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RE: ACLU Comments in Response to Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" RIN 1870–AA16

INTRODUCTION

The American Civil Liberties Union (ACLU) submits these comments on the U.S. Department of Education's Proposed Rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," published in the Federal Register on July 12, 2022.

For more than 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.[1] The ACLU is equally committed to the rights of students to be free from sex discrimination and to the rights of students to fair processes in school disciplinary proceedings. It is essential that the Department require that recipient institutions take sex-based harassment and assault reports seriously, and do so through processes that are fair to both those who report sex-based discrimination and those who face disciplinary action based on such reports.

[1] Other coalitions or networks to which the ACLU may belong may be submitting their own comments; this submission alone represents the ACLU's views on the Proposed Rule.

The ACLU is committed to the right to be free from sex-based discrimination, 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. This nation has failed to respond adequately to sex-based discrimination and the inequality perpetuated as a result. Sexual violence in higher education settings has received significant public attention in recent years, yet it remains a pervasive problem. One study, conducted by the Association of American Universities, surveyed 33 campuses and found that over 25 percent of undergraduate women who responded to the survey reported experiencing nonconsensual sexual contact involving physical force or incapacitation,[2] and nearly 60 percent of those responding reported experiencing sexual harassment since enrolling in school.[3] The percentage is even higher for LGBTQ students, as 65 percent of transgender, nonbinary, and queer students faced harassment.[4] 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.[5]

Though much of the national discourse regarding Title IX has focused on higher education, elementary, middle, and high school students experience sexual harassment and assault at alarming rates.[6] Twenty-one percent of middle schoolers in one study reported they had been pinched, touched, or grabbed in a sexual way.[7] Of the middle and high school students who participated in GLSEN's 2019 National School Climate Survey, 58 percent were sexually harassed at school.[8]

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.

This Comment articulates the ACLU's support for many of the proposed changes, proposes suggestions to further ensure and amplify Title IX compliance, and addresses the aspects of the Proposed Rule that do not go far enough to secure fair process for complainants

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[2] David Cantor et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, ASS'N OF AM. UNIVS., 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.

[3] *Id*. at 47.

[4] *Id*.

[5] *Id.* at 33.

[6] *See* Erica L. Green, *'It's Like the Wild West': Sexual Assault Victims Struggle in K-12 Schools*, N.Y. Times (May 11, 2019), https://tinyurl.com/2p8tfpju (noting that "[t]hough colleges get the attention," K-12 schools are substantially behind colleges in responding to sexual harassment).

[7] Dorothy L. Espelage et al., *Understanding Types, Locations, & Perpetrators of Peer-To Peer Sexual Harassment in U.S. Middle Schools: A Focus On Sex, Racial, And Grade Differences*, 71 Child & Youth Servs. Rev. 174 (2016), https://doi.org/10.1016/j.childyouth.2016.11.010.

[8] Joseph 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, GLSEN, 30 (2019), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

and respondents. This Comment proceeds in six parts: Part I discusses the Proposed Rule's definition of sex discrimination, recipients' obligation to address it, and the need to more clearly define and limit the use of sex separation in schools; Part II addresses the protections based on pregnancy or related conditions afforded under Title IX; Part III addresses the aspects of the Proposed Rule that amend procedural requirements for handling Title IX complaints; Part IV discusses the provisions of the Proposed Rule that provide clarity to improve recipients' Title IX obligations; Part V addresses provisions that affect transgender students; and lastly, Part VI addresses additional topics the Department should tackle to further equitable educational access.

I. THE PROPOSED RULE ADOPTS AN EXPANSIVE DEFINITION OF SEX DISCRIMINATION AND RECIPIENTS' OBLIGATIONS, BUT MUST FURTHER CLARIFY AND LIMIT THE INFLICTION OF NONTRIVIAL HARM.

A. The Proposed Rule broadly defines sex discrimination prohibited under Title IX and recipients' responsibility to address it, consistent with other civil rights laws and the First Amendment.

The ACLU supports the Proposed Rule's definition of sex discrimination, including the definition of sex-based harassment, as well as recipients' obligations to address it, consistent with the Department's approach to other civil rights laws. The Proposed Rule shifts the terminology of "sexual harassment" to "sex-based harassment" and generally draws on the Title IX standard previously used by the Department for administrative complaints. Recipients will be obligated to investigate all nonfrivolous complaints of sex-based harassment, and the Proposed Rule makes clear that recipients are permitted to investigate conduct that may violate their school policies regardless of whether the conduct amounts to sex-based harassment under the Department's Title IX regulation.

1. Prohibition on all forms of sex discrimination, § 106.10

Proposed Rule § 106.10 makes explicit that "[d]iscrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."[9]

The ACLU lauds this provision, which clarifies Title IX's scope of application. The Supreme Court ruled in *Bostock v. Clayton County* that anti-LGBTQ discrimination is a form of sex discrimination prohibited under Title VII, the workplace nondiscrimination law.[10] The Proposed Rule applies *Bostock*'s reasoning to equivalent language in Title IX and further aligns it with Title IX's text, purpose, and principles to more effectively protect people from all forms of sex discrimination in federally funded education programs and activities. The ACLU supports the clarification that the list of types of sex-based discrimination in the provision is not exhaustive.

2. Definition of sex-based harassment, § 106.2

Proposed Rule § 106.2 commendably shifts the terminology from "sexual harassment" to "sex-based harassment," which is a broader and more appropriate term to encompass the type of

[9] Proposed Rule, 87 Fed. Reg. at 41,571.
[10] *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

sex-based discrimination that students may experience. The Proposed Rule defines sex-based harassment as:

> sexual harassment, harassment on the bases described in § 106.10 and other conduct on the basis of sex that is: (1) Quid pro quo harassment. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct; (2) Hostile environment harassment. Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity . . . ; (3) Specific offenses . . . .(i) Sexual assault meaning an offense classified as forcible or nonforcible sex offense under the Uniform Crime Reporting [UCR] system of the Federal Bureau of Investigation [FBI].[11]

The ACLU supports the proposal to align the "hostile environment" definition with the definition that was in effect for two decades prior to the 2020 regulation and with the standard used under other civil rights laws, including racial harassment under Title VI. Recipients must investigate reports of unwelcome sex-based conduct that is severe *or* pervasive conduct and that denies or limits a person's educational opportunities. The "severe or pervasive" standard reflects that the government may proscribe some protected speech in the educational context in order to vindicate its interest in ensuring equal access to education, even if that speech might be protected in other settings. For example, refusing to use a student's appropriate pronouns may constitute sex-based harassment when it meets the "severe or pervasive" standard applicable to other forms of unwelcome sex-based conduct. The standard also reflects that, even in the educational context, the government may not prohibit or punish core protected expression, such as political speech.

The ACLU is concerned about the definition of fondling, one of the forms of "sexual assault" outlined in the Proposed Rule through reference to the Clery Act. The Clery Act requires schools to report specified crimes, including "sexual assault" defined as rape, fondling, statutory rape, or incest. The FBI defines "fondling" as "[t]he touching of the private body parts of another person *for the purpose of sexual gratification*, without the consent of the victim."[12] In other words, intentional, nonconsensual touching of private body parts is not considered sexual assault under the Proposed Rule if done to humiliate, intimidate, or for any number of other improper purposes. For example, a professor squeezing a student's breast in front of a lecture hall to humiliate that student, or one student attempting to stick a finger in another student's anus over their clothing done as a prank (an action that has been referred to as an "oil check") would not qualify as sexual assault for purposes of Title IX.[13] The Department should clarify that intentional, nonconsensual touching of private body parts will ordinarily qualify as "severe"

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[11] *See* Proposed Rule, 87 Fed. Reg. at 41,568–69.
[12] 34 C.F.R. § 668, Subpt. D, App. A (emphasis added).
[13] *See* Rebekah Chung, *'Alarming' sexual assault trend hitting Kansas schools*, KSN.COM (Mar. 2, 2022), https://www.ksn.com/news/local/alarming-sexual-assault-trend-hitting-kansas-schools/; Jamie L. Small, *Shame and secrecy shroud culture of sexual assault in boys' high school sports*, THE CONVERSATION (Apr. 6, 2022), https://theconversation.com/shame-and-secrecy-shroud-culture-of-sexual-assault-in-boys-high-school-sports-174684.

conduct and thus, as sex-based harassment when it denies or limits equal educational opportunities.[14]

3. Recipients' response to sex discrimination, § 106.44(a)

Proposed Rule § 106.44(c) states, "A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects."[15] This provision removes the unduly restrictive standard that the current regulations impose, which holds schools responsible only when they have "actual knowledge" of the harassment and assault and respond with "deliberate indifference."[16] The "actual knowledge" and "deliberate indifference" standards severely limit schools' responsibility to provide an educational environment free from discrimination and harassment, and are inconsistent with the standard that the Department imposes under Title VI.

The ACLU supports the Proposed Rule's return to obligating recipients to take prompt and effective action to end any sex-based discrimination that has occurred in their education program or activity, prevent its recurrence, and remedy its effects. In order to dispel any confusion and maintain consistency across Title IX, Title VI, and Title VII, the ACLU recommends that the Department clarify that a recipient's obligation is triggered when "it knows, or reasonably should have known" about the sex discrimination. This will help clarify when a school is on notice of sex discrimination.

4. Notice to recipients of possible sex discrimination, §§ 106.44(c), 106.45(a)(2)

Proposed Rule § 106.44(c) states, "An elementary school or secondary school recipient must require all of its employees who are not confidential employees to notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX."[17] An employee at a postsecondary institution or other recipient who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity, would be obligated to notify the Title IX Coordinator.[18] All other employees at a postsecondary institution or other recipient would be obligated to notify the Title IX Coordinator or provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information.[19] The Proposed Rule permits institutions to designate confidential employees, who are not required to

[14] The ACLU disagrees with reliance on the criminal law definition of fondling for Title IX enforcement. *See* Proposed Rule, 87 Fed. Reg. at 41,418; 85 Fed. Reg. at 30,175. It is inappropriate to direct recipients to rely on a standard applicable to criminal conduct that narrowly focuses on whether the defendant committed the touching for sexual gratification in the context of Title IX, which is concerned with the impact on a complainant's access to educational opportunities. A complainant may experience sex-based harassment that limits or denies access to educational opportunities regardless of whether the respondent sought sexual gratification or acted for some other purpose.

[15] *See* Proposed Rule, 87 Fed. Reg. at 41,572.

[16] 34 C.F.R. § 106.44.

[17] Proposed Rule, 87 Fed. Reg. at 41,572.

[18] *See id*.

[19] *See id*.

report to the Title IX Coordinator and instead must explain their confidential status to students and provide information about how to make reports.[20]

The ACLU supports this framework. In order to ensure that a recipient's program or activity is free from sex discrimination, a recipient's employees are obligated to undertake action when they have information about conduct that may qualify as sex discrimination under Title IX. It is also important to affirm complainant autonomy in postsecondary institutions. Ensuring that students can choose to speak with staff whom they know are not required to report to the Title IX Coordinator provides options for students who may not want to engage in the complaint process.

5. Off-campus conduct, § 106.11

Proposed Rule § 106.11 states that the regulations:

> appl[y] to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.[21]

The current regulations erroneously make recipients' responsibility contingent only on where the harassment occurred, rather than on its effect on the educational environment. They do not require a recipient to address a sex-based hostile environment in its education program or activity in the United States if the hostile environment results from sex-based harassment that happened outside of the recipient's education program or activity, or outside of the United States.

The ACLU supports requiring recipients to respond to sex-based harassment that denies or limits access to the recipient's programs or activities, regardless of where the original incident may have occurred, where recipients have authority over the respondent. 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 Department should clarify in the Final Rule that a recipient's obligation to respond to sex discrimination depends on whether that conduct denies or limits a student's educational opportunities, regardless of whether the recipient owned or controlled the premise in which the harassment occurred.

B. The Department should revise Proposed Rule § 106.31(a)(2) and withdraw portions of the Proposed Rule discussing contexts in which recipients could engage in sex separation in a manner that inflicts harm.

The ACLU agrees with the general principle articulated in § 106.31(a)(2); however, there are several issues with the Proposed Rule's regulatory language that should be modified in the

[20] *See id*. at 41,573.
[21] *See id*. at 41,571.

Final Rule. Proposed Rule § 106.31(a)(2) does not specify the standard that should be used to evaluate whether a person experiences more than de minimis harm, and the proposed language is unnecessarily vague in stating that persons may not be subject to more than de minimis harm "unless otherwise permitted."[22] The vagueness of the current language could allow covered entities or courts to improperly infer authorization to impose more than de minimis harm in almost any context. The Final Rule should remove the Proposed Rule's inaccurate discussion of 20 U.S.C. § 1686, which wrongly speculates that 20 U.S.C. § 1686 authorizes more than de minimis harm, an interpretation that is squarely in conflict with the Fourth Circuit's decision in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). [23]

1. Standard for determining whether an individual experiences more than de minimis harm, § 106.31(a)(2)

Proposed Rule § 106.31(a)(2) states:

> In the limited circumstances in which Title IX or this part permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm, unless otherwise permitted by Title IX or this part. Adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex.[24]

This provision does not specify the standard used to evaluate whether an individual experiences more than de minimis harm. The Department should revise § 106.31(a)(2) to clarify that the existence of more than de minimis harm must be assessed at an individual level from the perspective of a reasonable person in the individual's position under all the circumstances.

This proposed standard flows directly from *Bostock*'s discussion of sex-separated restrooms, locker rooms, and dress codes in dicta. In discussing contexts involving sex-separation, *Bostock* noted that the phrase "discriminated against" in Title VII "refers to 'distinctions or differences in treatment that injure protected individuals.'"[25] The Court held in *Burlington N. & Santa Fe Ry. Co. v. White* that courts must use an objective standard to distinguish between trivial and non-trivial harms, to be determined from the perspective of a reasonable person in the plaintiff's position. The *Burlington* Court emphasized that this objective standard must be assessed based on the plaintiff's individual circumstances, and that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships."[26] For example, "[a] schedule change in an

[22] *See id*.
[23] *See id*. at 41,536.
[24] *See id*. at 41,571.
[25] *Bostock*, 140 S. Ct. at 1753 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006)).
[26] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 59 (2006) (quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998)).

employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children."[27]

In the context of discrimination against transgender individuals, a person's gender identity is one of the relevant circumstances that must be included in any analysis of harm. Thus, as reflected by *Bostock*'s incorporation of *Burlington*, the harm inflicted by exclusion of a transgender boy from the boys' restroom must be assessed from the perspective of a transgender boy, and not from the perspective of a cisgender girl.[28]

2. Proposed Rule's discussion of Section 1686

The ACLU is deeply concerned about the Proposed Rule's discussion of 20 U.S.C. § 1686, which concerns sex-separated living facilities.[29] The Proposed Rule suggests Section 1686 not only authorizes schools to provide sex-separated living facilities, but also authorizes them to provide that separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm. That assumption is not supported by the statutory text and conflicts with the Fourth Circuit's decision in *Grimm*.

As the Proposed Rule correctly acknowledges, Title IX contains some statutory exceptions allowing covered entities to discriminate on the basis of sex. Those exceptions are all contained in Section 1681(a), which broadly prohibits discrimination and then lists circumstances in which 1681(a)'s prohibition "shall not apply." When the statutory text says that 1681(a)'s prohibition on discrimination "shall not apply," Title IX authorizes not just sex separation, but also other outright discrimination.

Section 1686 is different. Unlike the exceptions in Section 1681(a), the provision for housing in Section 1686 does not say that Section 1681 "shall not apply." It states that, "Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes."[30] The text of Section 1686 simply clarifies that the mere act of "maintaining separate living facilities for the different sexes" does not by itself violate Section 1681(a)'s prohibition on "discrimination." But the text does not state that Section 1681(a)'s prohibition on discrimination "shall not apply" or purport to authorize that separate living facilities be provided in a harmful or unequal way. Indeed, the Department has a longstanding rule requiring that living facilities for one sex be comparable in quality and cost to living facilities for another sex.[31] That regulation reflects the Department's understanding that Section 1686 does not immunize living facilities from Title IX's underlying prohibition on discrimination.

The Proposed Rule's discussion of Section 1686 also directly conflicts with the Fourth Circuit's decision in *Grimm*, which discussed *both* the restroom provision in 34 C.F.R. § 106.33 *and* the statutory provision for housing in Section 1686. After explaining why the restroom

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[27] *Id.* at 69.
[28] *See* Transcript of Oral Argument at 15, *Altitude Express, Inc. v. Zarda*, 140 S. Ct. 1731 (2020) (No. 17-1623) (Gorsuch, J.) ("[T]here are male and female bathrooms, there are dress codes that are otherwise innocuous, right, most -- most people would find them innocuous. But the affected communities will not. And they will find harm.").
[29] *See* Proposed Rule, 87 Fed. Reg. at 41,536.
[30] 20 U.S.C. § 1686.
[31] 34 C.F.R. § 106.32(b)(2)(ii).

regulation does not authorize harmful and discriminatory treatment, *Grimm* stated: "So too for the more generic Title IX provision allowing for sex-separated living facilities."[32] The court continued: "Again, this is a broad statement that sex-separated living facilities are not unlawful—not that schools may act in an arbitrary or discriminatory manner when dividing students into those sex-separated facilities."[33] Yet that is precisely what the Proposed Rule seems to authorize.

If Congress wanted to provide a complete exception to Section 1681's prohibition on discrimination, it knew how to do so explicitly. Congress's use of different language requires that Section 1686 be interpreted in a manner that harmonizes sex-separated housing with the rest of Title IX—not as an exception to it.

3. Authorization of more than de minimis harm, § 106.31(a)(2)

Proposed Rule § 106.31(a)(2) is unnecessarily vague in stating that persons may not be subject to more than de minimis harm "unless otherwise permitted."[34] The Department should revise § 106.31(a)(2) to prohibit more than de minimis harm "unless otherwise *explicitly* permitted." As written, § 106.31(a)(2) appears to contemplate that other unspecified provisions of the regulations could implicitly authorize schools to inflict more than de minimis harm and treat transgender students in a manner inconsistent with their gender identity. Opening the door to unspecified implicit authorizations would inadvertently invite covered entities and courts to engage in their own ad hoc judgments of when such harm is implicitly authorized by the nature of the sex separation at issue. For example, just as litigants have improperly argued that the authorization to provide sex-separated restrooms implicitly authorizes schools to separate transgender students by sex assigned at birth, litigants could similarly argue that separation by sex assigned at birth is implicit in the purpose of other types of separation such as single-sex education programs or human sexuality classes.

These concerns are heightened by the fact that the Proposed Rule suggests that the statutory provision regarding sex-separated dormitories implicitly allows schools to inflict harm and treat transgender students in a manner inconsistent with their gender identity.[35] As discussed above, that suggestion directly conflicts with *Grimm* and is not supported by the statutory text. If the discussion of Section 1686 is intended to illustrate an example of implicit authorization to harm transgender students, then it is difficult to imagine any regulatory provision that could not be similarly construed to provide authorize such discrimination. The Department should not open the door to this type of manipulation and should require that a regulation *explicitly* authorize more than de minimis harm before the regulation can be used as a basis for harming transgender students by treating them in a manner inconsistent with their gender identity.

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[32] *Grimm*, 972 F.3d at 618 n.16.
[33] *Id*.
[34] *See* Proposed Rule, 87 Fed. Reg. at 41,571.
[35] *Compare id*. at 41,535 (stating that barring access to otherwise permissibly sex segregated facilities or activities based on gender identity constitutes more than de minimis harm and is generally prohibited) *with id.* at 42,536 (stating that Congress permits more than de minimis harm with exclusion of "some students" in sex segregated living facilities).

II. THE PROPOSED RULE CLARIFIES THAT RECIPIENTS MUST PROTECT STUDENTS AND EMPLOYEES FROM DISCRIMINATION BASED ON PREGNANCY OR RELATED CONDITIONS.

The ACLU fully supports the Proposed Rule as it relates to the rights of pregnant and parenting students and employees, as well as those related to marital, parental, and family status. The Proposed Rule appropriately requires recipients to take proactive measures to respond to and prevent *all* forms of pregnancy discrimination, recognizing that even those that may be more "difficult to detect" can pose insurmountable obstacles, resulting in students having to choose between full access to their education and their families.[36] A few aspects are particularly noteworthy.

1. Definition of parental status, pregnancy, childbirth or related medical conditions, § 106.2

Proposed Rule § 106.2 defines parental status as:

> the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is: (1) A biological parent; (2) An adoptive parent; (3) A foster parent; (4) A stepparent; (5) A legal custodian or guardian; (6) In loco parentis with respect to such a person; or (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.[37]

The ACLU applauds this broad definition as it more accurately reflects the varied structures of our nation's families. The proposed changes to the rule's definitions of pregnancy, childbirth, or related medical conditions with respect to both students and employees are also particularly critical, both in order to conform with the interpretation of the Pregnancy Discrimination Act by the U.S. Equal Employment Opportunity Commission and to more accurately capture the contexts in which pregnancy discrimination frequently plays out today. Accordingly, the ACLU commends the proposed clarification that the rule applies to both actual and perceived pregnancy (rather than the current ambiguous and outdated term "false pregnancy"), "current, potential or future" pregnancy, termination of pregnancy, and lactation—a development now amply supported by case law under Title VII.[38]

2. "Substantially equal" separate programs, § 106.40(b)(1)

The Proposed Rule further makes numerous welcome changes in its substantive provisions. It preserves the existing crucial requirement that participation in any separate program for pregnant or parenting students be both voluntary and that such programs be comparable. This is necessary in order to prevent pregnant and parenting students being shunted into inferior programs.[39] To further strengthen this provision, the ACLU proposes the Final Rule

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[36] Generally, the ACLU supports conforming changes in §§ 106.51 et seq., related to employment as use of consistent standards throughout the regulation will facilitate more ready compliance in both contexts.
[37] Proposed Rule, 87 Fed. Reg. at 41,568.
[38] *See Equal Emp. Opportunity Comm'n v. Hous. Funding II, Ltd*., 717 F.3d 425, 428–29 (5th Cir. 2013); *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259 (11th Cir. 2017).
[39] *See, e.g.*, *ACLU* of Southern California, *ACLU Files Suit on Behalf of Pregnant and Parenting Teens Who Were Funneled Into Sub-Standard Alternative Education Programs*, (Sept. 1, 2004), https://www.aclusocal.org/en/news/aclusc-files-suit-behalf-pregnant-and-parenting-teens-who-were-funneled-sub-

change the standard so that programs are required to be "substantially equal" and to refer to the factors outlined in the current regulations to evaluate whether a program is "substantially equal."[40]

3. Modifications on the basis of pregnancy and lactation, §§ 106.40(b)(3)(ii), 106.40(b)(4), 106.57(e)

The ACLU particularly welcomes the inclusion of an express obligation to provide modifications on the basis of pregnancy and lactation, contained in § 106.40(b)(3)(ii) and (b)(4). As the Proposed Rule correctly identifies, this clarification is critical because ambiguities in the existing regulations, created by inclusion of the term "medical or hospital" benefits, have led some recipients to mistakenly believe that their obligations are limited to student and employee health plans and benefits.[41] More generally, the ACLU applauds the inclusion of guidance on proactive steps that recipients can take in order to eliminate barriers to full and equal participation, the clear delineation of the interactive process, and the specification that recipients document their efforts. As the Proposed Rule recognizes, recipients are already familiar with this process due to their obligations under Title II; incorporating those same standards will facilitate compliance. As in the context of leave, the Proposed Rule's specification that all modifications must be voluntary and based on an individualized assessment of need is equally critical here in order to prevent pregnant students being forced into taking leave.[42] The Proposed Rule's clarification of the scope of existing requirements with respect to leaves of absence is critical, including by preserving the requirement that any such leave be voluntary, making clear that the floor for such leave is determined by an individualized assessment of medical necessity, preserving the requirement that the student be restored to the same status upon return, and expanding the allowable certification for leave to recognize contemporary medical standards, in which care by advanced practice clinicians is common practice.

The list of potential modifications included in § 106.40(b)(4)(iii) also provides critical guidance to recipients, although the ACLU recommends addition of the words "or laboratory work" after "coursework" to address a common scenario in which pregnancy has resulted in discriminatory exclusion and denial of accommodations.

Further, the Proposed Rule rightly sets a high standard for provision of modifications, obligating recipients to modify a program or activity unless doing so would "fundamentally alter" it, in turn defined as "a change that is so significant that it alters the essential nature of the recipient's education program or activity."[43] The burden properly rests with the recipient to demonstrate that its reasons for denying an accommodation satisfy this standard, and further,

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standard; Tiseme Zegeye, *Quilting is not Geometry: Pregnant and Parenting Teens Deserve an Education Free from Discrimination*, ACLU WOMEN'S RIGHTS PROJECT (Jun. 21, 2012), https://www.aclu.org/blog/womens-rights/womens-rights-education/quilting-not-geometry-pregnant-and-parenting-teens; Kelli Garcia & Neena Chaudhry, *Let Her Learn: Stopping School Pushout for Girls Who are Pregnant or Parenting*, NAT'L WOMEN'S LAW CTR. (2017), https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf.

[40] 34 C.F.R. § 106.34(b)(3).

[41] Proposed Rule, 87 Fed. Reg. at 41,523.

[42] *See, e.g.*, *Hicks v. Edsitty Beach*, No. 1:12-cv-00231 (D.N.M. Mar. 6, 2012), at https://www.aclu.org/cases/hicks-v-edsitty-beach?redirect=womens-rights/hicks-v-edsitty-beach.

[43] Proposed Rule, 87 Fed. Reg. at 41,572.

recipients are nonetheless obligated to identify alternatives that would provide full and equal access to all programs and activities "to the maximum extent possible."[44]

Finally, the inclusion of lactation accommodations among the list of required modifications included in § 106.40(b)(4)(iii), as well as separately in §§ 106.40(b)(3)(iv) and 106.57(e), is particularly welcome—and the inclusion of lactation-related accommodations in § 106.57(e) specifically is critical to remove barriers to equality for *teachers*, who are among the categories of workers currently excluded under the ACA. The Proposed Rule correctly recognizes that students and teachers who are breastfeeding experience significant obstacles, in addition to negative health outcomes, and that provision of reasonable break time and a private location to express breast milk is critical to their continued ability to breast feed. In establishing these guidelines, reference to the requirements of the Break Time for Nursing Mothers provision of the Affordable Care Act[45] is fitting for the reasons stated in the explanatory section: Recipients already understand the law's requirements, and likely are already in compliance with respect to employees covered by the law. Moreover, these requirements, now in effect in most workplaces for years, have proven to be sufficiently flexible to meet the needs of workers in a range of sectors.[46] The Proposed Rule justly exceeds the ACA's minimum requirements to expressly state that the space provided must be "clean"—and recognizes that breaks may be necessary for *direct breastfeeding* as well as pumping.

III. THE PROPOSED RULE MAKES CHANGES THAT DENY STUDENTS IMPORTANT PROCEDURAL PROTECTIONS IN TITLE IX DISCIPLINARY PROCEEDINGS AND SHOULD BE MODIFIED TO FURTHER FAIR PROCESS AND EQUITY.

The ACLU values the right to be free from sex discrimination, harassment, and violence, a right central to gender justice. The ACLU likewise 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.

The Final Rule should be designed to protect fairness to, and the rights to education of, both the respondent and the complainant. Though these principles can come into conflict, there are important ways in which the goals of due process and equality are shared. Both principles seek to ensure that no student—complainant or respondent—is unjustifiably deprived of access to an education. Moreover, both parties (as well as the schools themselves) benefit from disciplinary procedures that are fair, prompt, equitable, and reliable.

The ACLU supports many of the procedural protections required by the Proposed Rule for Title IX grievance proceedings, but several of these provisions do not go far enough in protecting fair process rights, and others require amendments to ensure equitable treatment of both respondents and complainants and to conform to procedures governing other forms of harassment or discrimination.

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[44] *See id*. at 41,523.
[45] Codified at 29 U.S.C. § 207(r).
[46] *See* U.S. Dep't of Health & Human Servs., Office on Women's Health, *Lactation Break Time and Space in All Industries*, https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries (last visited July 29, 2022).

1. Live hearings and cross-examination, § 106.45(g)

Proposed Rule § 106.45(g) states: "A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination."[47] The proposed regulations permit, but do not, require recipients to provide a live hearing as part of its grievance procedures.

The ACLU supports requiring universities to provide a live hearing and an opportunity for cross-examination to assess credibility where serious sanctions for the respondent such as expulsion, suspension, or notation on a student's permanent school record are possible. Live hearings and an opportunity for cross-examination are critical safeguards in the higher education setting, where the participants are usually adults. Live hearings provide the most transparent mechanism for ensuring all parties have the opportunity to submit, review, contest, and rebut evidence to be considered by the factfinder in reaching its determination. Such a process is essential to student disciplinary proceedings where two students' interests are at stake and the possible sanctions are serious. The ACLU agrees with the Department that live hearings and cross-examination should not be required at the K-12 level.

As a policy matter, recipients can conduct live hearings and cross-examination either in person or can utilize virtual conferencing and procedural mechanisms to allow both parties to participate fully while also providing safeguards as requested. The Department should state in the Final Rule that if a recipient offers a hybrid live hearing, where one party testifies in person and another testifies remotely, the recipient must ensure both parties have equitable access to speak and listen during the hearing regardless of whether they appear in person or remotely.

The ACLU urges the Department to modify §106.45(g) to require recipients to provide live hearings and an opportunity for cross-examination where serious sanctions may apply to address concerns about effectiveness, equity, and bias.

2. Use of the single-investigator model, § 106.45(b)(2)

Proposed Rule § 106.45(b)(2) states that a recipient's grievance procedures must "[r]equire that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator."[48] The proposed regulations would not require a live hearing for evaluating evidence, and so, if a recipient determines it can achieve an equitable process using a single-investigator model, it is permitted to do so.

The ACLU agrees that any person designated as a Title IX Coordinator, investigator, or decision-maker must be neutral, but has serious concerns about authorizing a single individual to serve as both investigator and decision-maker. Permitting the investigator to also serve as the ultimate decision-maker creates a substantial risk that the decision-maker will not be able to maintain neutrality, or the appearance of neutrality, in cases that can have serious impacts on the educational rights of complainants and respondents.

[47] Proposed Rule, 87 Fed. Reg. at 41,576.
[48] *See id*. at 41,575.

In the university context, in cases where the respondent risks serious sanctions, the ACLU opposes the use of a single investigator. In cases where serious sanctions could not be imposed even if the recipient concluded that the reported conduct occurred, the Department should require recipients to designate a decision-maker other than the investigator as a matter of fairness. However, recipients may use a single investigator where the respondent makes a fully voluntary and informed choice to proceed without an independent decision-maker or, in cases involving complainants, where both the complainant and the respondent so choose.

3. Prior statements of a party or witness who does not respond to credibility questions, § 106.46(f)(4)

Proposed Rule § 106.46(f)(4) provides:

> If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond questions related to their credibility.[49]

It is generally appropriate for a recipient to disregard statements made by a party or witness who does not submit to cross-examination. However, that rule should not apply when a party has previously made a statement against interest. No party should be able to avoid introduction of their own prior statements against interest by declining to testify at the hearing.

The ACLU therefore supports the proposed change to this provision that would require a decision-maker to disregard prior supportive statements made by parties, while allowing consideration of prior statements against their interest, when parties do not submit to questions related to their credibility. Furthermore, the ACLU urges the Department to provide additional clarification regarding prior statements made by witnesses who do not submit to credibility questions. In cases involving serious sanctions, prior witness statements should generally not be considered if those witnesses are not subject to cross-examination. There may be limited circumstances when such statements are appropriately considered, but the proposed regulations do not provide adequate safeguards.

4. Preponderance of the evidence, § 106.45(h)(1)

Proposed Rule § 106.45(h)(1) states that, to determine responsibility in a Title IX grievance proceeding, the recipient must:

> [u]se the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred.[50]

The ACLU supports the use of the preponderance of the evidence standard in all cases where students' rights to educational access are at issue on both sides of the dispute. Preponderance is the standard used in most civil cases, including those raising claims of sexual or racial harassment under civil rights statutes such as Titles VI, VII, and IX. It treats the

[49] *See id*. at 41,578.
[50] *See id.* at 41,576.

complainant and the respondent equitably, favoring neither party, which is appropriate as both parties have an equal interest in access to educational opportunities. 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 their rights were violated.

The Proposed Rule allows recipients to use the clear and convincing evidence standard if they use that same standard for other discrimination complaints. In the ACLU's view, that is not appropriate for the subset of sex discrimination complaints where students' interests are implicated on both sides of the dispute. By allowing recipients to use a higher evidentiary standard, the Proposed Rule improperly gives greater weight to one student's educational interests than the other. For that reason, the ACLU urges the Department to require use of preponderance of the evidence standard in all cases where students' interests are at stake on both sides of the dispute.

5. Concurrent law enforcement proceedings, § 106.45(b)(4)

Proposed Rule § 106.45(b)(4) states that a recipient must establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay.[51] It removes explicit mention of concurrent law enforcement activity as an example of good cause for extending the recipient's timeframe.[52] The Department's stated rationale for removing this and all other examples was that it did not intend to suggest to recipients that extensions were mandatory in each of the listed situations.[53]

The ACLU calls on the Department to safeguard the respondent's ability to defend against criminal investigation or prosecution. Recipients should be required to grant an appropriate delay of grievance proceedings, upon request, when a party faces concurrent law enforcement proceedings for the same conduct that gave rise to a Title IX investigation. In cases in which a delay is granted, the educational institution should be required to implement interim measures as necessary to protect the complainant's access to education. The Final Rule 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. Nor may an educational institution refer a complaint to law enforcement for the purpose of delaying the recipient's own Title IX investigation or as a substitute for the recipient's own investigation into potential Title IX violations.

6. Party's advisors, § 106.46(e)(2)-(3)

Proposed Rule § 106.46(e)(2)-(3) states that a recipient: "[m]ust provide the parties with the same opportunities to be accompanied to any meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of the advisor for the complainant or respondent in any meeting or grievance proceeding; however, the postsecondary institution may establish restrictions regarding the extent to which the advisor may participate in the grievance procedures, as long as the restrictions apply equally to the

[51] *See id*. at 41,575.
[52] *See id.*
[53] *See id*. at 41,468.

parties" and "[m]ust provide the parties with the same opportunities, if any, to have persons other than the advisor of the parties' choice present during any meeting or proceeding."[54]

Though a student should have the ability to select an advisor or representative, it is essential that the Department modify the provision to state that in no event should either student's representative in the hearing be a person who exercises academic or professional authority over the other student. This is an important procedural protection that the current[55] and proposed regulations are lacking.

To ensure that students have access to competent representation without regard to financial circumstance, the Final Rule should provide that a recipient must provide a lawyer to either party upon request for the live hearing and 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.

7. Presumption that respondent is not responsible, § 106.45(b)(3)

Proposed Rule retains § 106.45(b)(1)(iv) from the current regulations, which requires a recipient to adopt a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.[56] The Proposed Rule relocates this provision to § 106.45(b)(3) and broadens its application, applying the provision to all complaints of sex discrimination, and not just sex-based harassment.

The ACLU fully supports the principle that no one can be held responsible for misconduct absent a finding that, under the applicable standard of proof, the respondent committed the act or acts alleged. Proposed Rule § 106.45(h)(1) already provides that "if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker should not determine that sex discrimination occurred." If that is all the presumption of non-responsibility means, the ACLU has no objection to it, but believes the Rule should clarify that that is indeed all that it means. Otherwise, there is a risk that the presumption might be confused with the presumption of innocence, a concept associated with the criminal process, where a defendant is presumed innocent until proven guilty "beyond a reasonable doubt"—and thereby imply that such a burden of proof applies in Title IX proceedings.

IV. THE PROPOSED RULE PROVIDES CLARITY AND GUIDANCE ON A RANGE OF ISSUES THAT WILL IMPROVE RECIPIENTS' TITLE IX OBLIGATIONS TO STUDENTS.

1. Title IX coordinator training, § 106.8(d)

Proposed Rule § 106.8(d) would require recipients to provide appropriate staff training related to Title IX that covers more than the grievance procedures for sex-based harassment.[57] The topics that are proposed for training make clear that employees of a recipient must receive training on aspects of Title IX that are relevant and essential to fulfilling their roles. These topics

[54] *See id*. at 41,577.
[55] 34 C.F.R. § 106.45(b)(5)(iv).
[56] Proposed Rule, 87 Fed. Reg. at 41,575.
[57] *See id*. at 41,570.

include the recipient's grievance procedures, how to serve impartially, determining the relevance of questions and evidence, and the types of impermissible evidence. For facilitators of an informal resolution process, training includes rules and practices associated with the recipient's informal resolution process and how to serve impartially.[58]

The ACLU supports this expanded list of required training topics, as such training is necessary to ensure that the grievance process is conducted in a manner that is fair and equitable to all parties.

2. Access to relevant evidence, §§ 106.46(e)(6), 106.45(b)(7)

Proposed Rule § 106.46(e)(6) provides that a recipient must either offer "equitable access to the relevant and not otherwise impermissible evidence or to the same written investigative report that accurately summarizes this evidence" to both parties.[59] If a recipient provides a written summary of the evidence, it also must provide access to the relevant evidence upon the request of either party. Proposed Rule § 106.45(b)(7) identifies three categories of evidence that a recipient must not access, consider, disclose, or otherwise use: 1) any evidence protected under a privilege recognized by Federal or State law; 2) a party's records made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party absent the party's voluntary, written consent; and 3) evidence or questions seeking evidence about the complainant's sexual interests and prior sexual conduct except when evidence of complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or when evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent is offered to prove consent.[60]

The ACLU agrees that the parties should enjoy broad access to any *relevant non-privileged* evidence in the recipient's possession and, by the same token, that there is no right to information that is either irrelevant or privileged under applicable law. Such evidence may include, but is not limited to, medical records, therapy notes, and other communications ordinarily protected against disclosure, such as communications covered by the attorney-client, doctor-patient, priest-penitent, and other applicable legal privileges. Where information is privileged, it may not be used in the proceeding at all absent a waiver by the party holding the privilege. Thus, it cannot be used either to find or to defeat responsibility or for any other purpose.

In addition, evidence of prior sexual history is generally irrelevant and can prejudice an investigation or determination. The proposed regulatory language appropriately prohibits questioning as to prior sexual history. The exception allowing for certain evidence regarding sexual interests and prior sexual conduct is too broadly worded, and should be clarified to require a showing of *particularized* relevance. Such a showing is needed to avoid infringing the rights of the complainant.

[58] *See id*.
[59] *See id*. at 41,577.
[60] *See id*. at 41,575.

3. Informal resolution, §§ 106.44(k), 106.45(j)

Proposed Rule §§ 106.44(k), 106.45(j) permit a recipient to offer an informal resolution process whenever it receives a complaint of sex discrimination or has information about conduct that may constitute sex discrimination under Title IX in its education program or activity.[61]

The ACLU supports providing an option for resolving complaints informally so long as the parties make a fully voluntary and informed choice and have the right to withdraw and resume a formal proceeding at any time.

4. Retaliation, §§ 106.2, 106.71

Proposed Rule §§ 106.2, 106.71 clarify that Title IX protects a student from retaliation and further defines retaliation as "intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity" because the person has reported possible sex discrimination, made a sex discrimination complaint, or participated in any way in a recipient's Title IX process.[62]

The ACLU supports making clear that intimidation, threats, coercion, or discrimination because of an individual's sex discrimination report or involvement in the Title IX process is sufficient to prove that actions were taken on the basis of sex. Proposed Rule § 106.71(a) rightly provides that disciplining students based on reports they submit regarding sex discrimination can constitute retaliation and is prohibited under Title IX.[63]

Proposed Rule §§ 106.2, 106.71 also purport to clarify a recipient's responsibility to address "peer retaliation." The Proposed Rule's definition of "peer retaliation" would encompass the same conduct set out in the proposed definition of "retaliation" generally, but "peer retaliation" would "cover only conduct engaged in by students against other students."[64] By way of illustration, the Department notes that the Proposed Rule's definition of "peer retaliation" encompasses: vandalism of a student's locker "by his teammates because the student complained to the administration that his high school is not providing substantially proportional athletics participation opportunities for girls"; and a student council president's threat "to remove a student council member from a student council committee close in time to the student council member's participation as a witness in sex-based harassment grievance procedures in which the student council president's friend is the respondent."[65] The Proposed Rule further states that "[p]eer retaliation can also constitute sex-based harassment or other adverse actions that do not meet the definition of 'sex-based harassment,' but still meet the definition of "retaliation" in proposed § 106.2."[66]

The ACLU supports the Proposed Rule's clarification that recipients are obligated to address peer retaliation as well as other forms of retaliation; however, without additional guidance, recipients might conclude that they are obligated to punish students for any activity—

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[61] *See id*. at 41,574, 41,576.
[62] *See id*. at 41,568, 41,579.
[63] *See also* Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 15, Know Your IX (2021), https://tinyurl.com/2wph5cjp (15% of survivors who reported their assaults to their schools faced or were threatened with punishment in connection with their report).
[64] Proposed Rule, 87 Fed. Reg. at 41,568.
[65] *Id.* at 41,540.
[66] *Id.*

including protected speech and purely private associational choices—undertaken with retaliatory intent on the grounds that it amounts to "intimidation," "coercion," or "discrimination" under Proposed Rule § 106.2. Although vandalism obviously is not protected by the First Amendment, criticism of another student's decision to report sex discrimination, file a complaint, or participate in a grievance procedure is constitutionally protected unless it amounts to harassment or falls under some other First Amendment exception. Similarly, while school-sponsored student organizations may be required to comply with anti-discrimination policies as a condition of sponsorship,[67] purely private student groups may have strong associational interests against government-backed interference in their membership and leadership decisions.[68] The Department should clarify that the Proposed Rule's peer retaliation provisions do not require recipients to punish students' protected speech and association, even when those First Amendment rights are exercised with retaliatory intent.

5. Supportive measures, §§ 106.44(f)(3), 106.44(g)

Proposed Rule §§ 106.44(f)(3), 106.44(g) provide that a recipient must "[o]ffer and coordinate supportive measures, as appropriate to the complainant and respondent to the extent necessary to restore or preserve that person's access to the recipient's education program or activity."[69] The Proposed Rule includes a non-exhaustive list of types of measures that a recipient can provide.[70] Additionally, the Proposed Rule states that "[s]upportive measures that burden a respondent may be imposed only during the pendency of a recipient's grievance procedure" and can only be imposed for non-punitive and non-disciplinary reasons, and designed to protect the safety of the complainant or recipient's educational environment.[71]

The ACLU supports providing supportive measures to the parties to ensure access to educational opportunity. Supportive measures can be critical for complainants' ability to continue their educations immediately following an incident of sexual harassment or assault in the absence of a final determination. Supportive measures must be proportional to the nature of the alleged harm and reasonably necessary to further the stated interests without unreasonably burdening either party. In cases where supportive measures may impose a burden, the respondent should be given the opportunity to seek modification or termination of such measures before they are imposed, or, if necessary under the circumstances, as soon as possible after the measure has taken effect, by appeal to an official other than the one who originally imposed the measures.

6. Guidance for elementary and secondary 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.

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[67] *See Christian Legal Society v. Martinez*, 561 U.S. 661, 667 (2010) (holding that a public educational institution may "condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization's agreement to open eligibility for membership and leadership to all students").
[68] *See id.* at 682 (recognizing that a regulation requiring private associations to accept members over their objection, with no opportunity to opt out of the regulation, raises more weighty free association concerns).
[69] Proposed Rule, 87 Fed. Reg. at 41,573.
[70] *See id*.
[71] *See id*.

Consequently, the nature of the protections needed in elementary and secondary schools may differ from protections needed in postsecondary institutions.

The Proposed Rule provides specific guidance for elementary and secondary schools in several key provisions, and protects the rights of parents and guardians to support their elementary and secondary school children. Under Proposed Rule § 106.44(c)(1), elementary and secondary schools would be required to address all sex discrimination occurring in their program or activity, as the rule requires all employees to report possible sex discrimination to the school's Title IX coordinator, with an exception for employees designated as "confidential employees.[72]

Proposed Rule § 106.6(g) would strengthen protections for parents, guardians, and other authorized legal representatives of students to act on behalf of a student, including by seeking assistance under Title IX and participating in any grievance procedures.[73]

The ACLU endorses providing greater clarity to elementary and secondary schools of their Title IX obligations.

V. THE PROPOSED RULE MUST PROVIDE FURTHER CLARITY REGARDING PROVISIONS THAT AFFECT TRANSGENDER STUDENTS.

The ACLU has concerns regarding additional provisions that affect transgender students. First, the Final Rule should not include the unnecessary discussion of the athletics regulations set forth in 34 C.F.R. § 106.41(b). The Department has stated that the Proposed Rule will not address changes to § 106.41 and instead that it will issue a separate notice of proposed rulemaking to address changes to that provision in the context of sex-separated athletics.[74] Mentioning the current regulations regarding athletics can create confusion and lead recipients to believe that the Proposed Rule authorizes recipients to impose more than de minimis harm to transgender students by banning them from teams consistent with their gender identity.

Additionally, the Proposed Rule notes that recipients with policies that prevent students from "participating in school consistent with their gender identity would be required to review and update those policies and practices under the proposed regulations."[75] However, the Proposed Rule does not specify exactly what those policies and practices should be. The Department should provide clarity regarding what procedural requirements schools can implement in regulating transgender students' use of school restrooms.

1. Discussion of the athletics regulations, § 106.41(b)

The Final Rule should not include the Proposed Rule's unnecessary discussion of the current athletics regulations set forth in 34 C.F.R. § 106.41(b).[76] As drafted, the Proposed Rule states that "the exclusion from a particular male or female athletics team may cause some students more than de minimis harm, and yet that possibility is allowed under current § 106.41(b)."[77] The ACLU is concerned that statement could be misinterpreted to mean that the current regulations authorize schools to inflict more than de minimis harm on transgender students by categorically excluding them from participating in sports consistent with their gender

[72] *See id*. at 41,572.
[73] *See id*. at 41,569.
[74] *See id*. at 41,537.
[75] *See id*. at 41,561.
[76] *See id*. at 41,536–37.
[77] *See id*. at 41,536.

identity. The Department should clarify that the Proposed Rule is not taking a position on how the current regulations apply to the participation of transgender students.

Moreover, not all "more than de minimis" harms are the same. When transgender students are categorically excluded from participating on teams consistent with their gender identity, they suffer a different degree of harm than when a cisgender student is "exclude[ed] from a particular male or female athletics team." As explained by the district court in *Hecox* v. *Little*, when a cisgender student is excluded from a particular team, that student still has access to equal athletic opportunities overall.[78] By contrast, a law or policy excluding transgender students from teams consistent with their gender identity "entirely eliminates their opportunity to participate in school sports."[79]

2. Policies related to gender identity

The Proposed Rule notes that "[a] recipient that maintains policies and practices that prevent students from participating in school consistent with their gender identity would be required to review and update those policies and practices under the proposed regulations."[80] But the Proposed Rule does not specify exactly what those policies and practices should be. Based on the ACLU's experience litigating cases on behalf of transgender students, it is likely that parties challenging the Department's regulations may try to characterize the regulations as requiring that schools allow students to access sex-separated facilities based entirely on a student's self-declaration of having a particular gender identity. Litigants may also characterize the regulations as requiring access over the objections of a student's parents and as requiring that students be allowed to switch back and forth from different-sex separated restrooms from day to day.

The Final Rule should clarify whether the Department is—or is not—taking a position on what policies and practices schools can implement in regulating transgender students' use of school restrooms. The Department can continue to refine its regulations as new case law develops or as best practices evolve. But the Department should be clear about which questions it is resolving now, and which questions it is not.

VI. THE DEPARTMENT SHOULD CONSIDER FUTURE RULEMAKING OR GUIDANCE ADDRESSING ADDITIONAL TOPICS NECESSARY TO PRESERVE EQUITABLE EDUCATIONAL ACCESS.

In our prior comments,[81] the ACLU previously asked the Department for regulations and/or guidance concerning additional topics that the Proposed Rule does not address. The ACLU reiterates its request for additional action on the following important topics, which are fundamental to ensuring students' equal and meaningful access to educational opportunities.

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[78] 479 F. Supp. 3d 930, 977 (D. Idaho 2020).
[79] *Id*.
[80] Proposed Rule, 87 Fed. Reg. at 41,561.
[81] American Civil Liberties Union, Comments for Title IX Public Hearing (June 11, 2021), https://www.aclu.org/aclu-written-comment-2021-title-ix-public-hearing; American Civil Liberties Union, Comment on Proposed Rule (ED-2018-OCR-0064) (January 30, 2019), https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule.

1. Dress codes and codes of appearance

Discriminatory dress codes and other codes of personal appearance that expressly impose different requirements for boys and girls perpetuate gender stereotypes and contribute to conditions that foster sex discrimination, including sex-based harassment. Even when dress codes are facially gender-neutral, they are often used to police girls' bodies and unequally enforced against girls, students of color, LGBTQ students, or students of different sizes.[82] Dress codes that require boys and girls to dress and groom themselves in distinct and sex-stereotyped ways also erase the identity and experiences of non-binary and gender non-conforming youth. Discriminatory dress codes are prohibited by the broad language of Title IX itself as well as § 106.31(a)(1)'s general prohibition against discrimination and the proposed inclusion of discrimination based on sex stereotypes in §106.10. However, the lack of an express regulation has led many school boards and administrators to erroneously conclude that Title IX does not cover dress codes. The Department should provide guidance or additional regulations that make clear, consistent with the Fourth Circuit's recent decision in *Peltier v. Charter Day School, Inc.*, 37 F.4th 104, 128 (4th Cir. 2022) (en banc), that codes of appearance that draw sex-based distinctions—whether on their face or through uneven enforcement—are subject to Title IX.

2. Religious exemptions

Title IX includes an exemption for educational institutions "controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization."[83] Prior to the regulatory changes in 2020, recipients seeking to claim this exemption were required to notify the Department and specify which provisions of the rules conflicted with their religious tenets. The requirement helped ensure that the religious exemption was not improperly asserted. The Proposed Rule fails to reinstate that policy.

Not only should the Department restore this protection, but it also should publish annually a list of recipients that have claimed the religious exemption, including the recipients' stated reason for doing so. In addition, the Department should direct recipients to identify any religious exemptions as part of schools' notices to students regarding the scope of their responsibilities under Title IX.[84] It is vital that students who attend an educational institution, as well as those who are considering whether to attend a particular school, have adequate notice that the school claims a religious exemption from Title IX. This information may be especially critical for women, LGBTQ students, pregnant or parenting students, and students seeking birth control or other reproductive health services.

3. School discipline

The Proposed Rule fails to address the intersection of gender justice and racial justice in the educational context and the disparate impact that school discipline has on girls of color. In July 2021, the ACLU submitted a letter to the Department regarding school discipline and Title VI.[85] Data collected over the years has shown that Black girls are punished more harshly and at

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[82] *See* Nat'l Women's Law Ctr., *Dress Coded: Black girls, bodies, and bias in DC schools* (Apr. 24, 2018), https://nwlc.org/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf.
[83] 34 C.F.R. § 106.12(a).
[84] 34 C.F.R. § 106.8(b)(2).
[85] American Civil Liberties Union, Comment on School Climate and Discipline (ED-2021-OCR-0068), (July 23, 2021), https://www.aclu.org/letter/aclu-comment-school-climate-and-discipline.

greater rates than any other female demographic from preschool through grade 12.[86] In addition to being over-disciplined and criminalized for common childhood behaviors,[87] girls of color face interlocking issues of race and gender discrimination. Black girls are perceived as needing less support and protection, being less innocent and knowing more about sex and "adult topics"—otherwise known as the "adultification bias."[88] This bias contributes to the fact that Black girls and other girls of color are at greater risk of sexual harassment and abuse but less likely to be believed when they report it.[89] The ACLU urges the Department to provide guidance on eliminating intersectional race and gender discrimination in schools.

CONCLUSION

For the reasons stated above, the ACLU commends the Department for many of the provisions in the Proposed Rule and objects to several of the provisions. The ACLU recommends that the Department modify the Rule consistent with these comments.

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[86] Leah A. Hill, *Disturbing Disparities: Black Girls and the School-to-Prison Pipeline*, 87 FORDHAM L. REV. 11, 58–59 (2018); *see also* Monique W. Morris, *Pushout: The Criminalization of Black Girls in* Schools, (2016); Erica L. Green, et al., *'A Battle for the Souls of Black Girls'*, N.Y. TIMES (Oct. 1, 2020).

[87] *See, e.g.*, Allyson Chiu, *Florida Officer Fired for 'Traumatic' Arrests of Two 6-year-old Students at School*, WASH. POST (Sept. 24, 2019), https://www.washingtonpost.com/nation/2019/09/23/girl-tantrum-orlando-classroom-arrested-battery-school-investigation/; Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES (Apr. 9, 2007), https://www.nytimes.com/2007/04/09/opinion/09herbert.html; Girls for Gender Equity, *School Policing Disparities for Black Girls* 14 (2020), https://search.issuelab.org/resource/policy-brief-school-policing-disparities-for-black-girls.html; Hassan Washington, *8-year-old Special Needs Student Handcuffed, Arrested for Tantrum at School*, THE GRIO (Mar. 8, 2013), https://thegrio.com/2013/03/08/8-year-old-special-needs-student-handcuffed-arrested-for-tantrum-at-school/; Kelsey Stein, *Hoover Student Claims in Lawsuit that She was Injured, Arrested After Falling Asleep at Des*k, ALA. NEWS (Mar. 6, 2019), https://www.al.com/spotnews/2013/05/hoover_student_claims_in_lawsu.html.

[88] Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls' Childhood*, GEORGETOWN L. CTR. POV'Y & INEQUALITY (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf; *see also* Alex Laughlin, *The Startling Thing that Happens to Black Girls in Preschool*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/04/25/monique-morris-pushout/ (noting that Black girls are stereotyped as being "social deviants" and having "certain attitude"); Edward W. Morris, *"Ladies" or "Loudies?"*, 38 YOUTH & SOC'Y 490, 502–12 (2007), https://www.researchgate.net/publication/258200296_Ladies_or_Loudies; Epstein et al., *Girlhood Interrupted*; NAT'L WMN'S L. CTR., *Let Her Learn*: A *Toolkit to Stop School Push Out For Girls of Color* (2016) at 1, https://nwlc.org/wp-content/uploads/2016/11/final_nwlc_NOVO2016Toolkit.pdf.

[89] Jennifer M. Wilmot et al., *Policy as Punishment and Distraction: The Double Helix of Racialized Sexual Harassment of Black Girls*, 35 EDUC. POLICY 347 (2021); *see also* Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non; Leticia Smith-Evans et al., *Unlocking Opportunity For African American Girls: A Call to Action For Educational Equity*, NAACP LDF & NAT'L WMN'S L. CTR. (2014) 25–26, https://www.naacpldf.org/wp-content/uploads/Unlocking-Opportunity-for-African-American_Girls_0_Education.pdf; Scott Michelman & Rebecca Ojserkis, *Punished for Reporting Sexual Harassment: How One Law School Almost Got a Student Survivor Banned From the Bar*, ACLU (Sept. 29, 2020), https://www.aclu.org/news/womens-rights/punished-for-reporting-sexual-harassment-how-one-law-school-almost-got-a-student-survivor-banned-from-the-bar.

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