National Alliance to
End Sexual Violence

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Submitted via www.regulations.gov

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Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW
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Catherine E. Lhamon
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Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona and Assistant Secretary Lhamon:

The National Alliance to End Sexual Violence along with the 79 undersigned organizations who advocate for survivors of sexual violence and the prevention of sexual violence are pleased to submit this comment in response to the Department of Education's proposed regulations under Title IX of the Education Amendments of 1972 ("Title IX").[1]

As we celebrate the 50th anniversary of Title IX this year, we recognize that much progress has been made to address sex discrimination in education, but that many inequities and challenges remain. Sex-based harassment, including sexual harassment, is both widely prevalent and underreported at all levels of education, and student survivors are often ignored, punished, or otherwise pushed out of school when they ask for help. In addition, LGBTQI+ students face high rates of harassment, assault, and other discrimination based on their sexual orientation and/or their gender identity, including an unprecedented wave of attacks on their rights through state policies that especially target transgender students.

We appreciate that the Department of Education ("the Department") is taking steps to undo the previous administration's harmful changes to the Title IX regulations by proposing new regulations to effectuate the law's broad and remedial purpose, as Congress intended when it passed Title IX in 1972. At the same time, we note that the Department's proposed regulations do not reach far enough in protecting against sex discrimination in education. To that end, we offer the following comments regarding the Department's

[1] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), *available at* https://federalregister.gov/d/2022-13734.

proposed regulations in Part I (protections against sex-based harassment); Part II (protections for LGBTQI+ students); and Part IV (other protections against sex discrimination):

I. Protections Against Sex-Based Harassment

A. When Schools Must Address Sex-Based Harassment

Definition of sex-based harassment. We support the proposed rules defining sex-based harassment to include sexual harassment and other harassment on the basis of sex (including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity) when this harassment takes the form of "quid pro quo harassment," "hostile environment harassment," sexual assault, dating violence, domestic violence, or stalking.[2] We also support the proposed rules more broadly—and appropriately—defining "hostile environment harassment" as sufficiently "severe *or* pervasive" sex-based harassment that "denies or limits" a person's ability to participate in or benefit from an education program or activity.[3] This would be a return to the Department's longstanding standard applied from 1997-2020[4] and a marked improvement over the current standard, which requires schools to ignore sexual harassment unless it is "severe *and* pervasive" harassment that "effectively denies" equal access to education.[5] We also urge the Department to define sex-based harassment to include harassment on the basis of parental, family, caregiver, or marital status (see **Part III.A: Parental, family, or marital status** below).

Location of harassment. We support the proposed rules requiring schools to respond to all sex-based harassment (or other sex discrimination) "occurring under [their] education program or activity," which includes conduct that a school has disciplinary control over or that occurs in a building owned or controlled by an officially recognized student organization at a college or university.[6] The preamble states that this means schools would be responsible for addressing incidents that occur off-campus or in a study abroad program, so long as it contributes to a hostile environment in school (*e.g.*, due to the harasser's continued presence on campus or their additional harassment of the complainant), and we urge the Department to expressly state in the regulations that Title IX covers off-campus school-sponsored activities.[7]

Dismissals. We support the proposed rules removing the 2020 rules' mandatory dismissal provisions, which, among other things, currently require schools to dismiss Title IX complaints of sexual harassment

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[2] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2), 41571 (proposed 34 C.F.R. § 106.10).
[3] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2(2)).
[4] *See, e.g.*, Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017) [hereinafter 2014 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020) [hereinafter 2001 Guidance], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.
[5] 34 C.F.R. § 106.30(2). While we support a return to the broader standard, it still may create burdens for survivors by requiring an inquiry into how a student's education is limited or impacted by harassment. For example, a school might interpret this to require a student to make a showing of lower grades, which would ultimately create a barrier to reporting, because without such a showing, the harassment might not rise to the level of "severe or pervasive" such that it "denies or limits" their ability to participate in or benefit from the education program or activity.
[6] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).
[7] *Id. See also id.* at 41403.

by individuals who were not students or employees of the school at the time they filed their complaint.[8] Under the proposed rules, schools would be required to address complaints by individuals who are not current students or employees of the school (*e.g.*, applicants, visitors, graduates, former employees), so long as the individual was participating or trying to participate in the school's program or activity at the time they *experienced the harassment (or discrimination)*.[9] The proposed rules would allow schools to dismiss a complaint where a respondent has transferred, graduated, or retired, as long as they provide supportive measures and take other "prompt and effective steps" to ensure the harassment or discrimination does not continue or recur.[10] We urge the Department to clarify that such "steps" may include, but are not limited to, providing training, investigating to determine whether there have been other victims and whether other school staff knew about the incident(s) but ignored it, or took steps to cover it up.

Notice of harassment. We appreciate that the proposed rules would *allow* schools to designate some employees as "confidential employees" (and would require those schools to notify students of the confidential employees' identities).[11] However, we urge the Department to instead *require* that schools designate one or more confidential employees, who, upon learning of possible sex-based harassment (or other sex discrimination), must tell that person how to report it to the Title IX coordinator and how the Title IX coordinator can help them—*e.g.*, offer supportive measures (even without an investigation), open an investigation, or facilitate an informal resolution. We also encourage the Department to clarify that confidential employees are not required to serve as advisors in investigations unless the survivor makes that request. Moreover, we recommend language that schools are encouraged to enter into memoranda of understanding with local community-based organizations that serve survivors to provide confidential employees. It is important to point out that state confidentiality and privilege laws vary with regard to advocating for sexual assault survivors. In states where community-based rape crisis centers are granted privileged communication, these programs may be the only truly confidential option for survivors. The status of an employee or advocate as confidential should be clearly indicated and a clear explanation of the scope and limits of that confidentiality should be shared with all students. This would protect victims' autonomy and privacy if they want to speak with a confidential resource for support and to understand their options before deciding whether to formally make a complaint.[12]

For K-12 schools, the proposed rules would require all non-confidential employees to report possible sex-based harassment (or other sex discrimination) to the Title IX coordinator. We support this requirement when the alleged victim is a minor student (as typically is the case in the K-12 context), but we ask the Department to use a different approach when the alleged victim is an adult employee—for example, see our recommendation below for responding to alleged victims who are employees in institutions of higher education.

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[8] 34 C.F.R. § 106.30(a) (defining "formal complaint"); 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2). While the 2020 rules make an exception if an individual filing a complaint was an applicant who intended to enroll in the school, and for an alumnus who intended to stay involved in alumni programs, this mandatory dismissal provision still currently leaves scores of individuals without protections under Title IX in the wake of sex-based harassment.

[9] 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2).

[10] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)-(iii)). *See also id.* at 41573 (proposed 34 C.F.R. § 106.44(f)(6)). These measures could range from the Title IX coordinator barring a third party (*e.g.*, former student or employee) from the school's campus if the coordinator discovers that they are attending school events and committing further harassment, to leading staff trainings on how to monitor for risks of sex discrimination in a specific class, department, athletic team, or program where discrimination has been previously reported. *See id.* at 41446-47.

[11] 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2 ("confidential employee"), 41573 (proposed 34 C.F.R. § 106.44(d)).

[12] In K-12 schools, however, schools may be limited in keeping some reports of sex-based harassment confidential because of obligations imposed by state mandatory reporting laws requiring many school employees to report possible child abuse to law enforcement.

For institutions of higher education, the proposed rules would create different reporting obligations for three categories of non-confidential employees: (i) those with "administrative leadership, teaching, or advising roles"; (ii) those with the authority to institute corrective measures; and (iii) all other employees, as well as different reporting obligations for some of these categories depending on whether the alleged victim is a student or employee.[13] We urge the Department to simplify reporting obligations and to acknowledge the privacy and autonomy rights of students and employees in higher education, who are typically adults.[14] First, employees with the "authority to institute corrective measures" should still be required to report all possible sex-based harassment (or other sex discrimination) to the Title IX coordinator, except when they learn of an incident from a public awareness event like Take Back The Night.[15] These employees' reporting obligations should be clearly indicated, for example on their office doors, in their email signatures, on their website profiles, in employee directories, and in other relevant locations.[16] Second, all other non-confidential employees should be required to tell the person: (i) how to report to the Title IX coordinator, who can offer supportive measures and, if requested, an investigation or informal resolution; and (ii) how to reach a confidential employee, who can provide confidential supports and services.[17] These employees should also be required to ask if the person would like them to report the incident to the Title IX coordinator, and if so, to report it as requested.[18] This approach would ensure victims can choose to speak with a confidential employee, learn about their reporting options, and can ask any non-confidential employee to report an incident to the Title IX coordinator.

Finally, given the complexities with requiring employees to report harassment or other discrimination to the Title IX coordinator, the Department should issue supplemental guidance instructing schools on how to respond to possible harassment or other discrimination while protecting the privacy and safety of LGBTQI+ students and employees (who may not wish to be outed to their parents or the school) and of pregnant students and employees (who may be at risk of criminalization if they seek an abortion or have a miscarriage).

B. How Schools Must Address Sex-Based Harassment

Standard of care. We support the proposed rule requiring schools to take "prompt and effective action" to end sex-based harassment (or other sex discrimination), prevent it from recurring, and remedy its effects on all people harmed.[19] This would be a welcome return to the standard of care previously required by the Department from 2001 until 2020 and a much-needed change from the current rules' harsh "deliberate indifference" standard, which allows schools to act less reasonably in response to sex-based harassment.[20]

Supportive measures. We support the proposed requirement for schools to offer supportive measures at no cost to individuals who report sex-based harassment (or other sex discrimination), regardless of

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[13] 87 Fed. Reg. at 41572-73 (proposed 34 C.F.R. § 106.44(c)(2)).
[14] While some students at institutions of higher education are minors, education laws like FERPA give them their own privacy rights, unlike minors in K-12 schools, whose privacy rights belong to their parents. *See* 20 U.S. Code § 1232g(d).
[15] While the proposed rules do not obligate the Title IX coordinator to do anything in response to possible sex-based harassment disclosed at public awareness events, the proposed requirement for employees to report such information to the Title IX coordinator could nevertheless chill student participation in classes and at public awareness events. 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(e)).
[16] Merle H. Weiner, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166, at 13-14 (Aug. 14, 2022).
[17] Kathryn J. Holland, Letter to Dep't of Educ., RE: Docket ID ED-2021-OCR-0166, at 6-7.
[18] Weiner, *supra* note 18, at 10, 12-14; Holland, *supra* note 19, at 6-7.
[19] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).
[20] 34 C.F.R. § 106.44(a); 2001 Guidance, *supra* note 4, at 10-12, 14-15, 23.

whether they request an investigation or an informal resolution,[21] and even if their complaint is dismissed.[22] We also support the proposed rules allowing schools to change a respondent's schedule in order to protect a complainant's safety or the school environment or to prevent further incidents.[23] While we appreciate the preamble's explanation that schools would be allowed to impose a "one-way no-contact order" against a respondent,[24] we ask the Department to clarify this in the regulations themselves, as it is a common point of confusion among schools and students. We also urge the Department to explicitly clarify in the regulations that if a party requests a certain supportive measure and it is "reasonably available,"[25] then the school must provide it; and if the school is aware that the supportive measure offered is ineffective, then the school must modify it or offer additional supportive measures.[26] Finally, we ask the Department to expand the list of examples of supportive measures to note the availability of academic supportive measures, so that students and employees are aware of what specific types of help their school can offer to ensure they keep up their grades and stay physically and mentally safe.[27]

Informal resolutions. In general, we support the proposed rules allowing schools to use an informal resolution to resolve student-on-student sex-based harassment (or other sex discrimination), subject to certain safeguards,[28] including a ban on using any information obtained solely through an informal resolution in an investigation.[29] However, we urge the Department to require all parties to give "written consent" to an informal resolution (not simply "consent"). Furthermore, we recommend that the Department expressly clarify that schools may use a restorative process as a type of informal resolution to resolve sex-based harassment (or other discrimination), but that they may not use mediation or other conflict resolution processes, as harassment (or other discrimination) is not a "conflict" where the victim and harasser share blame.[30]

Retaliation. We support the proposed rules prohibiting any school or person from retaliating against anyone because they reported sex-based harassment (or other sex discrimination) or participated or refused to participate in an investigation or informal resolution of such incidents.[31] Given the high prevalence of schools punishing student survivors,[32] we support the clarifications that schools may not

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[21] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.44(g)).
[22] 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)).
[23] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 ("supportive measures")); *id.* at 41573 (proposed 34 C.F.R. § 106.44(g)(1)).
[24] 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(1)); *id.* at 41450 ("one-way no-contact orders").
[25] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 ("supportive measures")).
[26] *Doe v. Sch. Bd. of Broward Cty., Fla*., 604 F.3d 1248, 1261 (11th Cir. 2010) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist*., 231 F.3d 253, 261 (6th Cir. 2000)).
[27] For example, we recommend adding at proposed § 106.44(g)(1): allowing a complainant to resubmit an assignment or retake an exam; adjusting a complainant's grades or transcript; if the instructor is the harasser, independently re-grading the complainant's work; preserving a complainant's eligibility for a scholarship, honor, extracurricular, or leadership position, even if they no longer meet a GPA, attendance, or credit requirement; and reimbursing tuition or providing a tuition credit to a complainant who does not complete a course due to harassment.
[28] The proposed rules would allow schools to use an informal process as long as all parties receive written notice of their rights and obligations, give consent to the process, can withdraw at any time before the end to do a traditional investigation, and are not required to participate in an informal resolution or to waive their right to an investigation in order to continue accessing any educational benefit; and as long as the school believes an informal resolution is appropriate (*e.g.*, the alleged conduct would not pose a future risk of harm to others). 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(1)-(2)).
[29] 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(3)(vii)).
[30] Conflict resolution, including mediation, is inappropriate for resolving sex-based harassment, because such processes assume both the victim and harasser share responsibility for the harassment, can allow harassers to pressure survivors into inappropriate resolutions, and often require direct interaction between the parties, which can be retraumatizing. In contrast, a restorative process requires the harasser to admit that they harmed the victim, center the victim's needs, repair the harm they caused, and change their future behavior.
[31] 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2 ("retaliation").
[32] *See*, *e.g.*, Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 13-16 (Mar. 2021), https://www.knowyourix.org/thecostofreporting; Zachary Hansen, *Fayette teen sues school district, says she was expelled for reporting sexual assault*, Atlanta Journal-Constitution (Aug. 27, 2019), https://www.ajc.com/news/crime--law/fayette-teen-sues-school-district-says-she-was-expelled-for-reporting-sexual-assault/wiSFAISB

discipline someone for non-harassing conduct that "arises out of the same facts and circumstances" as the reported incident[33] (*e.g.*, alcohol or drug use, self-defense); or for making a false statement or engaging in consensual sexual conduct based solely on the school's decision of whether sex-based harassment (or other sex discrimination) occurred.[34] 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.[35] Finally, we ask that the Department clarify in the regulations that retaliation includes: (i) disciplining a complainant for conduct that the school knows or should know "results from" the harassment or other discrimination (*e.g.*, missing school, expressing trauma, telling others about being harassed); (ii) disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (*e.g.*, a disciplined respondent files a counter-complaint against their victim alleging the victim was the actual harasser); (iii) requiring a complainant to leave an education program (*e.g.*, to take leave, transfer, enroll in "alternative school"); and (iv) 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.[36]

Preemption. We strongly support the proposed removal of the current provision that prevents schools from complying with a state or local law that conflicts with the Title IX regulations and provides greater protections against sex discrimination, including harassment.[37] This proposed change would return Title IX to its proper role as a floor—not a ceiling—for civil rights protections.

Monitoring and training. We support the proposed rules requiring schools' Title IX coordinators to address barriers to reporting sex discrimination.[38] We also appreciate the preamble encouraging schools to conduct surveys on how often students experience sex discrimination without reporting it and to take additional measures to eliminate barriers to reporting for students from marginalized communities,[39] and we ask that the Department give more specific examples of such measures in supplemental guidance after the regulations are finalized. In addition, we support the proposed requirement for all employees to

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[33] 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.71(a)).

[34] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(5)). The proposed rules would prohibit this type of discipline but would not define it as retaliation; we urge the Department to expressly state that it is prohibited retaliation.

[35] 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71).

[36] *See* Letter from Equal Rights Advocates, L.L. Dunn Law Firm, PLLC, and 35 Other Survivor Advocate Organizations to Catherine Lhamon, Ass't Sec'y for Civil Rights (June 2, 2022), https://www.equalrights.org/wp-content/uploads/2022/06/20220602-Letter-to-OCR-Regarding-Title-IX-Unconscionable-Agreements.pdf.

[37] 87 Fed. Reg. at 41404; *see also* 34 C.F.R. § 106.6(h).

[38] 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(b)).

[39] 87 Fed. Reg. at 41436. The preamble also stipulates that, to minimize barriers to reporting, a Title IX coordinator could participate in public awareness events to obtain feedback from students and employees about sex discrimination, or regularly solicit anonymous feedback via email from students and employees about barriers they have encountered to reporting sex discrimination. *Id.*

be trained on their own obligations and their school's obligations to address sex discrimination[40] and for all employees involved in Title IX investigations and informal resolutions to be properly trained as well.[41]

C. How Schools Must Investigate Sex-Based Harassment

Time-frame. We support the proposed rule requiring schools to conduct "prompt" investigations and set "reasonably prompt timeframes" for all major stages of an investigation of sex-based harassment (or other sex discrimination).[42] While we understand that schools may sometimes need to impose a "reasonable" delay for "good cause,"[43] we urge the Department to clarify in the regulations what situations constitute "good cause," and to explicitly prohibit schools from imposing more than a "temporary" delay due to a concurrent law enforcement investigation. However, we do oppose removing the current requirement that parties in a formal Title IX proceeding be given at least 10 days to review and respond to an investigative report and to receive an investigative report before a formal hearing. We believe that is the minimum amount of time necessary for both parties to be able to fully and fairly engage with the process, especially as they may still be attending school.[44]

Presumption of non-responsibility: We oppose the Department retaining the harmful rule from the previous administration that currently requires schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption.[45] This formal presumption and notice of such a presumption is not required in any other type of school proceeding and exacerbates the harmful and false rape myth that people who report sex-based harassment (or other sex discrimination)—primarily women and girls—tend to be lying, which also deters complainants from initiating or continuing with an investigation. While we appreciate the Department's efforts to ensure that schools do not presume one way or the other at the start of an investigation, the Department should simply require schools to notify parties of their rights and resources and that a determination about responsibility will not be made until the end of a fair and equitable investigation.

Questioning parties and witnesses. We support the proposed rules addressing K-12 investigations as they allow K12 schools the flexibility needed to address sex-based harassment (and other sex discrimination) promptly and appropriately.[46] For institutions of higher education, the proposed rules would remove the harmful requirement from the 2020 rules that mandate direct, live cross-examination, and instead allow more flexibility for questioning to be conducted either: (i) by a decision-maker at a live hearing or in individual meetings, with suggested questions from the parties; or (ii) by the parties' advisors via cross-examination at a live hearing, as is already required in some jurisdictions because of federal court decisions.[47] We support the additional flexibility that the proposed rules would provide for institutions of higher education and encourage the Department to provide further guidance as to how schools can conduct such processes while minimizing reliance on cross-examination and instituting measures that are

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[40] 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(d)(1)). *See also id.* at 41575 (proposed 34 C.F.R. § 106.45(b)(1)(iii)).
[41] 87 Fed. Reg. at 41570 (proposed 34 C.F.R. §§ 106.8(d)(2)-(3)). *See also id.* at 41429.
[42] 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(4), 106.46(e)(5)).
[43] *Id.*
[44] 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.46(e)(6)(ii).
[45] 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(iii), 106.46(c)(2)(i)). *See also* 34 C.F.R. §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B).
[46] Under the proposed rules, K12 schools would be required to allow all parties to present their witnesses and evidence and, if credibility is at issue, to use a process that enables the decision-maker to assess the credibility of the parties and witnesses. 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(f)(2), 106.45(g)).
[47] 87 Fed. Reg. at 41577, 41577-78 (proposed 34 C.F.R. §§ 106.46(e)(6)(ii), 106.46(f)(1)(i)).

trauma-informed throughout the proceedings. However, we oppose the proposed exclusionary rule, which would require that, if a party or witness at an institution of higher education does not respond to a question "related to their credibility," the school would have to ignore any statement they make that "supports their position."[48] We are concerned this means that a survivor who refuses to answer a single question related to their credibility would have all of their oral and written statements excluded from the evidence, and that this rule could be broadly applied given the Department has not explained how schools would determine whether a question is "related to" a person's credibility.[49]

Standard of proof: The proposed rule would require schools to use the preponderance of the evidence standard to investigate sex-based harassment (or other sex discrimination), unless the school uses the clear and convincing evidence standard in all other "comparable" investigations, including for all other types of harassment and discrimination.[50] We urge the Department to require the preponderance standard in all Title IX investigations, as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation,[51] and it is the same standard used by courts in all civil rights and other civil proceedings.[52] If the Department chooses not to require the preponderance standard, it should, at a minimum, clarify that "comparable" investigations include investigations of "non-sexual assault" (*e.g.*, non-sexual physical assault). Otherwise, schools could believe that they can use the preponderance standard to investigate *physical* assault and the clear and convincing evidence standard to investigate *sexual* assault, other sex-based harassment or discrimination, and all other harassment and discrimination based on race, disability, etc.

Appeals. We support the proposed rule requiring institutions of higher education to offer appeals to both parties based on a procedural irregularity, new evidence, or a Title IX official's bias or conflict of interest that affected the outcome, and allowing them to offer additional bases to both parties equally.[53] However, we urge the Department to ensure that parties are afforded the same appeal rights in K-12 schools as they would be at institutions of higher education. In addition, in order for students to be able to have a clear record to make an appeal and to ensure all parties have equal access to understanding findings, we encourage that K-12 institutions are still required to make a written decision in Title IX proceedings.

II. Protections for LGBTQI+ Students

A. Scope of Protections

We support the proposed rule's explicit listing of anti-LGBTQI+ discrimination as a form of sex discrimination, including discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), status as transgender or nonbinary, and sex stereotypes.[54] The clear explanation that LGBTQI+ students are protected under existing law is essential to achieving Title IX's promise of equal access to education for all students, and to implement the Supreme Court's

[48] 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(4)).
[49] While the proposed rules instruct decision-makers not to draw any inferences about whether sex-based harassment occurred based "solely" on a person's refusal to respond to questions related to their credibility, a complainant whose statements are excluded would have to rely solely on their witnesses' statements in order to prove their case. *Id.*
[50] 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).
[51] Letter from National Women's Law Center to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 33 (Jan. 30, 2019), https://nwlc.org/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf.
[52] Letter from Leadership Conference on Civil and Human Rights to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 7 (Jan. 30, 2019), https://civilrights.org/resource/civil-and-human-rights-community-joint-comment-on-title-ix-nprm.
[53] 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)(1)-(2)).
[54] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

decision in *Bostock v. Clayton County*.[55] In light of increasingly pervasive anti-LGBTQI+ violence, anti-LGBTQI+ state legislation, and the current preliminary injunction of the Department's 2021 notice on LGBTQI+ students' Title IX rights, all of which especially target transgender students, it is all the more urgent that the Title IX regulations codify explicit protections for LGBTQI+ students.[56]

B. Participation Consistent with Gender Identity

We support the proposed rule clarifying that preventing a student from participating in an education program or activity consistent with their gender identity is *per se* a form of sex-based harm and generally violates Title IX because it causes more than "de minimis" harm.[57] Additionally, we urge the Department to clarify that the de minimis harm standard applies to all sex-separated programs and activities—including, but not limited to, restrooms, locker rooms, overnight accommodations, etc.—unless Congress or the Department has expressly stated otherwise (see also **Part IV.B** below). We want to additionally point your attention to this national consensus statement of anti-sexual assault and domestic violence organizations opposing laws that discriminate against transgender people and supporting their rights including accessing facilities that match the gender they live every day.

C. Anti-LGBTQI+ Harassment

We support the proposed rules requiring schools to address harassment based on sexual orientation, gender identity, sex characteristics (including intersex traits), or sex stereotypes as a form of sex-based harassment,[58] and we refer to our comments above in **Part I**, which apply equally here. In addition, we urge the Department to clarify that, consistent with recent Department of Education enforcement actions,[59] harassment based on a student's gender identity clearly includes mocking or publicly ridiculing a student using terms of address that are known to be offensive and harmful to the student.[60]

IV. Other Protections Against Sex Discrimination

A. Other Forms of Sex Discrimination

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[55] *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020)

[56] The preliminary injunction of the Department's 2021 guidance was based on reasoning that Title VII and Title IX standards are not comparable (although courts have recognized for decades that they broadly overlap) and that the guidance lacked required notice and comment opportunities (which this proposed rulemaking provides.) *Tennessee et al. V. U.S. Dept. of* Education, No. 3:21-cv-308, 2022 WL 2791450 (E.D.T.N., Ju. 15, 2022) (memorandum granting preliminary injunction of guidance interpreting *Bostock*).

[57] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

[58] 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 ("sex-based harassment")), 41571 (proposed 34 C.F.R. § 106.10).

[59] The Department has recently investigated schools for failing to address intentional, months-long harassment against transgender students that harmed both mental health and grades. *E.g.*, Dep't of Educ., Office for Civil Rights, *Office for Civil Rights Announces Resolution of Sex-Based Harassment Investigation of Tamalpais Union High School District* (June 24, 2022), https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-sex-based-harassment-investigation-tamalpais-union-high-school-district; *Willits Unified School District Resolution Agreement*, Case No. No. 09-16-1384 (2017) (district will ensure "referring to the Student by other than her female name and by other than female pronouns is considered harassing conduct"); *City College of San Francisco*, Resolution Agreement, Case No. 09-16-2123 (2017) (school policy should reflect that harassment "can include refusing to use a student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes").

[60] This is also consistent with Title VII caselaw, which instructs that mocking or ridiculing a transgender person by intentionally misgendering (i.e., using the wrong pronouns to harass a transgender person) or deadnaming (i.e., using a transgender person's legal name to harass them) creates a hostile environment in violation of Title VII. *See Doe v. Triangle Doughnuts, LLC.*, 472 F. Supp. 3d 115 (E.D. Pa. 2020) (citing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (applying *Bostock*, the court held that, "in addition to being misgendered," this mistreatment "was sufficiently severe or pervasive to support her [hostile work environment] claim.").

The proposed rules would, for the first time, impose more detailed requirements for addressing sex discrimination that is not sexual harassment or other harassment based on sex, including LGBTQI+ status, sex stereotypes, or pregnancy/parenting status. In response to the proposed rules on these other forms of sex discrimination, we offer the same comments here as for sex-based harassment detailed above in **Part I**.[61]

B. Sex-Based Treatment or Separation

De minimis harm. We support the proposed rule stating that when schools treat individuals differently or separate them on the basis of sex, they cannot do so in a way that subjects a person to "more than de minimis harm," unless otherwise expressly permitted by the Title IX regulations.[62] However, the only specific example in the proposed rules of what causes "more than de minimis harm" is preventing someone from participating in an education program or activity consistent with their gender identity.[63] We urge the Department to clarify that the de minimis harm standard applies to all sex-based treatment or separation in any education program or activity—including but not limited to school restrooms, locker rooms, and overnight accommodations for school trips,[64] except to the extent that Congress or the Department has expressly provided that Title IX does not apply in a particular context.[65]

Dress and appearance codes. Dress and appearance codes often reflect and perpetuate gender stereotypes. Girls and women of color, especially Black girls and women, and LGBTQI+ students are more likely to be targeted and disciplined for violating dress and appearance codes. These codes also often reinforce rape culture by suggesting that boys and men cannot control their sexual impulses and that girls and women must dress a certain way to avoid sexual harassment.[66] In addition, these codes often force transgender, nonbinary, and gender-nonconforming students to conform narrowly to traditional gender norms and often prohibit Black and Indigenous[67] students from wearing protective and traditional hairstyles and head coverings.[68] Unfortunately, the proposed rules do not address dress and appearance codes. We urge the Department to initiate rulemaking under Title IX to explicitly prohibit dress and appearance codes in schools based on sex (including sexual orientation and gender identity), including by restoring and updating the Title IX dress code regulations that were rescinded in 1982 to make clear that sex-separated dress and appearance codes are discriminatory.[69]

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[61] With the exception of **Part I.A: Definition of sex-based harassment** and **Part I.C: Questioning parties and witnesses** (which discusses our recommended changes for institutions of higher education).
[62] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.31(a)(2)).
[63] 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.31(a)(2)).
[64] For example, courts have repeatedly held that providing separate restrooms for girls and boys does *not* inherently violate Title IX, but that excluding transgender girls from the girls' restroom or transgender boys from the boys' restroom does violate Title IX. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Doe v. Boyertown Area School District*, 897 F.3d 518, 530 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 2636 (2019); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049-50 (7th Cir. 2017). The Fourth Circuit also confirmed these policies violate the Equal Protection Clause of the Fourteenth Amendment. *Grimm*, 972 F.3d at 608-10; *see also Whitaker v. Kenosha*, 858 F.3d at 1051.
[65] *See*, *e.g.*, 20 U.S.C. § 1681(a) *et seq.* (Congress enumerating specific situations where Title IX "shall not apply"); 34 C.F.R. § 106.33 (the Department noting that schools "may provide separate toilet, locker room, and shower facilities on the basis of sex").
[66] National Women's Law Center, *Dress Coded: Black Girls, Bodies, and Bias in DC Schools* (2018), https://nwlc.org/resource/dresscoded.
[67] ACLU of Texas, *Complaints Filed Urging Federal Civil Rights Agencies to Investigate Texas School District's Discriminatory Dress Code* (Mar. 4, 2021), https://www.aclutx.org/en/press-releases/complaints-filed-urging-federal-civil-rights-agencies-investigate-texas-school.
[68] National Coalition for Women and Girls in Education, *Title IX At 50: A Report by the National Coalition for Women and Girls in Education* 17 (2022) [hereinafter NCWGE Report], https://nwlc.org/resource/ncwge-title-ix-at-50.
[69] Prior to amendments made in 1982, 34 C.F.R. § 106.31 stated, ". . . in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . . Discriminate against any person in the application of any rules of appearance . . . ."

C. Notice of Nondiscrimination

Enumeration of protected classes. We support the proposed rule requiring schools to adopt and publish a policy against sex discrimination and procedures to address complaints of sex discrimination.[70] We also ask the Department to require schools to notify students and families that the policy and procedures apply to sexual harassment, sexual assault, dating violence, domestic violence, stalking, and other harassment or discrimination based on sexual orientation, gender identity, sex characteristics (including intersex traits), sex stereotypes, and pregnancy or related conditions, so that they know which types of conduct constitute sex discrimination and when they can ask their schools for help.[71]

Religious exemptions. In 2020, the previous administration made two changes to the Title IX regulations that allow more schools to discriminate based on sex by claiming a religious exemption, which disproportionately harms women and girls, pregnant and parenting students, students who access or seek access to abortion or birth control, and LGBTQI+ students. First, although the Title IX statute only allows religious exemptions for schools that are "controlled by a religious organization,[72] the 2020 regulations allow schools that are not actually controlled by a religious organization to claim a religious exemption from Title IX if, for example, they are a divinity school, they require students to follow certain religious practices, or their mission statement refers to religious beliefs.[73] Second, the 2020 regulations assures schools that they may assert a religious exemption *after* they are already under investigation by the Department for violating Title IX.[74] This means students and employees are not entitled to any prior notice of a school's intent to discriminate based on sex despite the Title IX regulations requiring schools to notify students, their families, employees, and applicants of schools' anti-sex discrimination policies.[75] Unfortunately, the proposed rules do not address these changes. We urge the Department to swiftly issue proposed Title IX regulations that (i) rescind the rule inappropriately expanding eligibility for religious exemptions and (ii) require schools to notify the Department of any religious exemption claims and to publicize any exemptions in their required nondiscrimination notices.

Please feel free to contact National Alliance to End Sexual Violence Policy Director Terri Poore with any questions at terri@endsexualviolence.org.

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Thank you,

National Alliance to End Sexual Violence

Joined by:

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[70] 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)).
[71] *See* 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)). We also urge the Department to prohibit harassment on the basis of parental, family, caregiver, or marital status under Title IX (see **Part III.A: Parental, family, or marital status** above).
[72] 20 U.S.C. § 1681(a)(3).
[73] 34 C.F.R. § 106.12(c).
[74] 34 C.F.R. § 106.12(b).
[75] 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (proposed 34 C.F.R. § 106.8(c)(1)).

National Organizations:

Jewish Women International
Futures Without Violence
Joyful Heart Foundation
Just Solutions
National Center on Domestic and Sexual Violence
National Coalition Against Domestic Violence
National Council of Jewish Women
National Resource Center on Domestic Violence
Sexual Violence Prevention Association
Tahirih Justice Center
The Natalie Project
The National Domestic Violence Hotline
ValorUS

State Sexual Assault Coalitions:

Arizona Coalition to End Sexual and Domestic Violence
ACASA - Ar. Coalition
Colorado Coalition Against Sexual Assault
Florida Council Against Sexual Violence
Illinois Coalition Against Sexual Assault
Kansas Coalition Against Sexual and Domestic Violence
Louisiana Foundation Against Sexual Assault
Maine Coalition Against Sexual Assault
Maryland Coalition Against Sexual Assault
Jane Doe Inc. (Massachusetts Coalition Against Sexual Assault and Domestic Violence)
Minnesota Coalition Against Sexual Assault
MS Coalition Against Sexual
Montana Coalition Against Domestic and Sexual Violence
Nebraska Coalition to End Sexual and Domestic Violence
Nevada Coalition to End Domestic and Sexual Violence
New Hampshire Coalition Against Domestic and Sexual Violence

New Mexico Coalition of Sexual Assault Programs, Inc.
New York State Coalition Against Sexual Assault
NC Coalition Against Sexual Assault
Ohio Alliance to End Sexual Violence
Pennsylvania Coalition Against Rape
Day One, RI
Texas Association Against Sexual Assault (TAASA)
Vermont Network Against Domestic and Sexual Violence
Virginia Sexual and Domestic Violence Action Alliance
West Virginia Foundation for Rape Information and Services
Wisconsin Coalition Against Sexual Assault

Other State & Local Organizations:

Community Violence Solutions (CA)
Empower Yolo (CA)
Lassen Family Services (CA)
Los Angeles LGBT Center (CA)
Lumina Alliance (CA)
Monarch Services (CA)
Partners Against Violence, Inc. (CA)
Peace Over Violence (CA)
REACH (CA)
YWCA Greater Los Angeles (CA)
DOVE (CO)
Project Hope of Gunnison Valley (CO)
Project Safeguard (CO)
Renew, Inc. (CO)
Response (CO)
Sexual Assault Services Organization (CO)
The Blue Bench (CO)
Illinois Accountability Initiative (IL)
Sexual Assault Prevention and Response Services (ME)
The Center for Hope and Healing (MA)
Upper Cape Women's Coalition (MA)
Someplace Safe (MN)
Metropolitan Organization to Counter Sexual Assault (MO)

Community for a Cause (NY)
Safe Embrace (NV)
Crime Victim Services (OH)
Survivor Advocacy Outreach Program (OH)
King County Sexual Assault Resource Center (WA)
AWAY (f/k/a Women's Resource Center) (WV)
Eastern Panhandle Empowerment Center (WV)
Family Crisis Intervention Center (WV)
REACH Rape Crisis Program (WV)
Upper Ohio Valley Sexual Assault Response Center Inc. (WV)
Stop Abusive Family Environments, Inc (WV)
Deaf Unity (WI)
Embrace Services, Inc. (WI)
Milwaukee Center for Children and Youth (WI)
Safe Harbor of Sheboygan County, Inc. (WI)
Stepping Stones, Inc. (WI)