



September 12, 2022

Submitted via www.regulations.gov

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

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:

We, Girls Inc. and Stop Sexual Assault in Schools (SSAIS), are writing in response to the Department of Education’s (“the Department”) notice of proposed rulemaking published in the Federal Register on July 12, 2022 to amend the regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

Girls Inc. is the national organization that inspires all girls to be strong, smart, and bold, through direct service and advocacy. Our 75 local affiliates in the U.S. and Canada serve girls ages 5-18, primarily through afterschool and summer programs. We reach over 75,000 girls annually, 57% of whom come from families earning less than \$30,000 a year and 82% of whom identify as girls of color. We also advocate, with our girls, for policies and practices that will help break down barriers so that all girls and young women can have the chance to grow up healthy, educated, and independent. Girls Inc. has celebrated Title IX’s 50th anniversary throughout 2022 as we recognize the great progress the law has made while acknowledging the challenges that remain. Girls Inc. is committed to promoting safe and supportive learning environments so that all girls can grow up without barriers to their educational, physical, and emotional wellbeing.

Since 2015, the national nonprofit Stop Sexual Assault in Schools (SSAIS) has been educating K-12 students, families, and schools about the right to an equal education free from sexual harassment. Over the past seven years we have heard regularly from students and families across the country how their schools have mishandled sexual harassment complaints. These first-hand accounts paint an alarming and disturbing picture of traumatized young students whose educations have been derailed because school officials ignore, deny, or mismanage

reported sexual misconduct. While the focus of this letter is the impact of the proposed rules on K-12 schools and students, we also are very concerned about the impact of these rules on post-secondary education campuses and students. Girls Inc. and SSAIS have respectively signed onto other organization's comments that go into greater detail on the impact of these rules on marginalized students and post-secondary education campuses and students.

One in four girls experiences sexual abuse or sexual assault by the age of 18,¹ and more than two in three girls (68%) and over half of boys report being sexually harassed at some point in high school.² The statistics are even more staggering for individuals who identify as people of color or LGBTQ. In one report, it was found that 78% of transgender or gender non-conforming youth are sexually harassed in K-12 schools.³ And while we can appreciate that the Department is taking steps to undo the previous administration's harmful changes to the Title IX regulations by proposing new regulations to restore and fulfill the law's original purpose, we note that the Department's proposed regulations aren't expansive and inclusive enough in protecting all students against sex discrimination in education. To that end, we offer the following comments regarding the Department's proposed regulations.

I. 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. 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. This would be a return to the Department's longstanding standard applied from 1997-2020, and upon which many state education laws and existing district policies are based. It also represents 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.

II. Preemption:

The current regulations assert the primacy of federal Title IX regulations when they conflict with state education law. This provision forces school districts to navigate competing definitions of sexual harassment from state law and existing district policies that, for the most part, are aligned with Title IX guidance issued over the past 20 years. We therefore strongly support the proposed removal of the current provision that prevents schools from complying with a state or

¹ National Sexual Violence Resource Center. Get Statistics. Accessed December 12, 2018. <https://www.nsvrc.org/statistics>.

² Espelage, D., Low, S., Anderson, C., & De La Ru, L. (2014). Bullying, sexual, and dating violence: trajectories from early to late adolescence. Washington, DC: National Institute of Justice. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/246830.pdf>

³ Sexual Violence & Individuals Who Identify as LGBTQ. National Sexual Violence Research Center. 2012. Accessed December 12, 2018. https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Research-Brief_Sexual-Violence-LGBTQ.pdf.

local law that conflicts with the Title IX regulations and provides greater protections against sex discrimination, including harassment. This proposed change would return Title IX to its proper role as a floor—not a ceiling—for civil rights protections.

III. Location:

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. 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.

IV. 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 by individuals who were not participating in or attempting to participate in “a school program or activity at the time they filed their complaint. We support the the proposed rules requiring schools to address complaints by all individuals, even if they are not current students or employees of the school (e.g., applicants, visitors, graduates, former students, 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)*.⁴ The proposed rules would allow schools to dismiss a complaint where a respondent has left the school, 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.⁵ This is an important and necessary revision to the Title IX regulations, but 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.

V. Notice of harassment:

A 2017 analysis of data from the Department of Education’s Civil Rights Data Collection (CRDC) [found](#) that, for grades seven through twelve, 79% of the public schools surveyed disclosed **zero** reported allegations of harassment or bullying on the basis of sex. Such underreporting may be due to individual student fears of reporting to school authorities or law enforcement.⁶ Students

⁴ 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2).

⁵ 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.

⁶ Miller, K. (2018, November 2). Schools Are Still Underreporting Sexual Harassment and Assault. AAUW. Retrieved from <https://www3.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault/>.

need access to confidential Title IX resources, especially high school students who are old enough to make informed decisions about how they would like to handle sexual harassment or other forms of discrimination they experienced. However, under the new proposed rules, K-12 students may be unable to learn about their options from school staff without it being reported to the Title IX coordinator. Confidentiality is critical for students and victims to seek needed services without fear of retaliation, further discrimination, prejudicial treatment, or stigmatization. If students believe confidential information will not be maintained, they may be less likely to seek needed supportive measures.⁷

As written, the proposed rule would force students to decide whether they want to make a report before knowing exactly what that would entail, or what their other options may be. We urge the Department to require schools (rather than merely “allowing” schools as proposed) to designate one or more confidential employees, who are not required to report possible sex discrimination to the Title IX coordinator and must tell that students how to report it to the Title IX coordinator and how the Title IX coordinator can help them. These confidential employees’ status as confidential should be clearly indicated to students. Furthermore, K-12 schools should provide a list of individuals or organizations that are not bound by mandatory reporting laws to whom a student could report in confidence. 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).

VI. Trauma-Informed Training:

We support the proposed regulations requiring all school employees to be trained on Title IX issues.⁸ K-12 students need teachers and other trusted school employees to know how to handle gender-based discrimination and harassment. As part of this, the Department should also require school staff to be trained on trauma-informed practices. When students experience trauma, whether caused by discrimination, harassment, or something else, it can greatly impact their ability to learn.⁹ We need school staff to understand trauma and respond to it appropriately, especially employees with Title IX-related responsibilities, as trauma may impact a student’s participation in an investigation and/or inform the supportive measures they need to stay safe and engaged at school.¹⁰ Employees cannot “serve impartially” and accurately assess a complaint if, for example, they think a traumatized student who cannot remember the details of sexual harassment is lying instead of recognizing the results of trauma on memory.¹¹

VII. LGBTQI+ Students and Pregnant and Parenting Students:

LGBTQI+ Students

⁷ Proposed 34 C.F.R § 106.44(c)(1)

⁸ Proposed 34 C.F.R § 106.8(d)

⁹ 46% of youth under the age of 17 report experiencing at least one trauma. See Helping Children and Youth Who Have Traumatic Experiences, Substance Abuse and Mental Health Services Administration (May 2018), available at https://www.samhsa.gov/sites/default/files/brief_report_natl_childrens_mh_awareness_day.pdf

¹⁰ As defined under proposed 34 C.F.R §106.8(d)(2)-(4)

¹¹ As required by proposed 34 C.F.R §106.(d)(2)(iii)

LGBTQI+ students nationwide are being attacked and discriminated against for simply being who they are, and need legal protection now. We strongly support the decision to define sex discrimination as including anti-LGBTQI+ discrimination under the proposed regulations.¹² However, the new regulations could do even more to protect LGBTQI+ students by clearly establishing prohibited forms of harassment that are unique to anti-LGBTQI+ discrimination, such as misgendering students, refusing to use their lived name, and non-consensually disclosing their LGBTQI+ identity to others (or “outing” them). The rules could also be used to protect LGBTQI+ students from being outed to potentially unsupportive families by their schools, especially because some recent state bills explicitly require school officials to do so.¹³ Finally, the Department should issue rules regarding sex equity in athletics, including transgender students’ participation in school sports, as soon as possible so that student athletes are also protected from discrimination.

Pregnant and Parenting Students

Pregnant teens and teen parents frequently face educational policies that segregate them, exclude them from class or extracurricular activities, punish them for excused medical absences, or push them into less equitable alternative educational programs where they may lose in-person interaction and isolate them from peers and caring adults.¹⁴

We therefore support the proposed rules stating that schools must address harassment based on pregnancy or related conditions as a form of sex-based harassment. We agree with the proposed rules prohibiting schools from discriminating against any “person” (including students and employees) based on “current, potential, or past” pregnancy or related conditions and urge the Department to include “perceived” and “expected” pregnancy or related conditions to the list.

We support the proposed rules stating that schools must address harassment based on pregnancy or related conditions as a form of sex-based harassment. In addition, we ask the Department to instruct schools in the final regulations and in supplemental guidance on how to protect student privacy to ensure that school records regarding harassment based on pregnancy or related conditions are not used to prosecute complainants in states where abortion and other reproductive healthcare is criminalized. We urge the Department to develop and disseminate updated guidance specifically for K-12 schools regarding the Title IX rights of pregnant and parenting students, modeled after the OCR publication *Know Your Rights: Pregnant or Parenting? Title IX Protects You from Discrimination at School*.¹⁵

VIII. Standard of Care and Supportive Measures:

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

¹² Proposed 34 C.F.R §106.10

¹³ For example, Florida’s HB 1557, which has already caused state school districts to adopt new policies requiring staff members to notify a student’s parent or guardian if the child tells the employee they are gay or request to use a different name or pronouns. See Riedel, Samantha, After “Don’t Say Gay,” Florida School Districts Are Outing LGBTQ Students to Their Parents, *them* (Aug. 18, 2022) available at <https://www.them.us/story/sarasota-florida-school-outing-gay-trans-students-to-parents>

¹⁴ See Garcia, K., Chaudhry, N. (2017). Let her learn. Stopping school pushout for girls who are pregnant or parenting. Washington, DC: National Women’s Law Center. Available from <https://nwlc.org/let-her-learn/>

¹⁵ Available at <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-know-rights-201306-title-ix.html>.

effects on all people harmed. 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' "deliberate indifference" standard.

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 whether they request an investigation or an informal resolution, and even if their complaint is dismissed. 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. While we appreciate the preamble's explanation that schools would be allowed to impose a "one-way no-contact order" against a respondent, 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," then the school must provide it; and that if the school is aware that the supportive measures offered are ineffective, then the school must modify them or offer additional supportive measures. 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.

IX. Informal Resolutions:

We support the proposed rules allowing schools to resolve student-on-student sex-based harassment (or other sex discrimination) by using an informal resolution. However, we urge the Department to require all parties to give "written consent" to an informal resolution (not simply "consent"). Furthermore, students should not be pressured, coerced, or unduly influenced to "consent" to a restorative process or other informal resolution. 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. As the Department recognized in the 2001 Guidance, students in both K-12 and higher education can be pressured into mediation without informed consent, and even "voluntary" consent to mediation is inappropriate to resolve cases of sexual assault. Experts also agree that mediation is inappropriate for resolving sexual violence.

X. 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.¹⁶ We call on the Department to require schools to

¹⁶ 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).

use the preponderance of the evidence standard in Title IX investigations (instead of allowing schools to use the clear and convincing evidence standard) as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation,¹⁷ and it is the same standard used by courts in all civil rights and other civil proceedings.¹⁸ This would also be a welcome return to the Department's longstanding practice requires that schools use a "preponderance of the evidence" standard in Title IX cases to decide whether sexual harassment occurred.¹⁹ The Department has required schools to use the preponderance standard in Title IX investigations since as early as 1995 and throughout both Republican and Democratic administrations.

XI. Presumption of Non-responsibility:

We strongly 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. This presumption is not required for any other type of school misconduct and would encourage schools to ignore or punish historically marginalized and underrepresented groups that report sexual harassment for "lying" about it²⁰ – particularly exacerbating the myth that women and girls often lie about sexual assault.²¹ Schools may be more likely to ignore or punish survivors who are women and girls of color,²² pregnant and parenting students,²³ and LGBTQ students²⁴ because of harmful race and sex stereotypes that label them as "promiscuous." The Department should simply require schools to notify parties that a determination about responsibility will not be made until the end of an investigation and that neither party is presumed to be telling the truth or lying at the outset.

¹⁷ 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://nwl.org/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

¹⁸ 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>.

¹⁹ For example, the Department of Education's April 1995 letter to Evergreen State College concluded that its use of the clear and convincing standard "adhere[d] to a heavier burden of proof than that which is required under Title IX" and that the College was "not in compliance with Title IX." U.S. Dep't of Educ., Office for Civil Rights, Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College (Apr. 4, 1995), at 8, available at http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf. Similarly, the Department's October 2003 letter to Georgetown University reiterated that "in order for a recipient's sexual harassment grievance procedures to be consistent with Title IX standards, the recipient must ... us[e] a preponderance of the evidence standard." U.S. Dep't of Educ., Office for Civil Rights, Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University (Oct. 16, 2003), at 1, available at <http://www.nchem.org/documents/202-GeorgetownUniversity--110302017Genster.pdf>.

²⁰ Tyler Kingkade, When Colleges Threaten To Punish Students Who Report Sexual Violence, *Huffington Post* (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.

²¹ Tyler Kingkade, Males Are More Likely To Suffer Sexual Assault Than To Be Falsely Accused Of It, *HUFFINGTON POST* (Dec. 8, 2014) [last updated Oct. 16, 2015], https://www.huffingtonpost.com/2014/12/08/false-rape-accusations_n_6290380.html (Indeed, the data shows that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it).

²² Nancy Chi Cantalupo, And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color, 42 *Harvard J.L. & Gender* 1, 16, 24-29 (forthcoming), available at <https://ssrn.com/abstract=3168909>; National Women's Law Center, *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwl.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.

²³ Chambers & Erausquin, The Promise of Intersectional Stigma to Understand the Complexities of Adolescent Pregnancy and Motherhood, *Journal of Child Adolescent Behavior* (2015), available at <https://www.omicsonline.org/open-access/the-promise-of-intersectional-stigma-to-understand-the-complexities-of-adolescent-pregnancy-and-motherhood-2375-4494-1000249.pdf>.

²⁴ David Pinsof, et al., The Effect of the Promiscuity Stereotype on Opposition to Gay Rights (2017), available at <https://doi.org/10.1371/journal.pone.0178534>.

XII. 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). It is understandable that schools may sometimes need to impose a “reasonable” delay due to a concurrent law enforcement investigation, but the Department should clarify in its regulations what constitutes a “good cause” situation, and explicitly prohibit schools from imposing more than a “temporary” delay. We suggest that the Department revisit and consider reinstating similar Title IX guidance issued by the Obama administration that recommended that schools finish investigations within 60 days, and prohibited schools from delaying a Title IX investigation just because there was an ongoing criminal investigation. The Department should also reiterate that deliberate delays by school districts in responding to complaints of sexual harassment could constitute a form of institutional retaliation.²⁵

XIII. Questioning parties and witnesses:

We support the proposed rules addressing K-12 investigations as they allow K-12 schools the flexibility needed to address sex-based harassment (and other sex discrimination) promptly and appropriately.

XIV. Appeals:

We urge the Department to ensure that parties are afforded the same appeal rights in K-12 schools²⁶ as they would be at institutions of higher education – offering 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.²⁷

XV. 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. 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.

XVI. Religious Exemption:

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. Currently, schools can claim an exemption at any time, even after a complaint of discrimination is filed, without any prior notice to the Department of their intention to be considered exempt. We are disappointed

²⁵ 2014 Guidance, p34 Note 31: “If a school delays responding to allegations of sexual violence or responds inappropriately, the school’s own inaction may subject the student to a hostile environment. If it does, the school will also be required to remedy the effects of the sexual violence that could reasonably have been prevented had the school responded promptly and appropriately.”

²⁶ Some state laws (e.g., Washington State) mandate appeal pathways.

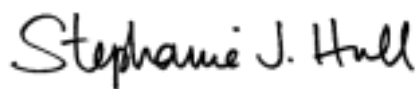
²⁷ 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(l)(1)-(2)).

that the Department's proposed rules do not address the 2020 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.

Students deserve – and the law requires – the U.S. Department of Education to fulfill its responsibility to protect the civil rights of all students to safeguard equal educational opportunities. The Department's proposed Title IX rule to restore and strengthen federal civil rights protections draws us closer to the promise of educational environments free from discrimination on the basis of sex. Girls Inc. and SSAIS support the Department's effort to restore Title IX's purpose. However, we cannot stress enough the Department's need to be more expansive and inclusive in protecting all students against sex-discrimination in its final regulations. We also appreciate the Department beginning to distinctly differentiate between K-12 schools and postsecondary institutions when it comes to enforcing sex equitable laws. Nevertheless, more can be done and additional guidance for K-12 schools should be issued that further support them in effectuating sex equitable laws.

Thank you for the opportunity to submit comments on the proposed regulations. If you have any questions or need any further information for Girls Inc. or Stop Sexual Assault in Schools, please contact Girls Inc. Director of Public Policy Katie Astrich at kastrich@girlsinc.org or (332) 230-1234 or Joel Levin at joel@stopsexualassaultinschools.org.

Sincerely,

A handwritten signature in black ink that reads "Stephanie J. Hull". The script is cursive and fluid, with the first name being the most prominent.

Stephanie J. Hull, Ph.D.
Girls Inc. President & CEO