

June XX, 2021

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

WRITTEN COMMENT TITLE IX PUBLIC HEARING: Discrimination based on sexual orientation and gender identity in the K-12 educational environment

At a time when lesbian, gay, bisexual, transgender, non-binary, queer, gender non-conforming, and intersex (LGBTQ+) young people face extraordinary challenges from the pandemic, structural racism, and state legislation attempting to undermine their civil rights, we are grateful for President Biden’s and the Department’s commitment to ensuring educational equity for all. President Biden’s Executive Orders on racial equity and underserved communities, implementing the landmark *Bostock* ruling, advancing gender equity and equality, collectively call for an “ambitious whole-of-government equity agenda,” including through enforcing Title IX’s protections for all students “to the fullest extent permissible under law.”¹

Ensuring an Educational Environment Free from Discrimination on the Basis of Sexual Orientation, Gender Identity, Transgender Status, Sex Stereotypes, or Sex Characteristics

President Biden’s recent Executive Orders clearly call for including LGBTQ+ students in the Department’s efforts to eliminate sex discrimination, consistent with the requirements of Title IX and the *Bostock* ruling.² The Department should revise its Title IX regulations to define “on the

¹ Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government). 86 Fed. Reg. §14 (January 25, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>.

Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). 86 Fed. Reg. §14 (January 25, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>.

Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity). 86 Fed. Reg. §46 (March 11, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

² Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). 86 Fed. Reg. §14 (January 25, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>.

Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity). 86 Fed. Reg. §46 (March 11, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

basis of sex”³ to include “on the basis of sexual orientation, gender identity, transgender status, sex stereotypes, or sex characteristics (including intersex traits).”

GLSEN’s 2019 National School Climate Survey found that LGBTQ+ students face unique challenges in K-12 education due to hostile school climates, discriminatory practices, and a notable absence of supports in the form of school policies and standard practices. LGBTQ+ youth experience higher rates of bullying and harassment than their non-LGBTQ+ peers.⁴ In a 2019 national survey of LGBTQ+ students, an overwhelming majority (81.0%) were verbally harassed because of their sexual orientation, gender expression, or gender identity, and over a third (35.1%) reported that they were verbally harassed often or frequently.⁵ More than one in three (34.2%) LGBTQ+ students were physically harassed (e.g., shoved or pushed) because of their sexual orientation, gender expression, or gender.⁶ One in seven (14.8%) LGBTQ+ students were physically assaulted (e.g., punched or kicked) because of their sexual orientation, gender expression, or gender.⁷

Recent studies suggest that the harm of bias-motivated harassment and bullying is especially severe in its effects on student well-being and success.⁸ This victimization of LGBTQ+ students is associated with a range of adverse educational outcomes, including increased absences, lowered GPAs, and a decreased likelihood of pursuing post-secondary education.⁹ Anti-LGBTQ+ harassment, assault, and discrimination are also associated with lower self-esteem and higher levels of depression.¹⁰ Students who hold multiple marginalized identities experience starker and often unique disparities. LGBTQ+ youth of color who experience both racist and anti-LGBTQ+ victimization were most likely to skip school due to feeling unsafe, report the lowest levels of

³ The Department’s Title IX regulations also address discrimination based on pregnancy, childbirth, termination of pregnancy or recovery therefrom as forms of sex discrimination.

⁴ Earnshaw, V. A., Reisner, S. L., Juvonen, J., Hatzenbuehler, M. L., Perrotti, J., & Schuster, M. A. (2017). LGBTQ Bullying: Translating Research to Action in Pediatrics. *Pediatrics*, 140(4).

⁵ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools*, p. 28. New York: GLSEN. <https://www.glsen.org/research/2019-national-school-climate-survey>.

⁶ Kosciw et al. (2020). *The 2019 National School Climate Survey*, p. 28. <https://www.glsen.org/research/2019-national-school-climate-survey>.

⁷ Kosciw et al. (2020). *The 2019 National School Climate Survey*, p. 28. <https://www.glsen.org/research/2019-national-school-climate-survey>.

⁸ Russell, S.T., Sinclair, K.O., Poteat, V.P., & Koenig, B.W. (2012). Adolescent health and harassment based on discriminatory bias. *American Journal of Public Health*, 102(3): 493–495.

Birkett, M., Newcomb, M.E., & Mustanski, B. (2015). Does it get better? A longitudinal analysis of psychological distress and victimization in lesbian, gay, bisexual, transgender, and questioning youth. *Journal of Adolescent Health*, 56(3):280–285.

⁹ Kosciw et al. (2020). *The 2019 National School Climate Survey*, p. xviii-xix. <https://www.glsen.org/research/2019-national-school-climate-survey>.

¹⁰ Kosciw et al. (2020). *The 2019 National School Climate Survey*, p. xviii-xix. <https://www.glsen.org/research/2019-national-school-climate-survey>.

The impact of bullying and harassment on mental health is especially alarming. The Trevor Project’s recent survey found that 42% of LGBTQ+ youth seriously considered attempting suicide in the past year, including more than half of transgender and nonbinary youth. See: The Trevor Project. (2021). *2021 National Survey on LGBTQ Youth Mental Health*. West Hollywood, California: The Trevor Project. <https://www.thetrevorproject.org/survey-2021/>.

school belonging, and experience the highest levels of depression, compared to those who experience one or neither form of victimization.¹¹

Currently, many schools fail to respond effectively to the victimization of LGBTQ+ students. GLSEN's 2019 National School Climate Survey found that one in five LGBTQ+ students (20.8%) who reported harassment or assault were told to change their behavior by, for example, changing the way they dressed,¹² and 7.3% disciplined after reporting their victimization to school staff.¹³

LGBTQ+ youth also experience unfair discipline, as when school policies prohibiting public displays of affection are not enforced for heterosexual couples but are for same-sex or queer couples.¹⁴ LGBTQ+ youth of color and LGBTQ+ youth with disabilities may be more likely to be disciplined for reporting victimization given racial and other disparities in disciplinary action: Black, Native American/Alaskan Native, Latinx, Arab American/Middle Eastern/North African, and multiracial LGBTQ+ youth experience more school disciplinary action than white LGBTQ+ youth¹⁵ and LGBTQ+ youth with disabilities are more likely to experience disciplinary action than LGBTQ+ youth without disabilities.¹⁶

Discrimination against LGBTQ+ students takes myriad forms. In addition to harassment, violence, and unequal discipline, students experience intentional misgendering and misnaming, refusal to update names and gender markers on records and school systems, denial of access to single-sex spaces and activities, and penalties under dress and grooming codes for failure to conform to sex stereotypes. All forms of discrimination are a serious problem that violate students' rights under Title IX.

¹¹ Truong, N. L., Zongrone, A. D., & Kosciw, J. G. (2020). Erasure and resilience: The experiences of LGBTQ students of color, Asian American and Pacific Islander LGBTQ youth in U.S. Schools. New York: GLSEN. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-AAPI-2020.pdf>.

Truong, N. L., Zongrone, A. D., & Kosciw, J. G. (2020). Erasure and resilience: The experiences of LGBTQ students of color, Black LGBTQ youth in U.S. Schools. New York: GLSEN. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-ResilienceBlack-2020.pdf>.

Zongrone, A. D., Truong, N. L., & Kosciw, J. G. (2020). Erasure and resilience: The experiences of LGBTQ students of color, Latinx LGBTQ youth in U.S. Schools. New York: GLSEN. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-ResilienceLatinx-2020.pdf>.

Zongrone, A. D., Truong, N. L., & Kosciw, J. G. (2020). Erasure and resilience: The experiences of LGBTQ students of color, Native and Indigenous LGBTQ youth in U.S. Schools. New York: GLSEN. <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-Native-2020.pdf>.

¹² Kosciw et al. (2020). The 2019 National School Climate Survey, p. 35. <https://www.glsen.org/research/2019-national-school-climate-survey>.

¹³ Kosciw et al. (2020). The 2019 National School Climate Survey, p. 35. <https://www.glsen.org/research/2019-national-school-climate-survey>.

¹⁴ Palmer, N., Greytak, E., & Kosciw, J. (2016). Educational Exclusion: Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth. GLSEN. <https://www.glsen.org/research/educational-exclusion-drop-out-push-out-school-prison-pipeline>.

¹⁵ Kosciw et al. (2020). The 2019 National School Climate Survey, p. 112. <https://www.glsen.org/research/2019-national-school-climate-survey>.

¹⁶ Palmer, N. A., Greytak, E. A., Kosciw, J. G. (2016). Educational exclusion: Drop out, push out, and school-to-prison pipeline among LGBTQ youth, p. 30. New York: GLSEN. https://www.glsen.org/sites/default/files/2019-11/Educational_Exclusion_2013.pdf.

The Department should define “on the basis of sex” to encompass discrimination based on sexual orientation, gender identity, or transgender status

The Justice Department has rightly adopted the position that because Title IX prohibits sex discrimination in language “sufficiently similar to... Title VII as to be considered interchangeable,” the *Bostock* ruling applies fully to Title IX.¹⁷ This understanding should be clearly and unambiguously codified in Title IX regulations.

While the *Bostock* Court framed cases before it as involving “sexual orientation or transgender status,”¹⁸ the Justice Department’s analysis rightly recognizes that *Bostock* applies equally whether a classification is viewed as one based on gender identity or the status of being transgender or cisgender.¹⁹ This is important because many institutions, including not long ago the federal government, seek to justify anti-transgender discrimination by improperly distinguishing these concepts.²⁰ While these arguments are meritless, the government’s prior reliance on them requires that they be openly repudiated. Accordingly, Title IX regulations should not be limited to transgender status.

The Department should define “on the basis of sex” to encompass discrimination based on sex stereotypes and sex characteristics, including intersex traits

While expressly recognized by the Supreme Court for decades²¹ and relevant to countless cases of educational discrimination,²² Title IX regulations to date have not codified the statute’s prohibition on discrimination based on sex stereotypes. The Department should correct this oversight. Critically, the Department should also define “on the basis of sex” to include discrimination based on sex *characteristics*, including intersex traits. Due to a legacy of stigma and secrecy, intersex youth face bullying, harassment, and other barriers in school even as they are coming out in

¹⁷ Memorandum of Principal Deputy Assistant Attorney General Pamela S. Karlan, Civil Rights Division, “Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972” (March 26, 2021).

¹⁸ 140 S.Ct. 1731, 1749 (2020).

¹⁹ Memorandum of Principal Deputy Assistant Attorney General Pamela S. Karlan, Civil Rights Division, “Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972” (March 26, 2021). (“The *Bostock* Court concluded that Title VII’s prohibition of discrimination ‘because of’ sex includes discrimination because of sexual orientation and transgender status. ... [T]he best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.”)

²⁰ See, e.g., DoD Instruction 1300.28, “Military Service by Transgender Persons and Persons with Gender Dysphoria” (Sept. 4, 2020; subsequently revised) (stating no person will be separated or denied accession “solely on the basis of his or her gender identity” while effectively prohibiting service by most transgender people); US Department of Housing and Urban Development, Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Proposed rule, 85 FR 44811 (Jul. 24, 2020; subsequently withdrawn) (purporting to maintain gender identity nondiscrimination provision while expressly permitting shelters to refuse admission based on transgender status).

²¹ *Price Waterhouse v. Hopkins* :: 490 U.S. 228 (1989)

²² See, e.g., *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); *Kahan v. Slippery Rock Univ. of Pa.*, 50 F. Supp. 3d 667 (W.D. Pa. 2014); *Tingley-Kelley v. Trs. of Univ. of Pa.*, 677 F. Supp. 2d 764 (E.D. Pa. 2010); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816 (C.D. Ill. 2008); *Montgomery v. Independent Sch. Dist. No. 709* F.Supp.2d 1081 (D. Minn. 2000);

increasing numbers.²³ Political and legislative attacks targeting transgender girls—including efforts to impose sex-testing requirements for sports,²⁴ restrict access to restrooms,²⁵ and even impose mandated reporting of “gender non-conformity”²⁶—are exacerbating these tensions and the potential for anti-intersex discrimination in schools.

Under the plain statutory language as well as *Bostock* and other Supreme Court precedents, Title IX clearly prohibits discrimination based on sex characteristics, including intersex traits. First, discrimination based on intersex traits necessarily involves a contrast between one indicator of sex and another. While anti-transgender discrimination focuses on the contrast between “persons with one sex identified at birth and another today,” anti-intersex bias most typically focuses on contrast between either a person’s sex as “identified at birth” or “today” and specific sex characteristics.²⁷

Second, discrimination against intersex persons is necessarily based on anatomical or physiological sex traits. While neither the *Bostock* Court nor the medical community has adopted a specific definition of “sex,” by any definition “sex” is simply one or more sex *characteristics*. Just as gender identity and sexual orientation are “inextricably bound up with” sex,²⁸ intersex traits are as well.

Third, discrimination based on intersex traits invariably involve sex-stereotyped assumptions that all persons do or should have some “standard” male or female body. Like transgender people, “By definition, a[n intersex] individual does not conform to the sex-based stereotypes of the sex that [they were] assigned at birth,” or indeed of either binary sex category.²⁹

The Department should clarify that provisions permitting single-sex programs or activities are not a safe harbor for anti-LGBTQ+ discrimination

Congress through the Title IX statute, and the Department by regulation, have set forth exceptions that permit single-sex or sex-segregated programs or activities in certain narrow contexts.³⁰ Certain entities, as well as past actions by the Department and other agencies, have repeatedly sought to stretch these exceptions into a kind of safe harbor for anti-LGBTQ+ discrimination. These statutory and regulatory provisions have been improperly invoked to defend—and even to require—that transgender, non-binary, gender non-conforming, or intersex students be excluded from school facilities, sports, or other opportunities, and that schools adopt intrusive sex-testing

²³ Jones, T., The needs of students with intersex variations, 16 SEX EDUC. 602 (2016).

²⁴ See, e.g., Ala. Acts 285 (2021); Ark. Acts 461 & 953 (2021); Miss. SB 2536 (2021); Tenn. Pub. Ch. 40 (2021); W.V. Code §18-2-25d (2021).

See also: GLSEN. (2021). Gender Affirming and Inclusive Athletics Participation. <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation>.

²⁵ See, e.g., Tenn. HB 1233 (2021).

²⁶ See, e.g., North Carolina SB 514 (2021); Iowa IA HF2272 (2020); Ohio HB 658 (2018).

²⁷ Cf. *Bostock*, 140 S.Ct. at 1747 (“By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today”).

²⁸ *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1742 (2020).

²⁹ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017).

³⁰ 20 U.S.C. § 1681(a)(6)-(9); 34 CFR § 106.15, 106.32-106.34, 106.41.

regimes.³¹ While courts have overwhelmingly rejected such arguments,³² these provisions—some created by the Department itself—remain the primary means by which entities attempt to justify unlawful sex discrimination against LGBTQ+ students.

The Department should make clear beyond all doubt that these provisions do not create any safe harbor for excluding LGBTQ+ students. The Department can do so by adding a new provision clarifying that provisions of Title IX or these rules that authorizes the provision of any program or activity separately on the basis of sex, or for members of one sex, shall not be construed to authorize or require a recipient to treat an individual in a manner inconsistent with their gender identity.

Ensuring an educational environment free from discrimination in the form of sexual harassment and violence

The Title IX executive order rightly directs the Department to “account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence; to ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination; and to ensure that their school procedures are fair and equitable for all.”³³ CDC data confirm that LGBTQ+ people experience elevated rates of sexual victimization across the lifespan, including in K-12 and post-secondary educational settings.³⁴ GLSEN’s 2019 National School Climate Survey found that a majority (58.3%) of LGBTQ+ students reported sexual harassment at school in the prior year,³⁵ and that sexual or other victimization at school was associated with LGBTQ+ students reporting lower grades, being less likely to feel safe at school, and being less likely to plan for college.³⁶ The 2019 NSCS also found that a majority of LGBTQ+ students who faced harassment or assault did not report it, most commonly because they feared it

³¹ Memorandum of Acting Assistant Attorney General John B. Daukas, Civil Rights Division, “Application of *Bostock v. Clayton County*” (January 17, 2021) (rescinded).

Memorandum of Acting Assistant Secretary Kimberly M. Richey, Office for Civil Rights, “Re: *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020)” (January 8, 2021) (archived).

Statement of Interest of the United States, *Soule v. Connecticut Association of Schools*, No. 3:20-cv-00201(D. Conn. March 24, 2020) (withdrawn).

³² *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018); *Cruzan v. Special School District No. 1*, 294 F.3d 981 (8th Cir. 2002).

³³ Executive Order 14021 of March 8, 2021 (Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity), § 2(b). 86 Fed. Reg. §46 (March 11, 2021). <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

³⁴ Chen, J., et al. (2020). Sexual Violence, Stalking, and Intimate Partner Violence by Sexual Orientation, United States. *Psychol. Violence*, 10(1): 110–119.

Johns, M.M., et al. (2019). Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017. *MMWR Morb. Mortal Wkly. Rep.*, 68:67–71.

Kann L., et al. (2016). Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12 — United States and Selected Sites, 2015. *MMWR Surveill. Summ.*, 65(SS-9):1-202.

³⁵ Kosciw et al. (2020). The 2019 National School Climate Survey, p. 30. <https://www.glsen.org/research/2019-national-school-climate-survey>.

³⁶ Kosciw et al. (2020). The 2019 National School Climate Survey, p. xvii–vxx. <https://www.glsen.org/research/2019-national-school-climate-survey>.

would not help.³⁷ And in fact, nearly two-thirds of those who did report harassment or assault to school staff said that nothing was done about it.³⁸ A recent study by the American Academy of Pediatrics also found that transgender and nonbinary students who were banned from using locker rooms and restrooms that matched their gender identity were significantly more likely to have been sexually assaulted during the previous 12 months.³⁹ This increased risk of sexual assault was observed among transgender boys (1.3 times higher), transgender girls (2.5 times higher), and nonbinary adolescents who were designated female at birth (1.4 times higher).⁴⁰

The Department must restore and strengthen protections for survivors of sexual harassment and violence and ensure fair and equitable processes for all students, employees, and members of campus communities. This includes rescinding provisions that conflict with the terms and purposes of the Title IX statute and codifying appropriate provisions outlining requirements for the prevention and response to sexual harassment and violence.

The Department should correct coverage standards to be as broad as Title IX's terms and ensure meritorious complaints are not dismissed out of hand

Under the 2020 rule, sexual harassment complaints could be dismissed solely because a student was harassed or assaulted in the wrong place;⁴¹ because they asked the wrong person for help;⁴² because they didn't put it in writing;⁴³ because they managed to stay in school;⁴⁴ because they *didn't* manage to stay in school;⁴⁵ or because their abuser left school.⁴⁶ Even when a complaint is investigated, the 2020 rule dramatically raises the bar for accountability, giving schools a pass unless their actions are "clearly" unreasonable or "deliberately indifferent."⁴⁷ These perverse barriers represent major departures from past practice,⁴⁸ and bear little if any relation to Title IX's

³⁷ Kosciw et al. (2020). The 2019 National School Climate Survey, p. 32-33. <https://www.glsen.org/research/2019-national-school-climate-survey>.

³⁸ Kosciw et al. (2020). The 2019 National School Climate Survey, p. 34-36. <https://www.glsen.org/research/2019-national-school-climate-survey>.

³⁹ Diane Ehrensaft & Stephen M. Rosenthal, Sexual Assault Risk and School Facility Restrictions in Gender Minority Youth, 143 PEDIATRICS 1 (May 6, 2019), <https://pubmed.ncbi.nlm.nih.gov/31061221>.

⁴⁰ Id. at 5.

⁴¹ 34 CFR § 106.44(a).

⁴² 34 CFR § 106.30(a) (definition of "Actual knowledge").

⁴³ 34 CFR § 106.30(a) (definitions of "Actual knowledge" and "Formal complaint").

⁴⁴ 34 CFR § 106.30(a) (definition of "Sexual harassment").

⁴⁵ 34 CFR § 106.30(a) (definitions of "Actual knowledge" and "Formal complaint").

⁴⁶ 34 CFR § 106.45(b)(3)(ii).

⁴⁷ 34 CFR §§ 106.44(a), 106.45(b).

⁴⁸ Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 2, 5, 10-13 (Jan. 2001) (rescinded) (schools are responsible for addressing any "unwelcome conduct of a sexual nature" if it is "sufficiently serious to deny or limit a student's ability to participate in or benefit from the school's program," regardless of where it occurs).

Questions and Answers on Title IX and Sexual Violence, 29 (Apr. 29, 2014) ("a school must process all complaints of sexual violence, regardless of where the conduct occurred").

Dear Colleague Letter: Sexual Violence, 4 (Apr. 4, 2011) ("If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.")

text or to the case law that applies to ED’s enforcement of Title IX.⁴⁹ It is clear that these provisions will expose survivors to greater harms and allow patterns of abuse to continue unabated. The Department should correct these standards to reflect applicable law and ensure all complaints within its jurisdiction are fairly investigated and resolved.

The Department should require grievance procedures that are fair

Under the 2020 rule, schools are encouraged—and in some contexts required—to adopt unfair procedures that are stacked against survivors and gratuitously re-traumatizing. Unlike other civil or administrative proceedings, schools must presume harassment or violence never happened,⁵⁰ and must subject survivors in post-secondary cases to direct, live cross-examination without the protections in a courtroom.⁵¹ Schools are also permitted to delay investigations indefinitely,⁵² subject K-12 students to cross-examination (despite evidence that this can lead to less accurate statements),⁵³ adopt an inappropriately stringent “clear and convincing evidence” standard,⁵⁴ and encourage survivors to enter mediation with their abusers.⁵⁵ Schools with union contracts requiring the “clear and convincing” standard for complaints against employees must then apply this standard to complaints against students.⁵⁶ The Department should revise Title IX rules to make clear that schools must ensure fairness to both parties, which includes use of a preponderance of the evidence rule.

The Department should make clear that students are entitled to a wide range of protections and remedies

Title IX has long been understood to require a wide range of supportive measures to protect complainants from continuing harms or retaliation.⁵⁷ Under the 2020 rule, schools are directed to limit the supportive measures provided for survivors, denying any kind of support that could be considered “disciplinary,” “punitive,” or “unreasonably burdening” a respondent.⁵⁸ In contrast to past guidance that clearly encouraged reasonable measures such as one-way no-contact orders,⁵⁹ the 2020 rule effectively encourages schools to impose “mutual” no-contact orders that put victims

⁴⁹ 20 U.S.C. 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”) (emphasis added); *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 291-92 (1998) (distinguishing liability standards for private damages suits from administrative investigations); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, i-iv (Jan. 2001) (rescinded) (discussing case law).

⁵⁰ 34 CFR § 106.45(b)(1)(iv).

⁵¹ 34 CFR § 106.45(b)(6)(i).

⁵² 34 CFR § 106.45(b)(1)(v).

⁵³ 34 CFR § 106.45(b)(6)(ii).

⁵⁴ 34 CFR § 106.45(b)(1)(vii).

⁵⁵ 34 CFR § 106.45(b)(9).

⁵⁶ 34 CFR § 106.45(b)(1)(vii).

⁵⁷ See, e.g., Questions and Answers on Title IX and Sexual Violence, 29 (Apr. 29, 2014); Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 2001) (rescinded).

⁵⁸ 34 CFR § 106.30(a) (definition of “Supportive measures”).

⁵⁹ Dear Colleague Letter: Sexual Violence (Apr. 4, 2011).

at risk of discipline, given that abusers often manipulate victims into violating mutual no-contact orders.⁶⁰ Moreover, some schools may now force victims to change their own classes and dorms to avoid their rapist or abuser, because they mistakenly believe that any changes to the respondent's schedule will be seen as unreasonably burdensome. The Department should make clear that complainants are entitled to a wide range of supportive measures, remedies, and protections against retaliation.

Ensuring Appropriate Implementation of Title IX's Religious Exemption

In order to implement President's order to review the 2020 rule, and other agency actions, for consistency with Title IX and the goal of equal educational opportunity, the Department necessarily must reconsider the provisions implementing Title IX's religious exemption. Two separate changes made to § 106.12 must be revised consistent with the statute and the President's directive.

First, the 2020 Title IX sexual harassment rule explicitly assures institutions that they need not provide advance notice to the Department—and thereby, to students, families, and the public—of their intention to rely on the religious exemption from Title IX in particular contexts. Many LGBTQ+ people are people of faith, and many seek out a religiously affiliated education.⁶¹ Because all denominations and traditions have internally varied views on gender and sexuality, knowing a school's faith tradition is not adequate notice of a school's intention to discriminate. This notice is essential both as a moral and practical matter for students making decisions about their futures, and as a legal matter to ensure consistency with the requirement that all students, applicants, and employees receive notice of a school's Title IX obligations and policies.⁶²

The Department can and should require advance notice as an independent procedural requirement. This notice requirement imposes negligible burdens compared with the potential for fundamentally unfair surprises and harms to students who may be disciplined, expelled, or denied a degree on the basis of sex. Moreover, allowing schools to not disclose their religious exemption is inconsistent with the Title IX rule that requires recipients to provide notice of its nondiscrimination policies.⁶³ How could a religious institution publish a statement to its school community that it does not discriminate based on sex, without also disclosing that it is claiming an exemption from certain provisions of Title IX in order to discriminate based on sex?

Second, a separate 2020 rulemaking added sweeping new criteria broadening the category of institutions eligible for the religious exemption, which expands this already-broad exemption even farther beyond the statutory terms and OCR's prior, longstanding interpretation.⁶⁴ As currently

⁶⁰ Joan Zorza, What Is Wrong with Mutual Orders of Protection? 4(5) DOMESTIC VIOLENCE REP. 67 (1999), available at <https://www.civicresearchinstitute.com/online/article.php?pid=18&iid=1005>.

⁶¹ Conron, K. J., Goldberg, S. K., O'Neill K. Religiosity Among LGBT Adults. Williams Institute. UCLA School of Law. <https://williamsinstitute.law.ucla.edu/publications/lgbt-religiosity-us/>.

⁶² 34 CFR § 106.8.

⁶³ 34 CFR § 106.8(b).

⁶⁴ Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program,

written, the rule lists five conditions, any of which are “sufficient” to establish eligibility, but some of which bear no relationship to whether an institution is “controlled by a religious organization.”⁶⁵ For example, a college previously not covered by the exemption can now remove itself from Title IX requirements simply by issuing a “doctrinal statement or a statement of religious practices,” even if those doctrines or religious practices are not derived from any religious organization, and the college has no relationship with such an organization.⁶⁶ Similarly, an educational institution can claim a religious exemption simply by amending its mission statement to “refer[] to ... religious tenets, beliefs, or teachings,” even if the institution has no actual affiliation with a controlling religious organization.⁶⁷ This overbreadth is both inconsistent with the law’s plain text and incentivizes institutions that wish to evade equal opportunity requirements to do so through gaming of the rules. This undue expansion, again, risks imposing substantial harms on students who may face discipline, expulsion, denial of a degree, or a refusal to address harassment or abuse on the basis of sex.⁶⁸ This expansion also flies in the face of the Supreme Court’s declaration that, “to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language,”⁶⁹ which has been echoed by federal courts.⁷⁰ The “logical corollary” to the principle that Title IX must be interpreted expansively “is to construe narrowly any exemption,” including the religious exemption, consistent with the statute’s overall purpose.⁷¹ Thus consistent with the purpose of Title IX, the Department must give the exemption a narrow interpretation in order to effectuate Title IX’s remedial purpose.⁷²

Updating Other Agencies’ Title IX Rules to Reflect Core Title IX Principles

While the Department is the primary agency responsible for enforcing Title IX, more than twenty other agencies also share this responsibility with respect to programs that they fund or administer. The current Title IX common rule was adopted by twenty-one of these agencies more than two decades ago and has not been updated to reflect core principles reflected by landmark cases such as *Bostock* and by President Biden’s recent executive orders.⁷³ While the common rule and other

and Strengthening Historically Black Graduate Institutions Program; Final rule, 85 FR 59916, 59946-62 (Sept. 23, 2020).

⁶⁵ 34 CFR § 106.12(c).

⁶⁶ Id. at § 106.12(c)(4).

⁶⁷ Id. at § 106.12(c)(5).

⁶⁸ See Comment of Know Your IX, FR Doc # 2019-26937 (Feb. 18, 2020),

<https://www.regulations.gov/comment/ED-2019-OPE-0080-16937>.

⁶⁹ N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 521 (1982).

⁷⁰ See *Haffer v. Temple Univ. of Com. System of Higher Ed.*, 524 F.Supp. 531, 537 (E.D. Pa. 1981), *aff’d* and *remanded sub nom. Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982) (stating that “[c]ivil rights statutes such as Title IX generally are entitled to broad interpretation to facilitate their remedial purposes.” See also *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 995 (S.D. Iowa 1993).

⁷¹ *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990) (determining that exemptions to the Fair Housing Act must be narrowly interpreted to give effect to a “generous construction” of its protections).

⁷² National Women’s Law Center. (February 18, 2020). Re: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program (RIN 1840-AD45).

<https://nwlc.org/wp-content/uploads/2020/03/NWLC-Comment-on-ED-FBO-and-Religious-Exemption-Rule.pdf>.

⁷³ Nuclear Regulatory Commission; Small Business Administration; National Aeronautics and Space Administration; Department of Commerce; Tennessee Valley Authority; Department of State; Agency for International Development; Department of Housing and Urban Development; Department of Justice; Department of

agency Title IX rules need not be as detailed as the Department’s rule in all respects, it should make clear that the same prohibitions on sexual harassment and violence and anti-LGBTQ+ bias apply. The Department should work with the Department of Justice and other agencies to amend their Title IX rules to reflect these core principles.

Ensuring Equal Opportunities through Guidance, Enforcement, Reporting, and Best Practices

Rulemaking is essential but must be part of a comprehensive approach to strengthen Title IX compliance and enforcement in these areas. In particular, ED should take the following steps:

- **Supplement the final rule with guidance** that clarifies particular applications of the rule’s core principles, and also addresses the protections of the Equal Access Act and the Family Educational Rights and Privacy Act (FERPA) for LGBTQ+ students and for survivors of sexual harassment and violence. The Department can build on the guidance that addressed all three statutes in 2016,⁷⁴ and on current case law⁷⁵ and state, local, and model policies.⁷⁶
- **Annually report disaggregated OCR complaint data**, including disaggregated data on claims involving discrimination based on sexual orientation, gender identity or transgender status, sex characteristics (including intersex traits), or sexual harassment or violence.
- **Prioritize enforcement and publicize key case resolutions** for complaints involving anti-LGBTQ+ discrimination or sexual harassment or violence.
- **Engage and promote visibility for LGBTQ+ students and educators**, including through targeted outreach and including their voices, stories, and achievements in Department events and publications.
- Work with the Office of Elementary and Secondary Education (OESE) to **publish updated best practice resources** on supporting LGBTQ+ students, building on resources published

Labor; Department of the Treasury; Department of Defense; National Archives and Records Administration; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; Department of the Interior; Federal Emergency Management Agency; National Science Foundation; Corporation for National and Community Service; Department of Transportation, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule, 65 FR 52857 (Aug. 30, 2000). See also Department of Energy, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 FR 4627 (Jan. 18, 2001).

⁷⁴ US Departments of Education and Justice. (May 13, 2016). Dear Colleague Letter on Transgender Students (rescinded).

⁷⁵ See, e.g., Grimm v. Gloucester County School Board, 972 F.3d 586 (4th Cir. 2020); Adams v. School Board of St. Johns County, 968 F.3d 1286 (11th Cir. 2020); Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020); Doe ex rel. Doe v. Boyertown Area School District, 897 F.3d 518 (3d Cir. 2018); Whitaker v. Kenosha Unified School District, 858 F.3d 1034 (7th Cir. 2017); Dodds v. U.S. Dept. of Education, 845 F.3d 217 (6th Cir. 2016); Cruzan v. Special School District No. 1, 294 F.3d 981 (8th Cir. 2002); A.H. ex rel. Handling v. Minersville Area School District, 408 F.Supp.3d 536 (M.D. Pa. 2019); J.A.W. v. Evansville Vanderburgh Sch. Corp., 396 F. Supp. 3d 833 (S.D. Ind. 2019).

⁷⁶ GLSEN & National Center for Transgender Equality. (2020). Model Local Education Agency Policy on Transgender and Nonbinary Students. <https://www.glsen.org/activity/model-local-education-agency-policy-on-transgender-nonbinary-students>.

GLSEN. (2020). State Education Agency Recommendations. <https://www.glsen.org/activity/state-education-agency-recommendations>.

in 2016 and consulting with relevant stakeholder organizations and those with lived experience.⁷⁷

- Work with OESE to **promote LGBTQ+ equity through the Every Student Succeeds Act (ESSA)**, including through updated guidance, templates, resources, and technical assistance, created in consultation with relevant stakeholder organizations and those with lived experience.⁷⁸
- **Strengthen the Civil Rights Data Collection (CRDC)** by adding questions about respondent demographics, incidents, policies, and overall climate with respect to sexual harassment and violence and equal opportunities for LGBTQ+ students.
- **Restore the Clery Act Handbook** to ensure timely and accurate data on crime on and around campus, and amend it as necessary to reflect any new Title IX rules and guidance.

Conclusion

Our organizations applaud the Department's and the President's commitment to guaranteeing safe, inclusive, and nondiscriminatory educational environmental for all students, including LGBTQ+ and other marginalized students. We look forward to continuing to dialogue and work with the Department to fully enforce Title IX and make equity and equality a reality for all students. If you would like to discuss these recommendations, please contact Aaron Ridings of GLSEN at 202-621-5815 or aaron.ridings@glsen.org. Thank you for your consideration.

Sincerely,

GLSEN
American School Counselor Association (ASCA)
Human Rights Campaign
National Association of School Psychologists (NASP)
National PTA
National Women's Law Center (NWLC)
PFLAG National

[Co-signers]

⁷⁷ Office of Safe and Healthy Students (Office of Elementary and Secondary Education). (May 2016). Examples of Policies and Emerging Practices for Supporting Transgender Students (archived). <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

⁷⁸ GLSEN. (2020). State Education Agency Recommendations. <https://www.glsen.org/activity/state-education-agency-recommendations>.

Attached resources to include:

- [GLSEN Civil Rights Principles For Safe, Healthy, & Inclusive School Climates](#)
- [GLSEN National School Climate Survey 2019](#)
- [GLSEN Erasure and Resilience reports on LGBTQ+ Students of Color](#)
- [GLSEN SEA Recommendations](#)
- [GLSEN/NCTE Model LEA TGNC Policy](#)
- [GLSEN Gender Affirming and Inclusive Athletics Participation](#)
- [GLSEN ESSA Federal Recommendations](#)
- [MAP/GLSEN Separation and Stigma: Transgender Youth & School Facilities](#)
- [NWLC Facts on Trans Inclusion in Athletics](#)
- [NWLC Transgender Students' Rights: FAQs](#)
- [NWLC 100 School Districts: A Call to Action for School Districts Across the Country to Address Sexual Harassment Through Inclusive Policies and Practices](#)