX grievance process, chilling those who have experienced or witnessed harassment from coming forward.⁷³

This organization also expressed concerns with the NPRM’s allowing funding recipients to mediate SH-GBV complaints, concerns that were shared by many NPRM opposers, especially with regard to how the proposals would enable schools to pressure victims to “work things out” with their assailant as though “they share responsibility for the assault.”⁷⁴ This concern was particularly acute, this commenter noted, with regard to minor students in both K-12 and higher education who could be pressured to agree to mediation without informed consent.⁷⁵

Educational institutions expressed an additional concern that the requirements of live hearings and other standard trial elements will be a significant administrative burden for institutions⁷⁶ and proposed instead that all parties be able to submit written questions to a fact-finder such as a hearing panel as an alternative to live cross-examination.⁷⁷ One Title IX Coordinator went on to address how live hearings and cross-examination would pressure both students and schools to engage in “a de facto arms race” in which:

[I]f the respondent hires an attorney, we will face pressure to have an attorney serve as the complainant’s advisor as well to ensure fairness . . . While [ED] seeks to alleviate the risks of re-traumatization by allowing the parties to be in separate rooms and by generally limiting questions regarding “the complainant’s sexual behavior or predisposition,” these measures may be inadequate because they still subject the complainant to real-time questioning by a confrontational advocate.⁷⁸

The medical-based national advocacy organization agreed, adding that the NPRM proposals are

<https://www.nature.com/articles/d41586-018-02169-w>).

⁷¹ Survivor, Comment [ED-2018-OCR-0064-7458](#) (Jan. 23, 2019).

⁷² Title IX Coordinator, Comment [ED-2018-OCR-0064-68548](#) (Feb. 15, 2019).

⁷³ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 11 (Jan. 29, 2019) (citing Sarah Zydervelt et al., *Lawyers’ Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, [57(1)] THE BRIT. J. OF CRIMINOLOGY 551-69 (2017)).

⁷⁴ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 11 (Jan. 29, 2019).

⁷⁵ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 11 (Jan. 29, 2019).

⁷⁶ President, Northwestern College, Comment [ED-2018-OCR-0064-8538](#) (Jan. 25, 2019).

⁷⁷ Title IX Coordinator, Comment [ED-2018-OCR-0064-68566](#) (Jan. 28, 2019).

⁷⁸ Title IX Coordinator, Comment [ED-2018-OCR-0064-68566](#) (Jan. 28, 2019).

actually less protective than even criminal procedures:

Nor would the proposed rules entitle the survivor to the procedural protections that witnesses have during cross-examination in the criminal court proceedings that apparently inspired this requirement; schools would not be required to apply rules of evidence or make a prosecuting attorney available to object or a judge available to rule on objections. The live cross-examination requirement would also lead to sharp inequities if one party can afford an attorney and the other cannot.⁷⁹

In this sense, this organization's comment both objected to the harmful effects of imitating criminal court procedures and pointed out that the NPRM was not even a good or accurate imitation. Other NPRM-opposers expanded upon this analysis by pointing to the relevance that Title IX is a civil rights law, not a criminal law. For example, a law professor stated that:

Of course, while rape is an act of sex discrimination that violates one's rights on campus, it is also a criminal act. But even though there is overlap between the responsibilities of schools and those of law enforcement, it is crucial to remember that the civil rights/criminal justice system distinction creates a different legal standard for school adjudications as compared to criminal cases.⁸⁰

Furthermore, many commenters noted that the previous standards for Title IX proceedings are consistent with other civil rights standards in educational settings as well as with other disciplinary procedures in academic settings. While the criminal legal system has certain procedures because of the severity of punishments available,⁸¹ educational institutions have less rigorous procedures because the worst punishment available is expulsion, a punishment of significantly less severity than incarceration.⁸²

b) Opposing the DeVos NPRM's Proposals Regarding Standards of Evidence

The preponderance standard is used by courts in all civil rights cases. It is the only standard of proof that treats both sides equally and is consistent with Title IX's requirement that grievance procedures be "equitable." By allowing schools to use a "clear and convincing evidence" standard, the proposed rule would tilt investigations in favor of respondents and against complainants.

- Healthy Women⁸³

Out of 4,432 comments addressing the standard of evidence in the proposed changes to Title IX procedures, 4,118 comments (94%) opposed the proposed changes. The concerns these commenters expressed included those relating to inconsistency with other, comparable proceedings, increased barriers to harasser accountability, and the incompatibility of the proposed standard with civil rights laws and principles.

Similar to the concerns NPRM-opposers expressed about the use of live hearings, mediation, and

⁷⁹ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 11 (Jan. 29, 2019).

⁸⁰ Law Professor, Comment [ED-2018-OCR-0064-30469](#) at 4 (Jan. 30, 2019).

⁸¹ Law Professor, Comment [ED-2018-OCR-0064-30469](#) at 3 (Jan. 30, 2019).

⁸² Law Professor, Comment [ED-2018-OCR-0064-30469](#) at 3 (Jan. 30, 2019).

⁸³ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 10 (Feb. 19, 2019).

cross examination, commenters objected that a higher standard of evidence would be inconsistent with other misconduct proceedings in educational institutions and other civil rights enforcement.⁸⁴ This inconsistency could lead to confusion for students, faculty, and staff regarding the various proceedings in these settings.⁸⁵

Many students opposed the proposed changes and expressed concern that the possibility of higher standards of evidence would allow many perpetrators to escape accountability.⁸⁶ Several students mentioned that sexual harassment cases often involve strictly testimonial evidence because it is an offense that “occurs in the shadows by their very nature” which makes the clear and convincing standard impossible to meet in many circumstances.⁸⁷ Thus, an inappropriately high evidentiary standard could allow people who have committed SH-GBV to escape culpability. The Student Union Assembly of University of California Santa Cruz wrote:

The UCSC Student Union Assembly strongly supports the application of a “preponderance of evidence” standard in cases of sexual assault which maintains an environment where the testimony of both parties is given appropriate weight. The use of the clear and convincing standard in these investigations is wholly inappropriate as it tips the scales against and places an undue burden on the survivor, poorly accounts for the nature of these cases, and can elicit a culture of disbelief.⁸⁸

Several educational institutions noted practical issues as well. Namely, that because of the proposed rule change, the standard of evidence applied to student complaints may conflict with the standards of evidence in existing contracts for employees:

The proposed rule appears to offer institutions flexibility, but it will in practice be difficult, if not impossible, for some institutions to use a “preponderance of the evidence” standard under the proposed regulations due to pre-existing faculty contracts or conflicts that could exist with state laws. While we recognize that some institutions may choose to adopt a “clear and convincing” standard, we believe they should be provided a real choice.⁸⁹

The law professor quoted above pointed to the legal basis for the standard of evidence, stating in her comment that Title IX is a civil rights statute and thus the correct evidentiary standard is preponderance of the evidence.⁹⁰ She noted that deviating from the preponderance of the evidence standard would be “contrary to well-established civil rights jurisprudence.” A teacher also distinguished criminal from school sanctions, stating that the preponderance of the evidence standard is appropriate for the school environment where criminal sanctions such as jail time are not available.⁹¹ This teacher

⁸⁴ Law Professor, Comment [ED-2018-OCR-0064-31987](#) (Jan. 30, 2019) (attaching manuscript of article by Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1 (2019), pp. 5-6, 8, 13-14, 69-72).

⁸⁵ E.g., Student, Comment [ED-2018-OCR-0064-11114](#) at 14 (Jan. 30, 2019).

⁸⁶ Student, Comment [ED-2018-OCR-0064-9410](#) (Jan. 27, 2019).

⁸⁷ Student, Comment [ED-2018-OCR-0064-9391](#) (Jan. 27, 2019).

⁸⁸ Student Union Assembly of University of California Santa Cruz, Comment [ED-2018-OCR-0064-9065](#) (Jan. 30, 2019).

⁸⁹ President, Northwestern College, Comment [ED-2018-OCR-0064-8538](#) (Jan. 25, 2019).

⁹⁰ President, Northwestern College, Comment [ED-2018-OCR-0064-8538](#) (Jan. 25, 2019).

⁹¹ Teacher, Comment [ED-2018-OCR-0064-11673](#) (Jan. 29, 2019).

noted that although the harshest punishment available in schools is expulsion, it is used in only about 13-30% cases in which fault is found.⁹² Finally, a White Paper signed by 115 law professors agreed with such points and articulated numerous additional reasons why the preponderance standard is the appropriate standard for Title IX proceedings.⁹³

The medical-based national advocacy organization questioned the reasoning for the proposed option of a higher standard of evidence:

The Department's decision to allow schools to impose a more burdensome standard in sexual assault cases than in any other student misconduct case appears to rely on the unspoken stereotype and assumption that survivors (who are mostly women) are more likely to lie about sexual assault than students who report physical assault, plagiarism or other school disciplinary violations. There is no basis for that sexist belief and in fact men and boys are far more likely to be victims of sexual assault than to be falsely accused of sexual assault.⁹⁴

iii. Opposing the DeVos NPRM's Proposals Regarding Supportive, Protective, and Interim Measures or Accommodations

For a survivor of sexual assault, having to interact with the person who assaulted them can cause severe psychological distress, as well as a range of other adverse health effects.

-Teacher⁹⁵

During the public comment period, members of the public submitted 5,460 comments that addressed supportive, protective, and/or interim measures or accommodations. Of the 5,460 comments written and filed, 5,355 comments (98.1%) opposed the NPRM's proposals.

Some of these commenters focused on how the proposed rules would make it more difficult for survivors to access such measures, which are key supports allowing survivors to continue pursuing their educational aspirations without the harm that can come from additional conflict or interaction with the reported harasser. As one student noted, "Revoking the ability of students to request the removal of their assaulter from their courses and dorms expedites decline in victim's abilities to perform both in and out of school."⁹⁶ These commenters criticized how the NPRM would force students to file a formal complaint in order to access supportive measures. For instance, an employee at an academic medical center stated:

Survivors will only be able to access supportive measures such as changes in housing, class schedules, extensions on assignments or extended time on tests if they formally

⁹² Teacher, Comment [ED-2018-OCR-0064-11673](#) (Jan. 29, 2019) (citing Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, THE HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/campus-sexual-assault_n_5888742).

⁹³ E.g., National Center for Lesbian Rights, Comment [ED-2018-OCR-0064-102845](#) (Jan. 30, 2019).

⁹⁴ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 10 (Jan. 29, 2019) (citing Tyler Kingkade, *Males Are More Likely to Suffer Sexual Assault Than to Be Falsely Accused of It*, HUFFINGTON POST (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html).

⁹⁵ Teacher, Comment [ED-2018-OCR-0064-11673](#) (Jan. 29, 2019).

⁹⁶ Student, Comment [ED-2018-OCR-0064-2822](#) (Dec. 6, 2018).

report to the Title IX Coordinator...Given that 90-98% of reported cases of sexual assault are not false (Lisak, 2010), it would not be imprudent to offer these interim support measures to survivors who do not formally report.⁹⁷

Other commenters, particularly educational institutions, objected to the way in which the NPRM's proposals made the parameters for offering supportive measures less clear. These commenters asked for clearer guidance on how to proceed when, for example, class schedules or living arrangements create more difficult and/or dangerous situations for survivors, or how to clearly separate supportive and/or interim measures from corrective measures so that they are not perceived as disciplinary or punitive measures against accused harassers. The National Women's Law Center ("NWLC"), for example, addressed the DeVos NPRM's "non-responsibility presumption," which ED said it proposed to ensure impartiality by the funding recipient until a determination is made. NWLC expressed concern that "[t]he presumption of non-responsibility may [instead] discourage schools from providing crucial supportive measures to complainants, in order to avoid being perceived as punishing respondents."⁹⁸

Commenters were also concerned that ED's proposed rules' lack of clarity regarding when schools are required to provide supportive and/or interim measures or accommodations would deprive many survivors of the option to pursue cases concurrently through their school and via law enforcement. A national advocacy organization urged ED to clarify that "recipients are required to provide survivors with supportive measures while criminal and school investigations are ongoing."⁹⁹ A similar organization concurred, providing examples of schools that had actually "abdicate[d] their obligations to provide survivors with supportive measures,"¹⁰⁰ including the following:

In a North Central High School in rural Indiana, the principal told one girl's family they would wait until the criminal investigation was done "to determine our course of action."¹⁰¹

At another school in Bucks County, Pennsylvania, the school refused to issue a no-contact order to the respondent because he had not been criminally convicted, despite the school's legal obligation to conduct its own investigation.¹⁰²

A third national advocacy organization stated that the NPRM could cause schools to feel "constrained from transferring a named harasser to another class or dorm because it would 'unreasonably burden' him, thereby forcing a survivor to change all of her own class and housing assignments in order to avoid her harasser."¹⁰³ The Association for Student Conduct Administration ("ASCA") expressed the common view that "effective interim measures, including...actions restricting

⁹⁷ Individual, Comment [ED-2018-OCR-0064-10191](#) (Jan. 28, 2019).

⁹⁸ National Women's Law Center, Comment [ED-2018-OCR-0064-30297](#) at 37 (Jan. 30, 2019).

⁹⁹ National Women's Law Center, Comment [ED-2018-OCR-0064-30297](#) at 37 (Jan. 30, 2019).

¹⁰⁰ Know Your IX, Comment [ED-2018-OCR-0064-32105](#) at 47 (Jan. 30, 2019).

¹⁰¹ Know Your IX, Comment [ED-2018-OCR-0064-32105](#) at 47 (Jan. 30, 2019) (citing Tyler Kingkade, *High Schools Are Failing Girls Who Report Sexual Assault*, HUFFINGTON POST (Mar. 17, 2016), https://www.huffingtonpost.com/entry/high-schools-sexual-assault-investigations_us_56e05a06e4b065e2e3d45f6f).

¹⁰² Know Your IX, Comment [ED-2018-OCR-0064-32105](#) at 47 (Jan. 30, 2019) (citing Rebecca Grant, *After Reporting Her Rape, a Teen Girl Says She Was Pushed Out of High School*, BROADLY (Nov. 22, 2017, 1:30pm), https://broadly.vice.com/en_us/article/gvj7y7/after-reporting-her-rape-a-teen-girl-saysshe-was-pushed-out-of-high-school).

¹⁰³ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 12 (Jan. 30, 2019).

the accused, should be offered and used while cases are being resolved, as well as without a formal complaint.”¹⁰⁴

iv. Opposing Religious Exemptions from Title IX Without Prior Written Notice

It is difficult to conceive of a religious tenet that is inconsistent with prohibiting sexual assault and other forms of sexual harassment. At the very least, it is certainly reasonable to require an educational institution to identify how adopting and enforcing policies against sexual assault and other forms of sexual harassment is in conflict with specific religious tenets.

- American Association of University Professors¹⁰⁵

Many commentors addressed a specific provision of the proposed changes that would allow religious schools to claim an exemption to Title IX, without prior written notice, after a Title IX complaint has been filed against the school, thus removing the previous requirement that a school make a written request to the Department of Education for a religious exemption prior to any such complaint being filed. An overwhelming majority of these commentors opposed this new provision, with 2,825 comments out of the 2,919 comments (97%) that addressed the religious exemption provision opposing the change.

These NPRM-opposers noted two specific harms that could result from the proposed changes: first that the exemption is so broad as to eliminate the need for religious schools to comply with Title IX at all, and second that the lack of pre-registration or public disclosure of religious exemption status would blind-side survivors whose schools suddenly claimed exemption after the survivor had been harmed.¹⁰⁶ Students¹⁰⁷ and concerned parents objected to the lack of procedural requirements for schools claiming a religious exemption, protesting that such an exemption would be ripe for abuse by educational institutions,¹⁰⁸ and emphasizing the negative effects of such exemptions on students at that institution:

Under the proposed rules, schools would be able to claim a religious exemption from Title IX, a civil rights statute, at any time. Even if a school has never indicated that it qualifies for a religious exemption, it can once it is under investigation for violating Title IX claim that it has no obligation to follow the law. This, obviously, does not give students notice of their school’s intent not to protect their civil rights under Title IX, and is particularly harmful to women, LGBTQ students, and married or unmarried pregnant

¹⁰⁴ Healthy Women, Comment [ED-2018-OCR-0064-11882](#) at 12 (Jan.20, 2019) (citing Association for Student Conduct Administration, *ASCA 2014 White Paper: Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses* (2014), <https://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>).

¹⁰⁵ American Association of University Professors, Comment [ED-2018-OCR-0064-10227](#) (Jan. 28, 2018).

¹⁰⁶ American Civil Liberties Union (ACLU), Comment [ED-2018-OCR-0064-17939](#) (Jan. 30, 2019); Academic/Think Tank, [ED-2018-OCR-0064-0821](#) (Dec. 2, 2018); National Council of Jewish Women, Comment [ED-2018-OCR-0064-105088](#) at 3 (Jan. 24, 2019) (stating that “This rule states that even if a school receives a religious exemption, they do not have to disclose the fact that they are claiming exemption to students before they engage in discriminatory actions. Schools can claim a religious exemption after the fact to shield themselves from a Title IX violation investigation allowing them to discriminate without any liability.”)

¹⁰⁷ Student, Comment [ED-2018-OCR-0064-0492](#), (Dec. 6, 2018).

¹⁰⁸ Student, Comment [ED-2018-OCR-0064-0659](#) (Dec. 6, 2018).

and parenting students.¹⁰⁹

Elected officials, such as the Women’s Caucus of the New York City Council,¹¹⁰ agreed with such concerns, pointing out that the considered changes would allow some schools to ignore students who report sexual misconduct on a large scale. Faith-based organizations added objections related to the effects of such an exemption on the role of religion and its interaction with law:

This subsection of the proposed rule is particularly degrading to all faith-based institutions and organizations — religion is not a “get out of jail free” card. As a faith-based organizations, we cannot allow schools to hide behind religion to simply decrease liability and obligation to students. This trivializes the role of religion [in] people’s lives throughout the country and disrespectfully manipulates religion as political leverage.¹¹¹

Such opposers often referenced the longstanding and fundamental American philosophy of separation of church and state, arguing that the proposed changes would practice favoritism for religious beliefs over other moral beliefs.¹¹² Moreover, these commenters objected, permitting religious exemptions to Title IX in the manner of the proposed rules elevates the right to religion over simple protection and causes it to conflict with the laws of the country.¹¹³

v. Disparate Impacts on Certain Student Populations

Many of those who opposed the proposals announced in the DeVos NPRM expressed concerns about the ways they would disparately impact certain student populations. Commenters pointed in particular to two methods by which they saw the NPRM increasing and exacerbating discrimination and inequality for particular student populations. First, the NPRM’s proposals require K-12 schools to adopt rules that are not only not tailored to meet the needs of our education systems’ youngest and often most vulnerable populations but, in many instances, would be unworkable. Second, the NPRM’s proposed rules have an especially discriminatory and disproportionate impact on multiply-minoritized students, such as students of color, LGBTQIA+ students, low-income students, and student with disabilities.

a) **Opposing the NPRM’s Impacts on K-12 Students**

While behaviors at this point may well not have the same motivation, however, the seriousness of possible incidents should in no way be minimized. As such, the framework and responsibilities might change, but the need to address children at these ages is just as important, if not more so.

- High School Teacher¹¹⁴

¹⁰⁹ Parent, Comment [ED-2018-OCR-0064-0019](#), (Nov. 29, 2018).

¹¹⁰ Women’s Caucus of New York City Council, Comment [ED-2018-OCR-0064-104720](#) (Jan. 30, 2019).

¹¹¹ National Council of Jewish Women, Comment [ED-2018-OCR-0064-105088](#) at 3 (April 2, 2019).

¹¹² *E.g.*, Americans United for Separation of Church and State, Comment [ED-2018-OCR-0064-31976](#) (Jan. 30, 2019); Student, Comment [ED-2018-OCR-0064-18423](#), (Jan. 30, 2019); Teacher, Comment [ED-2018-OCR-0064-5184](#) (Dec. 8, 2018).

¹¹³ *E.g.*, Teacher, Comment [ED-2018-OCR-0064-9022](#) (Jan. 16, 2019).

¹¹⁴ Teacher, Comment [ED-2018-OCR-0064-0928](#) (Dec. 3, 2018).

Although the DeVos NPRM stated that “[t]he proposed rule would apply to all recipients of federal financial assistance, including ... elementary and secondary schools,” it explicitly sought comments on the applicability of the proposed rules to K-12 schools and where the rules might be “unworkable.”¹¹⁵ Many commenters answered this call and overwhelmingly expressed concerns about the harmful effects of both SH-GBV and the NPRM’s proposals on children and teenagers. The vast majority of comments on this topic opposed the proposed regulations: 2,148 of 2,164 comments (99%).

Many K-12 teachers, child advocates, and other community members cited statistics about the prevalence of sexual harassment reported by elementary and secondary school students, emphasizing the need for strong Title IX protections for youth. A children’s advocacy center explained that the negative effects of childhood sexual abuse are “wide-reaching and long-lasting,” and abuse in childhood has been linked to behavioral and mental issues, as well as increased suicidal ideation.¹¹⁶ Another organization stated that:

We are very concerned with several sections of the proposed rules which would decrease protections for adolescent girls. Statistics indicate that nearly 1 in 5 girls between the ages of 14 and 17 have been victims of sexual assault or attempted sexual assault. While it is not clear how many of these assaults were perpetrated by fellow students or in school, there were at least 17,000 official reports of sexual assaults of K-12 students by their peers between 2011 and 2015. In a survey of 1,965 middle and high school students, it was found that between 2010-11, 56% of girls experienced sexual harassment in school.¹¹⁷

NPRM-opposers who offered up these statistics often shared a particular concern: that the proposed rule would lead to underreporting of sexual abuse in K-12 educational programs, especially because fewer school employees would be required to report sexual misconduct. These commenters echoed the points made by commenters who objected to the narrowing and limiting effects of the definitions of “sexual harassment,” “responsible employee,” etc., as well as the NPRM’s exclusion of off-campus and online harassment from ED’s Title IX enforcement sphere. For example, a national women’s rights organization objected to the NPRM because:

The proposed rules drastically narrow whom a student must tell for their harassment or assault to be investigated by the school, meaning even when students find the courage to talk to the adult school employees they trust, schools would frequently have no obligation to respond. Under the proposed rules, if a lower school age student told an adult school employee (i.e., a lunchtime or recess supervisor) that they had been inappropriately touched or sexually harassed by another student, their school would have no obligation to help them.¹¹⁸

A prevention education coordinator at a sexual assault victim advocacy center who works with middle schoolers wrote that because the proposed rule narrowed the definition of sexual harassment, students’ complaints could be dismissed if their education is not in immediate jeopardy.

¹¹⁵ Nondiscrimination on The Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 84 Fed. Reg. 61462-01, 61482 (proposed Nov. 29, 2018).

¹¹⁶ Chicago Children’s Advocacy Center, Comment [ED-2018-OCR-0064-102975](#) (Jan. 29, 2019).

¹¹⁷ Equality Now, Comment [ED-2018-OCR-0064-11851](#) at 1 (Jan. 30, 2019).

¹¹⁸ National Partnership for Women and Families, Comment [ED-2018-OCR-0064-10646](#) (Jan. 28, 2019).

To me, it is ludicrous that a school would be required to take action not before a student's education is in jeopardy, but only after their education is in jeopardy. Why would we want to force our schools to wait and play catch up, rather than protect its students from experiencing harassment at all? . . . According to the AAUW Educational Foundation (2011), approximately one third of 7th-12th graders who experienced sexual harassment did not want to go to school as a result of the harassment. If students are not allowed to report sexual harassment when it begins, there is a chance that by the time the sexual harassment has met the criteria of being so severe and pervasive, as outlined in the proposed rule, that they are no longer even attending school to actually make a report.¹¹⁹

One mother wrote that after her 15-year-old daughter had been sexually harassed at her high school, her daughter confided in a trusted teacher with whom she felt comfortable sharing the traumatizing information. The mother wrote that the proposed rule would not have allowed the teacher to take action and would have "instead required my daughter to go to an unfamiliar administrator with deeply personal information. Not only does this place an unreasonable burden on the victims, but it severely impacts and lessens the reporting that will occur, allowing more perpetrators to escape consequences and continue harassing victims."¹²⁰

With regard to off-campus and online harassment, the New York State Coalition Against Sexual Assault wrote that, for instance, if a middle school student experienced sexual harassment on social media outside of school hours, their school would be forced to dismiss the complaint "even if the harassment severely impacts the student's ability to participate in or benefit from educational programs or activities."¹²¹

b) Opposing the NPRM's Exacerbation of Intersectional Discrimination and Related Inequalities

DeVos and Marcus are trying to impose new regulations and standards on students who experience sexual harassment or assault, a burden that would fall disproportionately on girls, women, LGBTQ students, students of color, pregnant and parenting students, and students with disabilities. These are exactly the types of discrimination that Title IX and other civil rights laws were created to prohibit. These proposed rules would effectively transform Title IX from a law that protects students into one that shields schools and perpetrators from accountability.

- Individual¹²²

Many comments discussed the ways the NPRM would exacerbate other, additional inequalities, as well as intersectional discrimination, faced by certain students. Catalogers did not identify comments that mention discrimination or these communities specifically, so there is no exact number of how many comments discussed these topics. However, some catalogers did independently identify these comments and many large organizations and academic institutions discussed these topics in their comments.

¹¹⁹ Victim Advocacy Center Coordinator, Comment [ED-2018-OCR-0064-30389](#) (Jan. 30, 2019).

¹²⁰ Parent, Comment [ED-2018-OCR-0064-10206](#) (Jan. 28, 2019).

¹²¹ New York State Coalition Against Sexual Assault, Comment [ED-2018-OCR-0064-104607](#) at 4 (Jan. 30, 2019).

¹²² Individual, Comment [ED-2018-OCR-0064-11243](#) (Jan. 29, 2019).

Like with the commenters who focused on K-12 education, these NPRM-opposers echoed the points made by commenters who objected to the narrowing and limiting effects of the definitions of “sexual harassment,” “responsible employee,” etc., as well as the NPRM’s exclusion of off-campus and online harassment from Title IX’s jurisdiction, emphasizing how the NPRM’s proposed changes would be even more harmful for these multiply-discriminated-against groups. In addition, many educational institution commenters addressed the disparate impact that the quasi-criminal live hearing, cross-examination, and standard of evidence requirements proposed by the NPRM would have on multiply-marginalized students.

First, many of those comments that discussed additional inequalities and intersectional discrimination discussed the proposed provisions’ disparate effects on students from marginalized communities, such as students of color, LGBTQIA+ students, low-income students, and students with disabilities. These commenters provided statistics and cited research documenting the existence of disproportionately high rates of SH-GBV in certain communities and groups, often those that face intersecting forms of discrimination. For instance, the YWCA identified the higher risk of violence that women of color face, noting that “24 percent of Latina girls, 23 percent of Native American girls, and 22 percent of Black girls are kissed or touched without their consent,” that “students with disabilities are 2.9 times more likely than their peers to be sexually assaulted,” and that “[m]ore than half of LGBTQ students ages 13-21 are sexually harassed at school.”¹²³ Similarly, a comment from the National Center for Transgender Equality noted that “[t]ransgender students are among the most vulnerable to sexual harassment, sexual assault, and other forms of sex-based discrimination,” quoting statistics from a 2017 survey showing that 24% of transgender students have experienced rape, 23% have experienced sexual dating violence, and 26% have experienced physical dating violence.¹²⁴

These rates are increased even further the more intersectional identities a student has and the younger a student is:

78% of transgender or gender non-conforming youth are sexually harassed during grades K-12, and 12% experience other sexual violence. Those who are Native American, Black, and multi-racial experience higher rates of sexual violence than students of other races, with 58% experiencing harassment or sexual assault.¹²⁵

Second, with regard to the changes in definitions, commenters noted that the new definition of “sexual harassment” would not account for the particular harassment faced by students of color, LGBTQIA+ students, and students with disabilities. In noting how LGBTQIA+ students experience harassment that is different from heterosexual students, the commenter explained that:

LGBTQ+ are often subjected to harassment in the form of relentless teasing and name calling. Narrowing and limiting the definition of sexual harassment would force LGBTQ+

¹²³ Young Women’s Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 3 (Jan. 30, 2019).

¹²⁴ National Center for Transgender Equality, Comment [ED-2018-OCR-0064-11557](#) at 3 (Jan. 28, 2019) (citing Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts*, 63 MORBIDITY AND MORTALITY WEEKLY REPORT 67, 69 (2017), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf>).

¹²⁵ Young Women’s Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 3 (Jan. 29, 2019).

to continue to endure harassment and force them to attend class in a hostile environment, in violation of Title IX, because the behavior of their tormentors would not fall within the proposed definition of harassment.¹²⁶

Similarly, the Consortium for Citizens with Disabilities Education Task Force argued that the proposed rule would encourage or require schools to ignore sexual violence and harassment, particularly for cases affecting students with disabilities.¹²⁷

Commenters also objected to the disparate impacts that the proposed change to the definition of “responsible employee” would have. The new definition would require students to disclose to a smaller and more limited group of employees (in certain cases, only one employee: the Title IX Coordinator). NPRM-opposers discussed this impact on students who experience intersectional discrimination, explaining that these students will likely have fewer employees with whom they feel comfortable reporting and under the NPRM’s narrow definition, those employees are less likely to be a “responsible employee.” Therefore, reporting of sexual violence by intersectional populations will almost certainly decrease. For example, LGBTQIA+ students, a student commenter noted, would have to choose between disclosing their sexuality to school staff who they do not trust, making an already traumatic experience more difficult and sometimes even dangerous for these students, or not disclosing at all.¹²⁸

Several commenters discussed how the NPRM would exacerbate the additional barriers that students with disabilities already experience when trying to report sexual violence. A comment by the Consortium for Citizens with Disabilities Education Task Force noted that students with disabilities may be more comfortable reporting to a trusted employee, such as a teacher’s aide or school psychologist, rather than a teacher or employee that they do not know.¹²⁹ These students may also rely on different methods of communication, “whether it is sign language, interpreters, or technology assisted devices.”¹³⁰ The disparate impact of a change in the definition of “responsible employee” would be even greater on students who are non-verbal and cannot report what happened to them, a K-12 special education teacher explained.¹³¹ Moreover, these nearly insurmountable barriers can turn into an absolute bar where “[t]here is an absence of procedures to communicate with survivors who are Deaf or hard of hearing and inaccessible support services for students with mobility disabilities.”¹³²

A special education teacher for K-12 students on the autism spectrum added the effects of poverty to the negative impacts the proposed rule would have on students:

As a special education teacher that works in a school district with 30% of students homeless/living below the poverty line, there is a correlation with safety and their economic

¹²⁶ Student, Comment [ED-2018-OCR-0064-103191](#) at 3 (Jan. 23, 2019).

¹²⁷ Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 4 (Jan. 30, 2019).

¹²⁸ Student, Comment [ED-2018-OCR-0064-103191](#) at 2 (Jan. 24, 2019).

¹²⁹ Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 5 (Jan. 30, 2019).

¹³⁰ Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 5 (Jan. 30, 2019).

¹³¹ Teacher, Comment [ED-2018-OCR-0064-10158](#) (Jan. 27, 2019).

¹³² Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 5 (Jan. 30, 2019) (citing Nat’l Council on Disability, NOT ON THE RADAR: SEXUAL ASSAULT OF COLLEGE STUDENTS WITH DISABILITIES, 2018, <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>).

status. Many of these students come from abusive homes and have been exposed to some horrific events. I have seen bruises, inappropriate writing on their skin, cuts, and left over tape residue from when a student was hospitalized for getting into their parents' crystal meth... If this new proposed rule goes through, this could put my students into dangerous positions in and out of school.¹³³

Commenters also pointed out that the change in definition of “responsible employee” would have negative effects on men and boys, especially male survivors, who the YWCA noted “are far more likely to be victims of sexual assault than to be falsely accused of it.”¹³⁴ A comment from a law school pointed out that the “responsible employee” change will likely reduce the number of men and boys who are willing to report. Because male survivors can experience additional anxiety when reporting due to potential “skepticism about their masculinity,” they may not feel comfortable disclosing to an employee that they do not know well and already trust.¹³⁵ This is especially true for men of color, for similar reasons as those for women of color, discussed above.¹³⁶

Third, many comments written by schools and advocacy organizations discussed the greater negative impacts that the NPRM’s “increasingly legalistic” live hearing, cross-examination, and other procedural requirements would have on students from marginalized communities.¹³⁷ In their comment, YWCA points out that the adversarial process can “reinforce racial and class-based inequities if one party can afford an attorney and the other cannot,” especially with the cross-examination requirement.¹³⁸ Likewise, one university mentioned the findings of their campus climate survey, as they relate to this issue:

[W]e heard feedback that students of color in particular may avoid reporting incidents of sexual misconduct because of a lack of trust in adjudicatory systems. Research has also shown that for students who identify as LGBTQ who experience sexual assault, the discrimination they may face surrounding those identities often makes them hesitant to seek help from police, hospitals, or other systems that are supposed to help them. As such, we are particularly concerned that the aspects of the proposed regulations that would require institutions to operate their administrative educational processes like courts of law will lead to less reporting, less use of our institutional grievance procedures, less accountability, and could disproportionately impact students who are from marginalized or minority populations.¹³⁹

The YWCA analyzed the effect that requiring schools to presume the reported harassment did not occur would have on students of color, specifically women and girls.¹⁴⁰ Women and girls of color “face unfair discipline due to race and sex stereotypes,” and therefore are already more likely to be punished

¹³³ Teacher, Comment [ED-2018-OCR-0064-10158](#) (Jan. 27, 2019).

¹³⁴ Young Women’s Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 13 (Jan. 30, 2019).

¹³⁵ Dean, Rutgers Law School, Comment [ED-2018-OCR-0064-18416](#) at 4 (Jan. 30, 2019) (citing *Men and Sexual Assault*, ASSOCIATION OF ALBERTA SEXUAL ASSAULT SERVICES, <https://aasasmedia-library.s3-us-west-2.amazonaws.com/AASAS/wp-content/uploads/2015/07/Men-and-SexualAssault.pdf>).

¹³⁶ Dean, Rutgers Law School, Comment [ED-2018-OCR-0064-18416](#) at 4 (Jan. 30, 2019).

¹³⁷ President, Georgetown University, Comment [ED-2018-OCR-0064-17722](#) at 9 (Jan. 30, 2019).

¹³⁸ Young Women’s Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 12 (Jan. 30, 2019).

¹³⁹ President, Georgetown University, Comment [ED-2018-OCR-0064-17722](#) at 9 (Jan. 30, 2019).

¹⁴⁰ Young Women’s Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 9-11 (Jan. 30, 2019).

by schools.¹⁴¹ This comment cites the Department's Civil Rights Data Collection from 2013-14 and 2015-16, which both report that Black women and girls are more likely than white girls to be disciplined, suspended, and expelled, even in as young a grade as preschool.¹⁴² "Schools are also more likely to punish Black women and girls by labeling them as the aggressor when they defend themselves against their harassers or when they respond to trauma because of stereotypes that they are 'angry' and 'aggressive.'"¹⁴³ With the presumption that the harassment did not occur, women and girls of color can be at risk of being ignored by their schools for reporting or even face discipline for reporting.

The more legalistic nature of the NPRM's quasi-criminal procedural requirements can create challenges in getting help for students with disabilities, as well, commenters explained. The Consortium for Citizens with Disabilities commented that the NPRM's live hearing and cross examination requirements would put students with disabilities at risk of further harm.¹⁴⁴ "It is well documented that some people with intellectual disability have trouble speaking or describing things in detail, or in proper time sequence, making adversarial proceedings tremendously unhelpful in allegations of sexual harassment, including assault."¹⁴⁵ This comment also mentions the issues that students with disabilities have with getting necessary accommodations for these proceedings, and the NPRM's oversight in not specifying that accommodations must be provided to students with disabilities under the ADA.¹⁴⁶ Finally, another commenter noted that communication issues may prevent students with disabilities from providing appropriate evidence to school officials, making it harder for them to meet the clear and convincing standard of proof.¹⁴⁷

Fourth and finally, NPRM-opposers discussed the particular negative impacts on LGBTQIA+ students of the NPRM proposal allowing schools to claim a religious exemption after a Title IX complaint has been filed. One commentator perfectly sums up the primary objection with this change:

The proposal would also allow religious schools to discriminate against LGBTQ students without notice. Students deserve to know if a school intends to deny them admission or kick them out for being LGBTQ before they apply. Schools should be transparent about their beliefs and actions.¹⁴⁸

¹⁴¹ Young Women's Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 10 (Jan. 30, 2019) (citing *Let Her Learn: A Toolkit to Stop School Pushout for Girls of Color*, NAT'L WOMEN'S L. CTR., 1 (2016), https://nwlc.org/wp-content/uploads/2016/11/final_nwlc_NOVO2016Toolkit.pdf).

¹⁴² Young Women's Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 10 (Jan. 30, 2019) (citing U.S. Dep't of Education, Office for Civil Rights, *School Climate and Safety: Data Highlights on School Climate and Safety In Our Nation's Public Schools* (Apr. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf>).

¹⁴³ Young Women's Christian Association (YWCA), Comment [ED-2018-OCR-0064-18362](#) at 10 (Jan. 30, 2019) (citing *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity*, NAACP LEGAL DEF. & EDUC. FUND, INC. & NAT'L WOMEN'S L. CTR., 5, 18, 20, 25 (2014), <https://www.naacpldf.org/wp-content/uploads/Unlocking-Opportunity-for-African-American-Girls-0-Education.pdf>).

¹⁴⁴ Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 8 (Jan. 30, 2019).

¹⁴⁵ Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 8 (Jan. 30, 2019) (citing Joseph Shapiro, *The Sexual Assault Epidemic No One Talks About*, NPR (Jan. 8, 2018) <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>).

¹⁴⁶ Consortium for Citizens with Disabilities Education Task Force, Comment [ED-2018-OCR-0064-14977](#) at 8 (Jan. 30, 2019).

¹⁴⁷ Individual, Comment [ED-2018-OCR-0064-121896](#) (May 16, 2019).

¹⁴⁸ Individual, Comment [ED-2018-OCR-0064-12774](#) (Jan. 20, 2019).

V. CONCLUSION

The proposed rules would seriously undermine current protections for students, impair schools' ability to fulfill their obligations under the law, and ultimately, do not align with the Department's goals to end sex discrimination.

- Congresswoman Ayanna Pressley¹⁴⁹

The comments that were submitted in response to the DeVos NPRM expressed over and over again (at least 114,817 times) the view of over 99% of commenters that the NPRM's proposals do not support the DeVos ED's stated intention "to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities."¹⁵⁰ This report's data cataloging and analysis show that, of the 115,670 comments in which the commenter took a definitive position – in support or in opposition of the NPRM's proposals, only 853 comments – less than one percent – supported the DeVos NPRM proposals. Importantly, the opposition to the NPRM's proposals was true for every subgroup analyzed: Businesses, Educational Administrators, Educational Institutions, Local Governments, Non-Governmental Organizations, Parents, Students, State or National Governmental Agencies, Teachers or Professors, other (unspecified) organizations, and other (unspecified) individuals. This opposition also covered every major change in the NPRM's proposals, addressing the proposals' negative impacts over a myriad of diverse issues, concerns, and student populations.

Despite this massive opposition, on May 6, 2020, Secretary DeVos formalized new regulations that made only minimal changes to the NPRM's proposals. According to DeVos, who announced the issuance of the final rules on May 6, 2020, with an effective date of August 14, 2020, the final regulations are a combination of "years of wide-ranging research, careful deliberation, and critical input."¹⁵¹ The data collected by the Big Comment Catalog and summarized in this report shows little evidence that any of the three items on DeVos' list actually influenced the final regulations. In contrast, DeVos's ED appears to have actively ignored overwhelming evidence of the public's intense and virtually unanimous antipathy to its proposed regulations.

APPENDIX A

Volunteer catalogers:

Nell Aiello
Shannon Alford
Kelsey Aliabadi
Samantha Alvarado
Yolanda Alvarez
Ma'ayan Anafi
Nicholas Andras

¹⁴⁹ Congresswoman Ayanna Pressley, Comment [ED-2018-OCR-0064-31079](#) (Jan. 30, 2019).

¹⁵⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020).

¹⁵¹ Annie Grayer, Veronica Stracqualursi, *DeVos Finalizes Regulations That Give More Rights to Rhose Accused of Sexual Assault on College Campuses*, CNN (May 6, 2020) (quoting Betsy DeVos) <https://www.cnn.com/2020/05/06/politics/education-secretary-betsy-devos-title-ix-regulations/index.html>.

Isabelle Aragon-Menzel
Taylor Arnett
Olivia Arriviello
Ayesha Audu
Loriann Baggett
Sara Barnes
Sabrina Basma
Melissa Battah
Kira Becker
Madeleine Behr
Claire Berman
Annika Bertelsen
David Bills
Sara Bloch
Ava Blustein
Morgan Bolin
Bram Bonink
Bonnie Braeutigam
Stephanie Bramble
Mia Brill
Sierra Brill
Dawn Broussard
Cary Brown
Victoria Brown
Kenneth Bundy
Judy Burt
Eric Butler
Emma Campbell
Madeleine Cane
Emma Cantus
Alice Cao
Kailah Carden
Johnathan Carr
Samella Carryl
Melissa Chau
Max Chiaramonte
Kathryn Clancy
Julia Colette
Ellen Collier
Eloise Concannon

Tim Conley
Carolyn Corcoran
Kate Couch
Abigail Crawford
Samantha Crisanti
Katherine Crosby
Stephanie Crosby
Anna Cumming
Christina Dardis
Lydia Dasari
Lauren Dasmalchi
Jean Davis
Cara Day
Katherine Deery
Joann Delenick
Jackson Deterding
Thomas Dircks
Elaine Do
Wendy Dochterman
Molly Dorso
Katie Duke
Andrew Eaton
Kathryn Edgington
Duncan Eigg
Nina Eldredge
Mary Eldridge
Jeffrey Eppley
Julia Eritzian
Maya Erler
Brittany Escobar Solis
Jac Ewasyshyn
Madeline Farhani
Taylor Farzaneh
Tatum Federman
Lindsey Feitz
Rafael Fernandez
Olivia Ferreira
Rakael Fidis
Jesus Figueroa
Ben Fils

Claire Fisher
Amanda Floray
Erika Flores
Clara Foley
Johanna Folk
Kimberly Forster
Allison Foster
Nicole Frenette
Susan Frietsche
Mariel Galvan
Jessenia Garcia-Morales
Christine Garner
Madeline Gavatorta
Emily Gemar
Katie George
Alexander Gershen
Leora Ghadoushi
Brooke Gilmore
Joshua Graham
Brittany Green
Abigail Greene
Lillian Grieco
MariaElena Gutierrez
Sophia Haane
Lynnaya Hamby
Ginger Harn
Kate Harrison
Camryn Haubner
Elisabeth Heen
Morgan Helfman
Jennie Hemingway
Kathryn Hendricks
Jennifer Henkle
Denise Herrera
Tia Hockenberry
Lauren Hogan
Sophia Hogan
Max Horvath
Nora Howe
Kristen Hu

Francesca Hyde
Erin Ichimura
Ashley Ifeadike
Savannah Jacobs
Antonette Jefferson
Ejin Jeong
Katie Johansen
Laura Johnson
Grace Johnson
Emma Johnson
Sierra Johnson
Courtney Kaia
Howard Kallem
Claire Kaplan
Rachel Karden
Kayleigh Kenniff
Katelyn Kennon
Dorothy Kennon
Lisa Keshavarz
Celeste Kidd
Matt Killea
Min Jung Kim
Amy Klosterman
Maya Kneip
Almendra Kniep
Brett Kohler
Alexia Kovatsis
Greta Kramer
Angelica Kraska
Jennifer Kucak
Kate Kushner
Lindsey LaForest
Ariel Lasher
Susan Lee
Katharine Lee
Jayne Lester
Hange Liao
Heidi Lockwood
Anastajia Lopez
Samantha Maher Sheahan

Melinda Manning
Susan Marine
McKenzie Martinez
Isabella Matthews
Mariah McAfee
Sue McCarthy
Hanna McCrum
Sarah McLennan
Catherine McNeel
Shay Mellor
Emily Mensing
Sana Mesiya
Areen Mesrobian
Julie Millisky
Elizabeth Mireles
Tulika Mohanti
Annamaria Morales-Kimball
Marta Morataya
Quincy Morgan
Allison Munden
Jack Murphy
Mel Neal
Eunice Neeley
Daniel Nemeth-Neumann
Jennifer Ngo
Eva Niedermeyer
Patricia Noel
Agnes Norbury
Chaneci Norman
Katherine Norton
Patrick Nyman
Timothy O'Shea
Claris Park
Alice Park
Alexander Parker
Neemi Patel
Susanna Penfield
Michelle Perez
Lindsay Peria
Stephanie Periban Palacios

Hannah Perinich
Jill Perry
Helen Pham
Brian Pinder
Inna Pletukhina
Kathryn Pogin
Elizabeth Poitras
Rachel Pollan
Haley Purvis
Tiffany Quach
Kathleen Quinn
Rebecca Raskind
Katherine Rawson
Jean Reed
Claudia Ren
Kate Richey
Holly Rider-Milkovich
Susan Rimby
Garth Robillard
Michelle Rodrigues
Venessa Rodriguez
Mary Rogers
Antonio Rosales
Joanna Rosas
Cole Ross
Claire Rutstein
Lauren Ruvo
Yasmeen Saberi
Jana Sabo
Elizabeth Salomon
Cierra Sande
Madeline Sanderford
Karyn Schultz
Rachel Schumacher
Allison Seeley
Lamea "Elle" Shaaban-Magana
Natalie Shafer
Aish Shirahatti
Taite Shomo
Camille Sibel

Sarah Sievers
Sarah Simmons
Anjali Singapur
Megan Smith
Bianca Solorio
Ryan Spooner
Riley Starling
Tamara Stein
Jennifer Stover
Troy Strange
Tyler Strycula
Karen Tani
John Taylor
Nina Terebessu
Reagan Tierney
Kiana Ting
Toni Tsamasfyros
JD Tschopp
Ari Tuchman
Alice Vachss
Kristina Vadas
Alexis Valenzuela
Brittany Van Ryder
Julie Walker
Sofia Warner
Sophie Warren
Eileen Weinert
Sean Weisman
Mollie Weiss
Kiana Welty
Victoria Wengler
Vicki Wengler
Catharina Westergaard
Brigid Wheeler
Tatum Wheeler
Hannah White
Rexann Whorton
Brooke Williams
Grayson Williams
Merri Wilson

Hann Woodhouse
Kathryn Wotherspoon
Tallula Wray-Steigman
Micheal Wright
Madison Yates
Siriya Yuttapibool
Amy Zavadil
Mary Zelinka
Katherine Zhao

APPENDIX B

Available at:

https://docs.google.com/spreadsheets/d/14BqFvmExd5NgokLVU_keo0OGSD4lwdSKSWKXEZBDZjo/edit?usp=sharing



Know Your IX at Advocates for Youth
1325 G St. NW #980
Washington, DC 20005
knowyourix.org

September 12, 2022

Submitted via 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

We write on behalf of Know Your IX, Advocates for Youth, The Every Voice Coalition, SafeBAE, and 307 students and survivors, in response to the Department of Education’s Notice of Proposed Rulemaking (“NPRM”), to support many of the changes proposed by the Department, and to urge the Department to alter some of their current proposals to amend rules implementing Title IX of the Education Amendment Act of 1972.

Know Your IX is a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools. Know Your IX accomplishes our mission through educating college and high school students in the United States about their legal rights to safe educations free from gender-based harms; training, organizing, and supporting student survivor activists in challenging their educational institutions to address violence and discrimination; and advocating for policy change at the campus, state, and federal levels to ensure meaningful systemic action to end gender violence. Advocates for Youth partners with young people and their adult allies across the U.S. to champion youth rights to bodily autonomy and build power to transform policies, programs and systems to secure sexual health and equity for all youth.

In response to widespread violations of survivors’ civil rights, Know Your IX has called upon the Department of Education to strongly enforce Title IX. In 2013, our organizing led to the Office for Civil Rights (“OCR”) publishing—for the first time in history—a list of colleges and universities under investigation for sexual violence-related Title IX violations. Just one year later, the number of higher education institutions under investigation for sexual violence-related Title IX violations tripled and continued to rise during the Obama Administration. Further, OCR issued formal findings of noncompliance against several institutions — a turning point in federal Title IX enforcement. Between

2013 and 2017, student organizing led the Department of Education and the White House to begin tackling the epidemic of sexual violence in education. This gave many of us hope that schools would finally begin to prioritize the safety of their students over their bottom lines and reputations. Sadly, today, we are even farther from Title IX's core commitment: to ensure students are able to learn free from violence.

At the same time, Know Your IX has vigorously supported strong procedural protections for survivors and respondents. As we have repeatedly emphasized throughout our work, disruptions in education can have lasting consequences for both survivors who are forced out of school due to sexual violence and students who are facing discipline for allegedly perpetrating violence. In 2015, Know Your IX published an open letter to university presidents across the country calling for colleges and universities to adopt key procedural protections for complainants and respondents. Know Your IX also reiterated our commitment to fair procedures for complainants and respondents in our 2017 State Policy Playbook, which outlined a series of procedural protections for both parties. And as we have written in our online Fair Process resource, "Know Your IX is committed to fighting for robust procedural protections for students on both sides of school sexual violence cases, because we believe fair process serves all parties and we seek to create a world where no student is ever unfairly denied the opportunity to learn." That is why Know Your IX rejected the Department's efforts to afford respondents special procedural rights at survivors' expense through the 2020 regulation.

We are pleased to see that the Department is working to undo many of the harmful pieces of the 2020 regulation that undermined the gains achieved by students organizing for robust enforcement of student's civil rights and a stronger Title IX rule. The current regulation shields schools from liability for violations of survivors' civil rights by adopting interpretations of Title IX that contravene the statute's text and distort Supreme Court precedent, exceeds the statutory authority of the Department, and subverts Title IX's aims of protecting individual students against sex-based harassment and eliminating sex discrimination in federally-funded programs.

In our comment, we cover the following topics: i) sex discrimination, including the proposed rules defining sex-based harassment when it takes the form of "quid pro quo" harassment, "hostile environment" harassment, sexual assault, dating violence, domestic partner violence, stalking, and intimate partner violence; ii) recipient responsibilities, including confidential and non-confidential employees, prompt and effective action, transparency and students being provided with information on their rights, how to file a formal complaint, and how to access supportive measures following an incident of violence; iii) expanding survivor support, including supportive measures at no cost to the survivor and regardless of whether an informal or formal resolution; iv) grievance procedures, including defining a reasonably prompt timeline, informal resolutions such as mediation, restorative justice, or other conflict

resolution processes, presumption of the respondent's innocence, cross-examination, and the preponderance of evidence standard; v) preventing retaliation, including the definition of retaliation and restricting schools from requiring students to sign non-disclosure agreements; vii) protections for pregnant and parenting students, including expanding the definition regarding pregnant and parenting students, protection of complainants from retaliation for self-managing abortion and school discipline for self-managing abortion, and the impact of the Supreme Court's *Dobbs v. Women's Health Organization* on impact students' privacy rights under the Family Educational Rights and Privacy Act (FERPA); viii) protections for LGBTQI+ students, including affirming anti-LGBTQI+ discrimination as a form of discrimination under Title IX and the urgency of addressing athletics participation by the end of 2022 so that it may be finalized with this set of proposed rules by Spring 2023; ix) and lastly, religious exemptions, including the urgent need to swiftly issue proposed Title IX regulations that rescind the 2020 regulations inappropriate expansion of eligibility for religious exemptions and require transparency from schools claiming religious exemptions for Title IX.

In the process of writing our comment, Know Your IX collaborated with The Every Voice Coalition and SafeBAE, two survivor advocacy organizations empowering students to lead policy change to protect and support survivors of sexual violence. Our three organizations held listening sessions in the month of July with K-12 student survivors, college and graduate student survivors, recent alumni, and young people who have had experiences with Title IX over the past several years. Over seventy-five students and young people participated, sharing their experiences with us during the listening sessions or through a written comment form. The experiences that student survivors shared with us have informed the following recommendations in our comment, which are essential for the Department to hear before finalizing their Title IX rule.

We submit this comment in hopes that it will aid the Department in restoring Title IX to its intended purpose of protecting students' equitable access to education.

II. Sex Discrimination

Definition of Sex-Based Harassment.

We support the proposed rules defining sex-based harassment to include sexual harassment and other harassment on the basis of sex (including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity) when this harassment takes the form of “quid pro quo harassment,” “hostile environment harassment,” sexual assault, dating violence, domestic violence, or stalking.¹

¹ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2), 41571 (proposed 34 C.F.R. § 106.10).

We encourage the Department to build on this by taking a more encompassing and informed approach to how domestic, dating, and intimate partner violence is defined. Historically, recipients have struggled to understand and respond to the dynamics of power and control which underpin intimate partner violence (IPV), defined by the Centers for Disease Control and Prevention as “abuse or aggression that occurs in a romantic relationship.”² In defining IPV, the Department should make it clear that intimate partner violence is characterized by an individual’s pattern of controlling or dominating their partner through intimidation, coercion/threats, economic abuse, emotional abuse, gaslighting, denial, and blame, isolation, physical and sexual violence, and/or abuse of social privilege. The Department should make it clear to recipients that “mutual violence” is a myth and cannot exist in instances of IPV, because one party is consistently exercising power and control over the other.³ The Department should encourage recipients to review complaints of intimate partner violence with a lens towards patterns of power and control instead of viewing complaints as single instances of abuse.

During a listening session, one student survivor shared that they used self defense and was ultimately investigated for defending themselves after filing a Title IX report.⁴ They described how a lack of analysis regarding power dynamics in intimate partnership on the part of their school’s Title IX administrators contributed to further discrimination against the student: “[My school’s Title IX administrators] do not care if I used self defense, or if I can prove it, they just do not look at self defense as a mitigating factor.”⁵ We found this same pattern to be true in our recent survey of student survivors’ experiences reporting to their school. In *The Cost of Reporting*, several of the survivors who experienced cross-filing shared their attempts at self-defense or reactions to continuous abuse were weaponized against them.⁶ One survivor indicated she was going to file a complaint for the nearly two years of abuse she had endured, and so her perpetrator preemptively filed a harassment claim against her. When she went in to talk to the Title IX office in response to the charge against her, she disclosed his extensive abuse. Her report was largely disregarded and she was not made aware of how to formally report the abuse she was facing. This survivor was an art major. Following her disclosure, her abuser stalked her social media to view her art and then reported it—at least ten times over the next year and a half—to the school as harassment. He was neither named nor identified in any of it, but each time, she had to answer to the frivolous and abusive complaints.⁷

² CDC. *Preventing Intimate Partner Violence*. <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>

³ R., Jessica. The National Domestic Violence Hotline. *The Myth of Mutual Abuse*. <https://www.thehotline.org/resources/the-myth-of-mutual-abuse/>

⁴ Know Your IX, The Every Voice Coalition, SafeBAE (2022). Student Listening Sessions.

⁵ *Id.*

⁶ Nesbitt, Sarah, and Carson, Sage. “The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout.” Know Your IX. Advocates For Youth, March 2021. <https://www.knowyourix.org/thecostofreporting/>

⁷ *Id.*

We also support the proposed rules more broadly—and appropriately—defining “hostile environment harassment” as sufficiently “severe *or* pervasive” sex-based harassment that “denies or limits” a person’s ability to participate in or benefit from an education program or activity.⁸ This would be a return to the Department’s longstanding standard applied from 1997-2020⁹ and a marked improvement over the current standard, which requires schools to ignore sexual harassment unless it is “severe *and* pervasive” harassment that “effectively denies” equal access to education.¹⁰ The 2020 standard is antithetical to Title IX’s core aim of preventing gender violence from interfering with students’ education because it requires recipients to wait until education has already been disrupted in order to respond. Reversing the 2020 standard is especially important as the continuing effects of sexual harassment and rape, including a student’s constant fear of seeing their assailant in classes, libraries, extracurricular programs, and other educational programs and activities, can make their educational environment hostile.

We urge the Department to define sex-based harassment to include harassment on the basis of parental, family, caregiver, or marital status. The pregnancy and related conditions section of our comment will explain the necessity of prohibiting harassment based on these identities.

Location of Harassment.

Know Your IX supports the proposed rules requiring schools to respond to all sex-based harassment (or other sex discrimination) “occurring under [their] education program or activity,” including conduct that a school has disciplinary control over or that occurs in a building owned or controlled by an officially recognized student organization at a college or university.¹¹ The preamble states that this means schools would be responsible for addressing incidents that occur off-campus or in a study abroad program, so long as it contributes to a hostile environment in school (e.g., due to the harasser’s continued presence on campus or their additional harassment of the complainant). We urge the Department to expressly state in the regulations that Title IX covers off-campus school-sponsored activities.¹² This clarification is crucial, as harassment and violence more commonly occurs in off-campus

⁸ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2(2)).

⁹ See, e.g., Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

¹⁰ 34 C.F.R. § 106.30(2). While we support a return to the broader standard, it still may create burdens for survivors by requiring an inquiry into how a student’s education is limited or impacted by harassment. For example, a school might interpret this to require a student to make a showing of lower grades, which would ultimately create a barrier to reporting, because without such a showing, the harassment might not rise to the level of “severe or pervasive” such that it “denies or limits” their ability to participate in or benefit from the education program or activity.

¹¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).

¹² *Id.* See also *id.* at 41403.

locations than on campus.¹³ Given that the 2020 regulation required recipients to solely respond to instances of violence that occurred on campus, students who experienced violence in residences, other off campus locations, or while studying abroad were not protected by their school.

Furthermore, legal precedent illustrates support for the explicit requirement of schools responding to sex-based harassment or discrimination in off-campus settings. In *Crandell v. N.Y. Coll. Osteopathic Med.*, the holding was that school was required to respond to off-campus harassment in an instance where a professor was employed at the school, and the plaintiff alleged that the off-campus incidents created a hostile environment on campus.¹⁴ The case argues that the harassment the plaintiff experienced was within the school's control, as the plaintiff alleged that one professor's conduct made her feel frightened and uncomfortable, causing her to miss class.¹⁵ Furthermore, the case notes that actionable sexual harassment under Title IX is not limited to a current teacher and can include conduct committed by a former teachers, staff and other students if the presence of the perpetrator at the school would be expected to create a hostile environment.¹⁶

Similarly, in *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, the holding cited *Davis*, 526 U.S. at 645, recognizing that – despite the lack of a finding of deliberate indifference on the part of the school – sexual assault occurring outside of the control of the school can create Title IX liability, as long as there is “some nexus between the out-of-school conduct and the school.”¹⁷ A 2019 case, *L.E. v. Lakeland Joint Sch. Dist.* 272, also acknowledged the language in *Davis* regarding substantial control.¹⁸ The case's finding was that whether the district had control over the off-campus location where the plaintiff was sexually assaulted by fellow students was immaterial because the plaintiff's claim was not that the district was responsible for the sexual assault itself, but rather that the district failed to adequately address the conduct or implement safeguards at school despite knowledge of the sexual assault.¹⁹ As a result, the plaintiff was subjected to a hostile environment at school.²⁰ A 2020 case also supports the argument that recipients must be required to address instances of off-campus harassment and discrimination; *DeGroote v. Arizona Bd. of Regents* found that the school exercised substantial control over the harasser and context in which the harassment took place, despite the harassment occurring off campus, due to the location of the initial harassment.²¹

¹³ Eryn Nicole O'Neal, Brittany E. Hayes, and Andia M. Azimi. Distinguishing Between On-Campus and Off-Campus Sexual Victimization: A Brief Report. Violence and Gender. Mar 2021. 53-57. <http://doi.org/10.1089/vio.2020.0029>

¹⁴ *Crandell v. N.Y. Coll. Osteopathic Med.*, 87 F.Supp 2d 304, 315-16 (S.D.N.Y. 2000)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, e.g., *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1

¹⁸ *L.E. v. Lakeland Joint Sch. Dist.* 272, 403 F. Supp. 3d 888, 900-901 (D. Idaho 2019)

¹⁹ *Id.*

²⁰ *Id.*

²¹ *DeGroote v. Arizona Bd. of Regents*, 2020 WL 10357074 at *8 (D. Ariz. Feb. 7, 2020)

During listening sessions with college students, they shared that the lack of requirement by the 2020 regulations to address off-campus instances of violence had a detrimental impact on their ability to engage in school. Their school's lack of response created a hostile environment on their campus, making them feel unsafe. One student shared that "[with] off campus assaults not covered, students are left with no support, and [the] case ends up dropped altogether because it doesn't fit under Title IX."

III. Recipient Responsibilities and Improving Recipient Responses

Notice of Harassment (Confidential Employees).

We believe that the proposed rules which allow schools to designate some employees as "confidential employees" is extremely important. Despite high rates of sexual harassment and violence in schools, students across all age groups are not reporting it. Only 2% of girls ages 14-18 who are kissed or touched without their consent tell their school about it.²² At the college level, only one in ten survivors report sexual assault to their schools.²³ There are a variety of reasons that survivors choose not to report sexual harassment, including: feeling shame and embarrassment, fearing retaliation, fearing discipline by their schools, police, or immigration officials, and not wanting their harasser to get in trouble. Many students also may not report because they may believe that the harassment they experienced wasn't *severe enough* – either because it began consensually or involved alcohol or drugs – and as a result they may blame themselves and think that other people will not take it seriously. Students who are of color, undocumented, LGBTQI+, and/or disabled are often afraid of the criminal legal system because they belong to communities that are often targeted by police and don't want to perpetuate over-criminalization of their own community. Confidential employees open the door for students to feel more comfortable seeking help because it allows students to maintain their autonomy and privacy, which is especially important for survivors, and make an informed decision about what information they want to share with administrators. By breaking down the barriers to seeking support, students are more likely to actually receive support, and by prioritizing student awareness of rights and their agency in decision making, students will undoubtedly be better served.

While we support the Department's decision to allow schools to designate confidential employees, we urge the Department to go one step further by *requiring* that recipients designate at least one or more full-time confidential employees. These confidential employees are not obligated to report the incident to the Title IX coordinator, and upon learning of possible sex-based harassment, are trained to explain to students their rights, how to file a formal report if they choose to do so, and how to access

²² Tang, Elizabeth, and Ashley Sawyer, "100 School Districts: A Call to Action for School Districts Across the Country to Address Sexual Harassment Through Inclusive Policies and Practices," National Women's Law Center.

²³ National Sexual Violence Resource Center. "Statistics About Sexual Violence." https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf

supportive measures (even without an investigation). These employees' status as confidential should be clearly indicated on their office doors, in their email signatures, on their website profiles, in employee directories, and in other relevant locations. This would protect survivors' autonomy and privacy if they want to speak with a confidential resource for support and learn about their options before deciding whether to formally file a complaint. Similarly, employees who are *not* confidential resources (e.g. responsible employees) should be trained to disclose to students their reporting obligations, both in advance and at the moment of a possible disclosure of an alleged incident of sexual violence, and offer to connect them with a confidential resource if they would like to talk to someone without opening an investigation.

During our listening sessions with students, many college student survivors reported that, when their school did have confidential resources available on-campus, it was often difficult to access services due to understaffing and a lack of funding for these resources and positions. Survivor advocates and counselors often had limited availability, full caseloads, or served other conflicting roles at the school that prevented students from using them as a resource. To ensure that college students are able to receive the support necessary to autonomously decide how to proceed after experiencing violence or discrimination, we urge the Department to require all schools to designate at least one full-time confidential employee who is trauma-informed, who understands school's Title IX policy, who is cross-trained in multiple departments, and who can serve diverse populations.

For K-12 schools, the proposed rules would require all non-confidential employees to report possible sex-based harassment (or other sex discrimination) to the Title IX coordinator. We support this requirement when the survivor is a minor student (as typically is the case in the K-12 context), and recognize obligations imposed by state mandatory reporting laws for minors, but we ask the Department to use a different approach when the survivor is an adult and/or an employee that allows the adult and/or employee to autonomously decide how to proceed and access confidential resources. The Department should still require K-12 schools to employ at least one full-time confidential employee who is trained in trauma-informed care, the school's Title IX policy, is cross-trained in multiple departments, and who can serve diverse populations. This confidential resource is essential for adults, employees, and students at K-12 schools.

Finally, given the complexities with requiring employees to report harassment or other discrimination to the Title IX coordinator, the Department should issue supplemental guidance instructing schools on how to respond to possible harassment or other discrimination while protecting the privacy and safety of LGBTQI+ students and employees (who may not wish to be outed to their parents or the school) and of pregnant students and employees (who may be at risk of criminalization if they seek an abortion or have a miscarriage). Moreover, recipients should have a responsibility under Title IX to

actively, continuously, and widely disseminate transparent, clear, accessible information related to sexual harassment and discrimination—including, but not limited to, details regarding student and employee rights, institutional policies, grievance processes, reporting, accessing support, and violence prevention.

Standard of Care.

We support the proposed rule requiring schools to take “prompt and effective action” to end sex-based harassment (or other sex discrimination), prevent it from recurring, and remedy its effects on all people harmed.²⁴ This would be a welcome return to the standard of care previously required by the Department from 2001 until 2020 and a much-needed change from the current rules’ harsh “deliberate indifference” standard, which allows recipients to shirk their responsibility to respond to sex-based harassment in a manner that proactively addresses and meets student survivors’ needs after experiencing harassment or violence.²⁵

IV. Expanding Survivor Support

Access to Supportive Measures.

We support the proposed rules which clarify that schools must offer supportive measures at no cost to individuals who report sex-based harassment or discrimination regardless of whether they request an investigation or an informal resolution, and even if their complaint is dismissed. We recognize that interpersonal violence is frequently traumatic and often constitutes an ongoing safety threat and/or educational barrier, and that a lack of adequate or appropriate supportive measures for student survivors—regardless of whether a formal complaint process is pursued or not—inherently impedes affected students’ access to numerous educational services, and can directly lead to the proliferation or exacerbation of a hostile environment. Therefore, Know Your IX recommends that the Department explicitly clarify in the regulations that if a party requests a certain supportive measure and it is “reasonably available,”²⁶ then the school must provide it. With the 2020 regulation still in place, student survivors have shared with Know Your IX that schools are failing to uphold their promises to provide necessary supportive measures to ensure that the survivor can keep up with their classes.²⁷ One student who attended our listening sessions said they needed academic support – specifically, extensions on assignments – but their school’s Title IX Office refused to provide them despite it being a reasonable request.²⁸ The student shared that, as a result, “I got the worst grades I ever have in my entire life” and

²⁴ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

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

²⁶ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 (“supportive measures”)).

²⁷ Nesbitt, Sarah, and Carson, Sage. “The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout.” Know Your IX. Advocates For Youth, March 2021. <https://www.knowyourix.org/thecostofreporting/>

²⁸ Know Your IX, The Every Voice Coalition, SafeBAE. Student Listening Sessions. July 2022.

that the experience deeply impacted their ability to engage on campus.²⁹ Another student survivor shared that they wanted to change their schedule in order to avoid seeing the person who was harassing them, but never received the support from their school's Title IX Office to be able to do so.³⁰ The Title IX staff who had "handled" their case had left at this time, so they were unable to obtain any schedule changes or any sanctions against their abuser (such as alcohol education or consent trainings).³¹ The student shared with us that "The Title IX office was negligent the entire process, but put up the front that they supported me. This experience is not unique to my school."³²

Schools' failure to adequately provide supportive measures and accommodations is sadly pushing many survivors out of school. In our survey of over 100 student survivors who reported to their school, 39 percent of survivors who reported sexual violence to their schools experienced a substantial disruption in their educations.³³ Broken down, this means that 27 percent of survivors who reported took a leave of absence, 20 percent transferred schools, and nearly 10 percent dropped out of school entirely.³⁴ Sadly, these numbers are not even fully reflective of the pushout rate of these students—since the publication of this report, even more survivors who shared their story with us have dropped out of school entirely. A large factor in this drop out rate was schools' disregard for survivors' safety, and the role that supportive measures played in ensuring that safety. In fact, 70 percent of survivors who reported to their schools stated they experienced adverse effects on their safety and privacy.³⁵ These safety concerns led to a plethora of negative impacts, ranging from further physical and psychological harm to increased vulnerability to school drop-out.³⁶ One survivor obtained a school issued no contact order because they wanted to ensure their perpetrator stayed out of their dorm. Within one week of that order being issued, the school amended it to allow the perpetrator into the survivor's dorm.³⁷ Another survivor stated that she and several witnesses notified the school when the perpetrator threatened their safety or harassed them. Despite even criminal findings against the perpetrator on related charges, the school chose to take no safety measures, beyond obtaining the perpetrator statement that he would not contact, harass, or harm the survivor.³⁸ Yet another school defied court orders to protect a survivor entirely. There, the survivor wrote, "the university refused to honor the judge's order for him to stay out of my classroom buildings and told me I would have to take it upon myself to avoid him."³⁹

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Nesbitt, Sarah, and Sage Carson. "The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout." Know Your IX. Advocates For Youth, March 2021. <https://www.knowyourix.org/thecostofreporting/>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Additionally, we recommend that the Department require schools to monitor the efficacy of supportive measures offered to students. If the school is aware that the supportive measures offered are ineffective, then the school must modify it or offer additional supportive measures.⁴⁰ Finally, we ask the Department to expand the list of examples of supportive measures to note the availability of academic supportive measures, so that students and employees are aware of what specific types of help their school can offer to ensure they keep up their grades and stay physically and mentally safe.⁴¹

We support the proposed rules which clarify distinctions between supportive measures, disciplinary sanctions, and remedies. Noting the definition of supportive measures, which “are intended to preserve or restore a complainant’s or respondent’s access to the recipient’s education program or activity and may be provided to the complainant or respondent, as appropriate, after the Title IX Coordinator has been notified of conduct that may constitute sex discrimination under Title IX,” we urge the Department to issue clarification on the coordination and implementation of supportive measures when a student discloses sexual harassment to a confidential resource, such as a counselor or advocate, rather than to the Title IX Coordinator. Forcing a survivor to share their story multiple times to multiple different people in order to receive help is retraumatizing and unnecessarily burdensome.

While we support the Department’s clarification requiring schools to provide supportive measures, we recognize that recipients may fail to provide effective supportive measures in a variety of areas. For instance, student-survivors may not be sufficiently informed of the available supportive actions schools can take to protect them and their access to education, ultimately rendering available supportive measures inaccessible. Additionally, schools may fail to fulfill survivor requests for support measures, despite those measures being reasonably available and necessary. Therefore, we urge the Department to mandate that recipients must publish clear information regarding accommodations in student handbooks and on both district and school websites. The Department should require that relevant information be made available at multiple locations to ensure that a broad range of survivors are able to easily locate important information regarding their rights. Published information should include directions detailing how and where students may access available accommodations. As outlined in the rescinded 2011 Dear Colleague Letter, the Department should also require schools to include instructions for filing a formal Title IX complaint, contact information for the Title IX coordinator, and contact information for on and off campus counseling and victim services.⁴² Published information should also include concrete

⁴⁰ *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

⁴¹ For example, we recommend adding at proposed § 106.44(g)(1): allowing a complainant to resubmit an assignment or retake an exam; adjusting a complainant’s grades or transcript; if the instructor is the harasser, independently re-grading the complainant’s work; preserving a complainant’s eligibility for a scholarship, honor, extracurricular, or leadership position, even if they no longer meet a GPA, attendance, or credit requirement; and reimbursing tuition or providing a tuition credit to a complainant who does not complete a course due to harassment.

⁴² U.S. Department of Education Office for Civil Rights, Dear Colleague Letter from Assistant Secretary Russlynn Ali [RESCINDED] pp. 17 (2011).

examples of available accommodations such as “adjusted course schedule” or “term paper extension” to aid with survivor comprehension.

Additionally, the Department should mandate that schools provide confidential, accessible, and effective mental health support to student survivors. Survivors often suffer from serious mental health concerns in the aftermath of assault,⁴³ which contribute to, among other problems, poor scholastic outcomes.⁴⁴ Student survivors should have unlimited access to free and confidential counseling services as accommodations⁴⁵ and schools should ensure that they notify student survivors of these services. Providing survivors with access to mental health services is a vital step in ensuring their equitable access to education:

- a. *The Department should mandate that schools provide student survivors with unencumbered access to on-campus mental health services where possible and easily accessible care from off-campus service providers in other cases.* Where possible, mental health services should be provided to survivors on campus. Where unique circumstances render on-campus service provision impossible, schools should provide cost-free, accessible transportation to and from such services or an alternative means of access, such as telemental health. In addition to scheduled mental health care appointments, schools should provide “on call” counselors to assist student survivors whenever necessary. Many counseling centers based at educational institutions cap the number of free counseling sessions that students can receive. This cap should be removed altogether for student survivors to receive the care they require. Moreover, many counseling centers based at educational institutions have late arrival and no-show fees and policies. These should be relaxed or removed altogether for student survivors to maximize access to care.
- b. *The Department should mandate that student survivors have maximal agency over their mental health care.* Schools should give student survivors, including those who are minors, as much agency and control over the mental health care they receive as is legally possible. Student survivors should be able to choose their care providers from as many options as possible. Student survivors should be included in all decisions about when and how they receive care and what kind of care they receive.

⁴³ International Society for Traumatic Stress Studies. (2018). Sexual assault, sexual abuse, and harassment: Understanding the mental health impact and providing care for survivors. Briefing Paper: Sexual Assault and Harassment.

⁴⁴ Simon, C. (2019, March 1). On top of everything else, sexual assault hurts the survivors' grades. The Washington Post. <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/>.

⁴⁵ In addition to Title IX, other federal and state laws, such as Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, may require such accommodations.

- c. *The Department should mandate that schools provide access to mental health care services from counselors who are adequately trained for work with sexual abuse survivors. Counselors who lack specialized training may be ill-equipped to provide effective services to student survivors.*⁴⁶

Another supportive measure that is essential to preserve students' access to educational services is accommodations for housing. We urge the Department to mandate that all residential educational institutions, including K-12 boarding schools, colleges, and universities, provide accessible emergency housing to student survivors. Accessible emergency housing is a critical resource for student survivors, as student survivors frequently face ongoing threats of active physical danger, including repeated assault, and psychological and emotional harm from fear of crossing paths with abusers.⁴⁷ During our listening sessions, college students shared that their schools often failed to provide them with housing accommodations, even in situations where it was necessary to ensure the survivor's safety. This lack of response has a silencing impact on reporting, as it sends a message to survivors of harassment, violence, and discrimination that their school will not provide the supportive measures and resources necessary for them to stay in school. One college student survivor shared:

Even the way that they handled the Title IX process really disincentivized people from reporting... I know someone who went through the process and the respondent was found responsible, but she was the one who had to move her dorm room. So [the school is] doing Title IX, but not really. - Anonymous⁴⁸

When students feel unsafe in or are displaced from their homes, learning becomes impossible. Given these considerations, recipients should reserve a number of vacant rooms or apartments for students who feel unsafe in their living situation in the wake of violence. The choice to move into emergency housing should be at the sole discretion of the student survivor. Schools should never forcibly remove student survivors from regular housing and place them into emergency housing.

Students are much more likely to experience sexual assault in on-campus residence halls than off campus.⁴⁹ On campuses, abusers often know where survivors live and have easy access to their

⁴⁶ Artime, T. M., & Buchholz, K. R. (2016). Treatment for Sexual Assault Survivors at University Counseling Centers. *Journal of College Student Psychotherapy*, 30(4), 252–261. <https://doi.org/10.1080/87568225.2016.1219610>

⁴⁷ The Right to Safe Housing on College Campuses for Survivors of Sexual Assault, Stalking, Domestic Violence, and Dating Violence. American Civil Liberties Union. (2011, October 1). <https://www.aclu.org/other/right-safe-housing-college-campuses-survivors-sexual-assault-stalking-domestic-violence-and>.

⁴⁸ Know Your IX, The Every Voice Coalition, SafeBAE. Student Listening Sessions. July 2022.

⁴⁹ The Right to Safe Housing on College Campuses for Survivors of Sexual Assault, Stalking, Domestic Violence, and Dating Violence. American Civil Liberties Union. (2011, October 1). <https://www.aclu.org/other/right-safe-housing-college-campuses-survivors-sexual-assault-stalking-domestic-violence-and>.

residences, increasing safety concerns.⁵⁰ The Department should require schools to provide lease-breaking assistance to student survivors in the form of informational guidance on how to break campus leases and advocates to assist survivors in the process. The Department should not allow schools to assess any lease breakage fees or other ongoing or punitive costs to student survivors moving from school-owned housing.

The Department should also require parallel informational guidance and advocates for students breaking leases in non-school-owned housing. Where state or local law allows survivors of gender-based violence to break leases free of charge, schools should inform student survivors of and facilitate the process of obtaining any necessary certification. Where such certification cannot be obtained, schools should cover the cost of any lease-breaking and related fees. Schools should also cover the cost of any reasonable moving expenses incurred through a survivor's move to emergency housing.

Finally, the Department should require all residential schools to provide gender-inclusive emergency housing for transgender and gender-nonconforming students. Transgender and gender-nonconforming individuals experience sexual violence at disproportionately high rates,⁵¹ and yet they often have few options for gender-inclusive housing on campus. Emergency housing accommodations must include meaningfully comparable gender-inclusive options.

Students with Disabilities.

We support the proposed regulations which newly address the potential intersection of federal disability law with Title IX in elementary school, secondary school, and postsecondary institution contexts. Proposed § 106.8(e) would provide clarification regarding the alignment of Title IX compliance with the requirements of the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) throughout the recipient's implementation of grievance procedures as discussed in § 106.45, and if applicable § 106.46. Individuals who identify as disabled are three times more likely to experience sexual violence than persons who do not identify as disabled.⁵² Additionally, individuals who have multiple disabilities experience even higher rates of violence.⁵³ Historically, schools have failed to meet their obligations to student survivors with disabilities due to factors such as accommodation accessibility issues, inadequate support for students with disabilities, and lack of coordination between Title IX and disability services offices.⁵⁴ Therefore, we support the proposed

⁵⁰ U.S. Department of Education Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties [RESCINDED] pp. 7 (2001). <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. Source acknowledges that sexual harassment taking place in "personal or secluded areas," such as dormitory rooms and residence halls, can be especially threatening.

⁵¹ Statistics. Know Your IX. (2017, March 13). <https://www.knowyourix.org/issues/statistics/>.

⁵² Bureau of Justice. *Crime Against Persons with Disabilities, 2009-2012*. <https://bjs.ojp.gov/library/publications/crime-against-persons-disabilities-2009-2012-statistical-tables>

⁵³ *Id.*

⁵⁴ National Women's Law Center. (2020, July 21). *Survivor Justice Is Disability Justice*. <https://nwlc.org/resources/survivor-justice-is-disability-justice/>.

regulations which confirm that if a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with that student's Individualized Education Program (IEP) team or group of persons knowledgeable about the student such as a section 504 team or other office designed to provide service to students with disabilities. Additionally, to fulfill their legal obligations, the Department should require schools to make Title IX information readily available to student survivors with disabilities in formats that are accessible to this population,⁵⁵ and schools must minimize barriers to accessing accommodations.⁵⁶

V. Grievance Procedures

Department's Refusal to Specify Model Investigation Timelines.

In 2011, the Department of Education adopted the position that Title IX grievance procedures should last "approximately 60 calendar days following receipt of the complaint."⁵⁷ However, the guidance also recognized that investigation timelines may vary, given "the complexity of the investigation and the severity and extent of the harassment."⁵⁸ Prior to the 2011 Dear Colleague Letter – and Department of Education oversight – schools would frequently force survivors to undergo unnecessarily lengthy and burdensome processes that further traumatized survivors. These long waiting periods led to survivors dropping out of an investigation against their abuser, or out of school entirely. One anonymous survivor who reported prior to the issuance of the 60-day guideline reported to Know Your IX:

A prompt timeline would have allowed me to finish my education. My investigation was taking so long that it made it impossible to go to class. The case was taking over 280 business days, and I couldn't bear to see him on campus any more [sic], so I dropped out.⁵⁹ - Anonymous

The Department's decision to remove the accountability measures that ensured prompt investigations, and instead "require recipients to designate reasonably prompt timeframes for the grievance process."⁶⁰ was justified by claiming the prior guidance resulted in "hurried investigations and adjudications, which sacrificed accuracy and fairness for speed."⁶¹ However, the Department failed to offer data demonstrating that a 60-day guideline compromised accuracy and fairness in adjudications.

⁵⁵ National Council on Disability. (2020, September 17). Not on the Radar: Sexual Assault of College Students with Disabilities. NCD.gov. <https://ncd.gov/publications/2018/not-radar-sexual-assault-college-students-disabilities>.

⁵⁶ Parker, T. (2018). National Conference on Higher Education and Law: 38th, 39th. Pp. 13-14

https://www.researchgate.net/publication/326997956_The_Less_Told_Story_The_Intersection_of_Title_IX_and_Disability.

⁵⁷ U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER:SEXUAL VIOLENCE 12 (2011) (rescinded by the Trump Administration), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁵⁸ *Id.*

⁵⁹ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

⁶⁰ 83 Fed. Reg. at 61473.

⁶¹ *Id.*

Moreover, although the Department claimed in the context of its administrative enforcement that “[j]ustice delayed is justice denied, and justice for many complainants has been denied for too long,”⁶² the agency refused to account for similar delays within schools’ investigative processes. In fact, as Know Your IX has found, lengthy investigations are the norm in the Title IX context, and these delays often result in harm to the educational prospects of complainants and respondents. Vague, non-specific guidelines introduce opportunities for widespread non-compliance – regardless of a recipient’s intent – making enforcement significantly more difficult. Ambiguous language may encourage recipients—especially those institutions struggling with inadequate staffing or resources— avoid enforcing existing written policies, dismiss complaints prematurely or unfairly, or stretch out pending cases for exorbitant periods of time. We oppose the Department’s proposal to not reinstate the 60-day timeline as it will further the harm of the 2020 rule, and weaken the efficacy of the rest of the proposed rule.

Lengthy Delays in Schools’ Investigations of Sexual Violence.

By failing to define a “reasonably prompt” timeline, the Department’s regulation will exacerbate the long delays that routinely occur in recipients’ Title IX processes. For example, as one survivor reports:

It took the University of Cincinnati 519 days to expel the student I endured stalking, harassment and dating violence from while I was a student there. My Title IX investigation took so long, that when I reached out to the department to follow up, my email bounced back as undeliverable. The Title IX Coordinator and her assistant had left the University without anyone following through on my case. When the Interim Coordinator was chosen to temporarily fill the position, she had no evidence of my case existing at all; I had to start my case again from square one! All of the witnesses I provided in April 2014 were contacted in June 2016 to recall information from the 2013-2014 years. I am glad I retained all of the threatening voicemails and harassing texts even though seeing them triggered my PTSD because I was forced to relive the experiences all over to provide the University with my official statement because they failed me the first time. They finally found him responsible, three months after the Hamilton County court system did. My faith in University officials is completely shattered. I still have trauma-related nightmares where I am in that abusive situation again and I call police for help, but no one comes. THAT is what my fear is now. Being harassed and physically assaulted is no longer what I’m afraid of, it’s no one helping when I reach out and need it the most. - Megan O.⁶³

⁶² Andrew Kreighbaum. Not Looking for Patterns, INSIDE HIGHER ED (Jun. 16, 2017), <https://www.insidehighered.com/news/2017/06/16/education-department-suggests-less-expansive-approach-ocr-investigations>.

⁶³ Electronic submission received through <https://www.handsoffix.org/share-your-story/> (last accessed Jan. 19, 2019).

Another survivor from Michigan State University feared running into her abuser and his wife on campus and faced impacts to her employment on account of the university's delays in investigating her complaint:

My experience of sexual harassment took place from 2010 to 2012. I filed my initial report with the MSU Office of Institutional Equity ("OIE") on February 19, 2018. The initial meeting with investigators from Kroll was scheduled for March 13. During that meeting, they set the expectation that the investigation would be completed within 30 to 60 days. I didn't think it would take 30, but I never expected that it would ultimately take 184 days. The outcome was in my favor, but it definitely had a negative impact on my mental health. The person who harassed me was a big personality in the community, and I always had to wonder if I would run into him or his wife in public settings, which did happen once. On April 6, I re-sent my witness list to OIE after learning that none of them had been contacted. They responded that the report was to be drafted imminently, but I emailed again on April 25 at which point they said they hoped to send a draft report 'in the next two weeks,' but that the internal review process was, 'out of their hands.' I received the final report on August 22 – 184 days after initially contacting OIE – and was notified that the redacted report had been released to the press on October 31. - Elizabeth B⁶⁴

Other survivors report that long investigations affected their mental health and exacerbated disability-based barriers to their education. As one anonymous survivor told Know Your IX:

I reported in late July of 2017, the investigation started in early May, and it wrapped up completely in late October 2018. The first extension was because my assailant kept missing meetings and they had a hard time contacting him. The second was because he got a lawyer on the last possible day he could before the hearing and the lawyer had to review the material. I tell people I feel like the hearing was almost more traumatizing than the rape itself. I know that's crazy but reliving that and having five other people who weren't there talk about my rape with me being able to say so little was terrible. And the fact that it was extended to when midterms were starting was extremely difficult. I struggled a lot with flashbacks and symptoms of PTSD associated with the many delays. I had to move because I was unable to sleep well due to the flashbacks. I was lucky because my assailant was found responsible, but the hearing being so late into the semester affected my academics because I started missing classes and sometimes wasn't

⁶⁴ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

able to study due to a combination of poor mental health and additional meetings associated with the hearing. I also felt a lot of anxiety associated with the extensions because I didn't know what was going on or what was going to happen. - Anonymous⁶⁵

Students reported extraordinarily and unacceptably long timelines for their Title IX grievance process. These students reported sexual violence because sharing a school with their perpetrators made learning—and surviving—so difficult. But their schools' lack of urgency left them without recourse for months, even years. One survivor's investigation dragged on through her entire time in school. She explained: "I am currently a senior in college and I reported freshman year first semester. I still haven't gotten the results of my case back."⁶⁶

A lack of specified timeline with regards to the grievance process timeline presents as stressful, unclear, and unaccountable to schools, complainants, and respondents alike. Furthermore, the absence of clarity relating to the recommended timeline lacks a trauma-informed approach to grievance processes. Recipients' indifference to students' reports of discrimination, procedural errors, victim-blaming officials, and outrageous delays have a lasting impact: they discourage survivors—and their peers—from seeking help in the future. One graduate student survivor explained that if she had known what she would face when reporting, she would never have gone through with it. Another survivor stated that the whole process destroyed her worldview: "[O]nce you learn that so many systems are designed to hurt people who have already been hurt, and how selfish universities are in handling these incidents... it breaks your trust." The administrative, procedural, and educational consequences of unspecified regulatory language regarding the timeline work to create additional educational barriers for student survivors, increasing the immense burden felt while negating their rights to an accessible and non-discriminatory educational environment.

Moreover, recipients' delays in investigating and resolving cases also have harmful effects on respondents. As one survivor who attended Harvard University reported to Know Your IX, delays in her investigation compromised her job performance and made it difficult for the respondent to find a job in the first place. At the same time, the survivor noted that the respondent in her case was also negatively impacted by the drawn-out timeline. Because the respondent had not technically graduated, the delays in the investigation rendered him unable to get a job during the summer and created uncertainty about whether he would be able to matriculate at graduate school in the fall.⁶⁷ These students' cases lasted between 184 days to 519 days, and these delays directly impacted their educational and employment opportunities. Accordingly, when the Department refuses to define a "reasonably prompt" timeline,

⁶⁵ *Id.*

⁶⁶ Know Your IX, The Every Voice Coalition, SafeBAE. Student Listening Sessions. July 2022.

⁶⁷ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

recipients – who are already inclined to drag out investigations until the complainant graduates or drops the case – may operate with impunity.

The Department's Elimination of the Sixty-Day Guideline.

Since the Department rescinded its 2011 Dear Colleague Letter and issued guidance and a regulation without a specific recommended timeline, recipients' delays have increased. Following the issuance of 2020 Title IX regulation, Know Your IX conducted interviews with a number of survivors who filed complaints with their schools in the Fall of 2017. Sadly, many students reported that their cases were pending nearly two years later. As one survivor describes:

I reported in February of 2018 and my report hasn't concluded yet [written January 12th, 2019]. I reported in February but an official investigation wasn't started until May 2018 because my mom came down and asked for a meeting with the Title IX office. The Title IX Officer personally knew who I was accusing, which is why she hadn't opened an investigation. The coordinator tried to get me to drop my case and told me if I moved forward she was going to have him file a counter complaint against me. I got a Title IX lawyer over the summer. I kept reporting the Title IX Coordinator for being biased, but no one did anything until I got a lawyer. - Anonymous, Atlanta GA⁶⁸

Another survivor with an ongoing case at Michigan State University reported to Know Your IX that the school's delay has interfered with her education:

It's been 9 months since I reported and my case is still not over. It's taking so much out of me and my life. It's made me do poorly in school and decreased my graduate school chances. It's caused friendships to end. It's divided me with my family. The fact that it's been so long isn't even shocking to me, at first I was shocked. Now I realize these investigators just don't care about me and my well-being. This is almost a year of my life I won't get back. Everyday has me fearful of the outcome. I reported to try to find justice but I realize that will never happen. I go to Michigan State and you would think they would care about correcting their past mistakes but just today our president resigned over a disgusting comment about the Nassar victims. Time and time again, Michigan State has shown survivors are not their priority. This investigation has just made me regret the day I reported. I thought having to go to court with my rapist was the worst day of my

⁶⁸ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

life, but yesterday I read the report from the OIE office doing the investigation. I've lost everything from this case. I know 100% what happened. The rape isn't even the worst part of the process though, it's the investigation. I can heal from the rape but trying to rebuild every aspect of my life and get back what has been taken from me [by the school] will take so much. -Rebecca R, MSU⁶⁹

Defining “Reasonably Prompt” as a Sixty-Day Period.

Because long delays in schools' investigations create gender and disability-based barriers to students' educations, Know Your IX recommends that the Department define a “reasonably prompt” timeline as a sixty-day period but permit schools to extend the investigation period based on the complexities of the case and the needs of the parties. Adopting such a measure would help ensure a fair process for both complainants and respondents. Furthermore, in order to increase parties' knowledge of standard investigative timelines, Know Your IX also recommends that the Title IX rule include the following language to the effect of:

Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Recipients must designate reasonably prompt timeframes for the grievance process, defined as approximately 60 calendar days following receipt of the complaint. However, schools may extend investigations for good cause and with notice to the parties if merited by the complexity of the investigation and the severity and extent of the discrimination.

Informal Resolutions.

In general, we support the proposed rules allowing schools to use an informal resolution to resolve student-on-student sex-based harassment (or other sex discrimination), subject to certain safeguards,⁷⁰ including a ban on using any information obtained solely through an informal resolution in an investigation.⁷¹ However, we urge the Department to require all parties to give “written consent” to an informal resolution (not simply “consent”). Furthermore, we recommend that the Department expressly clarify that schools may not use mediation or other conflict resolution processes to address sex-based harassment between a complainant and respondent, as harassment (or other discrimination) is not a

⁶⁹ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

⁷⁰ The proposed rules would allow schools to use an informal process as long as all parties receive written notice of their rights and obligations, give consent to the process, can withdraw at any time before the end to do a traditional investigation, and are not required to participate in an informal resolution or to waive their right to an investigation in order to continue accessing any educational benefit; and as long as the school believes an informal resolution is appropriate (e.g., the alleged conduct would not pose a future risk of harm to others). 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(1)-(2)).

⁷¹ 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(3)(vii)).

“conflict” where the survivor and harasser share blame. Conflict resolution, including mediation, is inappropriate for resolving sex-based harassment, because such processes assume both the victim and harasser share responsibility for the harassment, can allow harassers to pressure survivors into inappropriate resolutions, and often require direct interaction between the parties, which can be retraumatizing. In contrast, a restorative justice process requires the harasser to take accountability for harming the victim, center the victim’s needs, repair the harm they caused, and change their future behavior.

At the same time, Know Your IX urges the Department to work with schools and community-based organizations that are currently conducting restorative justice programs for sexual violence cases to create recommendations for best practices on conducting informal resolutions. We would encourage the Department to issue further guidance on best practices for addressing sex-based harassment and violence with informal resolutions and restorative justice processes, as well as providing further clarification as to what “voluntary” participation entails. Furthermore, we ask the Department to require all schools that use informal resolutions to provide formal training to all individuals involved in administering the proceedings.

Assumption of Non-Responsibility Requirement.

We oppose the Department retaining the harmful rule from the previous administration that currently requires schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption.⁷² This formal presumption and notice of such a presumption is not required in any other type of school proceeding. This special protection just for respondents in cases related to sex-based harassment is built upon and exacerbates the harmful and false rape myth that people who report sex-based harassment (or other sex discrimination)—primarily women and girls—are lying.⁷³ We want to be very clear that we do appreciate the Department’s efforts to ensure that schools do not make assumptions one way or the other before the conclusion of an investigation. To meet this intended goal, we would instead recommend that the Department require schools to notify parties that a determination of responsibility will not be made until the end of an investigation.

⁷² 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(iii), 106.46(c)(2)(i)). See also 34 C.F.R. §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B).

⁷³ See generally Kathryn R. Klement et al., Accusers Lie and Other Myths: Rape Myth Acceptance Predicts Judgments Made About Accusers and Accused Perpetrators in a Rape Case, SEX ROLES 81, 16–33 (2019), <https://link.springer.com/article/10.1007/s11199-018-0950-4#citeas> [<https://perma.cc/BZY7-PTS5>] (exploring the ways in which police officers and jurors alike rely on rape myths to justify their disbelief of sexual assault victims).

Cross-Examination.

We support the proposed rules addressing K-12 investigations as they allow K-12 schools the flexibility needed to address sex-based harassment (and other sex discrimination) promptly and appropriately.⁷⁴ For institutions of higher education, the proposed rules would remove the harmful requirement from the 2020 rules that mandate direct, live cross-examination, and instead allow more flexibility for questioning to be conducted either: (i) by a decision-maker at a live hearing or in individual meetings, with suggested questions from the parties; or (ii) by the parties' advisors via cross-examination at a live hearing. This change is essential as the Department's current cross-examination policy is not legally required under the Mathews balancing test. The Sixth Circuit has clarified that, where due process demands cross examination, written statements will not suffice.⁷⁵ Instead, universities "must allow for some form of live questioning."⁷⁶ However, such live cross examination need not occur in the form of a direct cross-examination by an advisor. Instead, the Sixth Circuit emphasizes that such questioning must occur "in front of the fact-finder" to allow for credibility assessment "by the university."⁷⁷ This emphasis on the audience rather than the actor demonstrates that due process is located in the opportunity of the school to assess credibility, not the opportunity of the respondent (or an advisor of the respondent) to personally or directly question adverse witnesses. Case law plainly requires only that a university has the opportunity to observe the complainant responding to live questioning; the Department's conclusion that an "advisor aligned with [a given] party" must have an opportunity to directly cross examine the complainant and other witnesses,⁷⁸ is not plainly required by law.⁷⁹

We support the additional flexibility that the proposed rules would provide for institutions of higher education and encourage the Department to provide further guidance as to how schools can conduct such processes while minimizing reliance on cross-examination. Cross-examination can be an extremely traumatizing process. Survivors have shared with us that cross-examination processes impeded their immediate and long term success:

My assailant did cross-examine me. I didn't just want to die, I planned to die. I thought about killing myself all of the time. My grades fell, and eventually I sought counseling through the school. That didn't help. I connected with [a] local private therapist. I never got my GPA back up.

⁷⁴ Under the proposed rules, K12 schools would be required to allow all parties to present their witnesses and evidence and, if credibility is at issue, to use a process that enables the decision-maker to assess the credibility of the parties and witnesses. 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(f)(2), 106.45(g)).

⁷⁵ Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018)

⁷⁶ *Id.* at 583.

⁷⁷ *Id.* at 585, 583.

⁷⁸ 83 Fed. Reg. at 61476.

⁷⁹ Baum explains that direct cross examination by a respondent of a complainant is unnecessary and could subject the complainant to psychological harm. The ruling in Baum allows for, but does not require, cross examination by an "accused student's agent." 903 F.3d at 583.

Triggering moments and repulsive flashbacks interrupted my studies in undergrad, as well as in law school.⁸⁰

Another student survivor described attempting suicide after being cross-examined in the context of pursuing a restraining order:

I was directly cross examined by my rapist when I later filed a restraining order. That action directly led to a suicide attempt, and there is no doubt in my mind that had she, a year prior, been allowed to cross examine me, I would have attempted then too. The entire process was already grueling and my school was doing nothing to prevent rampant retaliation against me.⁸¹

However, we oppose the proposed exclusionary rule, which would require that, if a party or witness at an institution of higher education does not respond to a question “related to their credibility,” the school would have to ignore any statement they make that “supports their position.”⁸² We are concerned that 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.⁸³

Standard of Proof.

The proposed rule would require schools to use the preponderance of the evidence standard to investigate sex-based harassment (or other sex discrimination), unless the school uses the clear and convincing evidence standard in all other “comparable” investigations, including for all other types of harassment and discrimination.⁸⁴ We urge the Department to require the preponderance standard in all Title IX investigations, as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation,⁸⁵ and it is the same standard used by courts in all civil rights and

⁸⁰ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

⁸¹ Electronic submission received through <https://www.handsuffix.org/share-your-story/> (last accessed Jan. 19, 2019).

⁸² 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(4)).

⁸³ *Id.* While the proposed rules instruct decision-makers not to draw any inferences about whether sex-based harassment occurred based “solely” on a person’s refusal to respond to questions related to their credibility, a complainant whose statements are excluded would have to rely solely on their witnesses’ statements in order to prove their case.

⁸⁴ *Id.*

⁸⁵ 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>.

other civil proceedings.⁸⁶ Not requiring preponderance of the evidence rings in contrast to Title IX's objectives by promoting inaccuracy in adjudication: imposing a clear and convincing standard would increase the risk of wrongful findings of non-responsibility and therefore contribute to a denial of the sex-based harassment survivor's educational opportunities. And because it is likely that fewer complainants would file formal reports if a recipient adopted a clear and convincing standard, the Department's proposed regulation, if promulgated, could compromise the recipient's efforts to eliminate sex discrimination from its educational programs.

Further, it is essential that the standard of evidence recognizes both parties' equal stake in the case as researchers have found that students already endorse rape myths in overly gendered ways: "among college men, recent data showed that 22% agreed that 'women lie about rape to get back at men,' and 13% agreed that 'a lot of women lead men on and then cry rape.'"⁸⁷ Other studies have indicated that the rape myths that received the most endorsement were, "He didn't mean to" and "She lied."⁸⁸ By allowing schools to question the credibility of harassment survivors more than the credibility of the respondent, the Department of Education may further subordinate the very class of people that Title IX is intended to protect. Numerous academic articles document the fact that individuals that file complaints of sexual assault are judged more harshly than individuals accused of perpetrating sexual assault, particularly when cases "deviate from the 'real rape' stereotype of a violent attack of a stranger on an unsuspecting victim."⁸⁹ Moreover, the closer the prior relationship between the parties, the more blame individuals attribute to the alleged survivor, as opposed to the alleged perpetrator.⁹⁰ And when survivors are intoxicated, the perpetrator is seen as less likely to be culpable.⁹¹ Research also suggests that individuals who report rape are singled out for unique scrutiny and that perpetrators of robbery may experience higher rates of blame than perpetrators of sexual assault.⁹² Survivors of sexual harassment face high rates of stigma when they disclose violence—which often leads to survivors being denied the supportive measures, accommodations, and resources they need to continue to pursue an education. In one study of 102 rape survivors, almost 41% of survivors were called "irresponsible" or told to "get on" with their

⁸⁶ 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>.

⁸⁷ Katie Edwards et al., Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change, 65 SEX ROLES 761, 767 (2011).

⁸⁸ Sarah McMahon, Rape Myth Beliefs and Bystander Attitudes Among Incoming College Students, 59 JOURNAL OF AMERICAN COLLEGE HEALTH, 3, 4 (2010).

⁸⁹ Mary White Stewart et al., "Real Rapes and 'Real Victims': The Shared Reliance On Common Cultural Definitions of Rape, 4 FEMINIST LEGAL STUD. 159, 162-64 (1996).

⁹⁰ *Id.* See also Steffen Bieneck & Barbara Krahne, Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?, 26 J. OF INTERPERSONAL VIOLENCE, 1785, 1793-94 (2011).

⁹¹ *Id.* Cf. Erica L. Green & Sheryl Gay Stolberg, Campus Rape Policies Get a New Look as the Accused Get DeVos' Ear, N.Y. TIMES (July 12, 2017) (quoting from Assistant Secretary of the Office for Civil Rights Candace Jackson, falsely claiming that most reports of sexual violence "fall into the category of 'we were both drunk,'" and are "not even" as serious as other cases), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>. N.B. Assistant Secretary Jackson, who played a significant early role in the development of the Department's NPRM, later apologized for her comments.

⁹² Steffen Bieneck & Barbara Krahne, Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?, 26 J. OF INTERPERSONAL VIOLENCE, 1785, 1798-90 (2011).

lives.⁹³ These findings are supported within the academic literature: one researcher found that survivors “receive significant negative reactions including being blamed and disbelieved when disclosing assault; these reactions are related to poorer psychological and physical health outcomes.”⁹⁴

If the Department chooses not to require the preponderance standard, it should, at a minimum, clarify that “comparable” investigations include investigations of “non-sexual assault” (*e.g.*, non-sexual physical assault). Otherwise, schools could believe that they can use the preponderance standard to investigate *physical* assault and the clear and convincing evidence standard to investigate *sexual* assault, other sex-based harassment or discrimination, and all other harassment and discrimination based on race, disability, etc.

Appeals.

We support the proposed rule requiring institutions of higher education to offer appeals to both parties based on a procedural irregularity, new evidence, or a Title IX official’s bias or conflict of interest that affected the outcome, and allowing them to offer additional bases to both parties equally.⁹⁵ However, we urge the Department to ensure that parties are afforded the same appeal rights in K-12 schools as they would be at institutions of higher education.

⁹³ Rebecca Campbell et al., Social Reactions to Rape Victims: Healing and Hurtful Effects on Psychological and Physical Health Outcomes, 16 VIOLENCE & VICTIMS 287, 298-99 (2001).

⁹⁴ Rebecca Campbell et al., Social Reactions to Rape Victims: Healing and Hurtful Effects on Psychological and Physical Health Outcomes, 16 VIOLENCE & VICTIMS 287, 291-95 (2001).

⁹⁵ 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)(1)-(2)).

Conflicts of Interest.

We support the Department's requirement that, "any person designated as a Title IX Coordinator, investigator, or decision maker must not have a conflict of interest or bias regarding complainants or respondents generally or regarding a particular complainant or respondent." This requirement is essential to creating a process that survivors' feel they can turn to for help without fear of it being unfair or biased. But we encourage the Department to make clear what roles might constitute a conflict of interest for the Title IX Coordinator, investigators, or decision makers—and to ensure that conflict of interest also includes the positionality of the individuals within the structure of the school. Since prior guidance was rescinded by the Trump administration, survivors have reported their Title IX Coordinators holding clear conflicts of interest that have often been aimed at protecting the school first and foremost. For example, survivors shared with us that following the issuance of the 2020 regulation, their school moved to have their general counsel serve as their Title IX Coordinator, or supervise the Coordinators—placing Title IX as first and foremost about school risk instead of educational access.⁹⁶

VI. Preventing and Limiting Retaliation Against Student Survivors

We support the Department of Education's clarification (proposed § 106.71) that would build on the current regulations and clarify what types of conduct would constitute prohibited retaliation, including peer retaliation. This clarification is essential to ensure that student survivors are not fearful of experiencing further harm after reporting harassment or violence to their schools. Expanding the definition of retaliation is urgently needed, as sexual harassment is significantly underreported due to a culture of peer retaliation and threat of it, schools' failure to respond to retaliation, and even schools' engaging in institutional retaliation against survivors. Know Your IX's survey found that 70 percent of survivors who reported to their schools stated they experienced adverse effects on their safety and privacy.⁹⁷ These safety concerns led to a plethora of negative impacts, ranging from further physical and psychological harm to increased vulnerability to school drop-out.

Furthermore, survivors have shared that the retaliation they face from perpetrators is strikingly similar to litigation abuse, wherein respondents use school disciplinary resources to further abuse. According to our survey, many respondents and schools utilized or threatened to utilize legal systems to control and/or silence survivors.⁹⁸ Our survey found two forms of retaliation survivors who reported to their schools experienced at concerning high rates: retaliatory cross-filing and the threat of defamation suits. The 2020 regulation has contributed to an increased, disturbing trend of survivors experiencing

⁹⁶ Know Your IX, The Every Voice Coalition, SafeBAE. Student Listening Sessions. July 2022.

⁹⁷ Nesbitt, Sarah, and Carson, Sage. "The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout." Know Your IX. Advocates For Youth, March 2021. <https://www.knowyourix.org/thecostofreporting/>

⁹⁸ *Id* at 17.

retaliation, hand in hand and institutions failing to provide student survivors with the necessary support after experiencing retaliatory cross-filing or a defamation lawsuit.

Retaliatory Cross-Filing.

Retaliatory cross-filing occurs when a survivor files a complaint with their school saying they experienced sexual harassment or violence and, as a response, the perpetrator also files a complaint against them alleging that they were in the fact the victim of harassment and/or violence, and the survivor was actually the perpetrator of the abuse. In some cases, the perpetrators may even file first to get ahead of this process. Survey responses from survivors showed that retaliatory cross-filing through the school was similar in tactic and outcome to perpetrators who abused survivors through litigation by cross-filing for protective orders, filing frivolous complaints, relitigation attempts, and prolonging court proceedings. In campus disciplinary systems, as in legal systems, the goal of these tactics was to force survivors and their perpetrators to have to interact through the disciplinary process, drag out the process, control and/or silence the survivor, and drain their time and financial resources. Our survey, *The Cost of Reporting*, found that half of survivors who faced retaliatory cross-filing took a leave of absence or transferred schools.⁹⁹

Threat of Defamation Suit.

In addition to retaliatory cross-filing, 23% of survivors report being threatened by their perpetrator or the perpetrator's attorney with a defamation lawsuit as retaliation for speaking out, and 19% report being warned by their school of the possibility of a defamation suit.¹⁰⁰ These threats not only silence survivors and prevent others from coming forward, but also constitute retaliation against the survivor, as the threats are a direct result of reporting the sexual harassment. One survivor wrote that her abuser threatened to sue her for defamation if she reported, saying "If you come after me, I'll come after you." Another explained that her perpetrator's family contacted her family, threatening them with a lawsuit unless she dropped her Title IX case. The threats universally inspired fear, discouraged online engagement, and inhibited reporting, because the survivors knew those threats were not empty ones. As one survivor wrote: "Knowing my abuser—he will do anything to retaliate against me."¹⁰¹

One survivor shared with Know Your IX her school's failure to respond to retaliation, and the lasting impact it had on her educational experience and future opportunities:

⁹⁹ *Id* at 19.

¹⁰⁰ *Id* at 21.

¹⁰¹ *Id* at 21.

“[My] perpetrator tried to open a case against me for “damaging his reputation” (libel/slander). As a result, [my] school disregarded my existing case and forced us to do mediation (despite my existing no contact order against the perpetrator). 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.” - D.K.

Survivors choose not to report sexual violence to authorities for a multitude of reasons, one of which is a fear that their perpetrator will retaliate or escalate the violence. Fear of retaliation is particularly powerful in deterring female survivors from reporting.¹⁰² The retaliation survivors fear may be social, psychological, or physical. For survivors of intimate partner violence (IPV), the fear of escalated violence in response to reporting is particularly salient; leaving an abusive relationships are the most dangerous time for a survivor. Because IPV is first and foremost about power and control, perpetrators interpret leaving and other pro-separation acts as a loss of power and control over the survivor. In response, perpetrators escalate violence as a way to attempt to regain or maintain that control.¹⁰³ The same dynamics are true of stalking.¹⁰⁴ Perpetrators who exert power and control may even escalate to the point of lethality in response to perceptions that they are losing control over the survivor.¹⁰⁵

Nondisclosure Agreements.

We urge the Department to issue clarification prohibiting schools from requiring survivors to sign nondisclosure agreements (NDAs) or other agreements as a condition of receiving supportive services or having their Title IX claims investigated. The agreements require survivors and their advisors to agree not to disclose any information about the grievance process, even after it has concluded, or risk expulsion or civil litigation if they fail to comply with their school’s terms.¹⁰⁶ These agreements are coercive and retaliatory, and condition access to a school’s grievance process on silence and a forfeiture of due process by students, many of whom are minors. This creates unsafe educational environments which disproportionately impact women, girls, LGBTQI+ students, and students from historically marginalized backgrounds. Many students cannot afford legal counsel, and as a result are signing these agreements and unknowingly waiving their rights.¹⁰⁷

¹⁰² Marjorie R. Sable et. al., Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students, 55 J. AMER. C. HEALTH 157, 160 (2006).

¹⁰³ Ruth E. Fleury et al, When Ending the Relationship Does Not End the Violence, 6 VIOLENCE AGAINST WOMEN 1363, 1378 (2000).

¹⁰⁴ TK Logan & Robert Walker, Stalking: A Multidimensional Framework for Assessment and Safety Planning, 18 TRAUMA, VIOLENCE, & ABUSE 200, 207 (2016).

¹⁰⁵ NAT’L INST. JUST., INTIMATE PARTNER HOMICIDE 22 (2003).

¹⁰⁶ Equal Rights Advocates and L.L. Dunn Law Firm, PLLC, “Letter to OCR Regarding Title IX Unconscionable Agreements,” June 2022, 1.

¹⁰⁷ Equal Rights Advocates, “Letter to OCR Regarding Title IX Unconscionable Agreements”, 2-5.

Given the retaliation that survivors experience after reporting to their schools, we ask that the Department clarify in the regulations that prohibitions on retaliation include:

1. Disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g. retaliatory cross-filing)
2. Disciplining a complainant for conduct that results from the harassment or discrimination (e.g. speaking out, expressing trauma, missing school)
3. Requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, an informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations

VII. Protections for Pregnant and Parenting Students

Definition of Pregnancy and Related Conditions.

Pregnant, parenting, and students with pregnancy-related conditions are now even more vulnerable to educational inequities given recent political events. The Supreme Court’s brazen overturning of *Roe v. Wade* has revealed the truth behind the aphorism “so many things are about abortion because abortion itself is about so many things.”¹⁰⁸ There has been a deluge of reporting about how the lives and rights of pregnant people will and have changed since *Roe* was overturned several weeks ago. National Advocates for Pregnant Women have documented over 1,700¹⁰⁹ cases from 1973 to 2020 where pregnant people were arrested or prosecuted for negative pregnancy outcomes. Lack of access to abortion may prevent a pregnant person from obtaining cancer treatment.¹¹⁰ A pregnant woman in California was sent home when her fallopian tube burst; she was having an ectopic pregnancy, which is potentially fatal.¹¹¹ Students face these same threats to bodily autonomy, which obviously implicates education. Thus, to ensure educational equity for students and student survivors more specifically, there must be strong protections for pregnant, parenting, and students with pregnancy-related conditions. We endorse most of the proposed regulation’s definitions and procedures concerning pregnancy, parenting, and pregnancy-related conditions. However, the final rule could be stronger by amending the definition of pregnancy and related conditions and their scope of coverage, adding explicit protections for students seeking abortion care, providing clarity regarding certain aspects of Title IX’s nondiscrimination

¹⁰⁸ Sanger, Carol. Talking About Abortion. <https://journals.sagepub.com/doi/abs/10.1177/0964663916668250?journalCode=slsa>

¹⁰⁹ “Arrests and Prosecutions of Pregnant Women, 1973-2020.” National Advocates for Pregnant Women, May 9, 2022. <https://www.nationaladvocatesforpregnantwomen.org/arrests-and-prosecutions-of-pregnant-women-1973-2020/>.

¹¹⁰ Boboltz, S. *People Will Still Die In Anti-Abortion States That Have ‘Lifesaving’ Exceptions*. (HuffPost, 2022), <https://www.huffpost.com/entry/death-risk-pregnancy-despite-lifesaving-exceptions-for-abortion_n_62b715c9e4b04a61736b0aa9> [Accessed 19 August 2022].

¹¹¹ Nolan, S. *My Fallopian Tube Burst Due To An Ectopic Pregnancy. An ER Doctor Sent Me Home*. (2022), [online] HuffPost. <https://www.huffpost.com/entry/roe-wade-abortion-ectopic-pregnancy_n_62f52039e4b0288b61a27a35> [Accessed 19 August 2022].

protections, strengthening reasonable accommodation and leave of absence procedures, and improving lactation spaces.

Expanded Scope of Coverage.

The proposed rule defines pregnancy and related conditions as pregnancy, childbirth, termination of pregnancy, or lactation; medical conditions related to pregnancy; and recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions.¹¹² This definition is a significant improvement from the current Title IX regulation, which lacks an explicit definition of pregnancy and related conditions.¹¹³ We strongly support the Department adding “lactation” as a related condition, especially when comprehensive protections are lacking in other contexts.¹¹⁴ This is a critical and positive step towards protecting pregnant and parenting students’ health and supporting their academic success.

The proposed rule’s definition of pregnancy and related conditions further clarifies that schools are prohibited from discriminating against any “person” (including students and employees) based on “current, potential, or past pregnancy or related conditions” and “past parental, family, or marital status.”¹¹⁵ This starkly contrasts from the current regulation, which does not specify the scope of coverage¹¹⁶ for pregnancy and related conditions. We strongly approve of this expanded scope of coverage. This language provides students with the possible recourse of utilizing Title IX grievance procedures or accessing accommodations when faced with discrimination. In fact, there have been several instances of students experiencing discrimination for current or past pregnancy or related conditions.

In *Wort v. Vierling*,¹¹⁷ a federal district judge ruled that a high school discriminated against a student on the basis of her past premarital pregnancy in violation of Title IX by dismissing her from the school’s National Honor Society (NHS). In *Cazares v. Barber*,¹¹⁸ a student was also excluded from her school’s NHS due to her current pregnancy. Discrimination based on potential pregnancy is also not uncommon. In Louisiana, a public school policed the bodies of young female students based on their childbearing capacity by forcing them to take pregnancy tests and requiring them to undergo home

¹¹² 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”).

¹¹³ 34 C.F.R. § 106.2. Elsewhere in the current rule states that recipients are prohibited against discriminating against applicants for admission on the basis of “pregnancy, childbirth, termination of pregnancy, or recovery therefrom” and states that a recipient must treat “disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom.”

¹¹⁴ Break Time for Nursing Mothers is a provision of a federal law that mandates employers to provide accommodations for breastfeeding, but exempts many occupations from its protection. See Fair Labor Standards Act § 7(r) (as amended by the Patient Protection and Affordable Care Act, P.L. 111-148).

¹¹⁵ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”), 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(ii), 106.40(b)(1)), 41579 (proposed 34 C.F.R. § 106.57(b)).

¹¹⁶ 34 C.F.R. §§ 106.40(a), 106.40(b)(1).

¹¹⁷ *Wort v. Vierling*, 778 F.2d 1233, 1234 (7th Cir. 1985).

¹¹⁸ *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992).

schooling if they refused,¹¹⁹ egregiously interfering with their education. Under the proposed rule, these cases would clearly violate Title IX.

Additionally, other government entities have used the Department's proposed scope of coverage in their definitions of pregnancy and related conditions or have recognized discrimination based on current, potential, or past pregnancy. The Department of Health and Human Services recently released guidance about pharmacists' obligations to provide reproductive healthcare services.¹²⁰ The guidance specifically states that "under federal civil rights law, pregnancy discrimination includes discrimination based on current pregnancy, past pregnancy, potential or intended pregnancy,¹²¹ and medical conditions related to pregnancy or childbirth." Keeping this language in the final rule promotes synchrony between government entities and guards against discrimination based on speculation about someone's current, past, or potential fertility, parental, familial and marital status.

Finally, and of particular importance, the definition of pregnancy and related condition continues to include abortion ("termination of pregnancy"). This is greatly appreciated and noted at a time when abortion access is dwindling across the country. A day after the Notice of Proposed Rule Making (NPRM) was released on June 23, the Supreme Court reversed *Roe v. Wade*, effectively eliminating the constitutional right to abortion. As of August 12, fourteen states have either banned abortion entirely (Alabama, Arkansas, Mississippi, Missouri, Oklahoma, South Dakota, Kentucky, Louisiana, and Texas) or implemented a ban on abortion beginning at six weeks of pregnancy (Georgia, Ohio, South Carolina, Idaho and Tennessee).¹²² Pregnant students residing in these states will likely need to travel out of state for abortion care. While Title IX does not guarantee the right to abortion access, the Department's proposed rule makes explicitly clear that needing an abortion falls under pregnancy and pregnancy-related conditions, and that students have a right to learn in an environment free from discrimination because they sought, obtained, or are recovering from an abortion. Recipients will thus have a responsibility to provide pregnant students with the necessary accommodations to continue their education amidst needing to travel out of state and recover from an abortion. As such, we firmly believe keeping the "termination of pregnancy" language in the final rule will advance accessibility in higher education and meet the needs of students seeking abortion care as nationwide access becomes increasingly limited. Despite all of the protections included in the proposed definition of pregnancy and related conditions, the proposed rule can still be strengthened, especially for students who need abortions.

¹¹⁹ Zegeye, T., *Get Tested Or Get Out: School Forces Pregnancy Tests on Girls, Kicks out Students Who Refuse or are Pregnant*. (American Civil Liberties Union, 2022).

<<https://www.aclu.org/blog/speakeasy/get-tested-or-get-out-school-forces-pregnancy-tests-girls-kicks-out-students-who#:~:text=In%20a%20Louisiana%20public%20school,forced%20to%20undergo%20home%20schooling.>> [Accessed 19 August 2022].

¹²⁰ U.S. Department of Health and Human Services. *Guidance To Nation's Retail Pharmacies: Obligations Under Federal Civil Rights Laws To Ensure Access To Comprehensive Reproductive Health Care Services*. 2022.

<https://www.hhs.gov/sites/default/files/pharmacies-guidance.pdf>.

¹²¹ U.S. Department of Health and Human Services, *Guidance To Nation's Retail Pharmacies*, 2-3.

¹²² Guttmacher Institute. *Interactive Map: US Abortion Policies and Access After Roe*. 2022. <https://states.guttmacher.org/policies/>

Further Protections, Including for Termination of Pregnancy and Protection of Abortion Access.

The definition of pregnancy and related conditions can be ameliorated by adding more specificity. The final version of the rule should change “medical conditions related to pregnancy,” expanding this phrase to “health conditions related to pregnancy, including, but not limited to nausea or morning sickness, dehydration, fatigue, increased body temperature, anemia, bladder dysfunction, gestational diabetes, pregnancy-induced hypertension (high blood pressure), infertility or need for fertility treatments, gestational diabetes, hyperemesis, preeclampsia, loss or termination of pregnancy, recovery from childbirth, and lactation conditions such as swelling or leaking of breast tissue or mastitis.” “Medical conditions” may be misinterpreted to mean that a student must have a condition that is considered a disability under the American Disabilities Act and could limit students’ access to accommodations. Mental health concerns, such as postpartum depression or anxiety, should also qualify as a health condition related to pregnancy. This more extensive definition allows students to access accommodations for conditions that may impact their education.

In addition, lack of access to abortion care is an educational equity issue that marginalizes students, especially student survivors of gender violence. As of the writing of this comment, abortion is banned or mostly banned¹²³ in seventeen states. Abortion restrictions and bans will only exacerbate existing health disparities, which will undoubtedly impact educational outcomes of pregnant and parenting students due to health complications that make it impossible to continue their education,¹²⁴ or due to caring for their child.¹²⁵

Gender violence obviously implicates abortion, as a survivor could become pregnant as a result of rape or intimate partner violence. An unwanted pregnancy can disrupt a student survivor’s education and exacerbate their trauma. Pregnancy further ties survivors of rape and intimate partner or domestic violence to their abusers, making it harder to escape their perpetrator(s).¹²⁶ Given the hostile abortion landscape and the potential for educational inequities, there needs to be additional protections for student survivors of sexual harassment who need to terminate a pregnancy. We therefore urge the Department to require schools to adopt the following policies:

¹²³ Caroline Kitchener et al., *Abortion is now banned in these states. See where laws have changed.* June 24, 2022.

<https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/>

¹²⁴ Bohanon, Mariah. *Experts Encourage College Campuses To Prepare For Repercussions Of Roe V. Wade’s Overturn.* (Insight Into Diversity, 2022),

<https://www.insightintodiversity.com/experts-encourage-college-campuses-to-prepare-for-repercussions-of-ro-v-wades-overturn/>.

¹²⁵ Wladis, Claire. *OPINION: Many Student-Parents Drop Out Because They Don’t Have Enough Time For Their Schoolwork, Research Shows.* (The Hechinger Report, 2022), <https://hechingerreport.org/opinion-many-student-parents-drop-out-because-they-dont-have-enough-time-for-their-schoolwork-research-shows/>.

¹²⁶ Craig, Hannah. *Limiting Abortion Rights Keeps DV Victims In Danger.* (Domesticshelters.Org, 2022), <https://www.domesticshelters.org/articles/in-the-news/how-limiting-abortion-rights-keeps-survivors-in-danger>.

First, in abortion-hostile states, schools must shield complainants and their friends in sexual harassment and sex discrimination grievance procedures from retaliation by perpetrators for self-managing an abortion or “aiding and abetting” the complainant in obtaining an abortion. Second, schools cannot discipline, suspend, expel, and refer to law enforcement students who obtain or self-manage an abortion. As previously discussed, disciplinary action has been used as a tool to punish student survivors¹²⁷ for coming forward. This has pushed many student survivors into taking leaves of absences, transferring schools, or dropping out completely.¹²⁸ Finally, the Department must clarify how the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* will impact students’ privacy rights under the Family Educational Rights and Privacy Act (FERPA)¹²⁹. Schools need to protect student privacy to ensure that school records regarding reproductive decisionmaking are not used to prosecute complainants in states where abortion and other reproductive healthcare is criminalized. These policies will help promote educational equity for students who sought and/or obtained an abortion, especially student survivors.

Solidifying Nondiscrimination Procedures to Protect Students.

The proposed rule would require schools to explicitly state in their notice of nondiscrimination that they do not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity that it operates, as required by Title IX and its regulations. This notice of nondiscrimination should be amended to state the following: “the recipient does not discriminate on the basis of sex and prohibits sex discrimination, including sexual harassment and discrimination on the basis of pregnancy or related conditions and parental status, in any education program or activity that it operates, as required by Title IX and its regulations, including in admission (unless subpart C of part 106 does not apply) and employment (proposed § 106.8(c)(1)(i)).” Students may not know that sex discrimination encompasses pregnancy discrimination. This clear language will allow students to understand their rights under Title IX as it pertains to pregnancy and related conditions and parental status.

The proposed rule also states that a recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions. This section of the proposed rule should be more specific about the

¹²⁷ Nesbitt, Sarah, and Carson, Sage. “The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout.” Know Your IX. Advocates For Youth, March 2021. <https://www.knowyourix.org/thecostofreporting/>

¹²⁸ *Id.* at 15.

¹²⁹ College and university presidents raised concerns about how *Dobbs* will impact higher education, see Meghan Brink. *Meeting the Vice President on Abortion*. (Inside Higher Ed, 2022), <https://www.insidehighered.com/news/2022/08/09/vice-president-meets-college-presidents-abortion>.

definitions of “voluntary” and “comparable.” Students may opt to participate “voluntarily” in a separate activity, but may have been coerced into doing so. The final version of the rule should define “voluntary” as “of their own volition, not forced or coerced.” Additionally, the final version of the rule should reevaluate the definition of comparable. This section of the proposed rule must lastly be amended to explicitly prohibit schools from requiring that pregnant, parenting, or students with pregnancy-related conditions participate in separate activities.

The proposed rule’s nondiscrimination section should also explicitly prohibit harassment on the basis of parental, family, caregiver, or marital status. In *Tingley-Kelley v. Trustees of Univ. of Pennsylvania*,¹³⁰ the District Court stated 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.

The Proposed Regulations’ Reasonable Modification, Leave of Absence, and Lactation Requirements Solidify Protections for Students But Must Be Expanded.

The Department’s proposed rule clarifies an educational institution’s obligation to protect students from discrimination based on pregnancy or related conditions, including termination of pregnancy and lactation, by providing reasonable modifications to policies, practices, or procedures, allowing voluntary leaves of absence beyond the medically necessary minimum, and ensuring access to a private and sanitary lactation space that is not a bathroom.¹³¹

1) Reasonable Modifications

Though the Department of Education has consistently required certain reasonable adjustments be made to protect pregnant students’ health and help facilitate their continued education, schools have evidently struggled with implementation. In 2018, a student attending Belmont University College of Law in Nashville, Tennessee, reported returning to school *days* after having an emergency cesarean section—before she was even able to drive or carry her own books—due to pressure and lack of support from the university.¹³² Another student experiencing a high-risk pregnancy, reported being told to schedule medical appointments outside of class time to avoid using up absences despite a note from her doctor. She was also not given spring schedule information and early exams.¹³³ Just two months ago, the U.S. Department of Education’s Office for Civil Rights (OCR) determined that Salt Lake Community College in Utah violated Title IX because a professor encouraged a pregnant student to drop a course due to her

¹³⁰ *Tingley-Kelley v. Trustees of Univ. of Pennsylvania*, 677 F. Supp. 2d 764 (E.D. Pa. 2010)

¹³¹ Proposed 34 C.F.R. § 106.40(b)(3).

¹³² Steven Hale. *Women Say Belmont Law School Discriminates Against Pregnant Students*. (Nashville Scene, 2019), https://www.nashvillescene.com/news/pithinthewind/women-say-belmont-law-school-discriminates-against-pregnant-students/article_2ee17bf4-5586-5daa-bc95-b87b6c31e0b0.html.

¹³³ Hale, *Belmont Law School Discriminates*.

pregnancy, did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and did not excuse her pregnancy-related absences or allow her later to submit work following those absences.¹³⁴ Providing a student with the option of reasonable modifications is essential to preventing pregnancy-based discrimination and to ensuring equal access to education for students who are pregnant or have a related condition.

We appreciate the proposed rule making it clear that schools *must* “promptly” make “voluntary and reasonable modifications”¹³⁵ to their policies, practices, or procedures when needed for pregnancy or related conditions, unless a modification is “so significant” that it “alters the essential nature” of the school’s program or activity.¹³⁶ It is also explicitly clear that Title IX Coordinators have the authority and responsibility to ensure reasonable accommodations are actually provided to students, including by making certain faculty members understand their obligations to comply. We support these proposed changes. We are happy that students are not required to accept a reasonable modification and must approve them. We believe that this participatory process will empower students to advocate for themselves and foster collaboration between students and schools. We support the requirement that modifications be individually tailored to each pregnant student’s needs. As the Department correctly noted, the circumstances surrounding a student’s pregnancy will vary widely based on many unique factors.¹³⁷ An individualized, holistic approach allows students to feel valued in ways that a generalized approach would not.

Nonetheless, the reasonable modifications section of the proposed rule can be strengthened. The proposed “essential nature” qualifier is much too vague and could possibly encourage recipients to deny students who are pregnant or have a related condition access to reasonable accommodations that would enable them to continue their education. We accordingly recommend the Department state that if a student requests a certain modification and it is “reasonably available,” then the school must provide it; and that if a modification turns out to be ineffective, then the school must change it or offer additional modifications. We additionally urge the Department to add more specific examples of modifications (e.g., accessible parking, referral to child care or preschool options)¹³⁸ and to clarify that recipients need not require documentation from a healthcare provider in most cases in order to grant requests for reasonable modification. This can be extremely and unnecessarily burdensome for students, especially if the modification is one that is obvious or routine in nature (bathroom break, lactation break).

¹³⁴ U.S. Department of Education. *U.S. Department of Education’s Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College*. (2022), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-pregnancy-discrimination-investigation-salt-lake-community-college>.

¹³⁵ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

¹³⁶ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

¹³⁷ Proposed 34 C.F.R. § 106.40(b)(4)(i).

¹³⁸ The Department can add additional examples of modifications for parenting students at proposed 34 C.F.R. § 106.40(b)(4)(iii).

We further believe that reasonable modification protections should apply at the admissions stage, as similarly required under the ADA and in other employment contexts. The Department should also extend the same rights to reasonable modifications to *employees* who are pregnant or have a related condition as opposed to making such rights solely dependent on what modifications are provided to workers with temporary disabilities. When employees receive accommodations, pregnant workers are able to continue working safely and provide for their growing families, while employers retain an experienced employee.¹³⁹ Reasonable modifications should undoubtedly be available to *parenting and caregiving* students and employees as well, as the proposed rule does not entitle them to any. They should specifically be available for as long as the student or employee needs to care for a minor child or disabled adult who is sick, as specified in the Department's proposed definition of parental status.¹⁴⁰ This is consistent with the Department's intention to be inclusive and support students with caregiving responsibilities who have repeatedly raised the need for accommodations.

2) Easing access to leave for students who are pregnant or have a related condition

We support the Department's requirement that recipients 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.¹⁴¹ We particularly and very greatly appreciate the proposed rule permitting documentation from any licensed healthcare provider and not just a physician. As previously stated, this advances accessibility in higher education, as it recognizes that not all students can easily access a physician. Many pregnant students receive care from doulas, midwives, registered nurses, lactation consultants, and other non-physicians.

Despite this, the proposed rule does not address what happens when students in higher education who take a medically necessary “leave” are forced to withdraw or deregister from school during the leave, which results in ineligibility for critical benefits such as housing, financial aid, and healthcare. We urge the Department to remedy this by providing guidance to recipients on how to provide medically necessary leave without jeopardizing a student's access to benefits. The proposed rule would additionally create an arbitrary and harmful distinction between medically necessary “leave” (recovery from childbirth)—which must be granted if requested— and short “breaks during class” (lactation or bathroom breaks) or “intermittent absences” (for abortion or recovery therefrom)— which would be classified as “reasonable modifications” that a Title IX Coordinator has the discretion to approve or deny. Non-birthing parents and

¹³⁹ National Women's Law Center and A Better Balance. *It Shouldn't Be a Heavy Lift: Fair Treatment For Pregnant Workers*. (2013), <https://www.shrm.org/hr-today/news/hr-magazine/Documents/ItShouldntBeAHeavyLift.pdf>.

¹⁴⁰ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2).

¹⁴¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

caregivers are further excluded from these protections. Thus, the Department should make medically necessary “absences” available to parenting and caregiving students, in addition 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, as specified in the Department’s proposed definition of parental status.¹⁴² Once again, this is consistent with the Department’s intention to be inclusive and supportive of students with caregiving needs.

3) Lactation Protections

We support the proposed rule requiring schools to provide lactating students and employees with reasonable breaks and a clean, private non-bathroom space for expressing breastmilk or feedings. These requirements reflect existing state and federal workplace lactation laws and ensure that students can fully access and obtain the benefits of a recipient’s education program or activity. Experts advise breastfeeding parents to pump roughly every three hours in the early months in order to keep their supply up.¹⁴³ An inability to pump may cause students to experience pain or may cause clogged ducts and mastitis (inflammation of breast tissue that sometimes involves infection).¹⁴⁴ Students have a right to lactation accommodations that protect their health and the health of their infant, and ensure that they can continue their education or employment. We consequently ask that The Department retain this language in the final rule.

We urge the Department to clarify however, that lactation spaces must further include the following: a flat surface and chair, access to electricity, and access to running water and a refrigeration space where the student may store expressed breastmilk. Lactation spaces should also be required to be in reasonable proximity to the student’s place of study or employee’s place of work. Students and employees should not have to travel to distant locations to express breast milk, as it may cause them to miss more class or work than necessary or to skip or delay milk expression, risking painful and often severe health complications as a result.¹⁴⁵ Lactating students should not be forced to choose between their health or their infant’s health, and their education.

Lastly, the Department should explicitly state that students and employees are not required to use lactation spaces, as they have a right to pump or breastfeed in non-designated lactation spaces if they so wish. This combats shame and stigma associated with breastfeeding in public. No student should face harassment or other discrimination as a result of their lactation status.

¹⁴² *Id.*

¹⁴³ Cari Nazeer. *Breastfeeding Access Is a Workplace Issue*. (TIME, 2022), <https://time.com/charter/6193639/breastfeeding-work-pumping/>

¹⁴⁴ National Women’s Law Center., *Breastfeeding FAQ* (2016), <https://nwlc.org/resource/faq-breastfeeding-students/>.

¹⁴⁵ The Pregnant Scholar. *Fact Sheet: Protections for Lactating Students*. (2022), <https://thepregnantscholar.org/wp-content/uploads/FACT-SHEET-Breastfeeding.pdf>

Protections for LGBTQI+ Students

We support the proposed rule's listing of anti-LGBTQI+ discrimination as a form of discrimination under Title IX, including discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), status as transgender or nonbinary, and sex stereotypes¹⁴⁶. In its 2020 ruling in *Bostock v. Clayton County*, the Supreme Court affirmed that discrimination on the basis of a person's being transgender is "inherently" a form of sex discrimination.¹⁴⁷ One student stated that "discrimination is embedded into Title IX [current rules] for queer and nonbinary students."¹⁴⁸ This student felt not believed by their school due to their status in a queer relationship at the time of their abuse.

Nearly one-quarter (24%) of people who were out or perceived as transgender in college or vocational school were verbally, physically, or sexually harassed.¹⁴⁹ More than three-quarters (77%) of those who were out or perceived as transgender at some point between kindergarten and grade twelve experienced some form of mistreatment, such as being verbally harassed, prohibited from dressing according to their gender identity, disciplined more harshly, or physically or sexually assaulted because people thought they were transgender¹⁵⁰. Seventeen percent (17%) faced such severe mistreatment as a transgender person that they left a K–12 school¹⁵¹.

According to Youth Risk Behavior Survey data from the Centers for Disease Control and Prevention (CDC), the predicted prevalence of experienced physical dating violence among transgender students is 28.2%, while it is just 7.9% for cisgender students; this means that transgender youth are 3.6 times as likely as cisgender students to report this experience¹⁵². Transgender students reported forced sex, sexual violence, sexual dating violence and physical dating violence at higher rates than cisgender students. For example, one quarter (25.3%) of transgender youth were ever physically forced to have sexual intercourse in comparison to 7.2% of cisgender youth and more than one-third (35.1%) of transgender youth also reported experiencing sexual violence compared to 9.8% of cisgender students¹⁵³.

¹⁴⁶ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10)

¹⁴⁷ *Bostock v. Clayton County*, 590 U.S. ____ (2020)

¹⁴⁸ Know Your IX, The Every Voice Coalition, & SafeBAE (2022). Student Listening Sessions.

¹⁴⁹ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

¹⁵⁰ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

¹⁵¹ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.

¹⁵² Perry, JR and Frazer, S (2020). On All Sides: How Race & Gender Influence Health Risk for Transgender Students of Color. Washington, DC: Advocates for Youth. [https:// actionnetwork.org/forms/on-all-sides](https://actionnetwork.org/forms/on-all-sides).

¹⁵³ Perry, JR and Frazer, S (2020). On All Sides: How Race & Gender Influence Health Risk for Transgender Students of Color. Washington, DC: Advocates for Youth. <https:// actionnetwork.org/forms/on-all-sides>.

Similar trends were found for having experienced sexual dating violence and physical dating violence, with higher percentages of transgender youth reporting such experiences¹⁵⁴.

From September to December 2021, 45% of LGBTQI+ youth seriously considered attempting suicide in the past year, including more than half of transgender and nonbinary youth¹⁵⁵. Additionally, 73% of LGBTQI+ youth report that they had experienced discrimination based on their sexual orientation or gender identity at least once in their lifetime, and those who did attempted suicide at more than twice the rate of those who did not in the past year. LGBTQI+ youth are more than four times as likely to attempt suicide than their peers¹⁵⁶¹⁵⁷.

LGBTQI+ young people report lower rates of attempting suicide when they have access to LGBTQI+-affirming spaces¹⁵⁸. Many LGBTQI+ youth lack access to affirming spaces, with only 55% of LGBTQI+ youth reporting that their school is LGBTQI+-affirming¹⁵⁹. Therefore, it is critical that the Biden Administration fulfills the intention of Executive Order 14075, to combat unlawful discrimination and eliminate disparities that harm LGBTQI+ individuals and their families, defend their rights and safety, and pursue a comprehensive approach to delivering the full promise of equality for LGBTQI+ individuals¹⁶⁰. We agree that the federal government must strengthen supports for LGBTQI+ students in our Nation's schools and other education and training programs¹⁶¹.

We support the proposed rule clarifying that preventing a student from participating in an education program or activity consistent with their gender identity is *per se* a form of sex-based harm and generally violates Title IX because it causes more than “de minimis” harm¹⁶². The Department must clarify that the de minimis harm standard applies to all sex-separated programs and activities including, but not limited to, restrooms, locker rooms, overnight accommodations, etc. - unless Congress or the Department has expressly stated otherwise.

We support the proposed rules requiring schools to address harassment based on sexual orientation, gender identity, sex characteristics (including intersex traits), or sex stereotypes as a form of

¹⁵⁴ Perry, JR and Frazer, S (2020). On All Sides: How Race & Gender Influence Health Risk for Transgender Students of Color. Washington, DC: Advocates for Youth. [https:// actionnetwork.org/forms/on-all-sides](https://actionnetwork.org/forms/on-all-sides).

¹⁵⁵ The Trevor Project (2022). 2022 National Survey on LGBTQ Mental Health. Washington, DC: The Trevor Project. https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

¹⁵⁶ Johns, M. M., Lowry, R., Andrzejewski, J., Barrios, L. C., Zewditu, D., McManus, T., et al. (2019). Transgender identity and experiences of violence victimization, substance use, suicide risk, and sexual risk behaviors among high school student—19 states and large urban school districts, 2017. Morbidity and Mortality Weekly Report, 68(3), 65-71.

¹⁵⁷ Johns, M. M., Lowry, R., Haderxhanaj, L. T., et al. (2020). Trends in violence victimization and suicide risk by sexual identity among high school students — Youth Risk Behavior Survey, United States, 2015–2019. Morbidity and Mortality Weekly Report, 69,(Suppl-1):19–27.

¹⁵⁸ The Trevor Project (2022). 2022 National Survey on LGBTQ Mental Health. Washington, DC: The Trevor Project. https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

¹⁵⁹ The Trevor Project (2022). 2022 National Survey on LGBTQ Mental Health. Washington, DC: The Trevor Project. https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

¹⁶⁰ Exec. Order No. 14075, 3 C.F.R. 1 (2022)

¹⁶¹ Exec. Order No. 14075, 3 C.F.R. 1 (2022)

¹⁶² 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2))

sex-based harassment¹⁶³. We urge the Department to clarify that, consistent with recent Department of Education enforcement actions, harassment based on a student's gender identity clearly includes mocking or publicly ridiculing a student using terms of address that are known to be offensive and harmful to the student. The Department should also clarify the important distinction between a simple mistake, such as a teacher inadvertently using the wrong pronoun for a student but then *correcting the error*, and intentional harassment of students through public ridicule and repeated misgendering that causes distress and reduced ability to learn.

We urge the Department to issue its forthcoming rule addressing athletics participation by the end of 2022 so that it may be finalized with this set of proposed rules by spring 2023. Transgender and nonbinary students cannot wait for a separate rule-making process. In 2021, 83% of transgender and nonbinary youth said that they have worried about transgender people being denied the ability to play sports due to state or local laws¹⁶⁴. Between 2020 and 2022, 15 states passed laws that restricted the participation of transgender and intersex students on athletic teams and often authorized invasive "sex verification" procedures. One student described the proposed rule's lack of clarity for transgender students in sports as "... dehumanizing, I don't feel like any of these measures actually protect transgender students. You made it so they can apply, but you're not supporting them once they're in school. It appears that they don't see me as a full person."¹⁶⁵

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 student survivors, 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,"¹⁶⁶ the 2020 regulations allow schools that are not actually controlled by a religious organization to claim a religious exemption from Title IX if, for example, they are a divinity school, they require students to follow certain religious practices, or their mission statement refers to religious beliefs.¹⁶⁷ Second, the 2020 regulations assures schools that they may assert a religious exemption *after* they are already under investigation by the Department for violating Title IX.¹⁶⁸ This means students and employees are not entitled to any prior notice of a school's intent to discriminate based on sex despite the Title IX regulations requiring schools to notify students, their

¹⁶³ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 ("sex-based harassment")), 41571 (proposed 34 C.F.R. § 106.10)

¹⁶⁴ The Trevor Project (2022). 2022 National Survey on LGBTQ Mental Health. Washington, DC: The Trevor Project. https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf

¹⁶⁵ Know Your IX, The Every Voice Coalition, & SafeBAE (2022). Student Listening Sessions.

¹⁶⁶ 20 U.S.C. § 1681(a)(3).

¹⁶⁷ 34 C.F.R. § 106.12(c).

¹⁶⁸ 34 C.F.R. § 106.12(b).

families, employees, and applicants of schools' anti-sex discrimination policies.¹⁶⁹ Unfortunately, the proposed rules do not address these changes.

In Know Your IX's listening sessions with students, we heard from students at religious schools that they experienced retaliation and pushout from schools after reporting violence due to their school retroactively claiming a religious exemption, effectively avoiding accountability for violating students' civil rights. One college student survivor shared that they were kicked out of their religious school on the basis of their transgender identity. After going through a Title IX process to address the sexual violence they experience, their school's religious exemption was triggered after the fact and weaponized against the student to push them out of school. The student shared that in their experience, "there's no such thing as protection at religious schools that have a Title IX exemption." Another student shared that they felt that religious exemptions serve to protect schools that perpetuate discrimination against students: "When it comes down to it, its government funded discrimination. I paid taxes for the discrimination I faced."

College students also shared how the environment at a school that has a religious exemption leads to a culture of silence, and a lack of responsibility on the part of the recipient to respond to sexual violence.

"[At my religiously exempt school,] sex in general was very taboo. No one wanted to deal with it, it turned into a morality thing. Why are you even having sex at all? I know that that was one of the most consistent things that came up. As well as survivors of the LGBTQ+ community being pressured by the school to stay silent. When it came to handling sexual violence, you can't talk about the fact that this happened to you because this person isn't out yet."¹⁷⁰

According to the Religious Exemption Accountability Project, the LGBTQI+ students experience considerable challenges at religiously affiliated colleges because of how they identify.¹⁷¹ From their rates of self-reported depression, anxiety, loneliness, suicidality, sexual assault and harassment, and substance abuse, to their inability to be open about their sexuality or gender identity for fear of rejection and condemnation from their campus community, sexual and gender minority students face significant obstacles that create markedly different and inferior college experiences.¹⁷²

Another student shared how school administrators at their religious school intentionally avoided and prevented students from providing feedback about how the school could better address sexual

¹⁶⁹ 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).

¹⁷⁰ Know Your IX, The Every Voice Coalition, & SafeBAE (2022). Student Listening Sessions.

¹⁷¹ The Religious Exemption Accountability Project (2021). "The State of Sexual and Gender Minority Students at Taxpayer-Funded Christian Colleges." The Religious Exemption Accountability Project, 2021.

https://www.thereap.org/_files/ugd/0ae2d2_9b01481f670f45819315aac806b14336.pdf

¹⁷² The Religious Exemption Accountability Project (2021). "The State of Sexual and Gender Minority Students at Taxpayer-Funded Christian Colleges."

violence on campus. "During the listening session [on sexual violence] over zoom, the chat was initially on... and then they turned it off when we started talking about how sex is taboo because the school is religious."¹⁷³

We urge the Department to swiftly issue proposed Title IX regulations that (i) rescind the rule inappropriately expanding eligibility for religious exemptions and (ii) require schools to notify the Department of any religious exemption claims and to publicize any exemptions in their required nondiscrimination notices. We urge the Department to correct the extra-statutory definition of an “educational institution which is controlled by a religious organization,” require prior submission of religious exemption claims and appropriate notice to students and their families of religious exemptions, and rescind the *ultra vires* provisions requiring public colleges and universities to specially recognize and provide benefits to religious student organizations that fail to comply with basic nondiscrimination requirements that apply to other student groups.

In Conclusion

Since 2013, Know Your IX has worked with countless survivors who had their educations compromised and interrupted by experiences of sexual violence and harassment. Since joining Advocates for Youth, which works alongside thousands of young people in the U.S. and around the globe as they fight for sexual health, rights, and justice, Know Your IX and Advocates for Youth have supported countless youth activists and student survivors in advocating for a Title IX rule that will protect all students’ right to an education free from violence. Many of these survivors filed complaints with the Department of Education, in the hopes that the federal government would take their claims seriously and hold their schools accountable for violations of students’ civil rights. Survivors also organized within their school communities and passed state legislation to ensure that their campus communities would be safer and more equitable for future generations of students.

The Department of Education’s 2020 regulation was poorly reasoned, ill-supported by existing legal authorities, and improperly operated to the detriment of the class of students that Title IX is intended to protect. Upon being promulgated, it returned our country to an era where schools swept violence under the rug and abused survivors with impunity. Know Your IX and Advocates for Youth have continued to support student survivors through this difficult time, as young people’s civil rights are violated by their schools with very few accountability mechanisms.

We are grateful to the Department of Education for proposing a new Title IX regulation that will interrupt the harm that students continue to experience with the 2020 Title IX regulation in place. We urge

¹⁷³ Know Your IX, The Every Voice Coalition, & SafeBAE (2022). Student Listening Sessions.

the Department to amend the proposed regulations with the changes we have suggested to ensure that all students can pursue their civil right to an education free from violence and harassment and further meet the Department's commitment to ensuring equitable access to education for all.

Thank you for the opportunity to submit comments on the NPRM. We appreciate the Department of Education's commitment to protect young people from sex discrimination, harassment, and violence in schools.

Sincerely,

Know Your IX, Advocates for Youth

Joined by,

The Every Voice Coalition

SafeBAE

And the 307 undersigned student survivors, recent graduates, and young people who will be impacted by the Department of Education's proposed changes to Title IX:

1. A. Lewis, Emerson College, Massachusetts
2. AA, Kansas
3. AD, Moorhead High School, Minnesota
4. AD, Prospect High School, Illinois
5. Addie, Illinois
6. Aela Mansmann, Manhattanville College, New York
7. AH, Pennsylvania
8. AL, Syracuse University, New York
9. Alexandra, New York
10. Allison Hritz, Pennsylvania
11. Allison Jasso, Doane University
12. Alyson, University of Richmond
13. AM, Texas
14. Ambyr Braxton, UMass Amherst
15. Amelia, Trinity College, Connecticut
16. AMK, Massachusetts
17. Amy Mbawuiké, University of Pennsylvania
18. Amy Sapp, Illinois
19. Ana M, Binghamton University, New York
20. Andrea Flores, Binghamton University
21. Anna Ezzy, Hawai'i
22. Anna Shields, University of Delaware
23. Annaliese S, Illinois

24. Annika Shiffer-Delegard, Minnesota
25. Anonymous Recent College Graduate
26. Anonymous Recent College Graduate
27. Anonymous College Student
28. Anonymous Scientist
29. Anonymous High School Student, California
30. Anonymous, Binghamton University, New York
31. Anonymous, Binghamton University, New York
32. Anonymous, Binghamton University, New York
33. Anonymous, Binghamton University, New York
34. Anonymous, Cal Poly San Luis Obispo, California
35. Anonymous, Florida
36. Anonymous, Georgetown University, Pennsylvania
37. Anonymous, Maryland
38. Anonymous, Massachusetts
39. Anonymous, Michigan
40. Anonymous, New York
41. Anonymous, University of North Carolina Chapel Hill
42. Anonymous, University of North Carolina Chapel Hill
43. Anonymous, University of Vermont, Vermont
44. Anonymous, Utah
45. Anonymous, Washington State University
46. AR
47. AR, Kentucky
48. AR, Texas
49. Ari Kane, Georgetown University, Massachusetts
50. Arielle G, Ohio State University
51. AS, Binghamton University, New York
52. Ashley Klein, Virginia
53. AT, Pennsylvania
54. Baylynd Porter, Illinois
55. Beau Nelson, Williams College, Massachusetts
56. Bella T. Fong, California and Massachusetts
57. BreAnn Redcross, University of Oklahoma
58. Bridget L, Harvard University
59. Brooke A. Wharton, California Institute of the Arts
60. C. Kaufman, University of Michigan Ann Arbor
61. CA, Binghamton University, New York
62. Cadence Brown, Marshall County High School
63. Caroline Sliver, Penn State University, Pennsylvania
64. Catherine Henderson, University of Delaware
65. Celene Beth Calderon-Olsen, University of Utah
66. Chance Bonar, Harvard University
67. Cheryl Robison, Texas Christian University

68. Christina O, Binghamton University
69. Claire Ervin Lee
70. Claire McGlynn
71. Colie, Salem High School, Massachusetts
72. Connie Raper, UNC Chapel Hill, North Carolina
73. Cori Wolfe, Ohio
74. D. Heff, University of Wisconsin - Madison
75. Deepthi M, New York
76. Destiny D Cummings, North Carolina
77. DH, University of Alabama
78. Dharma Koffer
79. Diana, Connecticut
80. DK, New York
81. Dolores Lozano, Baylor University
82. Dominic Bossey, Binghamton University, New York
83. DV, New York
84. DW, Georgetown University, Washington DC
85. E. Kane
86. Eden, Binghamton, New York
87. Edward Geppert, Illinois
88. EKR, Claremont McKenna College
89. Eleanor, Washington University in St. Louis, Missouri
90. Elise Higgins, University of Kansas
91. Elizabeth Giardina, California
92. Elizabeth, Hendrix College, Arkansas
93. Ella Pascucci, Binghamton University, New York
94. Ella Suring, Berkeley High School, California
95. Ellie G, Ohio
96. Ellie H, Iona University, New York
97. Elsa F
98. EM, Tufts University, Massachusetts
99. Emily Harrison, George Washington University, Virginia
100. Emily Patterson, University of Notre Dame
101. Emma Grasso Levine, New York University
102. Emma Phoenix, Denison University
103. EO, Rollins College, Florida
104. ER, Hanover College, Indiana
105. Erin Bergen, Goshen College, Indiana
106. Esther Lastique, Florida
107. Ethan, Florida Atlantic University, Florida
108. EU, Binghamton University
109. Faith Ferber, Washington, DC
110. Frank Belcastro, University of Pittsburgh
111. G Broitman, University of North Carolina Chapel Hill

112. Gabriel Gomes, Notre Dame University and Columbia University
113. GC, Kansas State University
114. Genevieve Rogers, MIT
115. Gianna Milan, University of Miami, Florida
116. Gillian Mulder, Binghamton University, New York
117. Grace B, St. Olaf College, Minnesota
118. Grace Cunningham, University of Cincinnati, Ohio
119. GV, Sam Houston State University, Texas
120. Hannah C, Florida
121. Hannah Krauss, American University
122. Hazel Anderson, Michigan State University, Michigan
123. Heaven Rubin, Miami Palmetto Senior High School, Florida
124. IM, Colorado College, Colorado
125. IM, University of Colorado Boulder
126. IMSB, Massachusetts
127. Iris DeFino, Binghamton University, New York
128. Isa Bogart, Stanford University
129. Isabel Gurwitch, Binghamton University, New York
130. Isabella Myers, Keene State, New Hampshire
131. Isabella T, Binghamton University, New York
132. IV, New York
133. J Brandon, Wesleyan University
134. J. Powell, Binghamton University, New York
135. JA, Illinois
136. Jacqueline Pham, Evergreen Valley High School, California
137. Jailene Ramos, Harvard College
138. Jane Chischilly, Texas
139. Jarrett Cloud, New Jersey
140. Jaslin Kaur, CUNY Hunter College, New York
141. Jay Yencich, University of Illinois at Chicago
142. Jenna Butler, University of Southern Maine
143. Jessica Arvai
144. Jessica, Florida State University
145. Jessica, University of Louisville, Kentucky
146. JL Angell
147. John Ferrara, Binghamton University, New York
148. Jordan H., Tufts University, Massachusetts
149. Josie Shaw, University of Montevallo, Alabama
150. Julieta, University of California Santa Barbara
151. Justin Atkinson, University of Texas at Austin
152. Justin Thompson, University of Tennessee
153. Justin, University of Pennsylvania
154. Kaitlyn M, Connecticut
155. Karaleigh Saar, Boston University

156. Karen, CA
157. Karen, CSUSM, California
158. Kate Chisholm, University of Arizona
159. Kayla Randolph, Emerson College, CT
160. Kaylee Condon, Sartell High School, Minnesota
161. Kaylie Keim, University of Hawai'i at Mānoa, Hawai'i
162. KB, University of Utah
163. Kelly, Northeastern University, Massachusetts
164. Kendall Clary, Rhodes College, Tennessee
165. Kendra Whelan, University of Wisconsin
166. Kenzie W, Columbia High School, Texas
167. KH, Oregon
168. Kirsten, Rutgers, New Jersey
169. KT Fitzgerald, Binghamton University, New York
170. Lan Anh Dinh, Massachusetts
171. Laura C, Binghamton University, New York
172. Laura Reid, University of Houston, Texas
173. Lauren Schenk, Macalester College, Minnesota
174. Lauren Stricker, Columbia University, New York
175. LC, SUNY Binghamton, New York
176. LD, Kentucky
177. LeeAnne Williams, University of Notre Dame
178. Lena Jones, California
179. Lhiannon, Massachusetts
180. Liani, Tufts University, Massachusetts
181. Liceu Adriano Moreira
182. Lindsay Stone, Binghamton University, New York
183. LM, University of Notre Dame
184. LP, The Cooper Union for the Advancement of Science and Art
185. Luukia, Seattle University, Washington
186. M, Ohio
187. Mackenzie Lovell, Michigan State University, Michigan
188. Maddie, Suffolk University, Massachusetts
189. Maddy M, Georgetown University, Alaska
190. Mads, Cal Poly SLO, California
191. Makoto Toyoda, Binghamton University
192. Marin Hart, Illinois
193. Marla Sohl, Nebraska
194. Max Dixon, Rhodes College, Tennessee
195. Maya Corral, Barnard College, New York
196. MC, Stanford University
197. MCL, Massachusetts
198. Meghan, Pennsylvania
199. Meredith Cook, Maine

200. Meredith Kent-Berman, New York
201. Meredith Kirby, Portland State University, Oregon
202. MF, New York
203. Michelle M
204. Mike M
205. Miriam Nunez Valdovinos, California
206. MJ Borreggine, Harvard University, Massachusetts
207. MM, New York University
208. Mollie McDaniel, Wayne State University, Michigan
209. MT, Binghamton University
210. Muriel Bennett, University of New Hampshire
211. MZ, University of Notre Dame
212. Natalia Fuentes, Harvard College, Massachusetts
213. Netra, NC
214. Nicole Garduno, University of Nevada, Reno
215. Nimisha Srikanth, Texas A&M University, Texas
216. Nisha Seyed, Harvard University, Texas
217. NK, Illinois
218. NKA, Penn State
219. Noah Block, Goucher College
220. Noah Glaser, University of Illinois at Chicago, Illinois
221. Noelle D, New York
222. NS, Minnesota
223. NS, New York
224. Oksana Mykhaylyk, Providence College, Rhode Island
225. Oksana Mykhaylyk, Providence College, RI
226. Olivia Kaufmann. Rhodes College, Tennessee
227. Omny Miranda Martone, Northeastern University and Brown University
228. PD, Tufts University, Massachusetts
229. Phyllis W. Benjamin, Ohio
230. R Kohler, Binghamton University, New York
231. Rachel Barkley, Benjamin N, Cardozo School of Law, New York
232. Rachel Barry, Binghamton University, New York
233. Rachel, Illinois
234. Rahil, Pennsylvania
235. Ranen Miao, Washington University in St. Louis, Missouri (54th Student Body President)
236. Ray Epstein, Temple University, Pennsylvania
237. Rebecca, Illinois
238. Ren Birnholz, Northeastern University, Massachusetts
239. Rivka Reider, Binghamton University, New York
240. Rory Corcoran, Binghamton University, New York
241. Rose L, Head-Royce School, California
242. RS
243. RS, Rhodes College, Tennessee

244. Sage Carson, University of Delaware
245. Sage Galati, Binghamton, New York
246. Sam Rose Garcia, University of California Berkeley
247. Samantha Walker, Binghamton University, New York
248. Sanaa Lanett, Texas
249. Sandy Rhein
250. Sara R, Texas
251. Sarah Gordon, Oklahoma
252. Sarah Michal Hamid, University of Hawai'i at Mānoa, Hawai'i
253. Sarah, California
254. Sarah, Northeastern University, Massachusetts
255. Sasha, Binghamton University, New York
256. Savannah Collins-Key, University of Tennessee Knoxville
257. Savannah Graziano, Northwestern University, Illinois
258. SB, UNC Chapel Hill
259. Shayla Smith, Binghamton University, New York
260. Shelby L, CUNY School of Law, New York
261. Sheridan Burns, Little Elm High School, Texas
262. Sherrill Futrell, University of California Berkeley
263. Shona Harbert, Rhodes College, Tennessee
264. SJ, Massachusetts
265. SL, New Jersey
266. SL, SUNY Binghamton, New York
267. SL, Vermont
268. Sophia Calabrese, Binghamton University, New York
269. Sophia D, Binghamton University, New York
270. Sophia Stolkey, Hendrix College, Arkansas
271. Sophie Kulowski, Connecticut
272. Sophie Prescott, University of New Hampshire
273. Sophie, Binghamton University, NY
274. Sophie, Denison University, Ohio
275. SP, Emory University, Georgia
276. Sriha, University of California Los Angeles
277. Steph Black, American University
278. Stephanie Wu, Palomar College
279. Steven Tannenbaum, George Washington University, Washington DC
280. Susan
281. Susan King, University of North Carolina, North Carolina State University, and University of
Tulsa
282. Suzanne, The New School, New York
283. Sydney Bush, East Carter High School
284. Sydney W, Binghamton University, New York
285. Symone
286. Tabitha Garringer, Mira Costa High School, California

287. Tahra Suhan, Michigan
288. Taite Shomo, Middlebury College, Vermont
289. Tara Delcarmen, Binghamton University, New York
290. Tavia Galonski, The University of Akron School of Law
291. Thomas Nielsen
292. TL, Binghamton University, New York
293. Tony Fang, UNLV, Nevada
294. TT, Lafayette College, Pennsylvania
295. Ursula, Illinois Institute of Technology
296. VR, New York
297. W. Fraser, Binghamton University
298. Will Schneider, Mira Costa High School, California
299. XW, North Carolina School of Science and Mathematics
300. Zay, Queens New York
301. Zayden Q Bartosh, North Dakota
302. Zoe Farkas, NYU School of Law, New York
303. Zoe Levitt, Massachussetts Institute of Technology
304. Zoë Warczak, New York
305. Zoë, New York
306. Zoey Brewer, University of Tennessee, Knoxville
307. ZS, Delaware

Addendum: Comments from Student Survivors

Survivors need protections that preserve their access to education!

- Anonymous

I was assaulted in the year 2000. There needs to be a hard end date of 60 days for police and Title IX investigations. Despite a same-day arrest by campus police and DNA evidence, my case was never referred to a prosecutor, and I found the police report in December 2021, which *still* states the investigation is ongoing, and so information cannot be shared, because it might compromise the “investigation.” I guess an insider leaked the police report. We need more transparency.

- Anonymous

as a transgender youth who struggles with mental health in every capacity, i need this. these title IX changes mean everything to people like me, who aren’t necessarily always taken seriously. this allows us to take a stand for our rights, and feel the support of a government who truly does stand for freedom. i am both a youth and an advocate, and i have seen firsthand how rulings like this can affect people like me. i know three people who have gone through court cases for sexual assault charges and if they had had more rights and more information of said rights, i believe they would be better off today. as for the anti

discrimination rulings, i recently had to deal with changing my name at school. i had to invoke title IX, as my requests were being ignored. title IX empowers youth and allows them to be treated as people. please extend this support to survivors of all kinds.

- will schneider

Going through the current Title IX process made me want to quit school and life entirely. Over 8 people I knew got assaulted by one man on campus and we tried to go through the process but the school took his side. There was no protections for all the transgender survivors. That is why I sign. I want things to change. I want people to feel safe going to school. The trauma I experienced should not be the norm and I don't want others to continue to experience it through the Title IX process.

- Hanover Student

one of my best friends was assaulted and i'm signing for her and the other girl that were assaulted by the guy. i'm signing on for the girls that one sophomore date raped. i'm signing on for myself because i have 4 more years of high school and 4 of college. i'm signing on for the untold stories, the ones shared only by scandalized whispers in hallways and and shameful looks at the girl. i'm signing on for my older sister who has taught me everything i know, all i need to know, to keep myself and my friends safe. to not leave my drink unattended. how to be there for my friends. that i am not an object. that no means no. and that it would never be my fault.

- Anonymous

My concerns for my safety were dismissed to protect my stalker's access to optional extra curricular activities. Hardly any action was taken to protect me, and the few actions that were taken were too little too late, allowing him to continue to harass me for several months. After more and more meetings with university officials, I was repeatedly told I wasn't doing the right things even though I was the victim and was severely suffering. Eventually they decided to stop listening to me because Covid was starting to become a thing, and since campus life would be different, it wouldn't matter for them to take any action. This treatment cannot continue and I hate the fact that this continues to happen at my school- both before and after my experience, students have been murdered due to my school's failures and refusals to act.

- Anonymous

I was drugged and raped in my dorm room by another college student at the University of Utah in February 2006. After reporting my rape to campus police, nothing was done to protect me from my assailant. Not even Title IX opted to meet with me, let alone some type of counseling. Campus police

would later inquire about any legal action against the student, however, that call was made to my father and not myself. Of course, no legal action was permitted since I was told, ""that would ruin"" my assailant's life since he was a fraternity member and recent war vet.

- Anonymous

It wasn't until I broke my silence against the U of U and campus police in 2019. I received a "dm" from their Title IX office under a dummy account on Twitter. I would later meet with their office and frankly, it was a waste of time due to the inconsistent ""changes"" they presented on behalf of their current students. It is evident to see nothing had changed since my initial report due to the campus murders of Lauren McCluskey and Zhifan Dong. Lauren was murdered mere feet from where I was raped in 2006. These women also reported their assailants to campus authorities with no follow up or urgency made by police. The blood of these women are forever stained on the U of U campus. The level of my anger knows no bounds when it comes to these particular victims.

- Anonymous

In spring 2021, my psychiatrist would diagnose me with untreated PTSD, severe anxiety and depression due to the lack of mental health treatment post-rape. He then recommended therapy sessions twice a week with a psychiatrist AND therapist to combat my mental health diagnosis. This would leave me with the financial burden of this treatment due to the lack of accountability by the University of Utah. I sought out an attorney in 2021 to see if I could pursue legal action against the school but I would later face the inevitable statute of limitations. I am now responsible for all the wrongdoings of Title IX and campus police and I will never EVER remain silent again. I fear Title IX will continue to harm victims and survivors alike and real change needs to happen across the U.S.

- Celene Beth Calderon-Olsen, August 26, 2022

I was in a coercively controlling relationship throughout high school. I was only 13 and he was 17 when it started. At that time I didn't know that your boyfriend could rape you. So I just let it happen. For years, I only realized how bad my abuse was within the last few years. Young adults MUST be educated on topics like relationship violence and coercive control so they can look for the signs. I wish I had known then what I do now.

- Colie

As a former student survivor advocate and co-facilitator of the largest student survivor group in DC, I consistently met students who were being failed by the current Title IX office and services. Schools need to do better for their students and they should be held accountable.

- Anonymous

I helped implement Title IX at my alma mater soon after coercive sexual harassment from a staff member not covered by their harassment policy that was limited to professors at that time-- so no complaint option.

- Anonymous

Students of all ages need protection, and schools have shown they need clear and compelling guidance otherwise they will not act in the best interest of the student or the student body at large.

- Anonymous

Title IX gives women the same opportunities to succeed as men have always had. We cannot go backwards! Successful women create a successful society and country.

- Anonymous

I am a survivor of a brutal Title IX case against an abusive ex boyfriend in medical school. The school sided with him, and this violent man with a criminal record is now on his way to becoming an MD with the power to abuse patients in addition to women. This must stop. Schools must be accountable for taking action against perpetrators and ensuring that unstable violent criminals are not allowed to enter the medical profession. Otherwise the Larry Nassars of the world will never stop hurting and abusing innocent patients.

- Anonymous

During my time at Portland State University, I had one professor (Anoop) sexually assault me and another professor (Kevin) do something else to me which was worse. I later found out that Kevin has been doing terrible things to students for years. Neither of these men really faced any consequences for their actions. I met Anoop in a strip club where I was working. He asked what I did outside of the club and I said I was a student at PSU. He said he was a teacher there. We talked for a while and then he asked me for a lap dance. During the lap dance, he tried to perform oral sex on me without my consent. I told him I would report him to the school and then he tried to bribe me. The school's investigation found that he sexually assaulted me, and he even admitted to offering me money after I said I would report him. His

punishment was taking a workshop about power imbalances. Other students have emailed me to tell me that his behavior in class and on campus also made them uncomfortable after I spoke about what he did on social media. Kevin has faced no consequences at all to my knowledge despite multiple students coming forward and saying that his behavior drove them to the edge of suicide. A district attorney for Multnomah county said that his behavior towards me resembled sex trafficking. It's a long story but to put it in a nutshell he put me in a position where I felt like I had no choice but to sleep with his friend (who was also a former adjunct prof in the same department) and did this while I was having a psychotic episode (I am bipolar), was un-medicated and had completely lost touch with reality. Later the friend was stalking me and Kevin maintained a relationship with him and egged on the stalking. What he did to the other students wasn't quite the same but equally traumatic. He even confessed in writing to having inappropriate relationships with multiple students and still has faced no consequences. He tried to convince me that what happened with him was (direct quote) "a figment of my imagination." I guess that many of his former students must have vivid imaginations. Kevin also sued the school, claiming that they would've protected him better from the emails of a former student if he were a woman. That student was expelled and banned from the campus, and the school failed to grasp that this student was actually Kevin's victim, driven completely nuts by his manipulation and gaslighting. This man is a serial abuser and seems even to have abused Title IX as a means of hurting his victims. Both men still teach at PSU. I was kicked out of a law class called Civil Liberties for bringing up the sexual assault. I have given up on my dreams of going to graduate school. I feel that I have been discriminated against on the basis of my gender and my disability. The school doesn't see it that way.

- Anonymous

I went through the system in undergrad. Students and survivors deserve better.

- Anonymous

I was sexually harassed by professors at the two universities in NC and assaulted and battered by a female professor at The University of Tulsa. I only reported the incident in Tulsa, I had to sign a non-disclosure agreement, the university forced me to graduate early and before I met all the requirements for the degree, the Title IX coordinator was an assistant Dean and therefore had a stake in protecting the university, the investigation took over 5 months and witnesses were not interviewed. Please do not forget that professors, not just other students, can and do violate this law, and that a female professor assaulting and battering a student with no sexual violence is also a violation of Title IX.

- Susan King

Providence College has failed me when I needed to be protected from my abuser. I had to transfer colleges for my safety due to retaliation from students.

- Anonymous

I had to file a complaint against severe sexual harassment by my advisor/ research head/boss at my University (and in the workplace as i held a research position there) as a graduate student by an individual in power has done long lasting damage that ruined my career and life prospects. We need stronger laws for the protection of women who file against their superiors who hold positions of power. No one should be allowed to have that much power over their young students. We need stronger laws to protect those women brave enough to take a stand against evil. We need more anti-retaliation laws.

- Anonymous

From one survivor to another, we need protections in place.

- Anonymous

I want to promote and support policy changes that protect survivors and, accordingly, protect everyone.

- Anonymous

As someone who was assaulted on campus during my Freshman year of college and had to navigate through the aftermath of that experience, I believe these changes to Title IX could help provide the support to students that I did not have.

- Anonymous

I'm signing because the Title IX policies on sexual assault, especially at Notre Dame, are vastly insufficient. Title IX is so important to student survivors because schools are required to investigate all reports whereas the legal system has the power to pick and choose which is so corrupt. The Title IX outlet then needs to be adequate to really ensure that perpetrators receive necessary punishment to take accountability for their actions.

- Emily Patterson, University of Notre Dame

We need safer schools.

- Anonymous

Survivors of sexual violence must be protected and believed, and the right to remain in their place of education and to feel safe is essential.

- Anonymous

Title IX needs to be as survivor-focused as possible.

- Anonymous

I am signing on because, as a student survivor, I demand justice and better resources for survivors in campus settings in order for us to be able to continue our education and feel safe and supported in our school environment. Myself and so many others have been consistently failed by the system in being protected and given the care and action that we needed upon experiencing sexual violence on campus. I hope that not one more survivor has to face the injustices that come with sharing their stories or seeking help at the administrative level, and that the institutional negligence that so many colleges default to will no longer be acceptable. Our stories matter. Our voices matter. We demand better.

- Anonymous

Its protections of LGBTQ students and victims of sex based harassment are long overdue.

- Anonymous

A college campus should not be a dangerous place for women.

- Anonymous

Being a low-income, former foster care youth, I believed being accepted into an Ivy League institution was my ticket to upward mobility. After a life of trauma and setbacks, I thought the universe was rewarding me for not giving up. My vehicle for success became something else I had to survive, as I was stalked on and off campus by a fellow student. The hardest thing about my experience wasn't being believed or taken seriously by administrators. They had a hard time seeing that "someone like me" was being harmed. My upbringing and being socialized on the margins of society didn't make me a respectable or credible victim. My university once again made me a statistic and ultimately pushed me out of my education. We need protections at educational institutions. The system in place is broken. We need more additions to such protections, not more reductions.

- Anonymous

These changes to Title IX are crucial to support and protect student survivors. In my undergraduate experience, I witnessed the gaping holes in the Title IX process which put survivors into danger and disrupted their education, while ultimately violating their Title IX rights. Institutions must stop sweeping survivors under the rug and instead work with survivors voices to create safer campuses.

- Anonymous

A person can only be their most successful in school when they and their rights are tangibly protected.

- Anonymous

As a survivor of domestic violence, I believe it's extremely important to restore protections from sexual harassment and assault, as well as sex-based discrimination, including for LGBTQI+ students who confront discrimination based on their sexual orientation or gender identity. Over the course of the last 6-7 years, I have been fighting a Title IX case against Baylor University for not only their institutional failure, but for all the other survivors. Enough is enough. It's time for a change.

- Anonymous

When in college, my ex boyfriend was abusive. I had a restraining order against him and was going to court for a domestic violence case against him. During this time, I had a class with him and Temple University said nothing could be done to take me or him out of the class because we both needed the class to graduate. Luckily the professor was understanding and let me finish my assignments without coming to class in person and having to see him.

- Anonymous

My university failed me by not finding my assaulter responsible for his actions.

- Anonymous

The underlying rights to protection from harassment on college campuses still haven't been fulfilled.

- Anonymous

When I was a freshman, an upperclassman warned me not to trust IX to protect me. Throughout my time at college, I only saw those limited protections deteriorate. Thus, when I was assaulted I did not even consider reporting it to be an option for me. I want people to feel safe reporting sexual assault in the future and this is a step towards that future.

- Anonymous

I believe in justice for survivors.

- Anonymous

We should without any hesitation be supporting survivors in the biggest ways possible. As a survivor myself, I cannot imagine how impossible it would have been to fight through the misery, pain, sadness, rage, etc without unconditional support from friends, family, and institutions. Whatever is best for survivors should absolutely be in place.

- Samantha Walker

Title IX gives some form of protection even when administrations don't want to do anything – at least they have to do something.

- Anonymous

I was sexually assaulted by coercive consent. The current Title IX standards do not clearly condemn this and my case was overturned. I have also been harassed several times and the current Title IX standards were not able to help me.

- Anonymous

I was a part of the changes that were made during the Trump administration. I was actively supporting multiple peers going through cases on my campus. Without my university grandfathering in old policies, my peers would have been left behind due to changes in cross-examining, location, legal representation, timeline, etc. I am signing this document because it is imperative for the sake of justice that these protections be put in place.

- Anonymous

I signed on to the comment, because I have been organizing against campus sexual violence since 2015, and while some campuses have made improvements since then, large-scale change needs to happen so that students of all ages can attend campuses free of sexual violence. Title IX is important to that change.

- Anonymous

Our kids are under attack in our state saying trans girls cannot play on girls teams and that school staff must use legal names. Our students rights are being violated and the adults are getting away with it while

at the same time our suicide rates are staggering. Please help save lives. I'm lucky to have survived this state and am moving next year.

- Anonymous, North Dakota

As a graduate teacher, I've watched my undergraduate student survivors be failed by our under-staffed and directionless Title IX department. It's been a heartbreaking and infuriating experience to watch them seek out and never receive justice. Nobody else should go through that.

- Anonymous

Last year, a group of survivors and I held a protest on campus to draw attention to the way our Title IX office was failing. One thing we heard frequently when asking for faculty support was that the college couldn't change anything because then they'd not get the federal funding they needed. It was incredibly disheartening to learn that the school was assigning a monetary value to their students safety like that.

- Anonymous

I am a survivor who was raped and violently assaulted on my college campus by a friend and fellow student in the fall of 2020. I had an absolutely horrible experience with the Title IX office and coordinator at my school. I was not informed of or encouraged to seek proper resources. The way I was interviewed was not trauma-informed at all. The whole process was extremely re-traumatizing and made me feel like the assault was my fault. There were several lines of questioning about my sexual history during my initial interview, with no reasoning for this ever being given by the coordinator during the process. The "investigation process" took months and months, and the sheer length of it was enough to discourage me from pursuing the case, especially since my abuser was a senior about to graduate at the time. The student who raped me was wealthy and had an attorney as his advisor, whom I believe intimidated my school's Title IX office into pressuring me toward an informal resolution, with conditions that I was ultimately not comfortable or satisfied with. The Title IX coordinator at the time in my opinion broke (by 3rd party mediation) the no-contact order that had been put in place between me and him (the respondent): feeding me via email his purported wishes for an informal resolution after months of an ongoing investigation, despite me stating multiple times over the course of the investigation that I wished to pursue a formal hearing. I had a faculty member as my advisor who tried her best but was unfortunately not properly trained in the workings of the Title IX process by the college. All of this pressure and failure of support ultimately led me to give in to the informal demands of the respondent and his attorney. I felt defeated. I was persecuted and reprimanded by school officials for outing the student who assaulted me as a rapist months later, after realizing I was not happy with the outcome of my case or the way I was treated by the

Title IX office. I was even formally charged with (but not found guilty of) violating the student code of conduct for doing so. I started voicing my concern within my campus community, and many other students, fellow survivors, and faculty agreed with me. We protested and compiled a list of coherent demands for better supportive measures for victims of gender-based violence, campus-wide Title IX training, timely reporting, trauma-informed interviewing and effective communication, etc. We (student and faculty organizers) were met with staunch refusal to work with us on any of these points from administrative officials, seemingly out of their fear of breaking/violating any of the Trump-era regulation changes. These regulations need to be reviewed and changed immediately, as every day that goes by without the Trump administration's work being undone, more students are harmed and lives are shattered. American universities like Hendrix College leave students facing life-threatening violence alone and in the dark because they are afraid of breaking federal policy. I urge the Department of Education to please be thorough, fair, and just when writing this legislation that is supposed to protect and support students in their education when the unthinkable happens. Please help us to survive.

- Anonymous

I believe in the rights of students that may have been affected by incidents – either within the school or outside – need to know that they are safe!

- Anonymous

For far too long, survivors of sexual assault and other forms of sex/gender harassment have had their education upended by ineffective responses by schools. Under Betsy DeVos, things became even worse with a new Title IX rule that made it a challenge for survivors to obtain remedies for sexual assaults occurring in off-campus settings, even when having an impact on campus. Moreover, the rule created a requirement for live hearings with cross-examination in the college/university setting that had no place in an educational setting and did nothing to promote a fair process, while creating a number of roadblocks for survivors, turning Title IX into a rule protecting abusers rather than a rule protecting survivors. As someone enrolled in the midst of the abrupt onset of the 2020 Title IX changes during the start of the COVID-19 pandemic, having the protections taken away from off-campus conduct made it impossible to pursue any remedies for an incident taking place off-campus, even though it was almost immediately after a school-sanctioned event took place at an off-campus location. I urge the Department of Education to follow all the recommendations in the above comment to protect the education of all survivors of sexual assault and other forms of sex/gender harassment.

- Anonymous

I've dealt with Title IX issues my whole college career due to my gender & sexual orientations. As a non-binary queer student, more protections are needed to ensure that I am protected and can get the help I need when I inevitably face discrimination on my college campus.

- Mads, CA college student

My Title IX process was traumatizing rather than helpful. The process is so unorganized and I was tossed through the hands of many under-trained staff, ultimately to end up with an agreement with my perpetrator that made it seem as if what he had done was not a crime, and that our solution should require mutual sacrifice. This must change to show survivors we support them and that help is available.

- Anonymous

I was sexually abused, harassed and hunted by faculty as if sexual predation of the students was a game and side-perk of being faculty and staff. The over-whelming sexual predation of vulnerable students was not only condoned by the administration, it was applauded, as the president of the school regularly sexually assaulted his vulnerable chauffeurs, all of whom were young men (mostly teenagers), for whom this was a federal work- study job. Sadly, the unrelenting sexual abuse of children and young people in the arts is grossly under-reported, as children and young adults in the arts count on the "teacher" and/or administrator (usually their abuser) to assist them in providing an entry into their careers.

- Anonymous

Title IX is something I never know about, no one told me. It was something I learned years after my assault. It's important that all students know what rights they have after a sexual assault. We deserve options instead of silence.

- Anonymous

I was r*ped by an employee of my women's college in early 2019. The Title IX investigation lasted a year and was even worse than my experience with the criminal investigation. As Trump era rules took effect, I was maliciously blamed and called a liar by my college for what happened to me by one of their employees.

- Anonymous

As a 2004 graduate from Little Elm High School in Little Elm, TX, I now understand I was surrounded by a cesspool of predators. The way the system is currently set up did not protect me from sexual harassment back then, it did not protect my childhood friend against being groomed and sexually abused

by our teacher and will not protect my now freshman daughter. I'm speaking up in honor of the two women who bravely shared their horrifying stories on the newly released documentary "Keep This Between Us." Thank you!

- Sheridan Burns

Survivors deserve to have their voices heard when it comes to Title IX policy. We deserve to have our safety and justice prioritized, instead of prioritizing the safety and reputation of universities. We deserve our needs and our healing to be centered in the Title IX process.

- Anonymous

I signed this petition because, though I was not assaulted by a college peer, I have been a victim of sexual assault on several occasions and believe we need to do much more to protect and support survivors! I believe it's important to recognize that our current systems often fail survivors when it comes to creating a proper support system. This can be remedied through the actions outlined in the proposal; such as having a designated full time confidential employee on every campus, and implementing supportive measures accessible to survivors regardless of the resolution they choose.

- Anonymous

Even though my Title IX case is over, it is my hope that this expansion will further support, protect and help my friends and peers that are still in school. Education is a universal human right and we must defend every survivor's access to unimpeded education.

- Anonymous

All students should have the freedom to attend school without the fear of violence. I work with survivors on my campus and I am a survivor myself, and we reserve the right to an education without having our lives jeopardized. It makes the difference when there are policies in place to protect students and when a school will stand to defend its students in every way possible.

- ML

I am one of the current co-leaders of the Women's Student Union at Berkeley High School. Last year we filed a lawsuit against the Department of Education for Title IX violations, leading them to propose this amendment to Title IX. We want to see the amendment take effect across the country and we urge them to listen to young people and pass this immediately.

- Anonymous

Providence College is a private Catholic college in RI that has used its religion and status as a private institution to deny me various rights to safety and health. I was traumatized over and over throughout the very delayed and dragged-out Title IX investigation. I was harassed by the administration, the counseling center, students, and was the victim of malicious rumors and untruthful statements against me in the investigation. I will continue to suffer from this cumulative PTSD for the rest of my life. My education, career, health (mental/physical/emotional) were impacted which have changed the entire course of my life. My rapist and abuser will never face any social/legal/health/financial/education/career consequences. He will likely do this to other women since he has not faced any consequences, even socially. I have little sisters who will start college and I worry for their safety and future.

- Anonymous

I signed on and demand these changes to Title IX because student survivors deserve better, and should not have to pay for support services or fear retaliation. Additionally, LGBTQ+ student survivors deserve stronger protections.

- Anonymous

Title IX has failed so many people. I know some of them.

- Anonymous

I am currently a PhD student in a STEM field at a public university. During my graduate career, the Title IX/OED office and the Title IX provisions have had a profound and life-saving impact on my life. Last year, my dissertation advisor, a tenured professor, was placed on administrative leave following a multitude of sexual harassment, sexual assault, and verbal/physical assault allegations, including my own. The immediate and long-term actions of my university, and the protections they and my department were able to provide myself and others, are the reason that my life and education are still intact today. The policies in place allowed the UT administration, my faculty, and my lab to provide safety and stability after years of being harassed and abused by my advisor. It is a stability that I did not believe was possible to achieve again while being a student here. By the time my former advisor was placed under investigation, multiple current and former students---women and men---had come forward to submit statements detailing sexual and professional degradation, bullying and abuse, and sexual harassment and assault. It should not have taken two decades for this man to be removed from his position and his crimes to come to light. The catalyst was the provisions UT has gained in recent years that made former students feel they could finally come forward with their experiences.

- Savannah Collins-Key, Ph.D. Candidate, University of Tennessee

The research points to having options for survivors. Title IX can do more harm than good if it does not serve the unique needs of survivors. This comment addresses those needs. We do not need mandated reporting, we need mandated support: it should be entirely up to me what I do with my story, including who hears it. I waited until the day after my graduation in my undergraduate program to report because I was afraid of not being supported. I went to a Catholic school and was afraid of administrators knowing I was sexually active. As a graduate teaching assistant now, my students disclose stories to me. I want my students to have fully informed choices when it comes to reporting. I want them to have many options so they can seek support in the way that they feel is best. No one knows what is best for a survivor at that exact time except that survivor.

- M. Colleen McDaniel

As attacks on abortion and bodily autonomy continue to increase, the need for safety on our campuses is paramount. Allowing survivors of sexual violence on college campuses the tools they need to speak up and feel safe is critical.

- Anonymous

We need to preserve this for our girls!!!

- Anonymous

Protect individuals from harassment!

- Anonymous

Any change meant to protect the freedom to exist as a safe, healthy, and truthful person must be cemented. The rights and lives of our students are investments into the health of this country.

- NF

Title IX protections were part of what saved my life following a PTSD diagnosis after being drugged and raped in grad school. It is essential that we protect all students from gender based discrimination.

- Anonymous

I have had two open investigations for three years and have only been hurt further by this process.

- Anonymous

As a student, my Title IX complaint would not have been accepted under the DeVos regulations, and the Department of Education would not have picked up my case to force my college into legal compliance. As a student advocate, my clients deserve protections and supportive measures no matter how they engage in processes. And as a Kindergarten teacher, my students deserve to be protected throughout their education no matter their gender identity and expression, sexual orientation, eventual pregnancy status, and experiences with gender-based violence and harassment.

- Anonymous

Student survivors deserve to feel safe in schools!

- Anonymous

Without Title IX, I would not have had the support to continue my education while navigating legal avenues available to me as a victim of the dating/sexual violence, harassment and stalking I endured from another student. The Title IX department at my school offered literal life-saving counseling to me free of charge, moved me to a different section so that my abuser and I would not be in class together, worked with my professors to develop a schedule that both worked with court dates and granted me breaks to stabilize my mental health, and connected me with partners in the community like Women Helping Women to provide additional legal advocacy as I sought a restraining order and pressed criminal charges against my abuser. Everyone deserves a fair chance at education. A fair chance means ensuring Title IX works for victims of sex and/or gender harassment/violence/abuse who need policies in place that grant us the ability to focus on our schoolwork and not all the bullshit others force upon them. I believe the points KYIX has highlighted in their comment provide great examples of how you can show us that you hear and support us. I hope you will take them into consideration.

- Anonymous

I urge the Department to alter some of your current rules pertaining to the Title IX rules of the 1972 Education and Amendment Act.

- Anonymous

As a sex educator, reinforcement of title ix is vital to the safety and support of all students in preventing sexual violence.

- Anonymous

We need to do better – bottom line.

- Anonymous

My college barely even has a Title IX office, and as a survivor, that's offensive. Title IX is meant to allow me to report what happened without fear of repercussions, and that's more valuable than anything.

All survivors deserve access to justice. I am especially supportive of including trans and queer students under the new Title IX guidelines, expanding non-discrimination protections to LGBTQIA+ students.

i sign onto this comment because i'm a survivor.

- Anonymous

Healthy Care and Bodily Autonomy should be equitable.

- Anonymous

I signed on to show my support. In college (Western Mich U) I was raped twice. If that counts, I'll need to make comments.

- Anonymous

Title IX covers many topics when it comes to equality and equity, and needs to be protected to keep protecting.

- Anonymous

It is imperative that on campus policy actually reflects the voices of students, especially those of survivors.

- Anonymous

I knew many girls who suffered from SA, myself included, and instead of focusing on healing - they had to battle the school to try and get any form of justice. Most of which never came.

- Anonymous

I work in DV/SA/HT advocacy and many of the stories I've heard occurred in college. Many people did not report due to lack of evidence/fear of retaliation/not being believed. Perpetrators of this violence received no consequences for their actions and are more likely to repeat this behavior in the future, creating many more, preventable victims. This should not be.

I was sexually assaulted by a friend during the Red Zone of my freshman year at UMiami. One year later, and soon after the toxic Trump-DeVos policy went into effect, I endured—and won—my Title IX case against my rapist, who I later learned was a notorious campus sexual predator.

- Anonymous

Although these were the most emotionally taxing six months of my life, I was so fortunate to come forward to a Title IX investigator who listened to me and never victim-blamed me; to have an advisor/advocate who believed my story and truly cared about my healing by my side throughout the case; and to be surrounded by friends who always saw me as an unbroken person worthy of love and support while I struggled to see myself the same way.

- Anonymous

It goes without saying that earning justice through Title IX played a monumental role in my healing journey and sparked my passion for survivor activism.

- Anonymous

I've listened to dozens of stories that are beautiful yet devastating. The power of #MeToo is real, and it's always mutually comforting to be reminded that as survivors, we are not alone. But my heart especially aches every time I hear from a survivor who who was re-traumatized by their failed experience with Title IX—because their feelings and stories were dismissed by people who were supposed to help them, not hurt them.

- Anonymous

I personally have been affected by gender discrimination. I have almost lost my job at the university because of it and so far the Office of Equal Opportunity can't do anything about it. If these changes were proposed, I'd be able to get the justice I deserve.

- Anonymous

The fact that the government refuses to address safety for LGBTQ+ student means they are deciding to side with those who discriminate. There is no middle ground on the subject and the current Title IX is still with those who discriminate.

- Anonymous

This is why I—and we—need a strong Title IX rule that's PRO-SURVIVOR. It pains me to think about it, but my story is an anomaly. I'm the only person I know who's won their Title IX case—and I wish I wasn't. From experiencing a loss of self-esteem to suffering from PTSD and depression to undergoing therapy, student survivors of gender-based violence already have tremendous mental health obstacles to overcome on top of the demands of academics and navigating young adulthood. And our schools, specifically our Title IX administrators, should not be another source of obstacles that further derail our lives.

- Anonymous



September 12, 2022

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

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

Submitted via www.regulations.gov

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,

On behalf of the 170,000 members and supporters of the American Association of University Women (AAUW), we are pleased to submit this comment regarding the Department of Education's (the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, as published in the Federal Register on July 12, 2022.¹ AAUW has long advocated for educational equity for women and girls and supports the strengthening and vigorous enforcement of Title IX. We applaud the Department's NPRM to amend the rules implementing Title IX of the Education Amendments of 1972 (Title IX), which would I) restore protections for students against all sex-based harassment, including sexual harassment; II) clarify protections for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) students; and III) strengthen supports for pregnant and parenting students. We appreciate the Department's commitment and efforts to restore the promise and protections of Title IX.

I. Restore protections against sex-based harassment

When education environments are hostile due to sexual harassment, assault, or violence, students cannot learn and end up missing out on true educational opportunities. Yet sexual harassment, including sexual assault, remains prevalent in K-12 schools and in higher education. AAUW's own research found that nearly half of students in grades 7-12 and two-thirds of college students

¹ U.S. Department of Education, Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," *Federal Register* 87, no. 132 (July 12, 2022): 41390, <https://www.federalregister.gov/d/2022-13734>.

face sexual harassment.² Further, studies have shown that around 1 in 4 women and 1 in 15 men are sexually assaulted in college³—and incidences are often higher for LGBTQ+ students, Black and Brown women, and other marginalized students.⁴ Sexual harassment and assault in schools continues to be underreported, however, and research shows that when survivors do report their assaults, many are ignored or punished rather than receive the support they need.⁵ Educational equity for women and girls requires fair, responsive, fully-developed campus sexual harassment and assault policies; knowledgeable administrators; and ultimately an end to sexual harassment and violence on campuses.

Title IX regulations implemented in 2020 narrowed the definition of sexual harassment to potentially exclude many students' experiences and altered when and how schools must respond to reports of sexual harassment, applying more burdensome standards in these cases and requiring live hearings and cross-examination.⁶ The 2020 rules made it harder for students to come forward about sexual harassment or assault and to get the support they need from their schools. On behalf of our members and supporters, AAUW submitted a comment to the Department strongly opposing these changes.⁷

The proposed rule restores many of the protections against sexual harassment that were gutted by the harmful regulations implemented in 2020, and broadens the scope of harassment to which schools are required to respond. Under the proposed rule, schools are required to respond to complaints of *all* sex-based harassment, including sexual harassment, and to prevent sex-based harassment and discrimination from reoccurring.⁸ Importantly, schools would be required to address sex-based harassment that occurs in educational programs and activities on or off-campus—including study abroad programs outside of the United States, if the harassment contributes to a hostile environment.⁹ Schools would also be required to address complaints of sex-based harassment if the complainant was participating or trying to participate in a school

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

³ David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, (Rockville: Association of American Universities, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aaucampus-climate-survey-2019>.

⁴ Elizabeth Tang et al., *Title IX at 50: A Report by the National Coalition for Women and Girls in Education*, (Washington: National Women's Law Center, 2022), <https://nwlc.org/resource/newge-title-ix-at-50/>.

⁵ Sarah Nesbitt and Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout*, (Washington: Advocates for Youth, 2021), <https://www.knowyourix.org/thecostofreporting/>.

⁶ U.S. Department of Education, Final Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," *Federal Register* 85, no. 97 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

⁷ American Association of University Women, *AAUW Comments to Department of Education Opposing Proposed Regulatory Changes Regarding Title IX*, January 30, 2019, <https://www.aauw.org/app/uploads/2020/02/AAUW-Comments-to-Department-of-Education-Opposing-Proposed-Regulatory-Changes-Regarding-Title-IX-nsa.pdf>.

⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

⁹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11); The proposed rule returns to the definition of "hostile environment harassment" as sufficiently "severe or pervasive" sex-based harassment that "denies or limits" a person's ability to participate in or benefit from an educational program or activity, as was the standard prior to 2020 (proposed 34 C.F.R. § 106.2(2)).

program or activity at the time they experienced harassment, even if they are not currently a student or employee of the school.¹⁰ Lastly, we support the provision in the proposed rule that would allow schools to comply with a state or local law that provides greater protections against sex discrimination, including harassment.¹¹

The proposed rule similarly strengthens retaliation protections, which would extend to all reports of sex-based harassment.¹² Schools would be required to investigate complaints of retaliation, if requested, and to offer supportive measures to individuals who report retaliation.¹³ We urge the Department to clarify that retaliation includes disciplining a complainant for conduct that the school knows or should know “results from” the harassment or 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; requiring a complainant to leave an education program after reporting sex-based harassment or other sex discrimination; and requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations.

Under the proposed rule, schools would be allowed to dismiss a complaint where a respondent has transferred, graduated, or retired, as long as they provide supportive measures and take other “prompt and effective steps”¹⁴ to ensure the harassment or discrimination does not continue or recur. We urge the Department to clarify that when a school chooses to dismiss a complaint because the respondent has left the school, such “steps” may include, but are not limited to, determining whether there were other victims and whether school staff knew about the incident(s) but ignored it, or took steps to cover it up.

The proposed rule further requires schools to provide supportive measures for students regarding all complaints of sex-based harassment, even if the complaint is dismissed.¹⁵ We urge the Department to explicitly clarify that if a party requests a certain supportive measure and it is “reasonably available,”¹⁶ then the school must provide it; and that if the school is aware that the supportive measure offered are ineffective, then the school must modify it or offer additional supportive measures. We further urge the Department to require, rather than simply allow, schools to designate “confidential employees,”¹⁷ who would not be obligated to report to their Title IX coordinator but who could offer students confidential support.

¹⁰ 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2).

¹¹ 87 Fed. Reg. at 41404; *see also* 34 C.F.R. § 106.6(h).

¹² 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2 (“retaliation”)).

¹³ 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71(a)).

¹⁴ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. §§ 106.44(f)(6)), 41576 (§ 106.45(d)(4)(iii)).

¹⁵ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)); 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(d)(4)(i)).

¹⁶ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 (“supportive measures”)).

¹⁷ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(d)).

The proposed rule includes provisions that would ensure a fair, prompt, and effective process for all complaints of sex-based discrimination,¹⁸ and would remove the harmful requirement of live cross-examination while allowing schools more flexibility in how they conduct questioning. We urge the Department to provide further guidance as to how institutions of higher education can conduct questioning while minimizing reliance on cross-examination and live hearings.

The proposed rule would require institutions of higher education to offer appeals to both parties based on a procedural irregularity, new evidence, or a Title IX official's bias or conflict of interest that affected the outcome, and allow them to offer additional bases to both parties equally.¹⁹ We urge the Department to afford the same rights to appeals to students in K-12 schools that would be granted to students at higher education institutions.²⁰

We oppose, and urge the Department to remove, the requirement for schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption²¹—which is not required in any other school proceeding. Instead, the Department should simply require schools to notify parties that a determination about responsibility will not be made until the end of an investigation and that neither party is presumed to be telling the truth or lying at the outset.

We also oppose the provision that includes an exclusionary rule allowing a survivor's oral and written statements to be dismissed in their Title IX case if they do not respond to a question "related to their credibility,"²² and urge the Department to remove this provision from the final rule.

Lastly, we urge the Department to, at minimum, clarify regulations on schools' requirement to apply the same standard of proof across "comparable"²³ cases of discrimination, specifically regarding cases of sex-based discrimination including sexual harassment and assault so that schools do not adopt an inappropriately stringent standard for those cases. We further encourage the Department to consider requiring the preponderance of 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.

II. Clarify protections for LGBTQ+ students

For LGBTQ+ students, going to school often includes experiencing bullying and harassment on a regular basis, which impacts their ability to access education and harms their health and

¹⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

¹⁹ 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)(1)-(2)).

²⁰ 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)).

²¹ 87 Fed. Reg. at 41575 (proposed 34 C.F.R. §§ 106.45(b)(3)), 41577 (§ 106.46(c)(2)(i)).

²² 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(4)).

²³ 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).

wellbeing.²⁴ In 2019, around 7 in 10 LGBTQ students experienced verbal harassment at school based on sexual orientation, and more than half experienced harassment based on gender or gender expression.²⁵ AAUW research also found that students in grades 7-12 are often targeted for failing to follow norms that are typical for their gender.²⁶ Transgender and nonbinary students face especially hostile school climates compared to their cisgender peers—13 percent of transgender adults were sexually assaulted when they were in grades pre-K-12,²⁷ while 1 in 4 transgender, nonbinary, and gender-nonconforming students are sexually assaulted during their time in college.²⁸

A wave of anti-LGBTQ+ legislation continues across state legislatures—as of July 2022, legislators in 23 states have introduced anti-LGBTQ+ legislation.²⁹ Currently, two states have enacted laws that prohibit transgender students from using school facilities, including restrooms and locker rooms, in accordance with their gender identity.³⁰ This discriminatory legislation puts LGBTQ+ students at even greater risk of physical, mental, and emotional harm.³¹

The proposed rule importantly affirms protections for LGBTQ+ students under Title IX by clarifying that prohibited sex discrimination includes discrimination based on sexual orientation, gender identity, sex-related characteristics (including intersex traits), and sex stereotypes (in addition to pregnancy or related conditions).³² The Department should ensure that these forms of prohibited discrimination are explicitly enumerated in school nondiscrimination policies and required notices of nondiscrimination. Policies which specifically enumerate these protections would provide necessary clarity to students, families, educators, and Title IX coordinators, and are associated with less hostile school climates for LGBTQ+ students.³³

²⁴ U.S. Government Accountability Office, *K-12 Education: Students' Experiences with Bullying, Hate Speech, Hate Crimes, and Victimization in Schools*, GAO-22-10434, Washington: GAO, 2021. <https://www.gao.gov/assets/gao-22-104341.pdf>.

²⁵ Joseph G. Kosciw et al., *The 2019 National Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*, (New York: GLSEN, 2020), <https://www.glsen.org/research/2019-national-school-climate-survey>.

²⁶ Hill and Kearl, *Crossing the Line: Sexual Harassment at School*.

²⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, (Washington: National Center for Transgender Equality, 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

²⁸ Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*.

²⁹ “Anti-LGBTQ+ Bills in 2022,” Human Rights Campaign, accessed September 7, 2022, <https://www.hrc.org/resources/state-maps/anti-lgbtq-bills-in-2021>.

³⁰ Alabama H.B. 322 (2022) and Oklahoma S.B. 615 (2022) ban transgender youth from using restrooms or changing areas aligned with their gender identity.

³¹ The Trevor Project, *LGBTQ & Gender-Affirming Spaces*, (West Hollywood: The Trevor Project, 2020), <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

³² 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10); These proposed changes are consistent with President Biden's executive orders on the implementation of the Supreme Court's 2020 ruling in *Bostock v. Clayton County* (140 S. Ct. 1731, 1747 (2020)), which confirmed that workers are protected against discrimination based on sexual orientation or gender identity under Title VII.

³³ William J. Hall, “The effectiveness of policy interventions for school bullying: A systematic review,” *Journal of the Society for Social Work and Research* 8, no. 1: 45-69. <https://pubmed.ncbi.nlm.nih.gov/28344750/>; Mark L. Hatzenbuehler and Katherine M. Keyes, “Inclusive Anti-bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth,” *Journal of Adolescent Health* 53, no. 1 (2021): S21-S26, <https://www.sciencedirect.com/science/article/pii/S1054139X12003540>; Ryan M. Kull et al., “Effectiveness of

The proposed rule also clarifies that all students must have access to school facilities consistent with their gender identity (where facilities are separated) as a component of their full participation in schools.³⁴ We further urge the Department to clarify in plain language that this standard applies to all sex-separated programs and activities, including, but not limited to, restrooms, locker rooms, and overnight accommodations for school trips.

The proposed rule importantly clarifies that harassment and bullying based on sexual orientation, gender identity, sex-related characteristics, and sex stereotypes is prohibited under Title IX. However, the proposed rule fails to explicitly address mocking, ridiculing or the persistent, intentional misuse of names, personal pronouns, or gendered titles as a form of sex-based harassment. Nearly 1 in 4 LGBTQ students in grades 6-12 report being prevented from using their chosen name and pronouns.³⁵ The use of gender-affirming language, including pronouns, is vital to students' wellbeing—studies have shown that for transgender and nonbinary youth, having their pronouns respected improves mental health outcomes.³⁶ We strongly urge the Department to include guidance in the final rule that explicitly prohibits the persistent, intentional misuse of names, personal pronouns, or titles as a form of sex-based harassment under Title IX.

Secondly, the proposed rule does not provide regulatory guidance on dress and appearance codes, which effectively leaves room for discriminatory policies and enforcement practices in schools. Where gendered dress codes are enforced, students must be allowed to dress in accordance with their gender identity, and such policies should not be enforced more stringently on certain groups.³⁷ These clarifications are critical for LGBTQ+ students, particularly transgender and nonbinary students, who may face disciplinary measures for clothing perceived as “inappropriate” according to their sex assigned at birth.³⁸ The Department should clearly communicate that, where dress or appearance codes are in use, gender-neutral codes best support students' wellbeing and schools' compliance with Title IX, and that schools may nonetheless risk violating Title IX even when a separate gender dress code permits students to dress in accordance with their gender identity.

Lastly, we are deeply concerned that the proposed rule does not address access to athletics, which represents a key component of educational equity under Title IX. Regulations that affirm and protect the inclusion and participation of all students, including transgender and nonbinary students, in school athletics are urgently needed—state legislators introduced 70 transgender

school district antibullying policies in improving LGBT youths' school climate,” *Psychology of Sexual Orientation and Gender Diversity* 3, no. 4 (2016): 407; Terri Phoenix et al., “Homophobic Language and Verbal Harassment in North Carolina High Schools,” *Safe Schools North Carolina*, 2006, <https://eric.ed.gov/?id=ED491454>.

³⁴ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

³⁵ Kosciw et al., *The 2019 National Climate Survey*.

³⁶ The Trevor Project, *Pronouns Usage Among LGBTQ Youth*, (West Hollywood: The Trevor Project, 2020), <https://www.thetrevorproject.org/research-briefs/pronouns-usage-among-lgbtq-youth/>.

³⁷ See “Model Local Education Agency Policy on Transgender and Nonbinary Students,” GLSEN, <https://www.glsen.org/activity/model-local-education-agency-policy-on-transgender-nonbinary-students>.

³⁸ Kosciw et al., *The 2019 National Climate Survey*.

athlete bans in the first half of 2022 alone, and such bans are currently enacted in 18 states.³⁹ These discriminatory policies also harm students who do not conform to sex stereotypes, intersex students (whether transgender or cisgender), and will likely disproportionately harm Black women and girls and other women and girls of color owing to racist and sexist standards which associate femininity with whiteness.

We strongly urge the Department to move swiftly in their rulemaking on athletics—affirming that all students, including transgender, nonbinary, and intersex students, have rights under Title IX to participate in school sports in accordance with their gender identity—so that a single, consolidated rule may be finalized at the beginning of 2023. We further urge the Department to clarify in the final rule that state sports bans against transgender, intersex, or nonbinary students constitute prohibited sex discrimination under Title IX, and that Title IX preempts any state law or policy that categorically bans transgender, nonbinary, and intersex students from playing sports or their ability to play sports consistent with their gender identity.

III. Strengthen supports for pregnant and parenting students

Pregnant and parenting students continue to face discrimination and barriers in access to education, and are often steered toward separate, less rigorous schools or programs. More than 1 in 5 college students—or nearly 4 million undergraduates—are parents, including 1.7 million single mothers.⁴⁰ Student parents, 44 percent of whom work full time while enrolled,⁴¹ may also lack other vital supports like paid leave and affordable child care that make it harder for them to complete their education while supporting themselves and their families. Pregnant and parenting students' access to education and completion is not only a gender equity issue but also a racial equity issue, as 51 percent of student parents are people of color.⁴² While parenting college students tend to have higher grade-point averages than their non-parenting peers,⁴³ they are less likely to graduate,⁴⁴ largely due to lack of institutional supports and other barriers to completion.

The proposed rule importantly improves regulatory language prohibiting discrimination on the basis of “current, past, or potential pregnancy or related conditions,”⁴⁵ including termination of pregnancy, childbirth, lactation, or recovery from any of these conditions. We urge the Department to include “expected” and “perceived” pregnancy or related conditions, as well as explicitly add lactation, childbirth, and termination of pregnancy as a non-exhaustive list of

³⁹ “Trans and Nonbinary Athletic Inclusion Policies,” GLSEN, accessed September 7, 2022, <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

⁴⁰ Institute for Women’s Policy Research, “Parents in College by the Numbers,” accessed September 7, 2022, <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers/>.

⁴¹ U.S. Government Accountability Office, *K-12 Education*.

⁴² Institute for Women’s Policy Research, “Parents in College by the Numbers.”

⁴³ Institute for Women’s Policy Research, “Parents in College by the Numbers.”

⁴⁴ Renee Ryberg, Rachel Rosenberg, and Jessica Warren, *Higher Education Can Support Parenting Students and Their Children with Accessible and Equitable Services*, (Bethesda: Child Trends, 2021), <https://www.childtrends.org/publications/higher-education-support-parenting-students-and-their-children-with-accessible-equitable-services>.

⁴⁵ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”), 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(ii), 106.40(b)(1)), 41579 (proposed 34 C.F.R. § 106.57(b)).

“pregnancy or related conditions.” We further 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.”⁴⁶ These clarifications would affirm protections for 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.

The proposed rule strengthens supports for pregnant and parenting students, including ensuring students’ access to a clean, private lactation space that is not a bathroom.⁴⁷ We urge the Department to clarify that private lactation spaces should include a chair, a flat surface, and access to an electrical outlet, with nearby access to running water and a refrigerator, and that such spaces should be in reasonable proximity to students’ specific place of study. The Department should further clarify that pregnant and parenting employees also have a right to these lactation spaces, and that students and employees still have a right to pump or breastfeed in non-designated lactation spaces.

The proposed rule requires schools to provide voluntary and “reasonable modifications”⁴⁸ to policies, practices, or procedures for students experiencing pregnancy or related conditions. Supportive attendance policies are particularly critical given caregiving responsibilities, which fall disproportionately onto women. We urge the Department to extend the affirmative right to modifications to both parenting and caregiving students, as well as employees.

The proposed rule would allow, as under current regulations, for student to participate “voluntarily” in a separate portion of their school’s program or activity which is “comparable” to that offered to their peers.⁴⁹ We urge the Department to clarify that separate programs or activities must be substantially equal “in purpose, scope, and quality” to those offered to students who are not pregnant or parenting and do not have a pregnancy related condition, and to explicitly prohibit schools from requiring pregnant or parenting students to participate separately.

Further, the proposed rule expands leave beyond the minimum period deemed medically necessary by a healthcare provider, if school policy allows.⁵⁰ We urge the Department to require schools to presume that medically necessary absences (e.g. for prenatal care, lactation breaks, abortion care) are inherently “reasonable” modifications and must be granted, and to make such absences available to parenting and caregiving students and to employees.

Lastly, the proposed rule expands training requirements for Title IX coordinators and clarifies their responsibilities regarding prevention and responses to discrimination against pregnant and parenting students. Specifically, the proposed rules would require employees who know of a

⁴⁶ We urge the Department to further define “family status,” ensuring the definition is inclusive of non-traditional families including LGBTQ+ families.

⁴⁷ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. §§ 106.40(b)(3)(iv), 106.40(b)(4)(iii)), 41579 (proposed 34 C.F.R. § 106.57(e)).

⁴⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(a)(4)).

⁴⁹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(1)).

⁵⁰ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).

student's pregnancy or related condition to give them the Title IX coordinator's contact information⁵¹ and would require Title IX coordinators to then notify the student of their rights.⁵² We ask the Department, however, to instruct schools in the final regulations and in supplemental guidance on how to protect student privacy to ensure that, in states where abortion is criminalized, school records, including school health records, are not used to prosecute students who have been documented as being pregnant in the past but are not currently pregnant. Finally, we urge the Department to clarify that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy.

We urge the Department to expand data collection on pregnant and parenting students, including experiences of harassment and discipline, in the Civil Rights Data Collection (CRDC) in order to continue to improve these students' access and success in education. AAUW appreciates that the CRDC includes important, school-specific gender equity points—including data on pregnant and parenting students—that are helpful to advocates, parents, students, educators, and Title IX coordinators nationwide.

IV. Appropriate implementation of religious exemptions

Under Title IX statute, schools that are receiving federal funds and controlled by religious organizations may claim religious exemptions where the application of Title IX is inconsistent with their religious tenets. Unfortunately, religious exemptions have allowed schools to discriminate on the basis of sex, disproportionately harming women, pregnant and parenting students, LGBTQ+ students, and students who access or seek access to abortion or birth control.

Harmful Title IX regulations implemented in 2020 expanded the number of schools that are eligible for religious exemptions⁵³ and allowed schools to claim religious exemptions without providing any advance notice to the Department of Education or students and their families, including even if a school is under investigation for violating Title IX at that time.⁵⁴ This regulation is inconsistent with the Title IX rule requiring schools to provide notice of their nondiscrimination policies,⁵⁵ and makes it more difficult for prospective students and their families to make fully informed decisions when choosing a school.

As the proposed rule fails to address religious exemptions, we urge the Department to swiftly issue proposed Title IX regulations that would rescind the 2020 rule inappropriately expanding eligibility for religious exemptions, require schools to notify the Department of any religious exemption claims, and to publish claimed exemptions in their nondiscrimination policies and required notices.

⁵¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(2)).

⁵² 87 Fed. Reg. at 41571-72 (proposed 34 C.F.R. § 106.40(b)(3)(i)).

⁵³ 34 C.F.R. § 106.12(c).

⁵⁴ 34 C.F.R. § 106.12(b).

⁵⁵ 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).

Conclusion

We urge the Department to implement the recommended changes as outlined in this comment and to finalize the proposed rule swiftly, as students across the country continue to be subject to the harmful Title IX regulations implemented in 2020 under the previous administration. We look forward to working with the Department on the implementation of the final Title IX rule.

Thank you for your consideration of our comment and recommendations for the proposed rule. Please do not hesitate to contact me at blackwellg@aauw.org if you have any questions.

Sincerely,

A handwritten signature in black ink, reading "Gloria Blackwell". The signature is fluid and cursive, with the first name "Gloria" and last name "Blackwell" clearly distinguishable.

Gloria L. Blackwell
Chief Executive Officer, American Association of University Women

September 12, 2022

Submitted via 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: 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:

As organizations guided by our traditions, our heritage, and fundamental Jewish values, we strongly believe that discrimination has no place in our society, including our schools. The Jewish concept of *Kavod*, that everyone deserves to live life with dignity and respect, is central to what we as a community believe, and what we feel is central to every community's basic teachings. In order to respect one's basic human dignity, everyone must be guaranteed the right to receive an education free of violence.

All student survivors of sex-based discrimination and harassment in school settings deserve robust protections to ensure equal access to education. As we commemorate the 50th anniversary of Title IX, we celebrate this rule and the progress we have made against sex discrimination in education, however, we are concerned that many inequities and challenges remain.

The changes made to Title IX under the previous administration removed protections for survivors and made it more difficult for their institutions to address the violence perpetrated against them. The undersigned organizations agree with President Biden's proposal to increase protections and recourse for students and athletes, but also provide suggestions for additional improvements.

Religious exemptions. We urge the Biden Administration to propose additional Title IX regulations to reverse the harmful religious exemption policies in the 2020 Title IX rule that interpreted religious exemption so broadly as to allow schools with only a tenuous relationship with religious institutions to discriminate. Expanding the religious exemption from schools that are "controlled by a religious organization" to schools that merely "subscribe to specific moral beliefs or practices" harms students, employees, and others. Equal access to educational

programs and activities is the basic tenet of Title IX, and schools that receive federal funding should be required to abide by this provision of civil rights law, with very few exceptions.

Improving the investigation process. Under this proposition, schools must conduct “prompt” investigations and set “reasonably prompt timeframes” for all major stages of an investigation of sex-based harassment (or other sex discrimination).¹ We support this requirement that will provide survivors with an opportunity for prompt remedies and closure, however we suggest that the investigation process be further improved to require the preponderance of evidence standard in all Title IX investigations, no longer permitting schools to use the “clear and convincing” standard.

We are in full support of the following aspects of the proposed rule:

Redefining sex-based harassment. For the first time, “sex discrimination” under Title IX would include discrimination based on sexual orientation, gender identity, sex-related characteristics (including intersex traits), status as transgender or nonbinary, or sex stereotypes.² This means that LGBTQ+ students must be allowed to participate fully in school. This policy change guarantees that every student has the right to express their identity however they choose, and be addressed by staff and students in a manner consistent with their gender.

Addressing sex-based harassment. The proposed rule would require schools to take “prompt and effective action” to end sex-based harassment (or other sex discrimination), prevent it from recurring, and remedy its effects on all people harmed.³ This includes mandating schools to offer supportive measures (at no cost) regardless of whether the student requests an investigation, informal resolution, or their complaint is dismissed.⁴ Additionally, under this proposal, retaliation would be prohibited and student survivors shall never be punished in any capacity.

Supporting pregnant and parenting students. Schools must provide pregnant and parenting students with the option of reasonable modifications to policies, practices, or procedures due to pregnancy or related conditions, allow voluntary leaves of absence beyond the medically necessary minimum, and ensure access to a private and sanitary lactation space that is not a bathroom. Providing accommodations to pregnant and breastfeeding students is necessary to guarantee true equal access to education.

Join us in urging the Biden Administration to implement these changes to Title IX rules, thereby restoring the integrity of Title IX as an essential tool for fighting against sexual assault, harassment, and discrimination.

¹ 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(4), 106.46(e)(5)).

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

³ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

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

Sincerely,
Jewish Women International
Keshet

Joined by:

National Organizations

ALEPH: Alliance for Jewish Renewal
Ameinu
Avodah
Bend the Arc: A Jewish Partnership for Justice
Clergy Task Force on Domestic Violence in the Jewish Community
Jewish Labor Committee
National Council of Jewish Women
Network of Jewish Human Service Agencies
Rabbinical Assembly
The Workers Circle
T'ruah: The Rabbinic Call for Human Rights
Union of Reform Judaism
Women of Reform Judaism

Local Organizations

Carolina Jews for Justice
Detroit Jews for Justice
IKAR
Jewish Family Service of Atlantic County
Jewish Family Service of Houston
Jews For Racial & Economic Justice (JFREJ)
JF&CS
Project DVORA, Jewish Family Service Seattle
The Greater Washington Jewish Coalition Against Domestic Violence
The Shalom Center
Tivnu: Building Justice