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September 9, 2022

Via Federal eRulemaking Portal

The Honorable Dr. Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

RE: Comment on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance—Docket ID ED-2021-OCR-0166, RIN 1870-AA16, 87 Fed. Reg. 41,390 (July 12, 2022)

Dear Secretary Cardona:

On behalf of California, New Jersey, Pennsylvania, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington (“the States”), we write to express our strong support for the Department of Education’s (“the Department”) Notice of Proposed Rulemaking, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* (“the Proposed Rule”), published in the Federal Register on July 12, 2022, 87 Fed. Reg. 41,390. As Attorneys General, charged with enforcing laws prohibiting sexual violence and discrimination, we take the enforcement of Title IX and prevention of discrimination very seriously. It is critical that our students have the ability to learn in a safe environment, free from sex-based violence and discrimination. The Department’s much-needed action will reverse many of the critical missteps in the Department’s 2020 rulemaking, which have harmed and continue to harm our schools and our student community. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026 (May 19, 2020) (the “2020 Amendments”).¹

¹ Many of the state signatories to this letter are plaintiffs in a legal challenge to the 2020 Amendments on the grounds that they were arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706.

In many respects, the 2020 Amendments undermined or thwarted the purpose of Title IX of the Education Amendments Act of 1972 (“Title IX”), 20 U.S.C. § 1681. For example, the 2020 Amendments impose an onerous and quasi-criminal process for Title IX sexual harassment proceedings in schools, which deters students subjected to sexual assault and harassment from coming forward, weaken protections for students subjected to sexual assault and harassment², and burden schools and survivors by narrowing the scope of Title IX’s protections while also erecting new barriers to relief. If adopted, overall the Proposed Rule would advance Title IX’s nondiscrimination mandate by facilitating equal access to educational opportunities for all students.

The Proposed Rule addresses those serious flaws by creating comprehensive standards for Title IX that would no longer subject sexual harassment to heightened standards and quasi-criminal processes. The Proposed Rule likewise re-aligns Title IX’s implementing regulations with the statute’s nondiscrimination mandate. It also helps preserve schools’³ resources by limiting potential duplication of procedures. And of particular importance to the States, it complements state laws that ensure greater protections for victims, while preserving the rights of respondents under Title IX to fair and equitable proceedings.

Because of its added procedural flexibility, the Proposed Rule may also result in cost-savings for schools, which will provide much-needed relief after the 2020 Amendments required them to completely overhaul their procedures in a mere 90 days while simultaneously addressing the COVID-19 pandemic. To further that end in response to this regulatory revision, we urge the Department to allow for a reasonable implementation timeline.

We commend the Department on the significant improvements it has proposed to the 2020 Amendments and urge it to take additional steps to further align the Proposed Rule with longstanding Department practice. In the following comment letter, we address how the Proposed Rule: effectuates Title IX; standardizes and codifies definitions and procedures across Title IX enforcement; improves the complaint process generally, including and especially the K-12 grievance process; and realigns Title IX’s sexual harassment standards and higher education proceedings with more than 30 years of Title IX application prior to 2020. Where we believe there may be room for improvement or clarification, we have included recommendations.⁴

² Unless otherwise stated, the term “sexual harassment” encompasses all forms of sexual harassment, including sexual violence and sexual assault.

³ Unless otherwise stated, the term “schools” refers to all institutions that are “recipients” covered by Title IX’s mandate, including K-12 schools and institutions of higher education.

⁴ For the reader’s ease, we have included an appendix of documents cited herein that may not be readily accessible on the Department’s website, in the Federal Register, or on legal research websites. These documents are organized in the appendix based on the order in which they are referenced in this comment letter. All documents in the appendix and referenced in this letter are incorporated, by reference, as part of the comment record.

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I. THE PROPOSED RULE BETTER EFFECTUATES TITLE IX’S GOAL THAN THE 2020 AMENDMENTS.

A. The Proposed Rule aligns with Congressional intent and longstanding practices.

The Proposed Rule furthers Title IX’s antidiscrimination mandate. Congress enacted Title IX to accomplish two objectives: to provide individuals with effective protection against sex discrimination and harassment and to ensure that federal funds are not used to support such misconduct.⁵ Title IX requires schools to provide education programs and activities that are free from sex discrimination.⁶ To enforce Title IX, Congress established a robust administrative scheme and authorized the Department to withdraw federal funding for schools’ non-compliance and to issue rules only if they “effectuate” Title IX.⁷

The Proposed Rule furthers Congress’ twin goals for Title IX by “ensuring that recipients prevent and address sex discrimination, including but not limited to sex-based harassment, in their education programs or activities.”⁸ This is in direct contrast to the 2020 Amendments, which significantly narrow the definition of sexual harassment and limit the ability of students subjected to such harassment to properly seek redress and equal educational access. This narrowing “create[s] a barrier for potential complainants to effectively assert their rights under Title IX.”⁹ The 2020 Rule spent many pages explaining the application of the “*Gebser/Davis* framework,”¹⁰ but never once explained why aligning with a judicially-created standard for private enforcement fulfills Title IX’s mandate to eliminate sexual harassment.¹¹ This is not surprising, because it simply does not.

In addition, the Proposed Rule is consistent with the Department’s longstanding policy and practice of eradicating sexual harassment and ensuring equal access to education. During the Reagan Administration, the Department began affirmatively addressing sexual harassment in schools as a serious problem that contravenes Title IX,¹² consistent with its interpretation and

⁵ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

⁶ 20 U.S.C. § 1681(a); see *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

⁷ 20 U.S.C. § 1682.

⁸ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41,564 (July 12, 2022).

⁹ *Id.* at 41,409.

¹⁰ 85 Fed. Reg. 30,032 (“The three parts of this framework are: Conditions that must exist to trigger a school’s response obligations (actionable sexual harassment, and the school’s actual knowledge) and the deliberate indifference liability standard evaluating the sufficiency of the school’s response.”).

¹¹ See 83 Fed. Reg. 61,466-67; 85 Fed. Reg. 30,032-46.

¹² *E.g.*, U.S. Dep’t of Educ., *Sexual Harassment: It’s Not Academic 2* (1988) (quoting U.S. Dep’t of Educ., Off. for Civ. Rts., Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981)).

enforcement of Titles VI and VII of the Civil Rights Act of 1964.¹³ For decades, the Department's policies consistently reaffirmed several fundamental requirements for how schools must address sexual harassment.¹⁴ These documents explained that under Title IX, schools were obligated to: (1) take affirmative steps to prevent, end, and remedy sexual harassment, defined as unwelcome conduct of a sexual nature that is so severe, persistent, *or* pervasive that it adversely affects a student's ability to participate in or benefit from the school's program or activity; (2) address harassment committed outside an education program or activity if it creates a hostile environment *in* an education program or activity; and (3) adopt a prompt and equitable grievance procedure, which could be incorporated into existing codes of conduct and procedures.¹⁵

The Proposed Rule's return of Title IX standards to their longstanding prior form promotes the uniformity and consistency of federal laws.¹⁶ This is again in contrast to the 2020 Amendments, which create notable disparities between the standards applied to Title IX discrimination claims and those applied to discrimination claims under Title VI and Title VII.¹⁷ This difference in approach is inconsistent with prior directives from Congress and the United States Supreme Court, both of which made explicit that Title IX standards were modeled on, and meant to be consistent with, the standards of Title VI from which the 2020 Amendments diverge.¹⁸ The 2020 Amendments also create the unjustifiable (and unjustified) result that school *employees* are provided greater protection from sexual harassment than school students.¹⁹ The Proposed Rule

¹³ *E.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (Title VII); *Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance*, 59 Fed. Reg. 11,448, 11,449-51 (Mar. 10, 1994).

¹⁴ *Sexual Harassment Guidance: Harassment of Students by Sch. Emps., Other Students, or Third Parties*, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (1997 Guidance); *Revised Sexual Harassment Guidance: Harassment of Students by Sch. Emps., Other Students, or Third Parties*, 66 Fed. Reg. 5512 (Jan. 19, 2001, rescinded Aug. 2020) (hereinafter: 2001 Policy); Stephanie Monroe, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Jan. 25, 2006, rescinded Aug. 2020) (2006 Letter); Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011, withdrawn Sept. 22, 2017) (2011 Letter); U.S. Dep't of Educ., *Q&A on Title IX and Sexual Violence* (Apr. 24, 2014, withdrawn Sept. 22, 2017) (2014 Q&A); U.S. Dep't of Educ., *Q&A on Campus Sexual Misconduct* (Sept. 2017, rescinded Aug. 2020) (2017 Q&A).

¹⁵ *Id.*

¹⁶ *See* Section I.C., *infra*.

¹⁷ 85 Fed. Reg. 30,529 (justifying differences by asserting that Title VI was not a "comparator[s]" to Title IX).

¹⁸ *E.g.*, *Cannon*, 441 U.S. 677 at 704 ("Title IX, like its model, Title VI"); *Sex Discrimination Regulations, Review of Regulations to Implement Title IX, Hearings before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Labor*, 94th Cong., 1st Sess., 170 (1975) (Statement of Sen. Bayh) (in setting up "an identical administrative structure" Congress intended to provide the "same coverage" and "same statutory scope for Title IX as for Title VI").

¹⁹ Title VII continues to protect employees, including student employees, from sexual harassment that is "sufficiently severe *or* pervasive to alter the conditions of the victim's employment," *Vinson*, 477 U.S. 57 at 67, whereas the 2020 rule only protects against harassment that is severe *and* pervasive; *see also* 34 C.F.R. § 106.30(a).

restores Title IX standards that are consistent with Title VI and Title VII, as well as more than thirty years of the Department's enforcement efforts and guidance.²⁰

Finally, the Proposed Rule appropriately removes a provision of the 2020 Amendments that expressly preempts conflicting state and local laws, even where those laws provide *greater* protections to students than provided by Title IX.²¹ The 2020 Amendments' explicit preemption provision is flatly inconsistent with congressional intent. In creating the Department of Education, Congress explicitly announced its intention "to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs," and specifically not to "to increase the authority of the Federal Government over education or diminish the responsibility for education which is reserved to the States and the local school systems and other instrumentalities of the States."²² Even had Congress not made its intent so known, federal laws that are designed to protect citizens are presumed to allow for the enactment of state and local legislation that is more protective, barring explicit congressional intent to the contrary.²³ The Proposed Rule rightfully returns Title IX's mandates to a position as a "floor," not a "ceiling" that inappropriately limits state laws enacted to further protect their citizens.

B. The Proposed Rule defines "sex-based harassment" in a manner that effectuates Title IX and accords with longstanding practice.

The States welcome the Department's comprehensive new definition of "sex-based harassment," and, in particular, its (1) inclusion of not only sexual harassment but also additional types of sex-based harassment; (2) delineation of hostile environment harassment in a manner that accords with Title IX and historical Department practice; and (3) re-definition of *quid pro quo* harassment to more effectively protect students from discrimination.

First, the Proposed Rule rightly states that harassing conduct can violate Title IX not only if it constitutes "sexual harassment," but also if it includes harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. This clarification is another welcome step towards the comprehensive enforcement of Title IX. As many of the States explained in 2019, gender-based harassment had long been prohibited by Title IX,²⁴

²⁰ See Section I.C., *infra*.

²¹ Compare 34 C.F.R. § 106.6(h) (2020 amendment addressing regulation's "[p]reemptive effect") with 87 Fed. Reg. 41,569 (proposed § 106.6(b), holding that "[n]othing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination.").

²² 20 U.S.C. § 3403(a).

²³ See *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984) ("[F]ederal legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, . . . courts should wait for a clear statement of congressional intent.") (emphasis in original); *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 617 (7th Cir. 2003) ("[M]any federal regulatory laws, establish a floor, but not a ceiling, on state and local regulation.").

²⁴ 2001 Policy at v; U.S. Dep't of Educ., Off. for Civil Rights, *Dear Colleague Letter Re: Title*

and that interpretation of Title IX is in line with Supreme Court precedent on Title VII.²⁵ 87 Fed. Reg. 41,411 (explaining longstanding Department policy that Title IX applies to harassment based on sexual orientation, sex stereotyping, gender-based harassment, and pregnancy or related condition, regardless of the sex of the alleged harasser). However, the 2020 Amendments fail to specifically codify prohibitions on sex-based harassment, relying instead on incomplete and inadequate clarifications in the preamble.²⁶ The Department has now concluded that this was insufficient to protect students from harassment.²⁷ We agree.

Second, the States welcome the Proposed Rule’s return to the Department’s longstanding definition of “hostile environment harassment” as “unwelcome sex-based conduct that is sufficiently severe *or* pervasive, that, based on a totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”²⁸ The Proposed Rule rightly finds that the 2020 Amendments, including their far narrower definition of hostile environment harassment, “do not adequately promote full implementation of Title IX’s prohibition on sex discrimination, including sex-based harassment,” and the States applaud the Proposed Rule’s expanded definition of what constitutes sex-based harassment.²⁹

Over the objections of many stakeholder commenters,³⁰ the 2020 Amendments departed from historical Department practice and interpretation by requiring that hostile environment harassment involve sexual harassment that is “so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to” education,³¹ in order to be covered by Title IX. The result was one that the Department itself predicted—an undermining of schools’ attempts to stop

IX Coordinators (Apr. 24, 2015), <https://tinyurl.com/4xwnkqsw> (“In addition, a recipient should provide Title IX coordinators with access to information regarding . . . incidents of sex-based harassment. Granting Title IX coordinators the appropriate authority will allow them to identify and proactively address issues related to possible sex discrimination as they arise.”); *see also* Comment Letter of 19 State Attorney General, in response to proposed rule, *Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. 61,462, at 16 (Jan. 30, 2019), <https://tinyurl.com/2578z6c5> (hereinafter: States’ 2019 Comment Letter).

²⁵ *See, e.g., Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81–82 (1998); EEOC, *Sex-Based Discrimination*, <https://tinyurl.com/mw9uy9az> (“Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex.”).

²⁶ The 2020 Amendments state that sexual harassment on the basis of sexual orientation is prohibited by Title IX and that gender-based harassment is also prohibited, but do not prohibit other forms of sex-based harassment. 85 Fed. Reg. 30,178-79. It clarified in the preamble, without including in the regulations, that this could include conduct based on sex or sex stereotyping. *Id.* at 30,179.

²⁷ 87 Fed. Reg. 41,411.

²⁸ *Id.* at 41,568-69 (proposed § 106.2 (sex-based harassment) (emphasis added); *see also* 1997 Guidance at 12,034 (explaining that “[i]n order to give rise to a complaint under Title IX, sexual harassment must be sufficiently severe, persistent, *or* pervasive that it adversely affects a student’s education or creates a hostile or abusive educational environment.”) (emphasis added).

²⁹ 87 Fed. Reg. 41,407.

³⁰ Comment letters in response to 83 Fed. Reg. 61,462: Cal. Dep’t of Educ. Comm. at 1-2; SFUSD Comm. at 2; SSA Comm. at 2, 4.

³¹ 34 C.F.R. § 106.30(a) (emphasis added).

sexual harassment and prevent recurrence.³² The Department itself estimated that the 2020 Amendments' narrowed interpretation of Title IX would reduce investigations of sexual harassment by 50% in K-12 schools, which cannot legitimately be squared with the acknowledged underreporting and under-investigation of sexual harassment in schools given Title IX's mission.³³ For purposes of administrative enforcement, this standard raises the bar too high and results in far too many incidents of sexual harassment going unaddressed.

Nearly two thirds of all college students experience sexual harassment in school and, on average, 20.5 percent of college women experience sexual assault in college.³⁴ Despite the prevalence of sexual assault and harassment, only 12 percent of college sexual assault survivors and two percent of female survivors ages 14-18 reported sexual assault to their schools or police.³⁵ More than 20% of girls aged fourteen to eighteen have been kissed or touched without their consent, but only 3% reported the incidents, and in the 2017-18 school year, K-12 schools reported a 55% increase in sexual violence.³⁶

The 2020 Amendments exacerbate the problem of underreporting. Many institutions of higher education in the States reported having to dismiss matters they could have traditionally resolved through the Title IX process because they did not meet the 2020 Amendments' narrowed definition of sexual harassment. In these cases, schools had to dismiss certain Title IX complaints with a formal letter and then re-initiate proceedings under separate student conduct code policies. This sometimes resulted in complainants abandoning their complaints, making it more challenging to ensure that students have access to an education environment free from sexual harassment. But even when schools did not have to dismiss complaints, they found that the 2020 Amendments create a chilling effect that resulted in fewer students pursuing the complaint process, hampering schools' ability to keep their campuses safe and prevent the recurrence of sexual harassment.

The extremely narrow definition of hostile environment harassment adopted by the 2020 Amendments is not only contrary to Title IX itself,³⁷ but it also represents a sea change from decades of otherwise consistent enforcement of Title IX to combat sexual harassment resulting from unwelcome conduct on the basis of sex.³⁸ Since at least 1981, the Department has advised that Title IX protects against sexual harassment, including "verbal or physical conduct of a sexual

³² See 85 Fed. Reg. 30,070 (recognizing that weak enforcement encourages perpetration).

³³ *Id.* at 30,551-52, 30,565-68.

³⁴ States' 2019 Comment Letter at 17-18.

³⁵ *Id.* at 18.

³⁶ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1, 2 (Apr. 2017); U.S. Dep't of Educ., *2017-18 Civil Rights Data Collection: Sexual Violence in K-12 Schools* 5 (Oct. 2020), <https://tinyurl.com/CRDC2020> (nearly 15,000 reports of sexual violence in K-12 schools during 2017-2018 school year, a 55% increase) (CRDC 2020).

³⁷ Nowhere in Title IX does the statute require that the sex-based discrimination "effectively deny" an individual access to education. Instead, Title IX states that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" on the basis of sex. 20 U.S.C. § 1681.

³⁸ 87 Fed. Reg. 41,405-07.

nature.”³⁹ And in 1997, the Department explicitly recognized that sexual harassment results from conduct that is “sufficiently severe, persistent, or pervasive [such] that it adversely affects a student’s education or creates a hostile or abusive educational environment.”⁴⁰ This consistent understanding of what constitutes sexual harassment persisted for three decades, as the Department developed more specific guidance for enforcement of Title IX.⁴¹ The Department has consistently required that schools take “prompt and effective” measures to address a hostile school environment resulting from sex-based harassment.⁴²

The 2020 Amendments sharply deviated from this otherwise consistent enforcement history based on the rationale that the “administrative standards governing recipients’ responses to sexual harassment should be generally aligned with the standards developed by the Supreme Court in cases assessing liability under Title IX for money damages in private litigation.”⁴³ However, recognizing the broad scope of Title IX’s protections, the Supreme Court expressly acknowledged that the Department has regulatory authority to “promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,” even if those requirements do not give rise to a claim for money damages in private actions.⁴⁴ Furthermore, the Supreme Court made clear that its “central concern” in articulating more stringent standards for Title IX lawsuits was that private parties could seek “unlimited recovery of damages under Title IX,”⁴⁵ which is not a concern in administrative enforcement because money damages are not at issue at all. Indeed, the Court made clear that administrative enforcement of Title IX may differ from the standards for money damages.⁴⁶ The Department has now rightly recognized that the rationale underlying the 2020 Amendments was a “depart[ure] in many respects from OCR’s prior longstanding guidance that had been developed to ensure a recipient’s implementation of Title IX’s protections.”⁴⁷

Third, the States support changes the Proposed Rule makes with regard to “quid pro quo harassment.” In 2020, the Department concluded that “*quid pro quo* harassment” could be

³⁹ *Id.* at 41,405.

⁴⁰ See 1997 Guidance, 62 Fed. Reg. 12,034. As the Supreme Court recognized in *Cannon*, Title IX is patterned after Title VI, except for the substitution of the word “sex.” 441 U.S. 677, 694-95. As noted above, Title VI has long recognized hostile environment harassment.

⁴¹ 87 Fed. Reg. 41,405-07 (explaining history of the Department’s Title IX sexual harassment enforcement); States’ 2019 Comment Letter at 13-17 (demonstrating consistent application of “sexual harassment” definition under Title IX).

⁴² See 2001 Policy at 14 (“If a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school’s existing grievance procedure or otherwise inform the school of the harassment.”); see also *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449, 11,451 n.2 (Mar. 10, 1994).

⁴³ 83 Fed. Reg. 61,466.

⁴⁴ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

⁴⁵ *Id.* at 286-87.

⁴⁶ *Id.* at 292 (noting that federal agencies could continue to “promulgate and enforce requirements that effectuate the statute’s non-discrimination mandate . . . even if those requirements” would not be enforceable for money damages).

⁴⁷ 87 Fed. Reg. 41,407.

committed only by an “employee” of the institution,⁴⁸ even though previously Department policy had consistently applied this prohibition to non-employees in positions of authority.⁴⁹ It claimed that this definition was compelled by Supreme Court precedent,⁵⁰ once again improperly equating administrative enforcement with private damages lawsuits. The States welcome the Department’s determination “that this is not the appropriate analysis for assessing the Department’s responsibility for the administrative enforcement of Title IX.”⁵¹ In addition to employees, the Proposed Rule would prohibit *quid pro quo* harassment if conducted by an “agent, or other person authorized by the recipient to provide an aid, benefit, or service” under its education program or activity.⁵² This not only returns to the Department’s longstanding policy, but it addresses harassment that might not otherwise be addressed by individuals who assert power over students, such as teaching assistants or volunteer coaches who may condition grades or opportunities in return for sexual favors.

The preamble to the Proposed Rule also effectively balances effectuating Title IX’s protections with First Amendment interests and articulates a line that ensures freedom from sexual harassment without imposing on students’ free speech rights.⁵³ The States agree with the Department’s conclusion that the Proposed Rule’s “totality of the circumstances” approach properly requires schools to assess a variety of factors on both a subjective and objective basis to ensure that the alleged conduct actually constitutes harassment and is not mere speech.

In sum, these proposed changes to the 2020 Amendments are not only in line with longstanding practice, but also prevent the recurrence of sex-based harassment, which is crucial to schools’ ability to keep their campuses safe and to make their campuses attractive for recruiting. Restoring the concept of hostile environment harassment, empowering schools to take action when pervasive *or* severe harassment takes place, and requiring schools to address all forms of sex-based harassment all will allow schools to keep their campuses safe and welcoming to students and faculty. Moreover, enabling schools to address harassment before it “effectively denies” an individual’s access to education can prevent recurrence or even a student from losing their access to education altogether.

C. The Department’s proposed complaint resolution process comports with Title IX and avoids the harms caused by the 2020 Amendments.

We welcome the Department’s decision to implement grievance procedure standards for all Title IX complaints that do not single out sexual harassment complaints for quasi-judicial enforcement. Although some aspects of the Department’s proposed complaint procedures apply to sex-based harassment specifically, the States support the added flexibility included in the proposed grievance process that allows schools to adapt their sex-based harassment proceedings according

⁴⁸ 34 C.F.R. § 106.30.

⁴⁹ 2001 Policy at 3 n.9 (*quid pro quo* harassment by teaching assistant falls under Title IX).

⁵⁰ 85 Fed. Reg. 30,148.

⁵¹ 87 Fed. Reg. 41,412.

⁵² *Id.* at 41,569 (proposed § 106.2).

⁵³ *Id.* at 41,414-15 (explaining the Proposed Rule’s consistency with the First Amendment and with the Department’s prior Title IX policy).

to their campus needs and resources. The States also welcome the Department's streamlining of the K-12 complaint and grievance process, which takes some steps to address the onerous and impractical requirements of the 2020 Amendments while maintaining standards in line with due process requirements.

1. The Proposed Rule's general standards and procedures for resolving all Title IX complaints ensure that Title IX's protections are fully enforced.

The 2020 Amendments impose inflexible and prescriptive complaint, investigation, and hearing procedures,⁵⁴ and limit the conduct that schools can address under Title IX by restricting which persons may file a complaint and excluding conduct that occurs outside of a school's program or activity.⁵⁵ Hence, the Department's inclusion of the comprehensive general definition section furthers Title IX's purposes by standardizing the procedures governing all forms of sex discrimination, including sex-based harassment, and eliminates confusion regarding the scope of actionable harassment for schools.

Program or Activity. For purposes of sexual harassment complaints alone, the 2020 Amendments narrowly define an "education program or activity" under §§ 106.30, 106.44 and 106.45 as "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs" and "any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."⁵⁶ The 2020 Amendments then require a school to dismiss a formal complaint if the alleged sexual harassment did not occur in the school's "education program or activity, or did not occur against a person in the United States," even if there was a nexus to the school.⁵⁷ These requirements thereby undermine (and do not effectuate) Title IX, because harassing conduct taking place outside a school's education program or activity can nevertheless cause someone to "be excluded from participation in, be denied the benefits or, or be subjected to discrimination under any education program or activity."⁵⁸ Similarly, sexual harassment outside the United States may have direct consequences inside the United States that are prohibited under Title IX because they result in a student being "denied the benefits of" and "excluded from participating in" an education program or activity. Hence, the Department acted in a manner inconsistent with Title IX's mandate by categorically barring schools from moving forward with Title IX complaints alleging harassment outside the school's education program or activity or outside the United States.

The Proposed Rule corrects these errors in two ways. First, it abandons the notion that sexual harassment complaints should be assessed under a higher standard to determine whether conduct violated Title IX. Second, it clearly states that a school is obligated to address a complaint

⁵⁴ 34 C.F.R. §§ 106.30(a) (formal complaint); 106.45(b) (grievance process).

⁵⁵ *Id.* at §§ 106.30(a) (sexual harassment); 106.30(a) (formal complaint); 106.44(a).

⁵⁶ *Id.* at § 106.44(a).

⁵⁷ *Id.* at § 106.5(b)(3).

⁵⁸ 20 U.S.C. § 1681(a).

of sex discrimination under its education program or activity, even if conduct that could constitute sex discrimination “occurred outside the recipient’s education program or activity or outside the United States.”⁵⁹ This shift ensures that individuals whose access to an education program or activity has been limited due to sex-based harassment can file a complaint, which, in turn, further effectuates the purpose of Title IX to ensure that a school operates its education program or activity free from sex discrimination.

Complainant. The States commend the Department’s broadened definition of “complainant,” which uniformly applies to all forms of sex discrimination, including sex-based harassment.⁶⁰ Under the 2020 Amendments, a grievance process cannot begin without a formal complaint.⁶¹ Moreover, a formal complaint cannot be filed unless the complainant was participating or attempting to participate in the education program or activity “[a]t the time of filing a formal complaint[.]”⁶² As a result, a school cannot investigate and properly address and stop sexual harassment if the complainant left the school before filing a formal complaint. The Proposed Rule rightly eliminates this restriction by permitting a complaint by a third party “who was participating in or attempting to participate in the recipient’s education program or activity *when the alleged sex discrimination occurred.*”⁶³ There is no basis for excluding individuals who have been subjected to sex discrimination from Title IX’s protection just because they left the school at which the discrimination occurred. Indeed, sexual harassment can cause its targets to drop out of school, and redress is critical both for the targets of harassment and to prevent further harm.⁶⁴

Complaint. The States also support the Department’s proposed definition of “complaint” under proposed section 106.2, which removes the formal complaint requirement under the 2020 Amendments. The formal complaint requirement deterred reporting in contravention of Title IX. The Proposed Rule instead allows for both oral and written complaints. The 2020 Amendments require the affected person (or their parent/guardian) to submit a written formal complaint (generally signed) that includes a specific “request[] that the recipient investigate the allegation of sexual harassment” before an investigation can proceed.⁶⁵ This requirement was imposed regardless of the complainant’s age, disability, or writing ability, or the ability of a parent/guardian to file a complaint.⁶⁶ As explained further in Section I.C.3, *infra*, the formal complaint process

⁵⁹ 87 Fed. Reg. 41,571 (proposed § 106.11).

⁶⁰ *Cf.* 85 Fed. Reg. 30,095 (explaining that § 106.45 only applies to formal complaints of sexual harassment, and that complaints of other forms of sex discrimination may be filed and handled under the “prompt and equitable” grievance procedures under § 106.8(c)).

⁶¹ 34 C.F.R. § 105.45(b).

⁶² *Id.* at § 106.30(a).

⁶³ *See* 87 Fed. Reg. 41,557 (proposed § 106.2 (emphasis added)).

⁶⁴ *See, e.g.,* Alexandra Brodsky, How Much Does Sexual Assault Cost College Students Every Year?, Wash. Post (Nov. 18, 2014); Cecilia Mengo & Beverly M. Black, Violence Victimization on a College Campus: Impact on GPA and School Dropout, 18 J.C. Student Retention: Res., Theory & Prac. 234 (2015); *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (11th Cir. 2007) (student decision to drop out after rape was “reasonable and expected” and did not foreclose Title IX claim).

⁶⁵ 34 C.F.R. § 106.30(a).

⁶⁶ *Id.*

was of particular concern in the K-12 context where most complaints are made orally in the first instance at a school-site. Moreover, educational institutions in several of the States have reported that students in higher education are also at times hesitant to submit a written, signed complaint for fear of retaliation, especially with the level of detailed disclosure required. One state college has yet to move a single case through the entire grievance process as most complainants do not wish to proceed with a formal complaint. The Proposed Rule also remedies the 2020 Amendments' unjustified prohibition against certain third-party complaints,⁶⁷ thereby better effectuating Title IX's intent by increasing the possibility that harassment is addressed when it occurs.

Supportive Measures. The States also support the Department's proposed definition of "supportive measures" under proposed Section 106.2, along with its sufficiently clear requirements provided under proposed Section 106.44(g). Under the 2020 Amendments, supportive measures cannot unreasonably burden the respondent,⁶⁸ and, as a result, they sometimes did not offer the support and accountability necessary to promptly and effectively protect students. The Proposed Rule clarifies that supportive measures can include "temporary measures that burden a respondent," but only when such measures are "imposed for non-punitive and non-disciplinary reasons," "designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment, and may be imposed only if the respondent is given the opportunity to seek modification or reversal of them."⁶⁹ When schools implement supportive measures that burden respondents, they are to be determined on a case-by-case basis by recipients, and respondents can seek modifications of the supportive measures.⁷⁰ This new definition, and the ability for review where a burden is identified, is fair to both parties because it allows a school to promptly and effectively protect the complainant during the grievance procedures while ensuring that any temporary burdensome measures be imposed only if the respondent is given an opportunity to seek modification or reversal of them.⁷¹

Prompt and Equitable Resolution. Along with the proposed supportive measures, the Department's Proposed Rule requires schools to take "prompt and effective" action to end discrimination, prevent its recurrence, and remedy its effects.⁷² The States strongly support the Department's overall efforts to create and maintain school environments free from sex discrimination by returning to its prior longstanding policy of permitting schools to create "prompt and equitable" processes to address all forms of sexual harassment and to investigate and resolve harassment allegations.⁷³ In 2020, the Department abruptly departed from that policy and implemented the "deliberate indifference" standard, which did not require schools to act proactively to address sex discrimination or prevent harassment. The 2020 Amendments only require a school to provide supportive measures and provide a complainant with information about the grievance procedures in the absence of a formal complaint.⁷⁴ In other words, without a formal

⁶⁷ See 87 Fed. Reg. 41,557 (proposed § 160.2).

⁶⁸ 34 C.F.R. § 106.30(a).

⁶⁹ 87 Fed. Reg. 41,421 (proposed § 106.2).

⁷⁰ *Id.* at 41,573-74 (proposed § 106.44(g)).

⁷¹ *Id.* (proposed § 106.44(g)(4)).

⁷² *Id.* at 41,572-75 (proposed § 106.44).

⁷³ 62 Fed. Reg. 12,040; 2001 Guidance at 14, 19-21.

⁷⁴ 34 C.F.R. § 106.44(a).

complaint, a school has no obligation to take any action to investigate and address possible sex discrimination, even if it had information about it.⁷⁵ The Proposed Rule rights this wrong by requiring that “complaints of sex-based harassment are resolved in a prompt and equitable manner.”⁷⁶

Notice. The Department’s proposed tiered notification scheme eliminates the 2020 Amendments’ “actual knowledge” standard, which weakened students’ protections against sex discrimination in contravention of Title IX. Under the “actual knowledge” standard, a recipient is obligated to respond only to incidents of sexual harassment upon receiving notice through its Title IX coordinator, any official with authority to institute corrective measures, or any employee of an elementary and secondary school.⁷⁷ The tiered notification requirements also fill potential reporting gaps by imposing reporting responsibilities on different categories of nonconfidential employees.⁷⁸ This system reflects the practical reality that students may assume that certain employees without authority to institute corrective measures possess the authority to redress sex discrimination, and that employees can receive information about incidents involving sex discrimination in a variety of ways.⁷⁹ We commend the Department for addressing the definition of “confidential employee,” but note that recipients in our States may suggest ways that the definition be refined to better meet the needs of schools with different populations and staffing configurations. In general, however, we note that confidential resources allow those who are vulnerable and uncomfortable to report harassment and to receive appropriate supportive measures without disclosing their identity or automatically triggering a Title IX investigation.⁸⁰

Informal Resolution. The Proposed Rule also provides schools with discretion to offer an informal resolution process, such as mediation, as a voluntary alternative under proposed Section 106.44(k). The States agree that schools should be provided with a certain degree of flexibility to determine an alternative avenue for the parties to reach a resolution. As the Department notes, schools are often in the best position to assess and determine which resolution process is best based on individualized circumstances.⁸¹ The Proposed Rule also safeguards against misuse of an informal resolution process by requiring that the school obtain the parties’ voluntary consent and by foreclosing the use of informal processes in instances where an employee is alleged to have

⁷⁵ 87 Fed. Reg. 41,434.

⁷⁶ *Id.* at 41,392.

⁷⁷ 34 C.F.R. § 106.30.

⁷⁸ For an elementary or secondary school, all of its nonconfidential employees would be required to notify the Title IX coordinator upon receiving information about conduct that may constitute sex discrimination. 87 Fed. Reg. 41,572 (proposed § 106.44(c)(1)). For a postsecondary school, employees with authority to institute corrective measures on behalf of the school would be required, at a minimum, to notify the Title IX coordinator, and other employees who have responsibility for administrative leadership, teaching, or advising would be required to: (1) notify the Title IX coordinator any incident involving a student, and (2) either notify the Title IX coordinator or provide contact information of the coordinator and explain how to report sex discrimination when the incident involves an employee. *Id.* (proposed § 106.44(c)(2)).

⁷⁹ *Id.* at 41,438, 41,440.

⁸⁰ *Id.* at 41,441; A confidential employee is not required to notify the school’s Title IX coordinator. *Id.* at 41,573 (proposed § 106.44(d)).

⁸¹ *Id.* at 41,454.

engaged in sex discrimination against a student or where doing so would conflict with Federal, State or local law.⁸²

Grievance Procedures. Prior to 2020, the Department’s policies consistently emphasized that effective grievance procedures are not only essential to addressing complaints of sex discrimination, but that they are also excellent preventive mechanisms that demonstrate a school does not tolerate discrimination.⁸³ The 2020 Amendments broke with this tradition by imposing prescriptive, cumbersome, and inflexible grievance process on all schools solely for sexual harassment. And many stakeholders, including the States, raised concerns that the Amendments’ grievance procedures failed to effectuate Title IX’s nondiscrimination mandate.⁸⁴ The Proposed Rule’s streamlined grievance procedures instead provide for the prompt and equitable resolution of all complaints of sex discrimination, not just sexual harassment. They include key safeguards, such as a requirement that any investigator, Title IX Coordinator, or decisionmaker be impartial, to ensure a fair process for all parties.⁸⁵ As discussed further below, the States specifically support the Proposed Rule’s: (1) removal of inflexible timeframes; (2) preference for the preponderance of the evidence standard; and (3) privacy protections.

The States support the removal of inflexible timeframes imposed under the 2020 Amendments and the Proposed Rule’s decision to give schools greater flexibility to set reasonable timelines for prompt resolution of complaints. The 2020 Amendments’ grievance procedures imposed a time-consuming multi-step process, which substantially lengthened schools’ investigations.⁸⁶ For example, the 2020 Amendments require schools to give the parties at least 10 days to submit a response after reviewing the evidence. The investigator then prepares a requisite investigative report based on the parties’ responses and must provide it to the parties at least 10 days prior to the hearing.⁸⁷ The States have observed that their schools have spent an exorbitant amount of time administratively to meet the strict Title IX criteria with little benefit to the parties, and with adverse consequences for their ability to effectively address the harms to the complainant and stop the sex-based discrimination. We therefore commend the Department’s efforts to

⁸² *Id.* at 41,574-75 (proposed § 106.44(k)(1)).

⁸³ 62 Fed. Reg at 12,038, 12,040; 2001 Policy at 14.

⁸⁴ *See, e.g.*, 87 Fed. Reg. 41,395-97, 41,409, 41,457-58, 41,501.

⁸⁵ *See id.* at 41,575 (proposed § 106.45(b)).

⁸⁶ *See* 34 C.F.R. §§ 106.45(b)(2)(i)(B) (requiring formal written notice to the parties “with sufficient time to prepare a response before any initial interview”); 106.45(b)(5)(v) (requiring sufficient time for the prepare to participate meetings, including interviews and hearings, after written notice); 106.45(b)(5)(vi) (requiring an opportunity for the parties to inspect and review any evidence and afford “at least 10 days to submit a written response, . . . prior to completion of the investigative report”); 106.45(b)(5)(vii) (an investigation report to be created at least 10 days prior to a hearing and each party should be given a copy for review and written response); *see also* 87 Fed. Reg. 41,458 (noting stakeholders’ concerns that a process that may have taken days under an elementary or secondary school’s previous grievance procedures would take several months under the 2020 Rule’s time-consuming requirements); *id.* at 41,501 (noting a commentator’s concern that the process could add a “delay of nearly one month between the close of interviews and the start of a hearing”).

⁸⁷ 34 C.F.R. §§ 106.45(b)(5)(vi); 106.45(b)(5)(vii).

streamline the procedures by removing the specific timelines and providing schools with discretion to set reasonable timeframes.⁸⁸

Additionally, the Proposed Rule appropriately requires the use of the preponderance of the evidence standard to determine whether sex discrimination occurred; a recipient may only use the clear and convincing standard if that is the standard it imposes in all comparable proceedings.⁸⁹ As the States previously noted, the preponderance of the evidence standard best promotes compliance with Title IX, and many of our schools have long used that standard for similar complaints.⁹⁰ Moreover, the preponderance of the evidence standard would equally balance the interests of the parties by giving equal weight to the evidence of each party.⁹¹ The 2020 Amendments, on the other hand, expressly provide an “option” regarding the standard of proof that may be used (*i.e.*, the preponderance of the evidence standard or the clear and convincing evidence standard), but effectively require schools to align their standard with all other discipline proceedings.⁹² Overall, the States welcome the Department’s proposed framework that provides schools with the flexibility to use the preponderance of the evidence standard for Title IX as long as that is in line with comparable proceedings.

As explained further in Section I.C.3, *infra*, the Proposed Rule addresses many of the privacy concerns associated with the 2020 Amendments, by requiring that recipients take “reasonable steps to protect the privacy of the parties and witnesses during the pendency” of grievance procedures.⁹³ Conversely, the 2020 Amendments prohibit any restriction on the discussion of sex discrimination allegations.⁹⁴ As stakeholders expressed, the Department’s failure to place any restrictions on the parties’ ability to discuss the allegations exposed students to potential slander, social retaliation, and social media harassment.⁹⁵ In addition, the failure to impose commonsense privacy protections chills parties from participating due to reasonable fears of retaliation (including through social media) and negatively affects the reliability of witness testimony.⁹⁶ The States therefore welcome the Proposed Rule’s proactive measures to protect privacy during the grievance process, which appropriately balance the needs of the parties to collect evidence and represent themselves during the proceedings with students’ privacy interests.⁹⁷ The States also applaud the Proposed Rule’s prohibition on disclosing private student information except when the student has consented to the disclosure, when permitted by the Family

⁸⁸ 87 Fed. Reg. 41,575 (proposed § 160.45(b)(4)).

⁸⁹ *Id.* at 41,483.

⁹⁰ States’ 2019 Comment Letter at 43-47.

⁹¹ *See* 87 Fed. Reg. 41,485. *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983) (“A preponderance-of-the evidence standard allows both parties to ‘share the risk of error in roughly equal fashion.’ Any other standard expresses a preference for one side’s interests.”) (internal citation omitted).

⁹² 34 C.F.R. § 106.45(b)(1)(vii).

⁹³ 87 Fed. Reg. 41,469.

⁹⁴ 34 C.F.R. § 106.45(b)(5)(iii).

⁹⁵ *See* 87 Fed. Reg. 41,469.

⁹⁶ *Id.* at 41,470.

⁹⁷ *Id.* at 41,469, 41,575 (proposed § 106.45(b)(5)).

Education Rights and Privacy Act (FERPA), when required by other laws, or to carry out the purpose of Title IX.⁹⁸

However, the States suggest that the Department clarify Section 106.45(e) of the Proposed Rule regarding consolidated complaints to further ensure parties' privacy. Currently, the Proposed Rule allows a school to unilaterally consolidate complaints that "arise out of the same facts or circumstances."⁹⁹ The Department has long recognized that records relating to sexual harassment complaints may not be disclosed to third parties.¹⁰⁰ But the Proposed Rule's consolidation provision raises the concern that evidence about *all* students involved in a consolidated complaint must be disclosed to *all* parties and to each party's advisor. If records contain information about multiple students, FERPA—which generally forbids the disclosure of information from a student's "education record," including disciplinary records without consent of the student (or the student's parent)—only allows a student and their parents to review the parts of other students' records that relate directly to the reviewing student.¹⁰¹ The Department's longstanding policy had been that FERPA permits disclosure of a statement containing information related to other students only if the related information cannot be segregated or redacted without destroying meaning.¹⁰² The Department should consider clarifying the Proposed Rule's consolidation provision to ensure compliance with FERPA and to safeguard parties' privacy.

2. The proposed grievance procedures for sex-based harassment proceedings in higher education reinforce Title IX's antidiscrimination mandate while ensuring a fair process for complainants and respondents.

Section 106.46 of the Proposed Rule, which applies to sex-based harassment proceedings in higher education, brings Title IX sex-based harassment investigations and grievance procedures in higher education in line with civil rights law and Title IX's intent to rid higher education of sex discrimination. For institutions of higher education, implementing the onerous procedures required by the 2020 Amendments created a two-fold problem. First, it imposed rigid and inflexible requirements for Title IX sexual harassment proceedings alone. This was not only costly and onerous to implement, but it significantly prolonged the time to complete a single proceeding. Second, by imposing rigid requirements, it chilled reporting and discouraged complainants, making campuses less safe. The Department has demonstrated that it is grappling with those concerns, which have been repeatedly raised since 2018.¹⁰³

⁹⁸ *Id.* at 41,574 (proposed § 106.44(j)).

⁹⁹ *Id.* at 41,576 (proposed § 106.45(e)).

¹⁰⁰ *See, e.g.,* U.S. Dep't of Educ., Letter from Dale King, Dir. of Family Policy Compliance Off. (Nov. 6, 2015).

¹⁰¹ 20 U.S.C. § 1232g(a)(1)(A), (a)(4)(A)(i), (b); *see also* 34 C.F.R. § 99.12 (imposing similar requirements).

¹⁰² *See* Family Educ. Rights and Privacy, 73 Fed. Reg. 74,806, 74,832-33 (Dec. 9, 2008).

¹⁰³ 87 Fed. Reg. 41,395 (acknowledging that "stakeholders revealed . . . areas of concern and confusion following the implementation of the 2020 amendments," and that "aspects of the new requirements were not well-suited to some or all educational environments or to effectively advancing Title IX's nondiscrimination mandate").

While maintaining some separate procedures for post-secondary sex-based harassment grievances, the Department proposes a return to the educational and civil rights mandate of Title IX with appropriate due process protections, rather than the quasi-criminal procedures the 2020 Amendments impose. We welcome the Department largely aligning sex-based harassment proceedings under Title IX with all other Title IX proceedings. Where the Department has proposed requirements that are specific to sex-based harassment, it has allowed for more flexibility for schools while maintaining both Title IX's nondiscrimination mandate and the preservation of due process for the individuals involved. The Proposed Rule undoes many of the harmful effects of the 2020 Amendments, and with minor adjustments and clarification, the States believe it will better allow schools to prevent and end discrimination on campus.

As a result of its extensive consultation process, the Department noted that schools found that "certain requirements impeded their successful management of the day-to-day school environment."¹⁰⁴ Stakeholders, including many of the States, previously warned that the grievance procedures the Department imposed on schools and students in 2020 would create a quasi-criminal process, lengthen grievance procedures, chill reporting, and undermine schools' ability to stop harassment.¹⁰⁵ Moreover, the Department had conceded at the time that its 2020 requirements were neither compelled by due process concerns, nor required by Title IX's antidiscrimination mandate.¹⁰⁶ In the Proposed Rule, the Department now makes clear that it prioritizes truth-seeking and enforcing Title IX's nondiscrimination mandate, while maintaining a fair process. Specifically, and as discussed further below, the States applaud the Department's decision to: (1) make live hearings optional; (2) introduce flexibility into the process of assessing credibility; (3) remove the requirement that advisors conduct cross-examination; (4) exclude certain sensitive or harassing evidence from the grievance proceedings; (5) no longer mandate dismissal of complaints; and (6) provide guidance regarding whether Title IX grievance procedures apply when the individuals involved in the process are both students and employees.

First, making live hearings optional will relieve a significant burden on schools with fewer resources. Prior to 2020, many schools with significant resources were already carrying out hearings. However, the 2020 Amendments require live hearings with specific procedures for all higher education institutions and are overly prescriptive in specifying the requirements for those live hearings.¹⁰⁷ Even schools that have long held hearings as part of their Title IX sex-based harassment proceedings, have struggled with the number of roles required to process complaints under the 2020 Amendments. One New Jersey school, which has long held Title IX hearings, roughly estimated that in 2019 it took an average of 152 days to resolve one Title IX matter, whereas in 2021, it took 287 days, an 89 percent increase. This was exacerbated by the multiple

¹⁰⁴ *Id.* at 41,395-96.

¹⁰⁵ States' 2019 Comment Letter at 34-49.

¹⁰⁶ 85 Fed. Reg. 30,303 ("this provision affords parties greater protection than some courts have determined is required under constitutional due process"); *id.* at 30,101 ("unfair imposition of discipline, even in a way that violates constitutional due process rights, does not necessarily equate to sex discrimination [against the accused] prohibited by Title IX").

¹⁰⁷ States' 2019 Comment Letter at 34-49.

10-day review processes incorporated into the 2020 Amendments.¹⁰⁸ Consistent with other schools' experiences, the University of Massachusetts reports, the multiple 10-day review processes have made the review periods considerably slower. Schools also report expending up to \$18,000 to hire decisionmakers for a single hearing. Washington schools report having to hire outside investigators, hearing officers and advisors. Even for schools that have only moved a few cases through the grievance process, the costs have been enormous. The Association of Proprietary Colleges in New York, smaller institutions focused on providing education access to under-represented students, report that the live hearings have created "large burdens" because most offices have limited numbers of full-time staff and struggle to recruit, train, and retain volunteers, thus leaving the responsibility to fulfill the necessary roles on a small number of individuals. Some of these schools report spending \$10,000 to \$16,000 per hearing on a hearing officer alone. This is untenable, particularly for smaller schools with smaller budgets. California schools report that the proposed rules will allow them to more properly staff the investigative and hearing processes and will create greater equity for their students. The 2020 Amendments have thus resulted in the "protracted and unwieldy hearings" that the States warned of in 2019.¹⁰⁹ By making hearings optional and less prescriptive, the Proposed Rule will reduce the financial burden associated with processing complaints.

Higher education institutions also report that the 2020 Amendments have, as predicted, created a chilling effect on campus. The success of Title IX's enforcement scheme relies on "individual reporting."¹¹⁰ The live hearing requirement has acted as a deterrent and discouraged potential complainants from filing a complaint and pursuing the grievance procedures, undermining the purpose of Title IX's enforcement scheme. Making hearings optional allows smaller schools to assess both their resources and the campus needs to address sex-based harassment complaints in a manner that meets their community's circumstances. On smaller campuses, where students may fear particular risks of retaliation or reputational damage, schools may seek alternatives to live hearings in order to encourage reporting and prevention of sex-based harassment.

Second, the States welcome the flexibility that the Proposed Rule would introduce into the cross-examination process. The 2020 Amendments' cross-examination requirement has had a documented chilling effect. One Washington campus reports that when discussing resolution options with sexual harassment complainants, nearly 90 percent say they do not want to participate in a live hearing with cross-examination. The requirement discourages complainants from pursuing the grievance process under Title IX and potentially re-traumatizes victims of harassment.¹¹¹ The Commission of Independent Colleges and Universities (CICU) in New York has noted that "despite institutions' best efforts" cross-examination by advisors "has proven to be adversarial and harmful to students participating in good faith in the process." The length of their hearings (no less than six hours) has also required students to miss classes or required weekend hearings. Some Illinois schools report that respondents, complainants, and witnesses have declined

¹⁰⁸ See 34 C.F.R. § 106.45(b)(5)(vi) & (vii).

¹⁰⁹ States' 2019 Comment Letter at 41.

¹¹⁰ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005).

¹¹¹ States' 2019 Comment Letter at 41.

to participate in hearings after initial interviews were conducted because of the cross-examination requirement.

By requiring cross-examination by advisors, the 2020 Amendments improperly impose on all schools across the nation the requirement created by a single circuit court to conduct advisor-led cross-examination.¹¹² The courts agree that due process requires some ability to meaningfully examine the credibility of witnesses in school Title IX proceedings.¹¹³ But they have consistently refused to impose a requirement that “the person doing the confronting must be the accused student or that student’s representative.”¹¹⁴ At least one court has warned of such confrontation “mirror[ing] common law trials” and overwhelm[ing] administrative facilities” at the expense of “educational effectiveness,” while virtually mimicking a “jury-waived trial.”¹¹⁵ It is clear, therefore, that the mandate for advisor-led cross-examination in the 2020 Amendments is not required by due process, as the Department itself now concludes.¹¹⁶

The Proposed Rule instead allows the other party to present questions through a decisionmaker or other third party, consistent with due process concerns.¹¹⁷ This type of live questioning is less harmful for other parties to the proceedings and more appropriate for the educational setting. As the Department notes, it prioritizes enabling the “decisionmaker to seek the truth and minimize the chilling effects on the reporting of sex-based harassment” or participation in grievance procedures by both parties.¹¹⁸ It also allows schools to conserve resources by training or retaining a more limited number of people in the process related to establishing credibility.

Although the Proposed Rule’s treatment of assessing credibility is a dramatic improvement over the 2020 Amendments, several aspects of the Proposed Rule’s requirements on this score warrant further clarification. With respect to the process for questioning by a neutral decisionmaker to assess credibility, the Department should consider clarifying how recipients implement the requirement for cross-examination when credibility “is both in dispute and relevant to evaluating one or more allegations of sex-based harassment.”¹¹⁹ For example, the Department should clarify whether it requires specific findings on whether credibility is “in dispute” and

¹¹² See 87 Fed. Reg. 41,504-06 (discussion of Sixth Circuit requirements and *Baum*).

¹¹³ See, e.g., *Overdam v. Texas A&M Univ.*, 2022 WL 3207431, at *4 (5th Cir. Aug. 9, 2022) (holding that even in matters of sexual assault, where suspension was imposed, due process requires some opportunity to test credibility, but not necessarily direct cross-examination by an attorney); *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) (stating that “due process in the university disciplinary setting requires ‘some opportunity for real-time cross-examination, even if only through a hearing panel.’”).

¹¹⁴ *Haidak*, 933 F.3d at 69.

¹¹⁵ *Id.* at 69-70 (internal citations omitted).

¹¹⁶ 87 Fed. Reg. 41,505 (“The Department’s tentative view is that neither Title IX nor due process and fundamental fairness require postsecondary institutions to hold a live hearing with advisor-conducted cross-examination in all cases.”).

¹¹⁷ *Id.* (concluding that the Proposed Rule’s “live questioning process” “enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is in dispute and is relevant to evaluating” the allegations of sex-based harassment); *id.* at 41,577-78 (proposed § 106.46(f), (g)).

¹¹⁸ *Id.* at 41,505.

¹¹⁹ *Id.* at 41,482.

“relevant” prior to cross-examination of each witness and whether or not permitting such questioning could result in a recipient being sanctioned. The Department should also clarify the circumstances in which a live hearing requires cross-examination.

Third, under the Proposed Rule, if the school chooses to carry out live hearings, the parties may retain advisors of their choice and the school *may* allow advisors to conduct cross-examination, but it is not required to do so.¹²⁰ This provides schools with the necessary flexibility to adjust their sex-based harassment proceedings to their campus environment and resources. Schools that are able to train and retain advisors for cross-examination may do so.¹²¹ Others can instead maintain hearing panels or decisionmakers to conduct questioning. Schools that do not have the resources to retain attorneys as advisors will no longer feel compelled to do so under the Proposed Rule and can focus instead on thoroughly training decisionmakers. For example, the University of Massachusetts system reports that hearing officers have expressed concerns about serving as the Chair of a panel and having to rule on matters related to relevancy, particularly where the advisors are attorneys. In light of these concerns, under the 2020 Amendments, the University has hired external hearing panel members. But under the Proposed Rules, recipients will have the flexibility to focus their resources on decisionmaker training.

This shift—from requiring to permitting advisors to conduct cross-examination—addresses the issue of inequity where one party is represented by an attorney while the other is not. At the same time, the shift relieves the financial burden the 2020 Amendments sometimes placed on recipients. For example, to level the playing field in all Title IX sexual harassment proceedings, a Minnesota State University obtained attorney advisors for students who did not have their own attorney advisor. The school found it challenging to identify attorneys willing to undertake the task of representing either party. For schools that cannot pay for advisors, wealthier students may be able to secure legal representation while other parties to the proceeding would be represented by members of faculty or staff acting in a volunteer capacity, creating inequities that the States warned about in 2019.¹²² The New York CICU also reported that some institutions had to scramble to find affordable, high-quality advisors for parties, particularly for respondents. Similarly, Vermont schools report difficulty finding staff willing to serve as investigators and advisors.

With respect to advisors, the Department should consider clarifying that witnesses in a particular proceeding are prohibited from serving as advisors in that proceeding. Without this limitation a witness could be privy to confidential information shared throughout the process, thus affecting their credibility. If a witness served as an advisor, that would also require schools that allow advisor cross-examination to find a separate individual to cross-examine that witness.

Fourth, the States welcome the Proposed Rule’s amendments to what evidence and questioning may be excluded from the grievance proceedings.¹²³ Specifically, the Department now proposes to exclude evidence that is protected under privilege, health records, and sexual interests

¹²⁰ *Id.* at 41,578 (proposed § 106.46(f)(1)(ii)).

¹²¹ *Id.* (proposed § 106.46(f)(1)(i)).

¹²² States’ 2019 Comment Letter at 41.

¹²³ 87 Fed. Reg. 41,578 (proposed § 106.46(f)(3)).

or conduct.¹²⁴ It would also require schools to exclude questions that are “unclear or harassing of the party being questioned.”¹²⁵ Conversely, the 2020 Amendments provide little guidance beyond noting that information under a “legally recognized privilege” is generally inadmissible and questions, including questions about prior sexual behavior, could only be excluded if the decisionmaker determines that they are not “relevant.” The States welcome the Proposed Rule’s additional guidance.

Fifth, the States support the Proposed Rule allowing, but not mandating, the dismissal of complaints under certain circumstances, which relieves a major burden for schools.¹²⁶ The 2020 Amendments, conversely, mandate that complaints be dismissed if they do not meet the narrow definition of sexual harassment or the scope of required conduct,¹²⁷ even if they could constitute a claim under a code of conduct proceeding. This resulted in schools being burdened with dual track proceedings, as the States warned in 2019.¹²⁸ For example, after the 2020 Amendments were published, Goldey-Beacom College in Delaware amended its Sexual Misconduct Policy to include two grievance procedures, one for the Title IX incident process and one for sexual misconduct claims outside the scope of the 2020 Amendments’ criteria – *i.e.*, for cases in which sexual misconduct was alleged, but the alleged sexual misconduct failed to meet the 2020 Amendment’s criteria. Schools in Illinois note that it has been challenging for students to understand this dual process, making the jobs of Title IX coordinators and administrators more difficult. In many of the States, schools report that where they began an investigation and realized that the conduct may have occurred off campus or did not meet the narrowed sexual harassment definition, they were forced to formally dismiss the Title IX complaint process and then re-start the process under their code of conduct in order to ensure a safe learning environment for their students. For example, schools in the University of Massachusetts system report that where the incident reports did not meet the threshold of the 2020 definition of “sexual harassment,” the cases were formally dismissed under the Title IX process and then, depending on the facts and circumstances, either dismissed altogether or referred for alternative procedures. In some instances throughout our States, the complainants chose not to move forward after having their complaint dismissed once, thus hampering the schools’ ability to prevent recurrence.

Finally, the Proposed Rule adequately addresses the potential tension between Title IX and Title VII where individuals involved in the grievance procedures are both employees and students at a postsecondary institution. The Proposed Rule requires a “fact-specific inquiry” to determine whether Section 106.46 applies. As the States previously explained, when employees are involved in grievance procedures, Title VII’s requirements can also apply and may conflict with the 2020 Amendments.¹²⁹ In addition, collective bargaining agreements or state laws may impose additional

¹²⁴ *Id.* at 41,575 (proposed § 106.45(b)(7)).

¹²⁵ *Id.* at 41,578 (proposed § 106.46(f)(3)).

¹²⁶ *Id.* at 41,577 (proposed § 106.46(d)).

¹²⁷ 34 C.F.R. § 106.45(b)(3).

¹²⁸ States’ 2019 Comment Letter at 49-51 (“Even if the proposed rule allows broader protections against sex discrimination, mandating that schools dismiss Title IX complaints that fall outside of the regulations’ scope will still burden schools by requiring them to create two separate procedures.”)

¹²⁹ *Id.* at 27-28.

requirements on proceedings involving employees.¹³⁰ The Proposed Rule’s “fact-specific inquiry” appropriately provides guidance to schools regarding what procedure should apply without being overly prescriptive.¹³¹

3. The Proposed Rule’s changes to the grievance procedures for K-12 schools better effectuate the purpose of Title IX.

Students in grades K-12 are particularly vulnerable to sexual harassment.¹³² Instances of sexual harassment are both underreported and on the rise in K-12 schools,¹³³ and the unique developmental needs of K-12 students require an expeditious and supportive complaint process.¹³⁴ Evidence shows how important it is to address misconduct in young children before it escalates in order to prevent long-term harm.¹³⁵ The Proposed Rule makes vital changes to the grievance procedures for K-12 schools, including: (1) applying grievance procedures to all complaints of sex-based discrimination; (2) requiring reasonably prompt resolution of all complaints; (3) allowing Title IX coordinators to determine whether a complaint should be initiated; (4) protecting student privacy; and (5) ensuring protections for students with disabilities. Each of these changes, individually and taken together, further Title IX’s antidiscrimination mandate.

First, under the Proposed Rule, grievance procedures will apply to all complaints of sex discrimination, not just complaints of sexual harassment.¹³⁶ This is in direct contrast to the 2020 Amendments, which impose onerous procedures for complaints of sexual harassment only.¹³⁷ The States report that the 2020 Amendments created a dual-track investigative process (one track for sexual harassment complaints, another for all other sex discrimination complaints) that can take months to complete. For example, K-12 schools in Vermont have had to dismiss a sexual harassment complaint if it does not allege the level of sexual misconduct required to meet Title IX’s current definition, and then refile the report and take action under a separate process under state law. Schools in Washington and California have had similar experiences, finding that the grievance procedures imposed by the 2020 Amendments make it challenging to process complaints of sexual misconduct. Illinois schools have similarly found that the split grievance systems create unnecessary complexity, especially because individuals understand their grievance in terms of conduct, not legal grounds. The Proposed Rule will avoid the pitfalls of the 2020

¹³⁰ The 2020 Amendments acknowledge this and threaten schools for non-compliance. 85 Fed. Reg. 30,444 (recipients forego federal financial assistance if they will not renegotiate a collective bargaining agreement or are concerned about state law compliance).

¹³¹ 87 Fed. Reg. 41,577 (proposed § 106.46(b)).

¹³² Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), <https://tinyurl.com/3pyvmuxh>; Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), <https://tinyurl.com/ywyp7az5> (noting differences in the types of sexual harassment and reactions to it).

¹³³ *E.g.*, CRDC 2020.

¹³⁴ *See Petroleum Commc’ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

¹³⁵ *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 85 Fed. Reg. 30,486 (discussing harms raised by commenters from significant delays).

¹³⁶ 87 Fed. Reg. 41,463 (clarifying that the same grievance procedure is used for sexual harassment claims and other claims of sex discrimination).

¹³⁷ 34 C.F.R. § 106.45(b) (grievance procedure provided only for sexual harassment).

Amendments by streamlining grievance procedures and applying a single set of procedures to all sex discrimination claims.

The Proposed Rule also allows school districts to simultaneously meet other requirements of state law that may, for example, allow for greater protection for students subjected to sexual harassment, thus better effectuating Title IX's purpose and ensuring the opportunity for the Title IX coordinator to address patterns of discrimination in the recipient's educational program or activity.

Second, the Proposed Rule returns the K-12 grievance procedures to a prompt and equitable process that recognizes the unique needs of young students. As discussed, *supra* at Section I.C.1, the Proposed Rule appropriately requires that a recipient establish reasonably prompt timeframes for the major stages of the grievance procedures but does not mandate specific minimum timeframes for each stage.¹³⁸ This change is, again, in contrast to the 2020 Amendments, which require schools to adhere to set timeframes, which led to more protracted investigations. For example, under the Amendments, after the formal complaint is filed, a school must engage in 10-step process spanning at least 20 days before it can impose even minor discipline, such as an after-school detention, community service, or training, or issue any remedies that may unreasonably burden a respondent.¹³⁹

In the experience of the States, elementary and secondary school-age children are not best served by lengthy procedures, which are less effective at preventing recurring sex discrimination.¹⁴⁰ In Vermont, for example, the inability to use a single-investigator model has hampered schools' capacity to process complaints. The schools struggle to hire the necessary staff and resort to taking other administrative staff from their normal duties. Schools in the States also report spending exorbitant amounts of time and money on ensuring compliance with the 2020 Amendments. K-12 schools need flexibility to determine, after a constitutionally sufficient process, an appropriate response to prevent escalation of sexual harassment.¹⁴¹ This is what the Proposed Rule allows for, in furtherance of Title IX's purpose.

The Proposed Rule also gives a recipient more flexibility in conducting an emergency removal of a respondent when the respondent poses a threat to the health and safety of others, as it now permits emergency removal of a respondent after a recipient conducts an individualized assessment and determines that an immediate threat exists, and removes the limitation that the threat must be "physical."¹⁴² Taken together, these changes better effectuate Title IX's purpose and Congressional intent, balancing due process with the need to ensure that students are protected from sexual harassment and receive prompt and effective resolutions to their complaints.

Third, the Proposed Rule returns flexibility to the Title IX Coordinator to decide whether a complaint should be initiated and ensures that all complaints received orally or otherwise are

¹³⁸ 87 Fed. Reg. 41,468, 41,575 (proposed § 106.45(b)(4)).

¹³⁹ 85 Fed. Reg. 30,310; 30,288; 34 C.F.R. § 106.45(b)(2), (5)(iv)-(vii), (6)(i)-(ii), (7)(ii), (8).

¹⁴⁰ See 87 Fed. Reg. 41,459.

¹⁴¹ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 580, 582-83 (1975).

¹⁴² 87 Fed. Reg. 41,451-52, 41,574 (proposed § 106.44(h)).

promptly and equitably addressed.¹⁴³ Conversely, the 2020 Amendments, which require a written formal complaint before a sex discrimination investigation can be initiated, created significant barriers for K-12 students because (1) young children and students with disabilities often do not have the capacity to complete a formal complaint and may instead report via informal oral communications with staff, and (2) some children do not have a parent or a guardian, and therefore do not have a representative to help them file a complaint.¹⁴⁴ Furthermore, Los Angeles Unified School District has reported that parents may be unavailable to file on their child’s behalf for a variety of reasons, such as abuse, interaction with the foster system, literacy, difficulty writing in English, or disability.

While recognizing the importance of complainant autonomy, the Proposed Rule properly allows the Title IX Coordinator to weigh other factors—such as age—that are consistent with schools’ legally recognized *in loco parentis* responsibilities.¹⁴⁵ Furthermore, the Proposed Rule ensures that *all* students have an adult advocating for them by providing authorized legal representatives with the right to act on behalf of an individual without a parent or guardian.¹⁴⁶ This change appropriately permits an educational representative, who may not be a youth’s guardian but is legally authorized to act on the youth’s behalf, to initiate Title IX proceedings.¹⁴⁷ By adding flexibility regarding the initiation of a Title IX complaint, the Proposed Rule furthers Title IX’s antidiscrimination mandate.

Finally, the Proposed Rule also includes appropriate privacy protections to ensure that students who file a Title IX complaint do not experience retaliation from classmates, parents or school staff for voicing their concerns.¹⁴⁸ In contrast, the 2020 Amendments prohibit recipients from restricting the ability of either party to discuss the allegations, including the parties’ names, under investigation.¹⁴⁹ Under the 2020 Amendments, the States have seen that without any limitations on students’ ability to spread information about complaint allegations, complaining students have been subject to social retaliation—on and offline—which creates a chilling effect (and can subject the complainant to a further hostile campus environment). As discussed, *supra*, in Section I.C.1., the Proposed Rule properly returns the appropriate privacy protections to K-12 students by requiring that a “recipient must take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient’s grievance procedures,” while explicitly balancing this goal with various practical necessities of the grievance process.¹⁵⁰ Schools would also be prohibited from disclosing private student information except when the student has

¹⁴³ *Id.* at 41,451.

¹⁴⁴ *Id.* at 41,404 (the 2020 rule only designates a parent or guardian to act on behalf of the student), *Id.* at 41,569 (proposed § 106.6(g)).

¹⁴⁵ *Id.* at 41,445; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

¹⁴⁶ 87 Fed. Reg. 41,404.

¹⁴⁷ *Id.*; Lichty, L.F., Torres, J.M., Valenti, M.T. and Buchanan, N.T. (2008), Sexual Harassment Policies in K-12 Schools: Examining Accessibility to Students and Content. *Journal of School Health*, 78: 607-614. <https://tinyurl.com/5n7dfb35>.

¹⁴⁸ 85 Fed. Reg. 30,295 (acknowledging and chronicling concerns raised by many commenters); 87 Fed Reg. at 41,469.

¹⁴⁹ 87 Fed Reg. 41,469.

¹⁵⁰ *Id.* at 41,575 (proposed § 106.45(b)(5)).

consented to the disclosure, when permitted by FERPA, when required by other laws, or to carry out the purpose of Title IX.¹⁵¹ These changes represent a return to the longstanding practice of protecting the privacy of young students during grievance proceedings.¹⁵²

4. The Proposed Rule recognizes and appropriately gives effect to the parallels between Title IX and Title VI.

The 2020 Amendments inappropriately limit the definitions currently set forth in Title IX at Section 106.30 from being applied to Title VI complaints, even where a complaint consists of a mixed harassment complaint on grounds of sex and race, color, or national origin. Disconnecting Title IX from Title VI created problems for mixed harassment complaints.¹⁵³ For example, when a student faces discriminatory harassment based on sex and race in the same incident, the 2020 Amendments require the school to conduct two separate investigations and apply two separate legal standards to the same underlying harassing conduct, which could lead to absurd and inequitable results. And if that harassment could be proved through written admissions of a respondent who refuses to testify, under the 2020 Amendments, the respondent could avoid responsibility for the sexual harassment entirely while being held accountable for the racial harassment.¹⁵⁴

In addition to the practical problems for mixed harassment complaints, this separation is not supported by statutory text because, as the Supreme Court recognized in *Cannon v. University of Chicago*, Title IX is patterned after Title VI.¹⁵⁵ Both Title IX and Title VI seek “to accomplish two related, but nevertheless somewhat different, objectives”: (1) “to avoid the use of federal resources to support discriminatory practices” and (2) “to provide individual citizens effective protection against those practices.”¹⁵⁶ A congressional hearing to review Title IX regulations reaffirmed Congress’s intent to make the protections against sex discrimination in Title IX co-extensive with Title VI’s protections against discrimination based on race, color, and national origin.¹⁵⁷

By bringing definitions applicable to Title IX back into proposed Section 106.2 and removing any requirements not to apply Title IX’s procedural definitions to Title VI proceedings, the Department appears to have addressed the problems caused by the 2020 Amendments and brings enforcement of Title IX and Title VI back in line, as is contemplated by the parallel statutory protections.

¹⁵¹ *Id.* at 41,574 (proposed § 106.44(j)).

¹⁵² *E.g.*, U.S. Dep’t of Educ., *Sexual Harassment: It’s Not Academic Pamphlet* 7 (1988).

¹⁵³ *See* 85 Fed Reg. 30,432 (stating that schools may use a different grievance process to address race or disability allegations), 30,071 (acknowledging concerns with diverging standards between Title IX and Title VI, but dismissing them by stating that Title VI regulations will continue to be enforced).

¹⁵⁴ *Id.*

¹⁵⁵ *Cannon*, 441 U.S. at 694-95.

¹⁵⁶ *Id.* at 704.

¹⁵⁷ For example, Senator Bayh noted that Title IX “sets forth prohibition and *enforcement* provisions which generally parallel the provisions of Title VI.” 118 Cong. Rec. 5807 (1972) (emphasis in original)).

D. The Proposed Rule’s definition of the role of a Title IX Coordinator aligns with Title IX’s purpose.

The 2020 Amendments require that a school appoint a Title IX Coordinator, but fail to address important details regarding the role of a Title IX Coordinator. The Proposed Rule adopts additional requirements concerning the role and responsibilities of a Title IX Coordinator that more fully effectuate implementation of the statute.¹⁵⁸

First, rather than requiring the Title IX Coordinator to fulfill all required responsibilities on their own, the Proposed Rule permits a school to assign designees to help fulfill some of the Title IX Coordinator’s responsibilities, as long as the Title IX Coordinator retains oversight and ultimate responsibility for compliance.¹⁵⁹ As the Department appropriately notes, this approach enables recipients who provide services at multiple locations to more effectively enforce Title IX.¹⁶⁰ In the experience of schools in the States, it is helpful and more efficient to be able to delegate Title IX enforcement activities, and it is particularly untenable to have one person perform each of these activities with respect to larger schools.

Second, as discussed in Section I.C.3, *supra*, the Proposed Rule rightly empowers the Title IX Coordinator to determine whether to initiate a complaint where the complainant is unwilling or unable to make one, or to “[t]ake other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient’s education program or activity.”¹⁶¹ The preamble further explains the factors a Title IX Coordinator should consider in making such determination, ensuring that complainant autonomy is balanced against threats to health and safety.¹⁶² This is a significant improvement over the 2020 Amendments, which discussed the topic only sparingly in the preamble. That is especially true because complaints and related measures initiated by a Title IX Coordinator are an important tool for schools to be able to proactively ensure they are providing education programs or activities free from sex discrimination.

Third, the Proposed Rule appropriately requires the Title IX Coordinator to receive the same training required by all other recipient employees along with training on their specific responsibilities, the recipient’s recordkeeping system, and any other training necessary to coordinate compliance with Title IX.¹⁶³ These training requirements, which were absent from the 2020 Amendments, effectuate the purpose of Title IX by ensuring that Title IX Coordinators and other employees will receive training on the “aspects of Title IX that are relevant and critical to their specific roles.”¹⁶⁴

¹⁵⁸ 87 Fed. Reg. 41,569-70 (proposed §§ 106.8(a) & (d)), 41,573 (proposed § 106.44(f)).

¹⁵⁹ *Id.* at 41,424, 41,569 (proposed § 106.8(a)).

¹⁶⁰ *Id.* at 41,424.

¹⁶¹ *Id.* at 41,445, 41,573 (proposed § 106.44 (f)(5)-(6)).

¹⁶² *Id.* at 41,445-46.

¹⁶³ *Id.* at 41,570 (proposed § 106.8(d)).

¹⁶⁴ *Id.* at 41,428.

The States, however, propose two modest clarifications to the above provisions. First, while the preamble of the Proposed Rule indicates that “every reference to the ‘Title IX Coordinator’ in the preamble, other than in discussion of [certain specified sections] should be understood to include the Title IX Coordinator and any designees,”¹⁶⁵ the Final Rule would be clearer if Section 106.8(a) itself were amended to state where the rule requires or permits action by the “Title IX Coordinator” (except as to ultimate oversight and review) those duties may also be carried out by the “Title IX Coordinator’s designees.” Relatedly, the Department should consider explicitly stating that in large school districts with multiple sites, principals and vice principals may be designated to provide supportive measures like counseling, stay-away protections, and course changes because it is not feasible for the Title IX Coordinator or district-level designees to provide supervision or direct oversight.¹⁶⁶

II. THE PROPOSED RULE IMPROVES EQUITABLE ACCESS TO EDUCATION FOR ALL STUDENTS.

In addition to the improvements discussed above, which establish standards for Title IX enforcement concerning sexual violence and sexual harassment that are consistent with longstanding Department practice, the Proposed Rule makes substantive improvements in other areas that likewise better effectuate Title IX’s purpose to provide individuals with effective protection against sex discrimination and equitable access to educational opportunities. As discussed in further detail below, the Proposed Rule (1) recognizes and better protects students with disabilities, who are more likely to experience gender-based discrimination; (2) clarifies that the reach of Title IX includes discrimination on the basis of sex stereotypes, sex characteristics, sexual orientation, and gender identity, in line with how the United States Supreme Court and other federal agencies have interpreted related federal anti-discrimination law; (3) ensures compliance with and provides greater detail regarding existing mandates relating to pregnancy and parenting students, protections that are vital to ensuring gender equality in education; and (4) elaborates on longstanding protections Title IX affords to students to be free of retaliation for asserting their Title IX rights. The States applaud each of these improvements.

A. The Proposed Rule rightly recognizes that students with disabilities are protected under Title IX.

The Proposed Rule rightly recognizes that “sex discrimination . . . sometimes overlap[s] with other forms of discrimination, such as race discrimination and disability discrimination,” which keep[] affected students from benefiting fully from their school’s education programs and activities.”¹⁶⁷ The States’ experience shows that discrimination is often multi-faceted. Studies show that people with disabilities may be twice as likely to experience gender-based violence,¹⁶⁸

¹⁶⁵ *Id.* at 41,425.

¹⁶⁶ *See Id.* at 41,573 (proposed § 106.44(f)(3) (requiring the Title IX Coordinator to offer and coordinate supportive measures)).

¹⁶⁷ *Id.* at 41,392.

¹⁶⁸ U.S. Agency for Int’l Dev., *Advancing Women and Girls with Disabilities* (May 7, 2019), <https://tinyurl.com/4cpchj67>.

and women report experiencing nearly 1.5 times as many violations of the Americans with Disabilities Act as do men.¹⁶⁹ Moreover, evidence of sex and disability discrimination may be “inextricably intertwined,” and it can often be difficult to determine whether discrimination faced by a person with a disability “is derived from the [complainant’s] status as a woman, her status as a disabled person, or both.”¹⁷⁰

To effectuate Title IX’s protection against sex discrimination, the Proposed Rule appropriately adds a definition of the term “student with a disability,”¹⁷¹ and includes other provisions “that would require a recipient to consider the requirements of Federal disability laws when implementing the Title IX regulations.”¹⁷² As the Department correctly notes, both Section 504 of the Rehabilitation Act¹⁷³ and the Individuals with Disabilities Education Act¹⁷⁴ impose requirements on recipients that must be considered throughout the implementation of grievance processes under Title IX.¹⁷⁵

We also commend the Department for recognizing that supportive measures that address the effects of harassment in relation to a student’s disability “may require tailoring in ways that may not be obvious to a Title IX Coordinator,” and therefore whenever a student with a disability enters a Title IX grievance proceeding “the Title IX Coordinator has the responsibility to consult with the [Individualized Education Program] team [and/or] Section 504 team who are already charged by Federal law with making individualized decisions about students with disabilities.”¹⁷⁶ This is particularly important because supportive measures may intersect with decisions made by these teams, including placement, reasonable accommodations, special education, and related services that are necessary to ensure K-12 students have access to a free and appropriate education and postsecondary students have equal access to education.¹⁷⁷

However, we also note that in a K-12 setting, a student’s Individualized Education Program (IEP) team or Section 504 plan participants may include a wide range of members and may be difficult to convene in a timely manner. Thus, in order to more expeditiously provide the type of consultation that will benefit the student, without unnecessarily delaying the implementation of supportive measures, we suggest amending proposed Sections 106.8(e) and 106.44(g)(7)(i) to instead require the Title IX Coordinator to consult with a “lead member of” the IEP team for K-12 students with disabilities or the Section 504 Coordinator for students with a Section 504 plan.

¹⁶⁹ Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 Minn. L. Rev. 1099, 1102-3 (2017).

¹⁷⁰ *Id.* at 1100-01 (2017).

¹⁷¹ 87 Fed. Reg. 41,400 (discussing added proposed § 106.2 definition).

¹⁷² *Id.* (discussing proposed §§ 106.8(e) and 106.44(g)(7)).

¹⁷³ 29 U.S.C. § 701 *et seq.*

¹⁷⁴ 20 U.S.C. § 1400 *et seq.*

¹⁷⁵ 87 Fed. Reg. 41,429-30.

¹⁷⁶ *Id.* at 41,430.

¹⁷⁷ *See* 34 C.F.R. §§ 300.17, 300.300-300.328, and 104.34-104.36.

B. The Proposed Rule clarifies the scope of “sex discrimination” in accordance with Title IX, Supreme Court precedent, and historical Department practice.

The Proposed Rule appropriately clarifies that “sex discrimination,” as defined and prohibited by Title IX, includes “discrimination on the basis of sex stereotypes, sex characteristics . . . , sexual orientation, and gender identity.”¹⁷⁸ This clarification effectuates Title IX by ensuring protection of LGBTQI+ students, who are at greater risk of lower educational achievement due to sex discrimination, and by ensuring that enforcement of the statute aligns with the Department’s historical practice and Supreme Court precedent.

The protections in the rule are essential because LGBTQI+ students who experience discriminatory policies and practices have “lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students.”¹⁷⁹ LGBTQI+ students who experienced sex-based discrimination at school were found to be almost three times as likely to miss school as their non-LGBTQI+ classmates because they felt unsafe or uncomfortable.¹⁸⁰ LGBTQI+ students face prevalent discrimination in school, including sexual harassment.¹⁸¹ For example, transgender youth experience higher levels of discrimination, violence, and harassment than cisgender youth. Of students known or perceived as transgender, 77% reported negative experiences at school, including harassment and assault.¹⁸² Discrimination at school puts transgender students at risk of suicide, mental health issues, and worse educational outcomes, and Title IX’s strong protections are needed to ameliorate these risks.¹⁸³

The Proposed Rule is also consistent with governing case law. The Supreme Court’s recent decision in *Bostock v. Clayton County*¹⁸⁴ held that, under Title VII, discrimination on the basis of sexual orientation or gender identity “requires an employer to intentionally treat individual employees differently because of their sex,” which includes being discriminated against for “traits or actions it would not have questioned in members of a different sex.”¹⁸⁵ Because courts have

¹⁷⁸ 87 Fed. Reg. 41,410.

¹⁷⁹ Kosciw et al., *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools*, GLSEN 45, 48 (2020); see also Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools*, GLSEN 25, 27 (2009) (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

¹⁸⁰ Kosciw et al., *The 2019 National School Climate Survey*, at 49.

¹⁸¹ *Id.* at 28 (81% of LGBTQI+ students reported being verbally harassed because of their sexual orientation, gender identity, or gender expression, and more than one in three (35.1%) reported they were verbally harassed often or frequently).

¹⁸² Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat’l Ctr. for Transgender Equal. Dec. 2016).

¹⁸³ James et al., *2015 U.S. Transgender Survey*, at 132; Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People’s Lives*, J. of Pub. Mgmt. & Soc. Policy 65, 75 (2013).

¹⁸⁴ *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020).

¹⁸⁵ *Id.* at 1742, 1737.

long looked to Title VII to interpret Title IX's mandate,¹⁸⁶ it stands to reason that Title IX's protection against "discrimination on the basis of sex" therefore similarly protects against discrimination based on sexual orientation and gender identity. The Proposed Rule is likewise consistent with several federal circuit court decisions interpreting Title IX, and a U.S. Department of Justice memorandum determining, based in part on this case law, that the "best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."¹⁸⁷

The Proposed Rule's approach also aligns with the Department's longstanding practice and prior interpretations. In 1997, the Department's Office of Civil Rights (OCR) explained that "sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX."¹⁸⁸ Then, in 2001, OCR identified that sex discrimination included harassment based on sexual orientation, harassment based on the victim's failure to conform to stereotyped notions of femininity, and that sexual harassment can occur between members of the same sex.¹⁸⁹ In 2010, OCR reaffirmed that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."¹⁹⁰ In 2014, OCR reiterated that Title IX's prohibition on discrimination includes discrimination based on gender identity.¹⁹¹ In 2006 and 2020, OCR recognized protections against specific types of sex stereotypes.¹⁹² Finally, in 2016, OCR explained that a student's gender identity must be treated as their sex for purposes of Title IX's prohibition on sex-based discrimination.¹⁹³

¹⁸⁶ See, e.g., *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

¹⁸⁷ Memorandum, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, 2, U.S. Department of Justice Civil Rights Division (Mar. 26, 2021); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* 858 F.3d 1034 (7th Cir. 2017) (holding that exclusion of transgender children from restrooms that match their gender identity is prohibited under Title IX); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (same); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (observing that *Bostock's* interpretation guides the evaluation of Title IX claims), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021).

¹⁸⁸ See 1997 Guidance at 12,039.

¹⁸⁹ See 2001 Policy, <https://tinyurl.com/fp8v3y7x>.

¹⁹⁰ Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Harassment and Bullying, 8 (Oct. 26, 2010), <https://tinyurl.com/mrd4vjyc>.

¹⁹¹ 2014 Q&A.

¹⁹² See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,539 (Oct. 25, 2006) (proposed § 106.34(b)(4)(i) (recipients must ensure that their single-sex classes are substantially related to the recipient's important objective and do not rely on overly broad generalizations about either sex.)); 34 CFR § 106.45(b)(1)(iii) (Decisionmakers must receive training on the relevance of questions and evidence, which includes "questions and evidence about the complainant's sexual predisposition or prior sexual behavior [that] are not relevant.").

¹⁹³ Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Transgender Students, 2 (May 13, 2016, rescinded), <https://tinyurl.com/ue38fd8h>.

Relatedly, the Proposed Rule appropriately recognizes that sex discrimination need not occur based on binary gender identities. In this regard, the 2020 Amendments, which presupposed “sex as a binary classification,”¹⁹⁴ are out of step not only with Title IX and the Department’s historical practice, but also the irrefutable reality that there are thousands of Americans whose anatomy is neither typically “male” nor typically “female.”¹⁹⁵ Consistent with this, the Proposed Rule rightly prohibits discrimination on the basis of sex characteristics, including intersex traits,¹⁹⁶ and clarifies that the list of characteristics set forth in the preamble is not exhaustive.¹⁹⁷

Finally, the Proposed Rule appropriately recognizes that, while not all distinctions based on sex are impermissible, the limited circumstances where such distinctions are allowed must not cause more than *de minimis* harm to a person.¹⁹⁸ Studies show that denying students’ ability to participate in education-related activities that match the student’s gender identity cause more than *de minimis* harm. One study found that almost 70% of transgender students avoided restrooms and other school spaces because they felt unsafe or uncomfortable.¹⁹⁹ Additionally, denying students the opportunity to participate in sports causes more than *de minimis* harm for a number of reasons, including because students that participate in sports are more likely to graduate from high school, go to college, and achieve higher grades and scores on standardized tests.²⁰⁰ Participating in sports also increases students’ self-confidence and connection with peers.²⁰¹ Therefore, the Proposed Rule appropriately clarifies that “adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than *de minimis* harm on the basis of sex.”²⁰² This requirement is also consistent with court decisions finding that denying a student access to facilities or activities consistent with their gender identity is prohibited under Title IX.²⁰³ To further delineate the protections already outlined in the Proposed Rule, the States look forward to release of a Title IX athletics rule that will make “amendments to § 106.41 . . . in the context of sex-separate athletics.”²⁰⁴ We encourage

¹⁹⁴ 85 Fed. Reg. 30,178.

¹⁹⁵ Stephanie Dutchen, *The Body, The Self*, Harvard Medicine (2022), <https://tinyurl.com/24c2j92u> (“Estimates of incidence range from more than 1 in 100 to less than 1 in 5,000 births, suggesting a prevalence between 66,000 and 3.3 million people in the United States.”).

¹⁹⁶ 87 Fed. Reg. 41,532.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 41,534; *see Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 129 (4th Cir. June 14, 2022) (en banc) (“for the plaintiffs to prevail under Title IX, they must show that . . . the challenged action caused them harm, which may include ‘emotional and dignitary harm’” (internal citation omitted)).

¹⁹⁹ Kosciw et al., *2015 National School Climate Survey*, at 86.

²⁰⁰ National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), <https://tinyurl.com/y2787rey>.

²⁰¹ *Id.* at 42; *see also* Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional ‘SCS’ Scale*, 27 J. of Sport Management 349, 349-50 (2013).

²⁰² 87 Fed. Reg. 41,534.

²⁰³ *See, e.g., Grimm*, 972 F.3d at 617–18 (holding that evidence that a transgender boy suffered physical, emotional, and dignitary harms as a result of being denied access to a sex-separate program or activity consistent with his gender identity was sufficient to constitute harm under Title IX).

²⁰⁴ 87 Fed. Reg. 41,538.

this forthcoming proposed rulemaking to further clarify that under Title IX, all students can participate fully and equally in school sports.

C. The Proposed Rule’s provisions addressing sex-based discrimination on account of pregnancy and parental status are also consistent with Title IX’s mandate.

The Proposed Rule rightly clarifies and expands upon existing protections within the Title IX regulations designed to ensure that neither pregnancy nor parenting status should hinder full and equal access to educational opportunities. Students who are pregnant or raising children are subjected to sexual harassment at higher rates, leading to concrete educational harms in addition to the harm of the harassment itself.²⁰⁵ Moreover, discrimination based on pregnancy is a form of sex discrimination, a fact that the 2020 Amendments already acknowledge.²⁰⁶ The Proposed Rule addresses these issues and clarifies existing protections in multiple ways. First, it prohibits discrimination based on pregnancy or related conditions.²⁰⁷ Second, it prohibits the use of admissions criteria that discriminate against applicants who are pregnant or have related conditions.²⁰⁸ Third, it proposes various substantive requirements, such as the provision of a private lactation space, to ensure equal access for pregnant and nursing students.²⁰⁹ Finally, it provides various protections to pregnant or parenting students employed by educational institutions, such as pregnancy leave and lactation breaks.²¹⁰ The States applaud these provisions.

The Department and various courts have all acknowledged that the prohibition on pregnancy discrimination in the 2020 Amendments is consistent with Title IX,²¹¹ its legislative history,²¹² and other federal laws.²¹³ Although the 2020 Amendments’ prohibition on pregnancy *discrimination* is an important step forward “from the pre-Title IX era in which pregnant students

²⁰⁵ Nat’l Women’s Law Center, Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting 12 (2017), <https://tinyurl.com/czf3yun9> (56 percent of girls aged 14 to 18 who are pregnant or raising children are touched or kissed without consent).

²⁰⁶ 34 C.F.R. § 106.40.

²⁰⁷ 87 Fed. Reg. 41,571 (proposed § 106.10).

²⁰⁸ *Id.* (proposed § 106.21(c)).

²⁰⁹ *Id.* at 41,571-72 (proposed § 106.40).

²¹⁰ *Id.* at 41,579 (proposed §§ 106.51, 106.57).

²¹¹ *Conley v. Nw. Fla. State Coll.*, 145 F. Supp. 3d 1073, 1076-77 (N.D. Fla. 2015).

²¹² *See, e.g.*, 118 Cong. Rec. 5804 (1972) (Senator Birch Bayh, the sponsor of Title IX, explaining that the “social evil of sex discrimination in education” includes the fact that “[m]any students are denied leave for pregnancy and childbirth.”); *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526–27 (1982) (noting that Senator Bayh’s remarks “are the only authoritative indications of congressional intent regarding the scope of [Title IX]”).

²¹³ *See, e.g., Chipman v. Grant Cnty. Sch. Dist.*, 30 F. Supp. 2d 975, 978 (E.D. Ky. 1998) (acknowledging that the “purpose [of Title IX’s pregnancy protection] is generally the same as the Pregnancy Discrimination Act” and applying precedent from the latter to Title IX case); *Castro v. Yale Univ.*, 518 F. Supp. 3d 593, 605 (D. Conn. 2021) (noting that both Title IX and Title XI prohibit educational institutions from discriminating based on pregnancy in hiring); 87 Fed. Reg. 41,514-15 (noting that the Proposed Rule is consistent with Title VII’s prohibition on pregnancy discrimination in employment as added pursuant to the Pregnancy Discrimination Act).

were commonly excluded from school entirely or confined to separate schools for pregnant (or otherwise delinquent) girls,” the civil rights of pregnant and parenting students are violated by many circumstances other than outright exclusion.²¹⁴ And while the 2020 Amendments guarantee a pregnant student a right to educational leave and to reinstatement at the conclusion of pregnancy, they contain no explicit requirements to ensure that schools “provide the supports that pregnant students or new mothers might actually need to succeed in” their educational efforts.²¹⁵ To the extent the 2020 Amendments provide for any “affirmative accommodation mandates” for pregnant students, they did little to “ease the educational impacts of motherhood.”²¹⁶ In effect, the 2020 Amendments provide clear protections to *pregnant* students but leave the rights of *parenting* students less explicit.²¹⁷ The importance of protections for both pregnant *and* parenting students, including addressing lactation-related needs, has been widely recognized by regulators,²¹⁸ courts,²¹⁹ and commenters.²²⁰

The Proposed Rule answers this call by clarifying that pregnant and parenting students have equal access to all educational programs. The Proposed Rule reiterates that Title IX’s prohibition of sex discrimination includes discrimination on the basis of pregnancy or related conditions, which has long been recognized by the Department.²²¹ For students who are experiencing pregnancy or related conditions, recipients must ensure the student is notified of their rights, can take a leave of absence, is offered modifications to recipient’s procedures, and has

²¹⁴ Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 HARV. J. L. & GENDER 171, 187 (2020).

²¹⁵ *Id.* at 174.

²¹⁶ *Id.* at 187.

²¹⁷ Reflecting this, all examples of Title IX violations contained in the Questions and Answers section of a relevant 2013 guidance document put out by ED addressed pregnant students, and gave no examples or guidance for violations relating to parenting students. U.S. Dep’t of Educ., Off. for Civil Rights, Supporting the Academic Success of Pregnant and Parenting Students, <https://tinyurl.com/2much786> (June 2013).

²¹⁸ U.S. Equal Emp’t Opportunity Comm’n Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015) (noting, *inter alia*, the need to afford lactating employees opportunity and circumstances to allow for expression of milk multiple times daily); Affordable Care Act, 29 U.S.C. § 207(r)(1) (requiring employers to provide reasonable break times and a private location for breastfeeding employees to express milk for one year after a child’s birth).

²¹⁹ See, e.g., *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1259 (11th Cir. 2017) (“[L]actation is a related medical condition and therefore covered under the PDA.”); *Equal Emp. Opportunity Comm’n v. Hous. Funding II, Ltd.*, 717 F.3d 425, 428–29 (5th Cir. 2013) (finding that “[i]t is undisputed . . . that lactation is a physiological result of being pregnant and bearing a child” and therefore that lactation-related needs are protected under the Pregnancy Discrimination Act); *Nevada Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 730-34, 736 (2003) (noting that discrimination based on pregnancy or related conditions can reflect “mutually reinforcing stereotypes” about the roles of men and women and can occur based on the failure to accommodate conditions associated with women as effectively as those associated with men).

²²⁰ See, e.g., Kendra Fershee, *Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School*, 43 IND. L. REV. 79 (2009); Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J.L. & GENDER 323 (2008).

²²¹ 87 Fed. Reg. 41,531; see also, e.g., 34 CFR §§ 106.21(c)(2) & (3), 106.40(b), 106.51(b)(6), 106.57(b)-(d).

access to a prompt and equitable grievance procedure.²²² The Proposed Rule adds “or related conditions” to the prohibition that recipients cannot take adverse employment action against an employee for pregnancy, which means that an employee no longer pregnant but suffering from a medical condition related to pregnancy or lactation, such as mastitis, is now entitled to leave.²²³ Additionally, under the Proposed Rule’s pregnancy leave provision, the Department eliminated the word “she” in referring to the pregnant employee, which extends leave protections to transgender and gender nonconforming employees and is consistent with other changes discussed above, as well as longstanding enforcement practices.²²⁴

These changes are consistent with the Department’s prior enforcement efforts. The Department has investigated many schools that have improperly responded to the needs of pregnant and parenting students.²²⁵ These investigations include circumstances where schools failed to properly make ongoing accommodations to ensure pregnant students are not denied equal educational opportunity, both before and after giving birth.²²⁶

The provisions of the Proposed Rule are also consistent with protections provided by anti-discrimination laws in many of the States. For example, in the preschool-12 context, California law imposes notice²²⁷ and antidiscrimination mandates²²⁸ similar to those in the Proposed Rule. Minnesota, similarly, imposes notice requirements on public and regionally accredited private postsecondary educational institutions.²²⁹ In 2015, California enacted lactation space requirements, similar to those in the Proposed Rule,²³⁰ and in 2019 it imposed a variety of

²²² 87 Fed. Reg. 41,520.

²²³ *Id.* at 41,526.

²²⁴ *Id.* at 41,527.

²²⁵ *See, e.g.*, U.S. Dep’t of Educ., Off. for Civ. Rts., Cal. St. Univ., East Bay, OCR Case No. 09-18-2245 (Aug. 1, 2018), <https://tinyurl.com/4ztabpf4> (resolution letter) (school had, *inter alia*, informed complainant that “Title IX protected individuals who qualified under a protected class against discrimination and listed various protected groups which did not include pregnant students.”); U.S. Dep’t of Educ., Off. for Civ. Rts., Rivertown School of Beauty, OCR Case No. 04-15-2363 (Sept. 30, 2019), <https://tinyurl.com/yc2ej2b6> (resolution letter) (school had, *inter alia*, an official written policy excluding pregnant students from an esthetician program, regardless of the stage of pregnancy, and excluding students who were seven months or more pregnant from all programs); U.S. Dep’t of Educ., Off. for Civ. Rts., Stilwell Pub. Schs., OCR Case No. 07-16-1035 (May 2, 2016), <https://tinyurl.com/3bk5knhy> (resolution letter) (school had, *inter alia*, an official written policy excluding pregnant or parenting students from the cheerleading program).

²²⁶ *See, e.g.*, U.S. Dep’t of Educ., Off. for Civ. Rts., W. Ill. Univ., OCR Case No. 05-16-2087 (June 15, 2016), <https://tinyurl.com/377h94sm> (resolution letter) (resolution agreement required the University to provide all faculty and students a copy of the policies and procedures requiring faculty members to make necessary modifications for pregnant students, and to train administrators and faculty in how to provide modifications for pregnant students in order to ensure that the University does not discriminate against students based on their pregnancy).

²²⁷ Cal. Educ. Code § 222.5.

²²⁸ *Id.* at § 221.51.

²²⁹ Minn. Stat. 135A.158.

²³⁰ Cal. Educ. Code § 222.

curricular and leave requirements that also closely track requirements in the Proposed Rule.²³¹ In 2014, California also passed into law a bill explicitly reminding California’s postsecondary educational institutions of Title IX’s mandates regarding pregnancy discrimination, emphasizing the requirements already imposed by Title IX at that time.²³² In Illinois, the Illinois Human Rights Act (IHRA) makes it a civil rights violation for any person to unlawfully discriminate against an individual based on pregnancy status in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.²³³ Further, pursuant to the IHRA, public accommodations include a non-sectarian nursery, day care center, elementary, secondary, undergraduate, or postgraduate school, or other places of education.²³⁴ Additionally, in Michigan, the Elliot-Larson Civil Rights Act prohibits discrimination based on “familial status” and includes a person who is pregnant as a parent in this protected category.²³⁵ In Vermont, pregnant or parenting students are ensured access to any public school, approved Vermont independent school, or any other educational program approved by the Vermont State Board of Education in which other Vermont students may enroll.²³⁶

In sum, the Proposed Rule better informs schools of their obligations prior to, during, and after a student’s pregnancy. It will also encourage greater efforts by schools to comply with Title IX’s anti-discrimination mandate by ensuring students are given equal access to educational programs whether they are pregnant, on leave after giving birth, or balancing their educational obligations with ongoing parental roles. And it is consistent with other federal laws, as well as Title IX’s plain language and legislative history, and the Department’s historical interpretation.

D. The Proposed Rule appropriately recognizes the need to protect against retaliation.

To adequately protect against sex discrimination, it is important to also protect against the threat of retaliation for reporting sex discrimination or participating in the complaint-resolution process. The Supreme Court has recognized that Title IX prohibits retaliation.²³⁷ Further, since the 1975 Title IX implementing regulations, the Department has prohibited retaliation.²³⁸ Experience in the States shows that retaliation, including retaliation by other students, can create a chilling effect for reporting violations of Title IX, creating unsafe conditions for all students.²³⁹ Courts

²³¹ *Id.* at § 46015.

²³² *Id.* at § 66281.7.

²³³ 775 Ill. Comp. Stat. 5/sec. 1-102(A).

²³⁴ 775 Ill. Comp. Stat. 5/sec. 5-101(A)(11).

²³⁵ Mich. Comp. Laws §§ 37.2102(1), 37.2103(e).

²³⁶ Vt. Stat. Ann. Tit. 16, § 1073.

²³⁷ *Jackson v. Birmingham Bd. of Educ.* 544 U.S. 167, 173-74 (2005) (“Retaliation against a person because that person has complained of sex discrimination...is ‘discrimination’ ‘on the basis of sex’ in violation of Title IX.”).

²³⁸ 34 C.F.R. § 106.71.

²³⁹ See Los Angeles Unified School District Comment (Jan. 8, 2019), <https://tinyurl.com/28k9kvmn>.

have also consistently recognized that peer retaliation must be addressed in order to adequately effectuate Title IX protections.²⁴⁰

The Proposed Rule’s definitions for “retaliation” and “peer retaliation” and its amendment to Section 106.71, clarify what constitutes prohibited retaliation and the steps required to address and mitigate retaliation. First, the proposed definitions clarify that prohibited retaliation encompasses both retaliation by the recipient and retaliation by students against other students.²⁴¹ Further, the proposed definitions, together with the example of prohibited retaliation found in proposed Section 106.71(a), clarify the scope of retaliatory conduct that is prohibited by Title IX. Proposed Section 106.71 provides clarity regarding how recipients must respond to prohibited retaliation, permitting recipients to consolidate retaliation complaints with complaints of sex discrimination that arise from the same facts or circumstances.²⁴² These changes will streamline the investigation process and decrease the costs of enforcing Title IX protections. The specific definitions and examples of prohibited retaliation, together with direction in the Proposed Rule regarding how to respond to information and complaints of retaliatory conduct, provide guideposts to ensure students are protected from sex discrimination in education programs and activities.

III. THE STATES PROPOSE SEVERAL ADDITIONAL AMENDMENTS AND CLARIFICATIONS.

The States strongly support the Proposed Rule as a whole and believe that it effectuates the purpose of Title IX and brings the Department’s enforcement back in line with historical practice. The following requests for amendments and clarifications in specific areas, in addition to those suggested above at pp. 14, 16-17, 20, 21, 27-28, and 29, would further improve upon the Proposed Rule, allowing it to even more comprehensively provide effective protection against sex discrimination and harassment in education programs and activities.

A. The Department should reinstitute the longstanding prohibition on publications that suggest sex discrimination.

Although the Proposed Rule’s definition of sex properly encompasses sex stereotyping, elsewhere the Proposed Rule retains revisions made for the first time in the 2020 Amendments that removed a prohibition on a school’s use or distribution of publications that “suggest, by text or illustration” that the school discriminates based on sex.²⁴³ For 45 years, Title IX regulations rightfully prohibited schools from using or distributing any publication that “suggests” sex

²⁴⁰ See *Feminist Majority Foundation v. Hurley*, 911 F.3d 674, 695 (“[A]n educational institution can be liable for acting with deliberate indifference toward known instances of student-on-student retaliatory harassment.”); *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1311-12 (10th Cir. 2020) (holding that peer retaliation for reporting a sexual assault is a form of retaliation to which a school must respond).

²⁴¹ 87 Fed. Reg. 41,538.

²⁴² *Id.* at 41,541.

²⁴³ Compare 34 C.F.R. § 106.9(b)(2) (effective until Aug. 14, 2020) with 34 C.F.R. § 106.8(b)(2)(ii) (current 2020 version of same prohibition) and Proposed Rule (not addressing or editing this provision).

discrimination.²⁴⁴ The 2020 Amendments inexplicably change this prohibition to only prohibit publications that outright “state” sex-discriminatory policies.²⁴⁵ At the time of publication in 2020, the Department asserted, without any explanation, that a “clearly stated policy that [the school] does not discriminate” makes it unnecessary to scrutinize “graphics, photos, or illustrations.”²⁴⁶

We request that the Department reinstate the longstanding language from the 1975 rule. The States note that the mere existence of a nondiscrimination policy does not preclude a school from contravening that policy using sex stereotyping in its publications. The current language would permit schools to publish materials picturing exclusively male students in STEM classes, with exclusively female students depicted in education or nursing classes. Distributed materials of a school can be susceptible to “suggestions” of sex stereotyping, even where they do not “state” discriminatory policies. A prospective student is often introduced to an educational institution and its course offerings through the visual images in its publications issued by mail or posted on its website. Both male and female students may face sex stereotyping in the form of visual images, statements, and conduct that discourages, limits, or denies their access to vocational and educational career paths based on sex. This includes, as an example, male students discouraged from engaging in dance or theater because these occupations are not sufficiently “masculine,” and female students discouraged from participating in science or engineering based on stereotypical misconceptions of a woman’s ability to do math and science.²⁴⁷ In addition to reinstating the language from the 1975 rule, the States suggest the Department use this opportunity to provide clarity regarding the situations in which a publication may “suggest” sex discrimination.

Moreover, reverting to the pre-2020 Amendments is consistent with other provisions of the Proposed Rule relating to published materials, which require that “materials used to train Title IX Coordinators, investigators, decisionmakers” and others “must not rely on sex stereotypes.”²⁴⁸ It is difficult to see how the prohibition in training materials can be squared with allowing schools to create published materials that suggest discrimination by relying on those same sex stereotypes through imagery, so long as they do not “state” a discriminatory policy in words. Permitting materials that suggest (but do not explicitly state) discrimination is also inconsistent with the approach of other federal laws prohibiting discrimination. For example, the Fair Housing Act and

²⁴⁴ 34 C.F.R. § 106.9(b)(2) (effective until Aug. 14, 2020).

²⁴⁵ 34 C.F.R. § 106.8(b)(2)(ii).

²⁴⁶ 85 Fed. Reg. 30,468, 30,470.

²⁴⁷ See, e.g., Claire Cain Miller, Many Ways to Be a Girl, but One Way to Be a Boy: The New Gender Rules, N.Y. Times (Sept. 14, 2018) (three quarters of girls 14 to 19 said they felt judged as a sexual object or unsafe as a girl, and three-quarters of boys said strength and toughness were the male character traits most valued by society), <https://tinyurl.com/5chtu3pk>; Daniel Reynolds, You Throw Like a Girl: Gender Stereotypes Ruin Sports for Young Women, Healthline (July 2, 2018) (girls receive less encouragement from teachers and family members to be physically active and participate in sports; as a result, girls ages 8 to 12 are 19 percent less active, according to 2016 study), <https://tinyurl.com/4d9aysmw>; Rachael Pells, Sexism in schools: 57% of teachers admit to stereotyping girls and boys, Independent (Feb. 8, 2017), <https://tinyurl.com/bdfkcapr> (also noting that female employees in the US account for less than a quarter of STEM workers, despite making up almost half the overall workforce); Suzanne Vranica, Stereotypes of Women Persist in Ads, Wall St. J., <https://tinyurl.com/3dsmbczh> (Oct. 17, 2003).

²⁴⁸ See 34 C.F.R. § 106.45(b)(1)(iii).

its implementing regulations have been interpreted to prohibit publications advertising housing that “indicate” a particular race would be disadvantaged.²⁴⁹

We therefore encourage the Department to consider revising Section 106.8(b)(2)(ii) to reinstitute the decades-long prohibition on published materials that “suggest [discrimination], by text or illustration” and not only those that “state,” a policy or practice of sex discrimination.

B. The Department should clarify which training materials must be published on school websites.

The Proposed Rule requires that “[a]ll materials used to provide training under” Title IX must be made “publicly available on [the recipient’s] website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.”²⁵⁰ This requirement merits some clarification to avoid being overly burdensome to large school districts, where it could be read to require, for example, that any email reminding employees of Title IX obligations would necessarily need to be published on the district’s website. Similarly, sign-in sheets or email invitations to trainings could be considered “materials used to provide training” but would not be appropriate for website publication and would be extremely burdensome to produce. The States therefore suggest that the Department amend the proposed Section 106.8(f)(3) to provide a definition for “training materials” that only encompasses the PowerPoint or other instructive handouts provided to training participants.

C. The Department should reinstate the requirement that schools must provide advance written notice of their intent to assert a religious exemption to Title IX.

The 2020 Amendments permit schools to assert a religious exemption to Title IX for the first time *after* a complaint of sex discrimination has been filed.²⁵¹ Prior to the 2020 Amendments, regulations required institutions controlled by a religious organization claiming an exemption from all or part of Title IX to provide written notice to the Department with a declaration identifying which part of Title IX or the regulation conflicts with a tenet of the religion.²⁵² This advance notification requirement helps ensure students will not unknowingly enroll in schools that believe themselves to be exempted from Title IX but do not claim the exemption publicly, only to learn of their school’s position after they seek to assert their Title IX rights. In fact, before the 2020 Amendments, the Department maintained a list of exempt schools,²⁵³ and posted on its website

²⁴⁹ See, e.g., *Corey v. Sec’y, U.S. Dep’t of Hous. & Urban Dev. ex rel. Walker*, 719 F.3d 322, 326 (4th Cir. 2013) (interpreting Fair Housing Act, 42 U.S.C. 3604(c) (prohibiting any publication which “indicates” discrimination)); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (same).

²⁵⁰ 87 Fed. Reg. 41570 (proposed § 106.8(f)(3)).

²⁵¹ Compare 34 C.F.R. § 106.12(b) (effective until Aug. 14, 2020) with 34 C.F.R. § 106.12(a) and Proposed Rule (not addressing or editing this provision).

²⁵² 34 C.F.R. § 106.12(b) (effective until Aug. 14, 2020).

²⁵³ U.S. Dep’t of Educ., Off. For Civ. Rts., Institutions Currently Holding Religious Exemption Case (June 14, 2018), <https://tinyurl.com/yygqa6kp>.

statements of religious exemption.²⁵⁴ These lists allowed students, prospective students, employees, parents, and the public to know whether a particular school would comply with Title IX.

Students, parents, and the public formed a “legitimate reliance” on the pre-notice protection in pre-2020 regulation.²⁵⁵ In addition, as a policy matter, students should know before they matriculate whether (and to what extent) their school intends to comply with Title IX, and they should be able to assume that they will enjoy Title IX’s full protections unless the school has informed them otherwise. No student should learn, only after becoming a victim of discrimination, that their school considered itself exempt from the relevant requirements of Title IX. Even worse, under the current rule, a school could wait to assert its exemption from Title IX until after it initiates grievance procedures and a complainant participates in the hearing process and has personal information shared with the respondent and others, at which point they could learn the school has no intention to address the complaint at all. No student should face this prospect.

The burden of notifying the Department is minimal, and nowhere in the 2020 Amendments was any explanation given of how identifying religious tenets or related practices that conflict with Title IX is a burden. The elimination of a notice requirement is also inconsistent with various other provisions contained in the Proposed Rule and 2020 Amendments that place great weight on the importance of notice.²⁵⁶ On top of all this, under the 2020 Amendments, schools were not required to identify any specific conflict with a tenet of its controlling religious organization, encouraging potentially unsupported assertions of this exemption to avoid liability. For these reasons, we request a return to the Title IX regulation language as it existed prior to the 2020 rule.

Finally, we ask that the Department allow for a reasonable implementation timeline of the Proposed Rule.

The States welcome the important steps the Department has taken to enact much needed changes to the Title IX rules. We strongly support the Proposed Rule, which is consistent with Title IX’s antidiscrimination mandate, represents the return to longstanding Department practice, and works to ensure equal access to educational opportunities.

²⁵⁴ U.S. Dep’t of Educ., Off. for Civ. Rts., Other Correspondence (July 24, 2020), <https://tinyurl.com/yxuss3rk>.

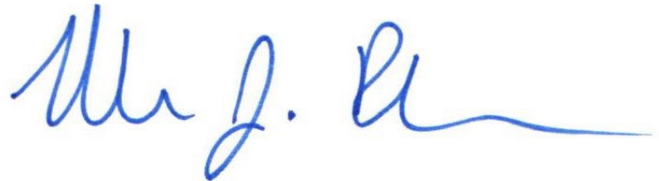
²⁵⁵ *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1913-14 (2020).

²⁵⁶ See, e.g., 34 C.F.R. §§ 106.44(c), 106.45(b)(1)(v), (b)(2), (b)(3)(iii), (b)(5)(v), (b)(9)(i); 85 Fed. Reg. 30,287 n.1142 (school cannot use respondent statement in sexual assault report because no advance written notice was provided), 30,473 (“education community will be aware of the procedures involved in a . . . grievance process without the unfairness of waiting until a person becomes a party to discover what [the process] looks like”); 87 Fed Reg. 41,472-3, 41,574 (proposed § 106.44(k)(3)), 41,575 (proposed § 106.45(c)).

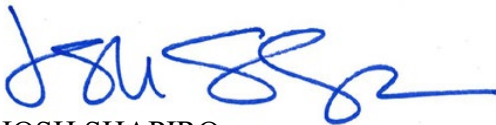
Respectfully Submitted,



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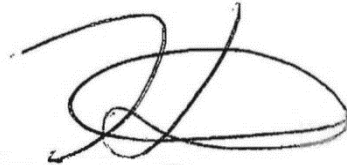
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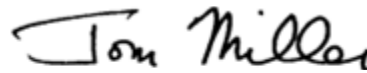
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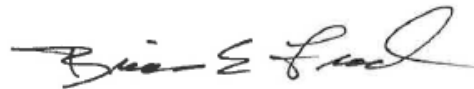
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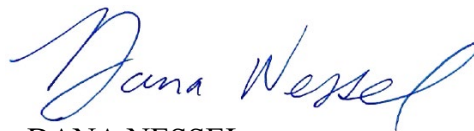
AARON M. FREY
Maine Attorney General



BRIAN E. FROSH
Maryland Attorney General



MAURA HEALEY
Massachusetts Attorney General



DANA NESSEL
Michigan Attorney General



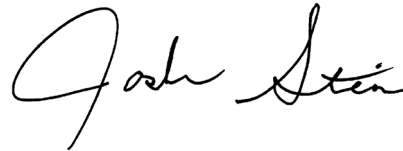
KEITH ELLISON
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