



NATIONAL ASSOCIATION OF
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The Honorable Catherine Lhamon
Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW
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**RE: Nondiscrimination on the Basis of Sex (including Sexual Orientation, Gender Identity, Sex Characteristics, and Sex Stereotypes) in Federally Funded Education Programs or Activities (87 FR 41390)
Docket ED-2021-OCR-0166**

The National Association of School Psychologists (NASP), which represents 25,000 school psychologists, is pleased to submit the following comments in response to the proposed rulemaking on Title IX of the Education Amendments of 1972 (Title IX). The Biden Administration has routinely affirmed the rights of transgender and gender diverse people and this proposed rule builds upon those actions. NASP applauds the Department's proposed revision of Title IX regulations to define "on the basis of sex" to include "on the basis of sexual orientation, gender identity, transgender status, sex stereotypes, or sex characteristics (including intersex traits)" and the detailed requirements to prevent and properly address sexual harassment, sexual assault and other forms of sex-based discrimination in our K-12 schools. NASP is committed to ensuring that all students attend school in an environment free from discrimination; as such, we are especially supportive of the enumerated protections in the proposed rule and the explicit acknowledgement of intersectionality and how Title IX interacts with other civil rights laws, including Section 504 of the Rehabilitation Act.

Students who are lesbian, gay, bisexual, transgender, queer, nonbinary, Two-Spirit, intersex, or who otherwise identify as LGBTQ+ commonly face barriers to equal access and opportunity in our K-12 schools and education systems. These barriers include discriminatory policies, discriminatory practices (including unfair and disproportionate discipline), harassment, bullying, and other forms of victimization. LGBTQ+ students who are transgender; nonbinary; Black, Indigenous, and people of color (BIPOC); and people with disabilities experience the most hostile school climates and compounded marginalization in education systems.

The proposed rule aligns with NASP's longstanding position on necessary enumerated policies and practices that support the civil, human, and educational rights of all students including those who identify as LGBTQ+. Students must be able to develop, express, and, when necessary, modify their gender identities, and have their identity affirmed and acknowledged in a school environment that is safe, equitable, inclusive, and free from discrimination, harassment, violence, and abuse. In recent years, barriers uniquely faced by LGBTQ+ students have been exacerbated, encouraged, and even mandated by policy proposals at both the federal and state levels that are symptomatic of a coordinated effort to denigrate, erase, and further stigmatize LGBTQ+ people and their families, particularly transgender children and youth and those who are BIPOC.¹

¹ See: Movement Advancement Project, "Equality Maps: Healthcare Laws and Policies," <https://www.lgbtmap.org/equality-maps/healthcare-laws-and-policies>; Movement Advancement Project, April 2021, LGBTQ Policy Spotlight: Efforts to Ban Health Care for Transgender Youth. www.lgbtmap.org/2021-spotlight-health-care-bans; GLSEN and TransAthlete.com (2022), "Navigator: Trans and Nonbinary Athletic Inclusion Policies," <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>; Movement Advancement Project, "Policy Spotlight: Curriculum Censorship & Hostile School Climate Bills, March 2022," www.lgbtmap.org/2022-spotlight-school-bills-report.

School psychologists are ethically obligated to speak up for the interests and rights of students and families, even when it may be difficult to do so.² The desire to accommodate others' reported discomfort does NOT justify a policy that singles out and disadvantages a particular class of students. The protection, acceptance, affirmation, and support of LGBTQ+ students can promote physical and psychological school safety, which allows for equal and equitable access to educational and personal attainment and can be *lifesaving*. Yet far too many educators who have stood up for the right and protections of LGBTQ+ students have been the target of egregious behavior by those who oppose equal rights for these students. Families are fearful that their children will have to hide information about their LGBTQ+ parents or siblings at school³, and some have made the difficult decision to uproot their families to protect their children from the impacts of anti-LGBTQ+ policies,⁴ including a policy that requires teachers to report the parents of transgender children for potential child abuse if the child is believed to be receiving gender-affirming care.⁵ Our children deserve better.

These proposed rules are consistent with case law, the landmark *Bostock v. Clayton County, Georgia* ruling, and provide strong legal standing for and affirmation of NASP's professional and ethical standards. Most importantly, the proposed revisions, when finalized, will support efforts to undo the harmful and discriminatory policies currently in place in many states and districts across the country and send a strong message that every student has value and discrimination has no place in education.

Ensuring an Educational Environment Free from Discrimination on the Basis of Sexual Orientation, Gender Identity, Sex Stereotypes, or Sex Characteristics (including Intersex Traits)

Anti-LGBTQ+ discrimination is a common and harmful barrier to equal access and opportunity in K-12 learning communities.⁶ Almost 60% of LGBTQ+ students, and more than 75% of transgender students, report experiencing anti-LGBTQ+ discrimination at school. Such discrimination includes: being denied the ability to use the bathroom or locker room that corresponds with their gender identity; being prevented from forming or promoting a Gender-Sexuality Alliance (GSA) or another LGBTQ+ affirming student club; and being disciplined because of their LGBTQ+ identity.⁷ This discrimination and mistreatment is detrimental to students' development and well-being and leads to negative academic and socio-emotional health consequences including truancy, drop-out, reduced grade attainment, depressed mood, anxiety, school phobia, self-injury, and suicidal ideation.⁸ Integrated educational settings where nondiscrimination is practiced are associated with positive educational, social, and cognitive outcomes for all students—both majority and minoritized group members—as well as long-term educational, economic, and civic outcomes.⁹

The Department's proposed new provision, §106.10, affirming that prohibited sex discrimination on the basis of sex encompasses discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes is an important and necessary revision to the Title IX regulations. The proposed regulation would further efforts to end discrimination in schools and aligns with school psychologists' ethical obligation to foster safe and supportive schools for all students. By updating the definition and understanding of "sex" to explicitly include accompanying features of an individual's identity, the Department would return Title IX to the longstanding

² Professional Standards of the National Association of School Psychologists.

³ See, e.g., Laura Meckler and Hannah Natanson, "New critical race theory laws have teachers scared, confused and self-censoring," *The Washington Post*, February 14, 2022, <https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/>; Jo Yurcaba, "Missouri teacher resigns after school tells him to remove Pride flag," *NBC News*, September 9, 2021, <https://www.nbcnews.com/nbc-out/out-news/missouri-teacher-resigns-school-tells-remove-pride-flag-rcna1959>.

⁴ See, e.g., Allie Spillyards, "Mother Moves Family Away from Texas to Protect Transgender Son," NDC 5 Dallas Fort Worth, <https://www.nbcdfw.com/news/local/mother-moves-family-away-from-texas-to-protect-transgender-son/2913635/>.

⁵ <https://www.edweek.org/policy-politics/texas-educators-say-they-dont-want-to-be-transgender-police/2022/03>

⁶ Joseph G. Kosciw, Caitlin M. Clark, Nhan L. Truong, and Adrian D. Zongrone, *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (New York: GLSEN, 2020), 49 – 51, <https://www.glsen.org/research/2019-national-school-climate-survey>.

⁷ Kosciw, et al., *The 2019 National School Climate Survey*, 40, 95, 99.

⁸ The Trevor Project. 2022 National Survey on LGBTQ Youth Mental Health. https://www.thetrevorproject.org/survey-2022/assets/static/trv01_2022survey_final.pdf

⁹ See National Association of School Psychologists. (2019). Prejudice, discrimination, and racism [Position Statement]. Bethesda, MD: Author; Kirwan Institute. (2009). The benefits of racial and economic integration in our education system: Why this matters for our democracy. Retrieved from http://www.kirwaninstitute.osu.edu/reports/2009/02_2009_EducationIntegrationBenefitsReport.pdf; and Wells, A. S., Fox, L., & Cordova-Cob, D. (2016). How racially diverse schools and classrooms can benefit all students. Retrieved from <https://tcf.o>

standard applied from 1997-2020 and ensure a marked improvement over the current standard, which requires schools to ignore sexual harassment unless it is “severe *and* pervasive” harassment that “effectively denies” equal access to education. NASP continues to oppose the current standard as it minimizes the impact of sexual harassment and victimization of students, including LGBTQ+ students, BIPOC students, and students with disabilities whose identity(s) may put them at higher risk for harms like harassment, sexual assault, or abuse. As such, NASP supports and appreciates the addition of ‘student with a disability’ in § 106.2.

Suggested Revisions

Ensure nondiscrimination policies and related notifications include prohibited sex-based discrimination as enumerated in proposed §106.10.

NASP supports the proposed revision of §106.8(b) and (c), which would improve clarity and dispel confusion regarding a school’s responsibility to publish and notify students, families, educators, and other staff of the adopted nondiscrimination policy. We urge the Department to fully enumerate sexual orientation, gender identity, sex characteristics (including intersex traits), sex stereotypes, and pregnancy or related conditions within the nondiscrimination policy detailed in §106.8(b)(1), and notification of the policy as described in §106.8(c)(1)(i).

This revision will ensure that a student or parent seeking recourse after an incident of targeted discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), sex stereotypes, and pregnancy or related conditions—does indeed have the right to seek recourse. Further, this will eliminate any confusion about the obligations of Title IX coordinators and other school personnel to respond to complaints. Studies have consistently found that explicitly enumerating these protections in school policies matters and is associated with less hostile school climates for LGBTQ+ students.¹⁰ For the much-needed clarification of Title IX’s broad scope under §106.10 to reach those who need it most, the Department should require full enumeration of the forms of prohibited sex-based discrimination enumerated in proposed §106.10 in state and local education agency policies.

Clarify that separate gender dress or appearance codes have violated Title IX and that students must be permitted to dress in accordance with their gender identities.

NASP is appreciative of the plain language examples of prohibited sex discrimination in cases where an individual is harassed because their dress, appearance, and/or gender expression are perceived as gender nonconforming in its discussion of proposed §106.10. However, the Department does not include a plain language discussion or examples of how school dress and appearance codes that impose different rules for boys and girls have facilitated sex discrimination in violation of Title IX, as case law has demonstrated. Transgender, nonbinary, and intersex students are particularly vulnerable to sex-based discrimination, as defined by proposed §106.10, when a dress or appearance code imposes separate rules based on binary gender categories. For example, a transgender girl may be disciplined for dressing in accordance with her gender identity and a school dress code that permits girls to wear skirts due to a discriminatory belief that she should be subject to dress code rules for boys instead.

The Department should clearly communicate that, where a dress or appearance code is in use, a gender-neutral code best supports all students’ wellbeing and compliance with Title IX.¹¹ Further, the Department should clarify that if a school uses a dress or appearance code with separate rules based on gender, transgender, nonbinary, and intersex students must be permitted to dress in accordance with their gender identities and school staff must not enforce a

¹⁰ William J. Hall, “The effectiveness of policy interventions for school bullying: A systematic review,” *Journal of the Society for Social Work and Research* 8, no. 1: 45-69. <https://pubmed.ncbi.nlm.nih.gov/28344750/>.

Mark L. Hatzembuehler and Katherine M. Keyes, “Inclusive Anti-bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth,” *Journal of Adolescent Health* 53, no. 1 (2021): S21-S26; Ryan M. Kull, Emily A. Greytak, Joseph G. Kosciw, and Christian Villenas, “Effectiveness of school district antibullying policies in improving LGBT youths’ school climate,” *Psychology of Sexual Orientation and Gender Diversity* 3, no. 4 (2016): 407;

¹¹ National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students. [Position Statement]. Examples of a gender neutral dress code include the GISEN and NCTE, “Model Local Education Agency Policy on Transgender and Nonbinary Students,” October 2020, <https://www.glsen.org/activity/model-local-education-agency-policy-on-transgender-nonbinary-students>.

dress or appearance code more strictly against any group of students. Even where a school ensures a separate gender dress or appearance code permits transgender, nonbinary, and intersex students to dress in accordance with their gender identities, the Department should make clear that a school nonetheless risks violating Title IX. For example, an appearance code that requires boys to keep their hair short while permitting girls to have long hair may result in more than *de minimis* harm, including emotional or dignity harm, especially where maintaining long hair is culturally meaningful to boys and men.¹²

Provide further clarity regarding prohibited sex-based discrimination in the context of separate gender facilities, programs, and activities

NASP supports the clarification provided in proposed §106.31(a)(2) that exceptions under Title IX, which permit sex-segregated programs or activities in certain narrow contexts, do not permit discrimination on the basis of gender identity. However, we urge the Department to include explicit language, and specific plain language examples, noting that to prevent access or participation consistent with a student's gender identity in the context of separate gender classes, school restrooms and locker rooms, housing, and overnight accommodations for school trips is a violation of Title IX. In addition, we urge the Department to clearly state that requiring a student to use a gender-neutral restroom instead of using a gender specific restroom, in correspondence with their gender identity, is also a violation of Title IX. Two states have enacted laws barring transgender students from using the bathroom and locker room consistent with their gender identity and others have recently considered legislating discrimination in this area.¹³ Furthermore, requiring a student to use a specific restroom potentially outs the individual as being transgender and singles them out for the discrimination Title IX is intended to prevent.

NASP appreciates the Department's plans to engage in rulemaking related to participation in school sports. Formal rulemaking in this area is imperative, especially in light of the discriminatory policies that have been debated and enacted over the last two years.¹⁴ We urge the Department to promulgate rules, in alignment with NASP's position¹⁵, that clearly state Title IX requires inclusive participation on sports teams and other sex segregated activities that correspond with a student's gender identity. In addition, the Department must specify that the use of invasive medical examinations to confirm or challenge one's gender identity is a violation of Title IX. We urge the Department to move swiftly with this separate rulemaking process to facilitate the issuance of one, comprehensive and final rule in early 2023.

Ensuring an Educational Environment Free from Discrimination in the form of Sex-Based Harassment

Anti-LGBTQ+ discrimination includes failing to respond effectively to harassment, bullying, and other forms of peer-to-peer victimization related to actual or perceived sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes, including by denying such targeted victimization occurred at all, telling victims to "ignore it," or otherwise fostering a hostile environment in which anti-LGBTQ+ victimization is effectively condoned. Transgender, nonbinary, and intersex youth experience marginalization through increased rates of harassment, abuse, and peer victimization when compared to their cisgender peers, which can result in acute or chronic mental health concerns.¹⁶ Further, anti-LGBTQ+ victimization is associated with a range of harmful educational and wellbeing outcomes, including increased absences, lower GPAs, decreased likelihood of pursuing post-secondary education, lower self-esteem, higher levels of depression, and suicidality.¹⁷ Alarming, more than half of transgender and gender diverse youth report having significantly considered suicide within the past year and 21%

¹² National Association of School Psychologists. (2020). Effective service delivery for Indigenous children, youth, families, and communities [Position Statement].

¹³ Alabama (H.B. 322, 2022) and Oklahoma (S.B. 615, 2022) have enacted anti-trans school bathroom laws. Arizona (H.B.2314, 2022), South Dakota (H.B. 1005, 2002), and West Virginia (H.B. 3199, 2021) recently considered anti-trans school bathroom bills.

¹⁴ "Navigator: Trans and Nonbinary Athletic Inclusion Policies, 2022, <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>; "Gender Affirming and Inclusive Athletics Participation," 2022, <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation>.

¹⁵ National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students. [Position Statement].

¹⁶ See National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students [Position Statement]. 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. GLSEN. <https://www.glsen.org/research/2019-national-school-climate-survey>

¹⁷ Kosciw, et al., *The 2019 National School Climate Survey*, 46-54; Johns, et al., "Trends in violence victimization and suicide risk by sexual identity among high school students"; Johns, et al., "Transgender identity and experiences of violence victimization, substance use, suicide risk, and sexual risk behaviors among high school students." *2022 National Survey on LGBTQ Youth Mental Health* (West Hollywood, California: The Trevor Project, 2022). <https://www.thetrevorproject.org/survey-2022/>.

having attempted it.¹⁸ LGBTQ+ people also experience elevated rates of sexual harassment and violence in K-12 educational settings.¹⁹ This underscores the importance of fostering protective factors to mediate risk factors. LGBTQ+ youth of color and those with disabilities may require additional supports to integrate what, at times, may feel like conflicting aspects of self (e.g., race, ethnicity, religion, parental expectations, societal expectations, sexual orientation, gender identity, and internalized homophobia and transphobia) to experience self-fulfillment. LGBTQ+ students 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 school belonging, and experience the highest levels of depression, compared to those who experience one or neither form of victimization.²⁰ We thank the Department for returning to the broader definition of “hostile environment” harassment that was used prior to the 2020 rule, and for clarifying that any sex-based harassment that creates a hostile environment—including harassment based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes as well as harassment that takes place off-campus—is prohibited. These proposed revisions are necessary to send a clear message that anti-LGBTQ+ harassment is unacceptable and to ensure students who are victims of anti-LGBTQ+ harassment have recourse.

Clarify that the persistent, intentional misuse of a name, personal pronoun, or gendered title constitutes prohibited sex-based harassment

NASP asserts that using student’s chosen name and pronouns supports healthy psychosocial and academic development, a sense of belonging in educational programs and activities, as well as physical and psychological school safety for LGBTQ+ students.²¹ We urge the Department to include plain language examples and summaries of relevant case law to clarify that mocking, taunting, ridiculing, or otherwise intentionally misusing a name, personal pronoun, or title creates a hostile environment for transgender, nonbinary, intersex, and gender nonconforming students, and is a violation of Title IX. For example, the Department should consider summarizing its recent resolution finding that a school district violated Title IX when it failed to effectively respond to a transgender student being repeatedly harassed by another student “about... her name... and her pronouns.”²² Intentional misuse of a name or pronoun could risk disclosure of a student’s transgender status without their consent. This could endanger their physical safety and could represent a violation of FERPA. Following the publication of the final rule, we urge the Department to issue clear guidance outlining how Title IX regulation intersects with existing student privacy and other civil rights protections.

Ensuring a Fair, Prompt, and Effective Process for All Complaints of Sex-Based Discrimination, including anti-LGBTQ+ Harassment

Many schools fail to respond effectively to complaints of sex-based discrimination, including anti-LGBTQ+ discrimination, harassment, and bullying. For example, among LGBTQ+ students who told school staff that they had been harassed or bullied, 60% said school staff did nothing or told them to ignore it, 20% said they were told to change their behavior, and 7.3% were themselves disciplined.²³ The most recent data continue to reinforce these

¹⁸ 2022 *National Survey on LGBTQ Youth Mental Health* (West Hollywood, California: The Trevor Project, 2022). <https://www.thetrevorproject.org/survey-2022/>.

¹⁹ Jieru Chen, Mikel L. Walters, Leah K. Gilbert, and Nimesh Patel, “Sexual violence, stalking, and intimate partner violence by sexual orientation, United States,” *Psychology of violence* 10, no. 1 (2020): 110–119; Johns, et al., “Trends in violence victimization and suicide risk by sexual identity among high school students”; Johns, et al., “Transgender identity and experiences of violence victimization, substance use, suicide risk, and sexual risk behaviors among high school students”; Laura Kann, Emily O’Malley Olsen, Tim McManus, William A. Harris, Shari L. Shanklin, Katherine H. Flint, Barbara Queen, et al., “Sexual identity, sex of sexual contacts, and health-related behaviors among students in grades 9–12—United States and selected sites, 2015,” *Morbidity and Mortality Weekly Report: Surveillance Summaries* 65, no. 9 (2016): 1-202.

²⁰ Truong, et al., *Erasure and resilience: The experiences of LGBTQ students of color. Asian American and Pacific Islander LGBTQ youth in U.S. Schools*, 17; Truong, et al., *Erasure and resilience: The experiences of LGBTQ students of color. Black LGBTQ youth in U.S. Schools*, 16; Zongrone, et al., *Erasure and resilience: The experiences of LGBTQ students of color. Latinx LGBTQ youth in U.S. Schools*, 17.

2022 *National Survey on LGBTQ Youth Mental Health* (West Hollywood, California: The Trevor Project, 2022), <https://www.thetrevorproject.org/survey-2022/>.

²¹ National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students [Position Statement].

²² U.S. Department of Education, Office for Civil Rights, “Office for Civil Rights Announces Resolution of Sex-Based Harassment Investigation of Tamalpais Union High School District,” June 24, 2022, <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-sex-based-harassment-investigation-tamalpais-union-high-school-district>.

²³ Kosciw, et al., *The 2019 National School Climate Survey*;

Neal A. Palmer, Emily A. Greytak, and Joseph G. Kosciw, *Educational exclusion: Drop out, push out, and the school-to-prison pipeline among LGBTQ youth*, (New York: GLSEN, 2016), <https://www.glsen.org/research/educational-exclusion-drop-out-push-out-school-prison-pipeline>; Kosciw, et al., *The 2019 National School Climate Survey*.

findings and also show that individuals with Autism (who identify as non-heterosexual at twice the rate of their typical peers²⁴) are also three times more likely than the general population to experience sexual violence.²⁵ This prevalence underscores the importance of a law protecting those who are at greater likelihood of targeted discrimination.

NASP strongly supports proposed revisions that would ensure all meritorious complaints are handled fairly, promptly, and effectively, including:

- §106.44 clarifying that schools must “take prompt and effective action to end any sex discrimination ... prevent its recurrence and remedy its effects.” We also appreciate the clear acknowledgement (proposed §106.2 and 106.44(g)(7)) that efforts to provide supportive services and investigate claims of discrimination that involve a student with disability in the K-12 must be done in coordination with members of the student’s IEP or Section 504 team.
- § 106.44(c) stating that “removals” now include “any threat to physical or nonphysical health or safety and the clarification that emergency removal” does not modify any rights under the IDEA, Section 504, or the Americans with Disabilities Act of 1990 (ADA).
- § 106.6(g) noting that an “other authorized legal representative” in addition to “a parent” or “guardian” may [also] have a legal right to act on a student’s behalf, including by making a complaint on behalf of a complainant. We also support maintaining that the student is always the complainant.
- § 106.71 prohibiting any school or person from retaliating against anyone because they reported sex discrimination or participated or refused to participate in an investigation or informal resolution of such incidents in § 106.71. Furthermore, we support the proposed rules requiring schools to offer supportive measures to individuals who report retaliation and to investigate complaints of retaliation, including peer retaliation. This includes support offered by school mental health support staff, including but not limited to school psychologists.

We ask that the Department clarify in the regulations that retaliation includes:

- Disciplining a complainant for behavior that the school knows or should know results from the harassment or other discrimination (e.g., missing school, expressing trauma, telling others about being harassed);
- Requiring a complainant to leave an education program (e.g., to take leave, transfer to another class or school, or enroll in “alternative school”); and
- Requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, an informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations.

Given the high prevalence of schools punishing student survivors including LGBTQ+ survivors, BIPOC survivors, and survivors with disabilities, the proposed provisions at § 106.71 are absolutely necessary. We also ask that you add clarifications to the section which outline what retaliation includes. This would ensure that the Title IX complaint process is fair, prompt, effective, and safe for all students.

Ensuring Appropriate Implementation of Title IX’s Religious Exemption

Title IX’s prohibition of discrimination on the basis of sex, including discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes applies to all schools receiving federal funds, including private religious schools. Private religious schools controlled by a religious organization may claim an exemption to the extent that the application of Title IX would be inconsistent with the religious tenets of the controlling organization.

Many LGBTQ+ people are people of faith and seek out a religiously affiliated education.²⁶ LGBTQ+ students may require additional supports and protections, including those provided in the educational setting, to integrate what may

²⁴ R. George, M.A. Stokual, *Orientation in Autism Spectrum Disorder*, *Autism Res* 1, 133-141 (2018): <https://pubmed.ncbi.nlm.nih.gov/29159906/>

²⁵ Cazalis Fabienne, Reyes Elisabeth, Leduc Séverine, Gourion David, *Evidence That Nine Autistic Women Out of Ten Have Been Victims of Sexual Violence*, 16 *Frontiers in Behavioral Neuroscience*, (2022), at: <https://www.frontiersin.org/articles/10.3389/fnbeh.2022.852203/full>

feel like conflicting aspects of self (e.g. gender identity, sexual orientation, religion, socialized transphobia).²⁷ Because all denominations and faith traditions have internally varied views on gender and sexuality, simply knowing a school's denomination or faith tradition does not provide adequate notice to students and families of a school's intention to discriminate based on sex, including sexual orientation and gender identity, and/or allow for anti-LGBTQ+ harassment by students and staff.

Two sets of harmful regulations promulgated in 2020 must be addressed. One such rule enables, and possibly encourages, a deliberate lack of transparency and clarity regarding a school's intent to discriminate based on sex due to a claimed religious exemption to Title IX.²⁸ A separate rule authorized an expansive, extra-statutory interpretation of "controlled by a religious organization."²⁹ Both of these are wholly inconsistent with the intent of Title IX and relevant case law.

We urge the Department to swiftly issue proposed Title IX regulations that rescind the egregious extra-statutory interpretation of "controlled by a religious organization" in §106.12(c) and require prior submission of religious exemption claims. At a minimum, we urge the Department to require that schools publish claimed exemptions within the nondiscrimination policy detailed in §106.8(b)(1), as well as within the contents of a notice of nondiscrimination described in §106.8(c)(1)(i). These requirements would impose negligible burdens compared with the potential for fundamentally unfair surprises and harms to students who may be disciplined, expelled, pushed out, or denied a degree on the basis of sex. Moreover, allowing schools to not disclose that they claim a religious exemption undermines the Department's efforts to improve clarity regarding school's nondiscrimination policies and notice thereof in proposed revisions to §106.8(b) and (c).

Ensuring Strong Implementation of Title IX's Nondiscrimination Protections

While this rulemaking is essential, it must be part of a comprehensive approach to strengthening awareness of Title IX's protections, as well as compliance and enforcement. To that end, the Department should take the following steps:

- **Supplement the final rule with technical assistance resources that further clarify particular applications of the rule's core principles**, including by addressing interactions and intersections with the Family Educational Rights and Privacy Act (FERPA), the Equal Access Act, Title VI of the Civil Rights Act, Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act and other relevant law.
- **Highlight examples of laws and policies that are in direct conflict with Title IX.** As stated previously, there is unprecedented effort to sanction discrimination and erasure of LGBTQ+ students, and those with intersectional identities, in both state law and state and local policy. The Department must send a clear message that discrimination will not be tolerated and those who seek to advance discriminatory policy or practice will be held accountable.
- **Annually report disaggregated OCR complaint data**, including disaggregated data on claims involving discrimination based on sexual orientation, gender identity, sex characteristics (including intersex traits), and sex stereotypes or anti-LGBTQ+ harassment.
- **Publicize key case resolutions** for complaints involving anti-LGBTQ+ discrimination or harassment, including the specific actions required to remedy harm and prevent future discrimination.

²⁶Kerith J. Conron, Shoshana K. Goldberg, and Kathryn Kay O'Neill, *Religiosity Among LGBT Adults in the US* (Los Angeles, CA: The Williams Institute, 2020), 5 <https://williamsinstitute.law.ucla.edu/publications/lgbt-religiosity-us/>.

Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, and Ma'ayan Anafi, *The report of the 2015 US transgender survey* (Washington, DC: National Center for Transgender Equality, 2016), 54, 77-78, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

²⁷ National Association of School Psychologists. (2022). Safe and Supportive Schools for Transgender and Gender Diverse Students. [Position Statement].

²⁸ U.S. Department of Education, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 85 FR § 97, 30573 (May 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf#page=548>.

²⁹ U.S. Department of Education, "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, and Strengthening Historically Black Graduate Institutions Program; Final rule," 85 FR § 185, 59980-81 (Sept. 23, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-20152.pdf#page=65>.

- **Strengthen the Civil Rights Data Collection**, including by collecting and publishing demographic data on students who report, or are disciplined for, anti-LGBTQ+ harassment or bullying and by publishing local education agency’s policies for preventing bias-related bullying and harassment.
- **Engage and promote affirming visibility for LGBTQ+ students and educators**, including their voices, stories, and achievements in Department events and publications.
- Work with the Office of Elementary and Secondary Education (OESE) and the Office of Special Education and Rehabilitative Services (OSERS), in collaboration with the National Association of School Psychologists, and other organizations with expertise, to **publish best practice resources** to prevent discrimination on the basis of sex and provide support for LGBTQ+ students and students with disabilities. This must include **professional development** for educators and administrators in understanding Title IX, identifying violations of Title IX, and taking proactive steps to prevent subsequent instances of targeted harassment and discrimination.
- Work with OESE and OSERS to **advance intersectional equity under the Every Student Succeeds Act (ESSA) and other federal funding programs**, including through updated guidance on authorized uses of funds for state and local education agencies.
- **Work with the Department of Justice and other agencies to amend the Title IX common rule**, adopted more than two decades ago, to make clear that the same prohibitions on sexual harassment and anti-LGBTQ+ discrimination, including anti-LGBTQ+ harassment, apply.

Conclusion

NASP is committed to advancing policy and practice that promotes equity in opportunity, access, and outcomes. School psychologists protect youth civil and human rights by affirming and validating the diversity of their cultural and individual differences. The Department’s proposed Title IX rule restores and strengthens federal civil rights protections, drawing us closer to the promise of educational environments free from discrimination on the basis of sex. This makes school psychologists’ work of protecting the civil and human rights of all youth that much more feasible and unassailable. For transgender, nonbinary, and other LGBTQ+ students who have been bullied, barred from school facilities and activities, and blamed for their victimization, the proposed rule clearly communicates that anti-LGBTQ+ discrimination will not be tolerated, is unlawful, and that they have recourse should it occur. The clarifications detailed within the proposed rule are necessary for students, families, educators, school psychologists, school staff, administrators, and all who are part of K-12 learning communities to understand their rights and responsibilities under Title IX and support their efforts to create safe, supportive, and inclusive schools and a positive school climate for all young people who are at risk of experiencing sex-based discrimination.

We thank the Department for its continued commitment to ensuring that every student, including those who are LGBTQ+ and otherwise experience marginalization, is safe and has equal opportunities to thrive and reach their full potential in our schools. We look forward to continuing to work with the Department to fully implement the final Title IX rule. If you would like to discuss these recommendations, please contact NASP Director of Policy and Advocacy, Kelly Vaillancourt Strobach (kvaillancourt@naspweb.org).

Sincerely,



Kathleen Minke, PhD, NCSP
Executive Director