June 11, 2021

The Honorable Miguel Cardona, Secretary
Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Submitted via T9PublicHearing@ed.gov

RE: ACLU Written Comments for Title IX Public Hearing

National Political Advocacy Department
915 15Th St., 6TH Floor
Washington, DC 20005
202-544-1681
aclu.org

Deborah N. Archer
President

Anthony D. Romero
Executive Director

Ronald Newman
National Political Director

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The American Civil Liberties Union ("ACLU") submits these comments in response to the call from the Office for Civil Rights of the Department of Education ("Department") for comments on steps the Department can take to ensure schools provide an environment free of discrimination in the form of sexual harassment; to ensure fair, prompt and equitable resolution of reports of harassment; and to address discrimination based on sexual orientation and gender identity consistent with Title IX.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee to all people in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction. The ACLU's comments are informed by our commitment to the Constitution and its values, and to the civil rights statutes that further those values. We are equally committed to the rights of students to be free from sex discrimination and to the rights of students to fair processes when facing disciplinary action by educational institutions. It is essential that the Department require that recipient institutions take sexual harassment and assault reports seriously, and do so through processes that are fair to both those who report sexual harassment and assault and those who face disciplinary action based on such reports.

For further elaboration on many of the points set forth below, please refer to the ACLU's 2019 comments[1] in response to the Department's Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities

[1] American Civil Liberties Union, Comment on Proposed Rule (ED-2018-OCR-0064-17939), https://www.aclu.org/sites/default/files/field_document/2019_1_30_title_ix_comments_final.pdf.

Receiving Federal Financial Assistance" ("Proposed Rule"),[2] issued in final form in May 2020 ("the 2020 regulations").[3]

I. THE DEPARTMENT SHOULD ISSUE NEW REGULATIONS TO SAFEGUARD OUR NATION'S SCHOOLS FROM SEX DISCRIMINATION.

A. Ensuring an educational environment at all ages free from sex discrimination, including sexual harassment and assault, is critical for gender equity.

The ACLU is committed to the right to be free from sex-based discrimination, including harassment and violence. Addressing discriminatory barriers to education is central to gender justice, given the import of education for our economic life, our democracy, and equality. The Department's commitment to address sexual harassment, assault and violence is therefore essential if girls and women, and all LGBTQ people, are to have a fair shot at education and thus equality.

For far too long, the nation has failed to respond adequately to sexual assault and other forms of gender-based discrimination and violence, and thus the inequality perpetuated as a result. Even with greater attention paid in recent decades, sexual harassment and assault of students remains a pervasive problem. One study, conducted by the Association of American Universities, surveyed 33 campuses and found that over 25% of undergraduate women who responded to the survey reported experiencing nonconsensual sexual contact involving physical force or incapacitation,[4] and nearly 60% of those responding reported experiencing sexual harassment.[5] An even higher percentage (65%) of transgender, nonbinary, and queer students faced harassment.[6] Women with disabilities overall faced much higher rates of nonconsensual sexual contact involving physical force or incapacitation than women without disabilities, and bisexual women experienced higher rates of nonconsensual sexual contact than virtually any other women.[7]

In recent years, much of the dialogue regarding Title IX and sexual harassment has focused on higher education. Yet, elementary, middle, and high school students experience sexual harassment and assault at alarming rates, with 21% of middle schoolers in one study reporting they had been pinched, touched, or grabbed in a sexual way.[8] Another study found that

---

[2] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Proposed Nov. 29, 2018).

[3] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (Effective Aug. 14, 2020).

[4] David Cantor et al., Ass'n of Am. Univs., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct ix (Sept. 2015, revised Jan. 17, 2020) ("AAU Study"), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf.

[5] *Id.* at 47.

[6] *Id.*

[7] *Id.* at A-7-36.

[8] Dorothy L. Espelage et al., *Understanding Types, Locations, & Perpetrators of Peer-ToPeer Sexual Harassment in U.S. Middle Schools: A Focus On Sex, Racial, And Grade Differences*, 71 Child & Youth Servs. Rev. 174 (2016), https://www.sciencedirect.com/science/article/pii/S0190740916304145?via%3Dihub.

more than 85% of those reporting sexual assault were girls.[9] Of the middle and high school students who participated in GLSEN's 2017 National School Climate Survey, more than half (57%) were sexually harassed at school.[10] The 2015 U.S. Transgender Survey (USTS), a study of nearly 28,000 transgender adults, found that among study participants who were either out as transgender at some point between K through 12 or who were perceived by classmates, teachers, or school staff to be transgender, almost one in eight (13%) was sexually assaulted during K-12.[11]

Sexual harassment and violence have serious consequences for education and equality at all ages,[12] and any Title IX rules must recognize the scope and gravity of the problem.

B. Underreporting and bias in the reporting process pose serious obstacles to investigating sexual harassment and assault.

The new regulations should create a process to maximize students feeling comfortable reporting. Underreporting continues to be a serious problem, one that means individual students will continue to suffer and schools are less equipped to address ongoing discrimination. Students of color, students with disabilities, and LGBTQ and nonbinary students are disproportionately less likely to report sexual harassment and assault. One study, for example, found that a majority of LGBTQ students harassed or assaulted at school did not report these incidents to school staff because the students did not believe school officials would help, and they feared that reporting would worsen the situation and that "they would be mistreated, disbelieved, or blamed for their own assault."[13] Other studies suggest they are right.[14] For example, Black girls and women who tried to defend themselves against sexual harassment or assault are more likely than their white peers to be *punished themselves* when seeking school support after sexual harassment or assault because of stereotypes that they are "angry" or "aggressive."[15]

---

[9] *Stats Revealed by AP Investigation of Student Sex Assaults*, Associated Press, May 1, 2017, https://www.ap.org/explore/schoolhouse-sex-assault/stats-revealed-by-ap-investigation-of-student-sex-assaults.html.

[10] Joseph G. Kosciw et al., GLSEN, The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools 26 (2018), https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCSFull-Report.pdf.

[11] Sandy E. James et al., Nat'l Ctr. for Transgender Equal., The Report of the 2015 U.S. Transgender Survey 11 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[12] In the AAU Study, nearly 19% of the students "reported sexually harassing behavior that either "'interfered with their academic or professional performance," "limited their ability to participate in an academic program" or "created an intimidating, hostile or offensive social, academic or work environment.'" AAU Study at xii.

[13] Lambda Legal, Comment on Proposed Rule at 8, 13 (ED-2018-OCR-0064-18240) (citing Joseph G. Kosciw et al., GLSEN, The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools 43 (2018), https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf).

[14] To reduce bias in responding to reports of harassment and assault, the Department may wish to urge recipients to adopt measures such as training for decision makers, clear and complete policies that mitigate the possibility of subjective bias, and review procedures for individual complaints and overall practices to monitor for disparities.

[15] Tyler Kingkade, *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/.

That means the new regulations should provide widely for faculty and staff to be responsible for addressing reports of sexual harassment and assault claims they receive, increasing the likelihood that students will have someone to whom they feel comfortable reporting. At the same time, the new regulations should ensure that recipients can designate a set of staff members who are exempt from mandatory reporting, such as mental health counselors, specified residential advisors, and clergy. This exemption is necessary so that students who do not wish to trigger formal grievance proceedings have the opportunity to seek confidential advice and support from designated staff, which they may otherwise avoid.

C. The Department should promote the fairness and legitimacy of schools' investigatory processes, hearings, and outcomes.

Although the Due Process Clause applies only to *public* universities, colleges, and K-12 schools, the ACLU believes that the principles of due process and fundamental fairness should govern all Title IX proceedings, just as they should govern other student-on-student grievance proceedings, regardless of whether the recipient is a public or private entity. As further detailed in Part III below, a fair Title IX process is necessary not only to protect the interests of complainants and respondents, but also to promote fairness and legitimacy of the recipient's investigatory process, hearings, and outcomes.

While these comments relate to sexual harassment and assault as prohibited by Title IX, the ACLU believes that the Department should adopt consistent procedures for all civil rights claims under its purview. In addition, schools should adopt consistent procedures for *all* disciplinary proceedings where similar penalties are at stake, whether or not the alleged misconduct involves students' civil rights.

D. The new regulations should protect against racial bias and avoid singling out students who report harassment or assault based on sex.

Two further points are in order as the Department considers its approach to issues of sexual harassment and assault in education.

One concerns the intersection of gender justice and racial justice in this context. There have been concerns raised about racial bias in Title IX proceedings and, in particular, concerns that the Department has not always required recipients to adopt sufficient procedural protections to address bias against Black men who are named as respondents.[16] Less often elevated is racial bias against Black women who are complainants. Not surprisingly, Black women are reluctant to report sexual harassment and assault, given racist stereotypes about Black women's sexuality, and systemic racism in the legal system.[17] Other racial biases also threaten to distort the process

[16] Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, The Atlantic (Sept. 11, 2017), https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/.

[17] Blackburn Ctr., *The Barriers That May Prevent Black Women From Reporting Sexual Assault* (Feb. 19, 2020), https://www.blackburncenter.org/post/2020/02/19/the-barriers-that-may-prevent-black-women-from-reporting-sexual-assault.

for both complainants and respondents. The Department must be attentive to racial bias in Title IX proceedings, including bias against *both* complainants and respondents.

Second is a caution that the new regulations should not single out reports of sexual harassment or assault for uniquely rigorous standards as compared to reports related to harassment based on other protected characteristics, such as race or ethnicity. Any move to do so would itself be a form of sex discrimination, akin to the longstanding rules governing rape, rules that treated women as not credible and placed as the priority concerns that men's reputations would be hurt, not that women speaking of rape might urgently need to be heard.

II. THE NEW REGULATIONS SHOULD BROADLY DEFINE HARASSMENT PROHIBITED UNDER TITLE IX AND RECIPIENTS' RESPONSIBILITY TO ADDRESS IT, CONSISTENT WITH OTHER CIVIL RIGHTS LAWS AND THE FIRST AMENDMENT.

A. The new regulations should ensure that recipients are obligated to address sexual harassment that limits students' equal educational opportunities.

The ACLU recommends that new regulations broadly define harassment prohibited under Title IX as well as recipients' obligations to address it, consistent with the ways the Department has interpreted other civil rights laws. The simplest approach would be for the Department to require recipients to respond to sexual harassment defined as "unwelcome conduct of a sexual nature that is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex." This standard would match definitions of harassment under Title VI and Title VII and restore the Title IX standard previously used by the Department for administrative complaints. Recipients should be obligated to investigate all non-frivolous complaints of sexual harassment, even if they do not immediately appear to meet the definition. Moreover, the new regulations should make clear that recipients are permitted to investigate conduct that may violate their own school policies regardless of whether it amounts to sexual harassment under the Department's Title IX regulation.

The Department should make clear that a recipient's responsibilities are triggered if it knows, or reasonably should have known, about the harassment. A recipient "reasonably should have known" about the harassment if any faculty or staff member knows of the incident or would have known of the incident upon reasonably diligent inquiry in the exercise of reasonable care. This would ensure consistency across Title IX, Title VI, and Title VII.

In addition, the Department should require recipients to respond where a recipient has authority over the respondent (e.g., a student or employee of the recipient), regardless of where the incident took place, where the incident may deny or limit access to the recipient's programs or activities. Incidents that occur off-campus often have continuing effects on students' participation in educational programs or activities. Therefore, responding to these complaints is vital to guaranteeing equal educational opportunity under Title IX.

The ACLU recommends that the Department address schools' obligations to remedy a hostile educational environment created by sexual harassment. The Department should return to its long-standing regulatory guidance requiring schools to take action to end harassment, prevent

its recurrence, and overcome the effects of the hostile environment.[18] As the Department recognized in 1997, a school's failure to effectively respond may appear to authorize harassment.[19]

B. The new regulations should address other forms of gender-based violence and harassment, including domestic violence, dating violence, and stalking.

The 2020 regulations explicitly applied to complaints of dating violence, domestic violence, and stalking. The ACLU recommends that new regulations also apply to these forms of gender-based violence, in addition to sexual assault and other forms of sexual harassment. Other federal agencies have recognized that discrimination against victims of domestic violence, dating violence, and stalking can constitute sex discrimination.[20] Moreover, the Clery Act requires schools to incorporate domestic violence, dating violence, and stalking into their policies and procedures, and thus it is important for OCR to explain how Title IX applies in those situations.

C. The Department can adopt a broad definition of harassment under Title IX without limiting free speech.

The ACLU is committed to vindicating the right to equal educational opportunity without stifling free expression. Sexual harassment is not a form of protected speech; it is a form of discrimination. In our view, the Department can and should define harassment under Title IX to both advance students' rights to equal educational opportunity and protect First Amendment rights.

The Department may pursue this goal in different ways. As noted above, the standard the Department previously used – "unwelcome conduct of a sexual nature that is sufficiently severe *or* pervasive to deny or limit a student's ability to participate in or benefit from the school's

---

[18] *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights, Sexual Harassment Guidance (1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html; U.S. Dep't of Educ., Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 10 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html; U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Dep't of Educ., Office for Civil Rights, Q&A on Campus Sexual Misconduct (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[19] *See* Sexual Harassment Guidance (1997) at text accompanying n.33.

[20] *See, e.g.*, Memorandum from Sara K. Pratt, Deputy Sec'y for Enforcement and Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep't of Hous. & Urban Dev. to FHEO Office Directors and FHEO Regional Directors: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act (Feb. 9, 2011) ("[S]tatistics show that discrimination against victims of domestic violence is almost always discrimination against women. . . . domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act."); U.S. Equal Emp. Opportunity Comm'n, Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic Violence, Sexual Assault or Stalking (Oct. 12, 2012), http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm (citations omitted) ("Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on . . . sex . . . and the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. . . . Title VII and the ADA may apply to employment situations involving applicants and employees who experience domestic or dating violence, sexual assault, or stalking.").

program based on sex" – would accomplish this purpose.[21] During the two decades in which that standard was in effect, it was never found unconstitutional. That is unsurprising, as the standard is not aimed at speech, but at harassment. To be sure, harassment can be carried out through words. For example, if one student were to follow another student around campus shouting sexual slurs, that would undoubtedly constitute harassment, even though it takes the form of speech. Title IX is appropriately focused not on the content of those words, but on the conduct of sex-based harassment that is serious enough to limit another student's equal access to educational opportunities.

III. THE NEW REGULATIONS SHOULD ENSURE FAIR, PROMPT, AND EQUITABLE RESOLUTION OF REPORTS OF SEXUAL HARASSMENT AND ASSAULT.

The ACLU values due process, including the right to a fair process in school disciplinary proceedings and the right to be free from discriminatory and overly punitive discipline practices. Fair process in this context is important so that neither students who face disciplinary consequences nor students who report sexual harassment or assault lose access to education because of bias, unjust outcomes, or an inability to be heard.

Fair process is necessary at any level of education and must be tailored to the age of the students involved. At a minimum, fair process for students of all ages requires notice and a meaningful opportunity to be heard. The ACLU's 2019 comments in response to the Proposed Rule issued by then-Secretary DeVos detail those elements of fair process the ACLU believes are essential.[22] Our core recommendations for the higher education context follow here; we address the secondary school context in Part V below.

All schools should have clear policies to address any form of disciplinary action involving students. The policies should be published and made readily available to the entire academic community. These policies must provide clear guidelines on how the process will unfold and must specify the range of sanctions.

In appropriate cases, allegations may be addressed through informal resolution instead of through formal proceedings. Those who report misconduct should also be offered a full range of options for addressing allegations, including alternative dispute resolution. Participation in alternative dispute resolution should be voluntary, with all participants having the right to withdraw and resume a formal proceeding at any time.

During the pendency of any investigation and proceeding, as discussed in Part IV below, any rule should provide that schools may adopt such measures as necessary to (1) restore or preserve access to the recipient's education program or activity, (2) protect the physical and

[21] There are other standards that would similarly comply with the First Amendment while addressing sex-based discrimination and harassment. For example, the ACLU previously endorsed the Be Heard in the Workplace Act, 116th Cong., H.R. 2148, which replaces Title VII's "severe or pervasive" standard with a detailed roadmap for judges and employers to follow in identifying what conduct does and does not constitute unlawful harassment in the workplace. Vania Leveille & Lenora M. Lapidus, *The BE HEARD Act Will Overhaul Workplace Harassment Laws*, ACLU (Apr. 10, 2019), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/be-heard-act-will-overhaul-workplace-harassment-laws.
[22] *See supra* note 1 at 2, 20-25.

mental health or safety of students in the recipient's educational environment, or (3) deter sexual harassment. The new regulations should mandate notice and an opportunity to be heard regarding interim measures that burden the respondent or complainant. Absent exigent circumstances, notice should be provided to any burdened party before the measures are imposed.

Where serious sanctions, including suspension, dismissal, or adverse statements on a student record, may be imposed, to ensure due process, disciplinary proceedings should include: (1) written notice of the allegations and evidence compiled in the investigation; (2) an opportunity to submit a written response; (3) a hearing before a neutral decisionmaker; (4) an opportunity to testify, present evidence, and cross-examine witnesses; (5) written notice of final decisions; and (6) a right of appeal to all parties.

Several safeguards are essential to ensure equity and prevent abuse in the hearing. First, the hearing officer, or at least one hearing officer, should be a lawyer who is trained to adjudicate such disputes. That is essential as cross-examination may often be conducted by non-lawyers, individuals who may share some personal connection to the party (e.g., a family relative, friend, or mentor), and individuals who have little or no understanding of the appropriate uses of and limits on cross-examination. Advisors who are not lawyers would not be bound by the rules of professional conduct that govern attorneys. A hearing officer with legal training is thus essential to ensure that any cross-examination is not abusive, or not conducive to facilitating an accurate factual determination by the factfinder.

The new regulations should require that hearing officers be trained in conducting Title IX hearings, including the appropriate scope and limits of cross-examination and in handling cases involving violence. Such training is necessary to ensure the examination of complainants is conducted in a manner that is conducive to the truth-finding function and minimizes the potential risk of harm to these individuals through abusive questioning.

The new regulations should provide that complainants and respondents in Title IX proceedings have the right to select someone to advise, represent, or support them during these proceedings, including an attorney. And to ensure that students have access to competent representation without regard to financial circumstance, the new regulations should provide that a recipient must provide a lawyer to either party upon request for the live hearing. In particular, the new regulations should include provisions to protect against a proceeding in which one side is represented by a lawyer and the other by a non-lawyer, absent a knowing choice by the party represented by a non-lawyer. Finally, in no event should a student's representative in the hearing be a person who exercises academic or professional authority over the other student.

The new regulations should provide that the preponderance of the evidence standard governs whenever students' access to education is implicated on both sides of the matter. Preponderance is the standard used in most civil trials, including those raising claims of sexual or racial harassment under under civil rights statutes such as Titles VI, VII, and IX . It makes more sense than "clear and convincing evidence" because it favors neither party, but treats the complainant and the respondent the same, which is appropriate where both the complainant and the respondent have a significant interest in access to education at stake. A "clear and convincing evidence" standard, by contrast, puts a thumb on the scale against the complainant,

and denies relief even if the complainant proves that it is more likely than not that her rights were violated.

Both parties must be afforded an opportunity to appeal; both have a stake in the outcome, including the terms that are imposed. In cases where there has been a finding of responsibility, for example, complainants are entitled to argue that the particular sanctions imposed are insufficient to restore or preserve the complainant's access to education. Similarly, a respondent should be able to argue that the sanctions are unwarranted, or too harsh.

Finally, several protections are necessary in those cases where there is an imminent law enforcement investigation or criminal prosecution. In those cases, if a respondent requests a delay, the recipient shall grant an appropriate delay of grievance proceedings. Of course, the new regulations should make clear that an educational institution may not refer a complaint to law enforcement for the purpose of delaying the recipient's own Title IX investigation. In those cases in which a delay is granted, the educational institution should implement interim measures as necessary to protect the complainant's access to education. The new regulations should further make clear that in cases where the respondent chooses to go forward with the grievance proceeding in the face of an imminent law enforcement investigation or criminal prosecution, recipients may not draw adverse inferences from a party's silence during Title IX grievance proceedings.

IV. THE NEW REGULATIONS SHOULD EXPLICITLY AUTHORIZE REMEDIAL MEASURES, INCLUDING INTERIM MEASURES AND MEASURES NECESSARY TO ADDRESS A HOSTILE EDUCATIONAL ENVIRONMENT.

Robust investigations and responses to complaints of sexual harassment and assault are critical to ensuring that complainants can access education. Experiences of sexual harassment and assault are often disruptive to students' educational lives – causing them to drop classes or change majors, transfer schools, avoid particular people or places, stop participating in activities, or even drop out of school altogether – along with a host of other potential effects on students' mental, emotional, and physical health.[23]

Remedial actions in the form of interim measures allow an educational institution to protect a complaining student's access to education while engaging in the necessary investigation and procedures consistent with due process. Interim measures should address the potential for ongoing harassment without unfairly burdening the complainant and advise students of their Title IX rights and available resources.[24]

The Department should also address schools' obligations to remedy components of a hostile educational climate as they manifest across the education environment and impact the student body as a whole. In the context of elementary and secondary education, it is widely recognized that a school-wide focus is needed to combat harassment and bullying and create a

[23] *See* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations under Title IX*, 125 YALE L.J. 2106, 2109-10 (2016).
[24] *See, e.g.*, 20 U.S.C. §§ 1092(f)(8)(B)(v)-(vi) (Clery Act requirement to provide notice of available resources).

positive school climate conducive to learning.[25] Similar findings have been made in the higher education context. For example, the National Academy of Sciences, Engineering, and Medicine concluded that a compliance-based response to harassment is insufficient, and that a broader focus on changing the educational environment is necessary.[26] Offering access to supportive student services like social workers or mental health professionals, and providing education to the entire school community addressing sexual harassment can be important means of remedying a hostile educational climate. Consideration of these remedial measures is also consistent with the need for elementary and secondary schools to avoid overreliance on exclusionary discipline, which is often discriminatory.[27]

V. THE NEW REGULATIONS SHOULD PROVIDE SPECIFIC GUIDANCE FOR ELEMENTARY, MIDDLE, AND HIGH SCHOOLS.

Despite the prevalence of sexual harassment in grades K-12, school districts are less likely to have formal policies, procedures, and trainings on the proper response to allegations of sexual violence. In addition, K-12 students are rarely educated about their rights under Title IX. Students who report sexual harassment in the K-12 context are more likely to face retaliation and discipline, as they may be accused of engaging in prohibited sexual activity at school. Because these cases usually involve minors, they are more likely to be automatically referred to law enforcement for disposition and schools often fail to conduct their own investigations.[28]

The new regulations should make clear that disciplining students based on reports they submit regarding sexual harassment can constitute retaliation and that referrals to law enforcement agencies cannot substitute for the recipient's own investigation into potential Title IX investigations. The Department should also ensure that significant resources for its compliance and enforcement activities are expended on examining school districts' responses to sexual harassment.

---

[25] *See, e.g.*, American Psychological Association, Bullying and School Climate (2017), https://www.apa.org/advocacy/interpersonal-violence/bullying-school-climate (collecting research and summarizing that "[R]esearch shows that bullying can be significantly reduced through comprehensive, school-wide programs designed to change group norms and improve school climate"); Jonathan Cohen et al., *Rethinking Effective Bully and Violence Prevention Efforts: Promoting Healthy School Climates, Positive Youth Development, and Preventing Bully-Victim-Bystander Behavior*, 15 Int'l J. of Violence and Schools 2 (2015), https://www.schoolclimate.org/storage/app/media/PDF/Rethinking_Bully_Prevention_Paper_IJVS_9-15.pdf.

[26] National Academies of Science, Engineering, and Medicine, Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine (2018), https://www.nap.edu/read/24994/chapter/1#ii.

[27] *See, e.g.*, The Leadership Conference, School Discipline Guidance Recommendations (May 5, 2021) (on file with the ACLU); U.S. Dep't of Educ., Office for Civil Rights & U.S. Dep't of Justice, Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (Jan. 8, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html.

[28] *See* Emma Brown, *Reporting a school sexual assault can increase a victim's risk of punishment*, Wash. Post (Jan. 17, 2016), https://www.washingtonpost.com/news/education/wp/2016/01/17/reporting-a-school-sexual-assault-can-increase-a-victims-risk-of-punishment/. All of these problems were evident in an OCR complaint brought by the ACLU on behalf of Rachel, a high school student who was accused of "lewdness" after she reported being sexually assaulted at school and was sent to the same disciplinary program as her attacker. Ultimately, OCR found that the school district violated Title IX by failing to conduct its own investigation and retaliating against Rachel after she made the report. U.S. Dep't of Educ., *Investigation Letter in Henderson Independent School District Case No. 06111487* (June 14, 2012), https://www.aclu.org/sites/default/files/field_document/2012.6.14_ocr_letter.pdf.

For secondary schools, the Department should ensure that recipients have a comprehensive and formal procedure, including a hearing and right of appeal, for those infractions that may lead to serious penalties, such as suspension or expulsion or a notation on the record. The student and their parent or guardian must be advised of the charges and of entitlement to representation and advice during the course of the proceedings, and must be given a reasonable time to prepare a defense. No live hearing and cross-examination should be required at this grade level.

VI. THE NEW REGULATIONS SHOULD EXPLICITLY RECOGNIZE THAT DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY, GENDER NON-CONFORMITY, OR TRANSGENDER STATUS IS DISCRIMINATION ON THE BASIS OF SEX.

A. Discrimination based on LGBTQ status is discrimination on the basis of sex under Title IX and the Department's implementing regulations.

The new regulations should explicitly recognize that discrimination based on a person's sexual orientation, gender identity, gender non-conformity or transgender status is discrimination on the basis of sex under Title IX and the Department's implementing regulations. In *Bostock v. Clayton County*, the Supreme Court held that discrimination against a person because they are lesbian, gay, bisexual or transgender is discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, even assuming "sex" refers exclusively to a person's sex assigned at birth: When an employer discriminates against a person because of their sexual orientation or transgender status, the Court explained, the employer "necessarily and intentionally discriminates against that individual in part because of sex."[29]

As the Department of Justice and the Department of Health & Human Services have already recognized, the same reasoning must apply to Title IX. Both statutes focus on discriminatory treatment of individuals, not groups: Title VII protects "[a]ny individual," 42 U.S.C. § 2000e-2(a)(1); Title IX protects any "person," 20 U.S.C. § 1681(a). And both statutes require no more than "but for" causation: Title VII prohibits discrimination "because of" sex, 42 U.S.C. § 2000e-2(a)(1); Title IX prohibits discrimination "on the basis of" sex, 20 U.S.C. § 1681(a). Under either statute, to discriminate against a student based on their sexual orientation, gender identity, gender non-conformity or transgender status is to "necessarily and intentionally discriminates against that individual in part because of sex."[30]

B. The new regulations should explicitly prohibit discrimination against transgender students in the provision of sex-specific facilities, activities, and programming, including athletic teams.

The new regulations should also clarify that regulations authorizing educational institutions to provide certain facilities and programming on a sex-separated basis do not permit recipients to do so in a manner that discriminates against transgender students. Existing regulations and guidance make clear that although schools may offer certain sex-separated facilities, activities and programming, they must be provided in a manner that does not exclude

[29] 140 S. Ct. 1731, 1744 (2020).
[30] *Id.*

individual students from participation in, deny individual students the benefits of, or subject individual students to discrimination in an educational program receiving federal financial assistance. The Department should be explicit in the new regulation that none of those regulations authorize schools to exclude transgender students from such facilities and programming consistent with their gender identity.

The new regulations should state, consistent with the interpretations of 34 C.F.R. § 106.33 adopted by the Fourth and Eleventh Circuits,[31] that neither 34 C.F.R. § 106.33 nor any of the Department's other regulations defines "sex" based on reproductive function or sex assigned at birth.

Similarly, neither 34 C.F.R. § 106.33 nor any of the Department's other regulations authorizes schools to engage in "discrimination" prohibited by 20 U.S.C. § 1681(a). In the particular context of transgender students, that means that the regulations do not authorize schools to exclude transgender students from facilities and programming consistent with their gender identity. But the principle applies more broadly as well. The regulations authorizing sex-separation under certain circumstances must be applied consistently with Title IX's prohibition on "discrimination," not as *exceptions* to the underlying statute.

The new regulations should also explicitly state that regulations permitting sex-separated athletic teams, 34 C.F.R. § 106.41, do not require or permit schools to separate teams based solely on a student's sex assigned at birth, "biological sex" or reproductive capacity or to adopt qualification standards that exclude transgender and intersex students from equal athletic opportunity. School or interscholastic athletic policies and practices must promote equal athletic opportunities for all students, including students who are transgender or intersex.

The need for more explicit regulations has become particularly urgent in light of at least nine states now banning transgender women and girls from scholastic athletics by either statute or executive order. In the past year, at least 34 states considered bills that would outright ban transgender women and girls from scholastic athletics at every level of competition.

VII. THE NEW REGULATIONS SHOULD MAKE CLEAR THAT TITLE IX PROHIBITS DISCRIMINATORY DRESS CODES, WHICH CONTRIBUTE TO CONDITIONS THAT FOSTER SEXUAL HARASSMENT.

A comprehensive approach to addressing harassment means stopping the stereotyped attitudes that lie at its heart – including by making clear that discriminatory dress codes are prohibited under Title IX.

In the early 1980s, the Department withdrew a portion of 34 C.F.R. § 106.31 that had expressly prohibited codes of dress or appearance based on sex. This has resulted in widespread confusion and the misimpression among school administrators either that dress codes are categorically exempt under Title IX, or that they are permissible so long as they do not pose

[31] *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (holding that 34 C.F.R. § 106.33 regulations permitting sex-separated restrooms do not justify excluding a transgender boy from the boys' restroom solely based on his assigned sex at birth); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) (same), *pet'n for rehearing en banc filed*, Aug. 28, 2020.

"unequal burdens" on boys and girls.[32] Neither is true. The agency should issue guidance making clear that, notwithstanding the withdrawal of the codes of appearance regulation, existing Title IX regulations still bar discriminatory dress codes.

Discriminatory dress codes include codes that expressly impose different requirements for boys and girls, such as requiring girls to wear skirts while boys must wear pants, or requiring "modest" dress for girls but not boys. They also include dress codes that are enforced unevenly, such as rules that ban "distracting" clothing that are enforced against girls for wearing common, comfortable styles such as sleeveless shirts or leggings.

Such dress codes reinforce stereotyped expectations regarding girls' appearance and behavior – such as modesty and femininity. Even when dress codes are facially gender-neutral, they are frequently used to police girls' bodies, and are often unequally enforced against girls, students of color, LGBTQ students, or students of different sizes.[33] Enforcement means students may miss class or be sent home from school, losing instructional time because of their sex.

Such rules reinforce the stereotypical notion that girls are to blame for being a "distraction" because of what they are wearing, and prioritize boys' ability to learn free of distraction over girls' comfort and ability to learn without the focus being on their bodies. These same problematic assumptions underlie the traditional view that women and girls are themselves responsible for inviting harassment, while failing to hold the harassers accountable for their actions. And they rely on the equally demeaning assumption that men and boys are incapable of controlling their sexual impulses.

Finally, dress codes that require boys and girls to dress in distinct and sex-stereotyped ways in order to attend school erase the identity and experiences of non-binary and gender non-conforming youth, who are already marginalized. Schools should not be in the business of reinforcing traditional gender norms, particularly when those same norms are used to excuse and perpetuate harassment.

Guidance making clear that dress codes are not exempt from – and in fact may violate – Title IX is a critical step toward addressing the conditions that lead to harassment of and discrimination against women and non-binary and gender-non-conforming youth.

VIII. THE NEW REGULATIONS SHOULD REQUIRE THAT RECIPIENTS PROVIDE NOTICE TO STUDENTS IF THEY CLAIM A RELIGIOUS EXEMPTION FROM TITLE IX.

Title IX creates an exemption for educational institutions "controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets

---

[32] The "unequal burdens" framework that has sometimes been applied to sex-specific clothing rules in the employment context was wrong when it was adopted, as it failed to account for sex stereotyping as a method of proving sex discrimination. *Bostock* has now made clear that framework is not viable by explaining that discrimination is not authorized merely because both men and women are subject to parallel gender stereotypes.

[33] See Nat'l Women's Law Ctr., *Dress Coded: Black girls, bodies, and bias in DC schools* (Apr. 24, 2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/04/Final_nwlc_DressCodeReport.pdf.

of such organization." There are two critical rules for the Department to consider with regard to implementation of this provision.

The first concerns notice. Students should be able to know if a school has secured an exemption and the extent of that exemption. Until recently, recipients seeking to claim an exemption were to notify the Department, specifying those provisions of the rules that conflicted with their religious tenets. The rule no longer includes such a requirement and indeed provide that a recipient may first raise the exemption during the course of an investigation by the Department. The rule does not further the aim of Title IX.

Students selecting an educational institution should have some way to know if the school they are considering attending, or are already attending, has chosen not to comply with Title IX because of the institution's beliefs. Such notice will permit students to assess whether the school will be safe for them and when a complaint of discrimination is appropriate. This information is important to all students and prospective students, but especially to those who might suffer sex discrimination in an educational institution covered by Title IX, including women, LGBTQ students, pregnant or parenting students, and students seeking birth control or other reproductive health services.

The Department should thus return to the decades long policy of requiring recipients asserting an exemption to notify the Department. It should further require the Department to publish that information annually, and direct that recipients notify students of any exemptions as part of alerting students to the scope of the school's responsibility under Title IX.

Second, the Department should remain faithful to the text of the statute, which speaks of educational institutions that are controlled by a religious organization as able to seek and secure an exemption. The current rule, however, is not true to this language. It deems it sufficient for a school to have a statement of doctrine or religious practice that members of the institution "espouse a personal belief in" or that it has a mission "that includes, refers to, or is predicated upon religious tenets." Such provisions go well beyond the language of the statute. Moreover, they are also inconsistent with the Department's longstanding policy for determining, through a properly narrow reading of the statutory language, whether a school is controlled by a religious organization, which reflected a properly narrow reading of the statutory language.[34]

The definition matters. Any expansion of the exemption beyond what the statute provides impermissibly strips students and employees of the core protections against sex-based discrimination provided by Title IX. It means that students and employees at schools that are not controlled by a religious organizations may be subjected to harms akin to those experienced by students and staff at schools covered by the exemption, including being expelled for being in a same-sex relationship or being transgender,[35] or being fired for having an abortion[36] or becoming

---

[34] *See, e.g.*, U.S. Dep't of Educ., Office for Civil Rights, Exemptions from Title IX, https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html (last modified Mar. 8, 2021).

[35] *See, e.g.*, Sarah Warbelow & Remington Gregg, *Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk*, Human Rights Campaign (2015), https://assets2.hrc.org/files/assets/resources/Title_IX_Exemptions_Report.pdf.

[36] *See, e.g.*, *Ducharme v. Crescent City Déjà Vu, LLC,* 406 F. Supp. 3d 548 (E.D. La. 2019).

pregnant outside of marriage.[37] The Department should in no way be authorizing this discrimination outside the narrow confines permitted by statute.

*   *   *

For the reasons stated above, the ACLU recommends that the Department issue new regulations consistent with these comments.

Sincerely,

David Cole
National Legal Director

Louise Melling
Deputy Legal Director

Chase B. Strangio
Deputy Director
LGBTQ & HIV Project

Ronald Newman
National Political Director

Ria Tabacco Mar
Director, Women's Rights Project

Sandra S. Park
Senior Staff Attorney
Women's Rights Project

[37] *See, e.g.*, Dana Liebelson & Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, Mother Jones (Feb. 10, 2014), https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant.