

June 11, 2021

Via Electronic Submission To T9PublicHearing@ed.gov

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

Re: Announcement of Public Hearing; Title IX of the Education Amendments of 1972

Dear Acting Assistant Secretary Goldberg:

Lambda Legal Defense & Education Fund, Inc. (“Lambda Legal”) submits these comments in response to the Notice published in the Federal Register on May 20, 2021 (“the Notice”) by the U.S. Department of Education (“the Department”).¹

Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education, and policy advocacy. The Notice requests information for the purpose of improving enforcement of Title IX of the Education Amendments of 1972 (“Title IX”). Specifically, the Notice seeks input from the public regarding steps the Department can take to ensure students are free from discrimination in the form of sexual harassment (which includes sexual assault and other forms of sexual violence), ways the Department can ensure schools have equitable resolution of reports of sexual harassment, as well as steps the Department can take to address discrimination based on sexual orientation and gender identity in educational environments.

Introduction

Thank you for the opportunity to provide written comments. LGBTQ students routinely face pervasive harassment and discrimination in schools. In a recent survey, over 80% of LGBTQ students reported verbal harassment because of their sexual orientation, gender expression or gender identity.² Almost 15% of LGBTQ students reported physical violence because of their sexual orientation, gender identity or gender expression.³ In addition to bullying, harassment and violence, LGBTQ students also experience widespread discrimination. In one recent survey, over

¹ 86 FR 27429, available at <https://www.federalregister.gov/documents/2021/05/20/2021-10629/announcement-of-public-hearing-title-ix-of-the-education-amendments-of-1972>.

² Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools, p. 28. New York: GLSEN. <https://www.glsen.org/research/2019-national-school-climate-survey>.

³ *Id.*

70% of LGBTQ youth reported discrimination due to their sexual orientation or gender identity.⁴ The discrimination LGBTQ students experience comes in many forms, including being denied the right to participate in school activities or use gender-segregated facilities in accordance with their gender identity, misgendering and use of an improper name to name just a few examples. In addition, LGBTQ students' privacy is often compromised through various software and computer platforms and methods of student identification.⁵ LGBTQ students also experience disproportionate school discipline, especially for their appearance. Research shows that schools are especially hostile towards LGBTQ youth of color who experience harassment from students and staff, and at the same time experience higher rates of school discipline than other students.⁶

When LGBTQ students do not feel safe in their schools, there are negative short-term and long-term consequences. In the short-term, LGBTQ students experience increased absences, lowered GPAs, and are less likely to go to college. This is especially true for LGBTQ youth of color who are the most likely to avoid school and who experience the highest rates of depression. Suicidality and mental health issues continue to plague LGBTQ youth as a result of the pervasive harassment and discrimination they experience. Almost 40% of respondents in a recent survey reported seriously considering suicide in the last year.⁷ In the long-term, these disparities lead to negative economic consequences because students are unable to finish school or to go to college.⁸ Absences and reduced likelihood to attend college contribute to long-term negative health care outcomes, housing insecurity and a lack of financial well-being.

We urge the Department to take prompt and decisive action. The disparities LGBTQ students already experience has been exacerbated by the growing number of legislative attacks on LGBTQ children. Even when those proposals do not become law, the messages of exclusion foster an educational environment of fear, harassment, and discrimination, and where they do pass, LGBTQ youth are denied equal treatment and participation leading serious and lasting harm.

⁴ See The Trevor Project, *National Survey on LGBTQ Youth Mental Health* (2019), available at <https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf>.

⁵ The Department recently identified an example of this issue the concerns raised when online learning platforms compromise the privacy of transgender students by pre-populating their name from a prior school record. See U.S. Department of Education, Office of Civil Rights, *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students*, pp. 27-30 (2021), available at <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

⁶ See Kathryn E. W. Himmelstein & Hannah Bruckner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, Pediatrics, available at <https://pediatrics.aappublications.org/content/127/1/49>; GSA Network, *LGBTQ Youth of Color: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline* (2018), available at https://gsanetwork.org/wp-content/uploads/2018/08/LGBTQ_brief_FINAL.pdf.

⁷ *Id.* at 2.

⁸ *Id.*

In this comment, we provide seven recommendations to address these disparities to ensure that LGBTQ students can fully participate in education programs and activities free from harassment and discrimination. Each recommendation is summarized below:

1. We recommend the Department clarify the statute’s definition of “on the basis of sex” encompasses sex stereotypes, sexual orientation, gender identity, sex characteristics including intersex traits, as well as pregnancy, childbirth, or a related medical condition.
2. We recommend the Department provide clarifying language to sex-segregated exception regulations that recognize that students must be allowed to participate in accordance with their gender identity.
3. We recommend the Department revise existing regulations to require assurances concerning entities seeking religious exemptions and that proper notice be provided to the public regarding religious exemptions made under Title IX. We also recommend that the eligibility criteria be narrowed for organizations seeking to qualify as religious organizations.
4. We recommend the Department address the problems students encounter due to application by schools of sex-differentiated appearance rules.
5. We recommend the Department revise the existing sexual harassment and sexual violence regulations to help ensure that survivors of sexual harassment and violence are safe and free from discrimination.
6. We recommend the Department continue to prioritize timely and vigorous enforcement of Title IX complaints in order to create effective deterrence of conduct that destroys educational opportunities for those subjected to discrimination.
7. We recommend steps be taken to protect LGBTQ students’ privacy and enable transgender students to update their name and gender on school documents.

In addition, we strongly endorse the comments submitted by GLSEN and others concerning anti-LGBTQ discrimination; the National Women’s Law Center concerning sexual harassment; the Women’s Sports Foundation concerning inclusion of transgender athletes in school sports programs; and the Family Equality Council concerning discrimination against the children of LGBTQ parents.

Recommendations

- 1. Recommendation: clarify the definition of “on the basis of sex” in 34 C.F.R. § 106.30.**

We recommend the Department provide clarification that Title IX’s prohibition against sex discrimination encompasses protections for LGBTQ people. To help ensure LGBTQ students are free from discrimination, the Department should provide clarification that the statute’s prohibition against discrimination on the basis of sex encompasses sex stereotypes, sexual

orientation, gender identity, sex characteristics including intersex traits, as well as pregnancy, childbirth, or a related medical condition.⁹

As President Biden’s January 20, 2021 Executive Order confirmed,¹⁰ the U.S. Supreme Court’s reasoning in the *Bostock* decision applies with equal force to Title IX and other federal laws that prohibit discrimination on the basis of sex.¹¹ Indeed, two circuit courts have already applied *Bostock*’s reasoning to Title IX’s prohibition against discrimination on the basis of sex. No circuit has ruled to the contrary. For example, in striking down a school policy prohibiting transgender students from using restrooms in accordance with their gender identity, the Fourth Circuit noted last year that Title VII of the Civil Rights Act of 1964 (“Title VII”) guides the evaluation of Title IX claims. When a recipient denies a person equal educational opportunity because they are transgender, the recipient necessarily and intentionally discriminates against that individual on the basis of sex.¹² Likewise, the Eleventh Circuit held that a school policy prohibiting a transgender student’s use of a restroom consistent with his gender identity violates the Title IX prohibition against discrimination on the basis of sex. The Eleventh Circuit held pursuant to *Bostock* that Title IX prohibits discrimination against transgender people, noting that both Title VII and Title IX employ a “but-for” causation test of whether the Plaintiff was harmed differentially on the basis of sex.¹³

In addition to including clarification that discrimination based on sexual orientation or gender identity is encompassed in the definition of sex discrimination, we also urge the Department to confirm that “sex stereotyping” is a form of sex discrimination. Courts have repeatedly held that various civil rights laws prohibiting sex discrimination cover discrimination for failing to conform with sex stereotypes.¹⁴ For example, in striking down a school policy prohibiting transgender students from using restrooms in accordance with their gender identity, the Seventh Circuit held that a policy denying a transgender student the use of a restroom consistent with his

⁹ 20 U.S.C. § 1681.

¹⁰ Executive Order 12988 (Jan. 20, 2021), available at <https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation>.

¹¹ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020). See also Memorandum of the U.S. Department of Justice, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

¹² *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), as amended (Aug. 28, 2020).

¹³ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306 (11th Cir. 2020).

¹⁴ *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (Title VII); *Harrington by Harrington v. City of Attleboro*, 15-CV-12769-DJC, 2018 WL 475000, at *5 (D. Mass. Jan. 17, 2018); *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1161 (C.D. Cal. 2015); *Pratt v. Indian River Central School District*, 803 F.Supp.2d 135 (2010).

gender identity “punishes that individual for his gender-nonconformance which in turn violates Title IX.¹⁵

2. Recommendation: provide clarifying language to sex-segregated exception regulations, including: Admissions (34 C.F.R. § 106.15); Housing (34 C.F.R. § 106.32); Comparable Facilities (34 C.F.R. § 106.33); Access to Classes and Schools (34 C.F.R. § 106.34); and Athletics (34 C.F.R. § 106.41).

The Department should clarify that regulations that permit separation or different treatment by sex are not exempt from Title IX’s prohibition against discrimination on the basis of sex with regard to LGBTQ students. We recommend the Department clarify in each of these regulations or in a new stand-alone regulation that students should be treated in accordance with their gender identity in sex-segregated contexts. This clarification is sorely needed for students and school administrators who are unclear about legal obligations—especially because some schools have used inconsistent interpretations of the law by the Department to inflict unlawful sex discrimination upon LGBTQ students.¹⁶ The courts consistently have held that Title IX protects LGBTQ students in sex-segregated spaces and have rejected claims brought by non-LGBTQ students claiming otherwise.¹⁷

Such clarification would also provide guidance to state legislators contemplating harmful legislation that targets transgender and nonbinary students by proposing to deny them full participation in school activities and facilities. We recently have witnessed a record number of bills seeking to prohibit transgender students from participating in athletics in accordance with their gender identity. This year alone, at least 31 states have introduced at least 75 bills seeking to exclude transgender youth from participating.¹⁸ Seven states have now passed laws prohibiting

¹⁵ *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017).

¹⁶ Compare Memorandum of the U.S. Department of Justice, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972 (March 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download> with Memorandum of Acting Assistant Secretary Kimberly M. Richey, Office for Civil Rights, *Re: Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Jan. 8, 2021) (archived).

¹⁷ See, e.g., *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306 (11th Cir. 2020). Examples of failed challenges brought by non-LGBTQ students seeking rulings that LGBTQ students are *not* protected under Title IX include *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) and *Doe ex rel. Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018).

¹⁸ H.B. 391, 2021 Leg., Reg. Sess. (AL 2021); S.J.R. 16, 2021 93rd Gen. Assemb., Reg. Sess. (AR 2021); S.B. 354, 2021 93rd Gen. Assemb., Reg. Sess. (AR 2021); S.B. 450, 2021 93rd Gen. Assemb., Reg. Sess. (AR 2021); S.B. 324, 2021 Gen. Assemb. (CT 2021); H.B. 6128, 2021 Gen. Assemb. (CT 2021); H.B. 935, 2021 Sess. (FL 935); H.B. 935, 2021 Sess. (FL 2021); H.B. 1475, 2021 Sess. (FL 2021); H.B. 2012, 2021 Sess. (FL 2021); H.B. 276, 2021 Gen. Assemb. (GA 2021); H.B. 272, 2021 Gen. Assemb. (GA 2021); H.B. 266, 2021 Gen. Assemb. (GA 2021); H.B. 1304, 31st Leg., 2021 Sess. (HI 2021); S.B. 208, 2021 Leg. Sess. (KS 2021); H.B. 542, 2021 Reg. Sess. (LA 2021); S.B. 156, 2021 Reg. Sess. (LA 2021); S.B. 106, 2021 Reg. Sess., Gen. Assemb. (KY 2021); H.B. 471, 2021 Reg. Sess., Gen. Assemb. (KY

transgender participation, and one state has issued an Executive Order prohibiting participation.¹⁹ Clarification from the Department that such treatment violates Title IX would be of invaluable assistance to legislators, school administrators, state attorneys general, and members of the public in the coming legislative sessions.

3. Recommendation: Amend 34 C.F.R. § 106 to require assurances and proper notice to the public regarding religious exemptions made under Title IX, and to narrow the eligibility for such claims.

Title IX allows certain educational institutions controlled by a religious organization to apply for exemption from compliance to the extent that compliance with Title IX is inconsistent with the religious tenets of the religious organization. The Department issued a Final Rule in 2020 that alarmingly eliminated the requirement that such entities submit a written statement to the Assistant Secretary for Civil Rights to qualify for the Title IX religious exemption.²⁰

The U.S. Department of Education provides tens of millions of dollars each year to the approximately one-third of all undergraduate institutions in this country that are religiously

2021); 130th Leg., 1st Reg. Sess. (ME 2021); S.B. 218, 2021 Leg. Sess. (MI 2021); H.F. 350, 92nd Leg. Sess. (MN 2021); H.F. 352, 92nd Leg. Sess. (MN 2021); H.F. 1657, 92nd Leg. Sess. (MN 2021); H.B. 1077, 1st Reg. Sess. 101 Gen. Assemb. (MO 2021); H.J.R. 56, 1st Reg. Sess. 101 Gen. Assemb. (MO 2021); S.B. 503, 1st Reg. Sess. 101 Gen. Assemb. (MO 2021); S.B. 2536, 2021 Reg. Sess. (MS 2021); H.B. 112, 67th Reg. Sess. (MT 2021); H.B. 198, 67th Leg. Assemb. (ND 2021); H.B. 198, 2021 Leg. Sess. (NH 2021); S. 3540, 219th Leg., 2nd Sess. (NJ 2021); H.B. 304, 2021 Reg. Sess. (NM 2021); H.B. 61, 134 Gen. Assemb. (OH 2021); S.B. 132, 134 Gen. Assemb. (OH 2021); S.B. 331, 2021 Reg. Sess. (OK 2021); S.B. 2, 2021 Reg. Sess. (OK 2021); H.B. 972, 2021-22 Reg. Sess. (PA 2021); S.B. 531, 124th Sess. (SC 2021); H.B. 1217, 2021 Reg. Sess. (SD 2021); H.B.3, 2021 Gen. Assemb. (TN 2021); S.B.228, 2021 Gen. Assemb. (TN 2021); S.B. 29, 87th Reg. Sess. (TX 2021); S.B. 373, 87th Reg. Sess. (TX 2021); H.B. 1458, 87th Reg. Sess. (TX 2021); H.B. 3455, 87th Reg. Sess. (TX 2021); H.B. 4042, 87th Reg. Sess. (TX 2021); H.B. 4043, 87th Reg. Sess. (TX 2021); H.B. 302, 2021 Reg. Sess. (UT 2021); A.B. 195, 2021-22 Sess. (WI 2021); A.B. 196, 2021-22 Sess. (WI 2021); H.B. 2141, 2021 Reg. Sess. (WV 2021); H.B. 2676, 2021 Reg. Sess. (WV 2021); H.B. 2734, 2021 Reg. Sess. (WV 2021); H.B. 3292, 2021 Reg. Sess. (WV 2021); S.B. 341, 2021 Reg. Sess. (WV 2021).

¹⁹ H.B. 391, 2021 Leg., Reg. Sess. (AL 2021); S.B. 450, 2021 93rd Gen. Assemb., Reg. Sess. (AR 2021); S.B. 2536, 2021 Reg. Sess. (MS 2021); H.B.3, 2021 Gen. Assemb. (TN 2021); S.B.228, 2021 Gen. Assemb. (TN 2021); S.B. 1028, 2021 Sess. (FL 2021). Although South Dakota Governor Noem vetoed legislation seeking to deny participation, the Governor subsequently issued an Executive Order implementing a similar ban on participation, see S.D. Exec. Order No. 2021-06 (Mar. 29, 2021), <https://governor.sd.gov/doc/2021-06.pdf>.

²⁰ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (May 19, 2020), available at <https://www.federalregister.gov/documents/2020/05/19/2020-10512/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>.

affiliated.²¹ Approximately 12% of all students are LGBTQ.²² The failure to provide adequate notice to LGBTQ students and employees means that educational institutions will impose significant harm on them—especially given the improper expansion of eligibility criteria. The 2020 Final Rule allows recipients of federal financial assistance to use religion as a justification for discrimination and to abuse the exemption. The Department should reinstate the prior and longstanding practice of requiring recipients to submit a written statement to the Assistant Secretary for Civil Rights.

It is important to note that this regulation contradicts rules requiring that each covered educational institution notify all applicants, students, employees, and unions that it does not discriminate on the basis of sex.²³ By requiring a school to tell students that it does not discriminate while simultaneously allowing it to opt out of anti-discrimination provisions whenever it chooses, the Department has created a system that enables schools to mislead students.

The Department in its 2020 Final Rule troublingly noted that students and prospective students “likely” will know whether an educational institution is a religious organization, such that they will “not to be surprised by a recipient’s assertion of such a religious exemption.”²⁴ But simply being aware that an educational institution has a religious character is not sufficient notice that the school will choose to request an exemption in order to discriminate against them. The tenets of religious organizations vary significantly both within broad traditions and also within specific organizations. It does not follow that simply because a college has religious affiliations that it will “likely” discriminate against LGBTQ students.

Students and prospective students and their families often spend many thousands of dollars for attendance at college and students are often highly vulnerable as they move away from familial support systems. Those students, prospective students, and their families, as well as employees of educational institutions, deserve to know whether their schools or employers have reserved the right to discriminate against them before they invest their resources and are placed at risk of harassment, bullying, and discrimination based on sex. For some students, appropriate notice will mean choosing an alternate school during the application process, transferring to another university, or even deciding not to come out as LGBTQ until after they graduate. In the absence of adequate communications between religious institutions and the Department, current and prospective students and their families lack the information necessary to make informed decisions with dire and lasting consequences, not least of which is suffering the harms of discrimination.

²¹ Religious Exemption Accountability Project & College Pulse, *The LGBTQ+ Student Divide, The State of Sexual and Gender Minority Students at Taxpayer-Funded Christian Colleges* (March 2021), available at https://593f573b-1436-46c6-85bf-bd1475656bfe.filesusr.com/ugd/0ae2d2_9b01481f670f45819315aac806b14336.pdf.

²² *Id.*

²³ See 34 C.F.R. § 106.9(a).

²⁴ 85 FR 30478

In 2020, the Department in separate rulemaking also expanded significantly the eligibility criteria for such exemptions which replaced internal guidance for determining whether an organization is a religious organization. The 2020 rule adopted broad eligibility criteria which easily can approve unlawful discrimination with claims that the discrimination was exempted based on the religious character of the institution.²⁵ For example, the existing rule allows an educational institution to claim the exemption simply by issuing a doctrinal statement. And if even such a minimal showing is deemed too burdensome, the rule provides that those institutions can also present “other evidence” to establish it is a religious organization.²⁶

Such expansion will allow serious harm to LGBTQ students by expanding the number of educational institutions that may claim an exemption and thereby will lead to further discrimination and harassment in educational settings for LGBTQ students. The expansive language adopted in the 2020 Final Rule creating additional eligibility criteria should be eliminated. In sum, the lack of notice, compounded by the expansion of eligibility criteria, invites great harm for LGBTQ students. We urge the Department to revise the existing rule to require a written statement for entities seeking an exemption and to revise the eligibility requirements to narrow which entities may claim the exemption and under what circumstances.

4. Recommendation: Create a new regulation clarifying that Title IX prohibits federally funded schools from discriminating against any student due to the student’s alleged noncompliance with any sex-differentiated rules of appearance. (34 C.F.R. § 106.31(b)(7))

Sex-differentiated dress codes often encourage and enforce gender stereotypes that create an educational environment hostile for many LGBTQ students. LGBTQ students experience disproportionately higher rates of disciplinary actions based on sexist dress and grooming standards that are applied against them in discriminatory ways.²⁷ Furthermore, prohibiting

²⁵ See Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program, 85 FR 59916, 34 C.F.R. § 12 (Sept. 23, 2020), available at <https://www.federalregister.gov/documents/2020/09/23/2020-20152/direct-grant-programs-state-administered-formula-grant-programs-non-discrimination-on-the-basis-of>.

²⁶ 34 C.F.R. § 106.12(c).

²⁷ See, e.g., Letter from Lambda Legal and ACLU to Clyde Consolidated Independent School District, Clyde, Texas, on behalf of Trevor Wilkinson regarding discriminatory grooming policies (Dec. 10, 2020), available at https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/letter_to_clyde_cisd_from_aclu_and_lambda_legal.pdf. See also GLSEN, *The 2019 National School Climate Survey*, pp. 39-45 (2019), available at https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf; see generally GLSEN, *Educational Exclusion* (2016) (“School policies that disproportionately affect LGBTQ students, such as gendered dress codes and rules about public displays of affection, also expose LGBTQ youth to greater rates of school discipline, and sometimes, as a result, involvement in the justice system”), available at <https://www.glsen.org/sites/default/files/2019-11/>

students from wearing clothing consistent with their gender identity places schools at risk of serious liability under Title IX and the U.S. Constitution. Currently, dress and grooming standards vary widely from school district to school district, which creates confusion and unfairness. Students should enjoy the same right to thrive in an educational environment free from discrimination, wherever they live. Directions clarifying that appearance standards must be written, enforced, and applied consistently and equally to all students regardless of gender, and must not enforce gender stereotypes, would be beneficial for students and would help clarify the legal obligations of school districts.

5. Recommendation: We urge the Department to revise the existing sexual harassment and violence rule to help ensure that victims of sexual harassment and violence are protected and free from discrimination.

Sexual harassment in schools is widespread. An estimated one in four women report sexual harassment in college. For LGBTQ students, experiencing sexual assault and harassment is routine. A staggering 60% of LGBTQ youth report sexual harassment.²⁸ One in four transgender, nonbinary or gender nonconforming students experience sexual assault as college undergraduates.²⁹ These figures are confirmed by the Center for Disease Control which shows that LGBTQ+ people generally experience higher rates of sexual violence.³⁰ For many of these students, being assaulted or harassed at school often means losing out on educational opportunities or having to drop out of school altogether. For example, in one survey LGBTQ students who faced high levels of in-school victimization were three times more likely to have missed school in the past month because they felt unsafe, were less likely to plan to pursue post-secondary education, and had lower GPAs than other students.³¹

Instead of working to decrease such barriers however, the Final 2020 Rule has made it more difficult for survivors of sexual harassment and violence to experience education free from discrimination. The Rule made it more difficult for students to report harassment and get the help they need to be able to continue their education, and made it easier for schools to decline to conduct fair and thorough investigations. The 2020 Rule also created a dangerously high standard for claims brought by survivors of sexual harassment by requiring that, to be actionable,

[Educational Exclusion 2013.pdf?emci=85a17d8c-fd3b-eb11-9fb4-00155d43b2cd&emdi=ea000000-0000-0000-0000-000000000001&ceid=%7b%7bContactsEmailID%7d%7d.](https://www.glsen.org/research/2019-national-school-climate-survey)

²⁸ GLSEN, *2019 National School Climate Survey*, *supra*, p. xix, 20 (2020), <https://www.glsen.org/research/2019-national-school-climate-survey>.

²⁹ AAU, Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct, ix (Oct. 15, 2019), available at <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

³⁰ See National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Findings on Victimization by Sexual Orientation, available at https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf.

³¹ *Id.*

conduct must be “severe and pervasive” rather than “severe or pervasive.”³² Unless changed, this improperly heightened standard will deter claims by survivors of sexual assault and will have a disproportionate effect on sexual assault targeting LGBTQ and youth of color who are often wrongfully viewed as sexually promiscuous and thereby inviting sexual assault.

The Department should clarify that sexual harassment includes dating violence, domestic violence, and sex-based stalking, and harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions. Uniform standards should be applied to all forms of sex-based harassment as well as harassment based on other protected characteristics, including race, color, national origin, and disability.

6. Recommendation: Robust Enforcement:

The Department’s Office for Civil Rights should prioritize and aggressively pursue complaints made by LGBTQ students, especially complaints that reflect a pattern of discrimination in certain parts of the country or where there are state laws that enforce such discrimination. Enforcement investigations and resolutions are a crucial step in ending discrimination where it occurs and will also serve as an important educational tool that will helpfully deter further discrimination.

7. Other Recommendations and Considerations:

There are other considerations that we recommend the Department consider in striving to create an educational environment free from discrimination for LGBTQ students. For example, we urge the Department to consider ways to ensure the privacy of LGBTQ students are protected. Additional clarification and enforcement would be helpful to signal the duties of school official and hopefully deter state legislation and school policies that would require teachers to notify parents if their child is transgender.³³ In addition, any steps the Department can take to ease the ability of transgender and nonbinary students seeking to change their name and pronoun on student roll call lists, email addresses and other contexts would be extremely beneficial to their health and welfare. The World Professional Association on Transgender Health recommends transgender youth be appropriately recognized and that governments eliminate barriers to gender recognition and to create easy-to-understand accessible ways to amend such documents.³⁴

Endorsement of Specific Comments Submitted:

In addition to the recommendations listed above, Lambda Legal strongly endorses the comments submitted by the National Women’s Law Center concerning sexual harassment; the Women’s Sports Foundation concerning inclusion of transgender athletes in school sports programs;

³² 85 FR 30036.

³³ *E.g.*, H.B. 658 (Ohio 2018).

³⁴ See WPATH Identity Recognition Statement (Nov. 15, 2017), available at <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>.



Family Equality regarding discrimination against the children of LGBTQ parents; and GLSEN regarding ensuring equal opportunities for LGBTQ students through guidance, enforcement, reporting and best practices.

Conclusion

Thank you for the opportunity to provide information for the purpose of improving enforcement of Title IX. Please let us know if you would like further clarification on any of these recommendations.

Most respectfully,
Lambda Legal Defense and Education Fund, Inc.

Sasha Buchert, Senior Attorney
sbuchert@lambdalegal.org
1776 K Street, N.W., 8th Floor
Washington, DC 20006-2304

Paul D. Castillo, Counsel and Students' Rights Strategist
pcastillo@lambdalegal.org
3500 Oak Lawn Ave., Ste. 500
Dallas, TX 75219-6722

Jennifer C. Pizer, Law and Policy Director
jpizer@lambdalegal.org
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010-3512