EQUAL RIGHTS ADVOCATES

September 12, 2022

Submitted via www.regulations.gov

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Avenue SW Room 6E231
Washington, D.C. 20202

Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue SW Room 6E231
Washington, D.C. 20202

Re: Docket ID ED-2021-OCR-0166, RIN 1870-AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Secretary Cardona and Assistant Secretary Lhamon:

Thank you for issuing proposed changes to federal regulations and guidance regarding the interpretation and enforcement of Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) at this critical moment in the law's history. Equal Rights Advocates respectfully submits this public comment in response.

Equal Rights Advocates ("ERA") is a national non-profit legal organization advocating for gender justice in schools, workplaces, and other spheres. Since our founding in 1974, ERA has led efforts to combat sex discrimination and advance gender equality by litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed numerous suits and appeared as amicus curiae in hundreds of cases to defend and enforce gender equity civil rights in state and federal courts, including before the United States Supreme Court. [1] Please see a copy of ERA's complaint in that action for a description of challenged components of the 2020 rules.

We applaud the Department of Education's current efforts to address the dire harm caused and threatened by the 2020 regulations. Equal Rights Advocates supports many of the changes in the Biden administration's proposed Title IX regulations, including expanded protections that explicitly include LGBTQI+ persons and lactating persons and clarify protections regarding

[1] *Victim Rights Law Center v. Cardona*, 552 F. Supp. 3d 104, 134 (D. Mass. 2021).

pregnancy, former pregnancy, and the ability to become pregnant. However, we would also like to use this opportunity to raise concerns regarding components of the regulations that we believe require inclusion, deletion, or further clarification and offer some additional suggestions that we believe the Department can and should pursue as Title IX marks its fiftieth anniversary year. Please find ERA's comment's below about the proposed regulations, which overlap in part and supplement other public comments ERA has signed in coalition with other advocates.[2]

ERA's Position on the Department's Proposed Regulations:

ERA Supports Proposed Provisions and Recommends Additions to Ensure the Effective Implementation of Title IX's Nondiscrimination Protections. ERA encourages the Department to supplement the final rule with resources that clarify the interactions of Title IX with the Family Educational Rights and Privacy Act (FERPA), the Equal Access Act, Title VI of the Civil Rights Act, Individuals with Disabilities Education Act, and section 504 of the Rehabilitation Act. ERA encourages the Department to report disaggregated OCR complaint data annually and collect demographic data on complainants and disciplined students.

ERA urges the Department to publicize key case resolutions for complaints involving anti-LGBTQI+ discrimination and harassment, and promote the visibility of LGBTQI+ students and educators. ERA urges the Department to work with the Office of Elementary and Secondary Education (OESE) to publish best practices for supporting LGBTQI+ students and preventing and responding to complaints of bullying and harassment in consultation with stakeholders, those with lived experience, and the Working Group on LGBTQI+ Students and Families. ERA also urges the Department to work with the OESE to advance intersectional equity under Every Student Succeeds Act, partly by updating guidance on funds authorized for state and local education agencies.

Lastly, ERA encourages the Department to work with other agencies and the Department of Justice so that these same prohibitions apply across agency application.

ERA Supports Proposed Provisions and Recommends Additions to Ensure a Fair and Effective Process for All Meritorious Complaints. ERA supports the proposed rules requiring schools to address complaints by individuals who are not current students or employees of the school, with certain restrictions.

---

[2] ERA performs the work of Title IX-related legal representation and policy advocacy every day. It is who we are as an established national organization. As part of that work, we are in constant conversation with other organizations who are either experts in Title IX law, in the communities affected by Title IX, or in adjacent areas also working to ensure the right to gender equity. Because of these conversations with our sister organizations on these and other matters involving Title IX regulations we have signed onto several letters spearheaded by such organizations. In light of this collaboration with our fellow sex and gender equity organizations, we will not restate all of our positions contained in those letters regarding the proposed rules here, but we would like to provide a summary of the aggregate positions that ERA has signed three separate sign-on letters submitted during this comment period. Those sign-on letters to which ERA is a signatory were submitted to the Department during this comment period by the National Women's Law Center (NWLC), the Gay, Lesbian & Straight Education Network (GLSEN), and the Pregnant Scholar Initiative at the UC Hastings Center for Work Life Law in partnership with the United States Breastfeeding Committee.

ERA supports clarifying that schools are required to inform complainants of available supportive resources, protections against retaliation, and specific support measures for students with disabilities. ERA urges the Department to require the preponderance of evidence standard to be used in all Title IX investigations. ERA supports the use of three categories of non-confidential employees (i) those with "administrative leadership, teaching, or advising roles;" (ii) those with the authority to institute corrective measures; and (iii) all other employees, as well as different reporting obligations for some of these categories depending on whether the alleged victim is a student or employee.

ERA is in support of the requirement for schools to offer no cost support for those who report sex-based harassment (or other sex discrimination) regardless of outcome. ERA urges that instead of "confidential employees," as stated in the proposed regulations, the Department instead require that schools designate one or more confidential employees, who will be clearly identified, and who, upon learning of possible sex-based harassment (or other sex discrimination), must tell that person how to report it to the Title IX coordinator and how the Title IX coordinator can provide support and aid. ERA supports the proposed removal of the current provision that prevents schools from complying with a state or local law that conflicts with the Title IX regulations and provides greater protections against sex discrimination, including harassment.

ERA Supports the Prompt and Effective Action Standard and the Expanded Definition of "Hostile Environment." In the proposed regulations, ERA is pleased to see the Department acknowledge that allowing a school to respond to sex-based harassment unreasonably, so long as the school's response was not "deliberately indifferent," created a harmful lower standard when addressing sex discrimination claims as opposed to other types of discrimination claims. ERA supports the proposed rule in §106.44(a) requiring a recipient to take prompt and *effective* action to end sex discrimination, prevent its reoccurrence, and remedy its effects. In particular, we appreciate the introduction of the word "effective" into regulation as a more measurable requirement upon recipients and one referred to and explored in Title IX case law and prior Department guidance.[3] Under this new rule, if a Title IX Coordinator's actions are ineffective in ending an instance of sex discrimination or preventing its recurrence, the Coordinator must take additional steps to fulfill the school's obligations under Title IX. This proposed updated is an improvement over the existing standard, which permits a school to provide only a limited "checklist" of responses, untethered from questions of effectiveness or appropriateness. The "prompt and effective" standard is clearer, practical, and best suited to the purpose of Title IX and its real-life implementation. Lastly, ERA supports the Department returning to the pre-2020 definition of "hostile environment."

---

[3] *See*, *e.g.*, *Donovan v. Poway Unified Sch. Dist.*, 167 Cal. App. 4th 567, 611 (2008), *reh'g denied* (affirming finding of deliberate indifference where "corrective measures . . . undertaken by [the defendant] in response to th[e] harassment were ineffective"); Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. 15 (Apr. 4, 2011) ("In addition to counseling or taking disciplinary action against the harasser, *effective* corrective action may require . . .changes to the school's overall services or policies.") (*emphasis added*); U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12 (2001) ("If a student sexually harasses another student . . . the school is responsible for taking immediate *effective* action to eliminate the hostile environment and prevent its recurrence.") (*emphasis* added) [hereinafter *2001 Guidance*].

ERA Supports the Application of Title IX to Off-Campus Conduct. We applaud the Department for rescinding arbitrary and senseless geographical limitations imposed by the 2020 rules. The 2020 rules required schools to ignore all complaints of off-campus or online sexual harassment that happen outside of a school-sponsored program – even if the student is forced to see their harasser on campus every day and the harassment directly impacts their education as a result. ERA supports the proposed rule that requires schools to respond to all sex-based harassment or discrimination occurring under an education program or activity which includes conduct that occurs in any building owned or controlled by an officially recognized student organization of the school. ERA further urges the Department to expressly state in the regulations that this covers off-campus school-sponsored activities and off-campus incidents involving school community members such that the incident could affect a student's access to their educational program or activity by "spilling over" onto the campus.

As we urged the Department in 2019 in our public comment on the then-proposed regulations, the Department cannot ignore the reality that sexual harassment that happens off campus and/or outside of a school activity is no less traumatic than on-campus harassment.[4] The negative impact on the student victim's education is typically the same if they are forced to see their harasser regularly at school, regardless of where the harassment took place. At ERA, we know that "off-campus" harassment is equally as likely to create an unsafe and hostile educational environment as harassment that takes place on campus or during a school activity. We see it every day at both the K-12 and the collegiate levels.

For example, after one of our clients was gang-raped at an off-campus party by high school classmates, her assailants took pictures of her body immediately after the rape and posted them on social media. When the School Resource Officer learned about the rape, he called the victim out of class to ask her irrelevant and traumatizing questions (such as, "Were you a virgin?"). After this interview, he escorted her off campus, advising her not to return for the rest of that academic year because her presence was "distracting" to other students and "everyone was talking about what happened." When the Assistant Vice Principal learned about the rape, he reportedly asked another employee to "make sure we don't have to do anything for [the student]." The 2020 rules improperly validated the incorrect views of administrators like this Assistant Vice Principal that schools are not obligated to respond in such situations.

Further, almost 9 in 10 college students live off campus[5] and much of student life takes place outside of school-sponsored activities. Moreover, living on campus is an expensive luxury. Many independent students, returning (older) students, low-income students, students of color, LGBTQI+ students, and former foster youth are struggling to make ends meet while making it

---

[4] The Department admitted in the previous leaked draft of the NPRM that 41% of college sexual assaults occur off campus. *See* Letter from Anne C. Agnew to Paula Stannard et al., *HHS Review: Department of Education Regulation - Noon September 10,* U.S. DEP'T OF HEALTH & HUMAN SERVICES at 78 n.21 (Sept. 5, 2018) [*hereinafter* Draft NPRM], *available at* https://atixa.org/wordpress/wp-content/uploads/2018/09/Draft-OCR-regulations-September- 2018.pdf.

[5] Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows*, NEW YORK TIMES (Aug. 5, 2016), *available at* https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html.

through college. They need the civil rights protections promised to them by Title IX to follow them as they eat, work, and live in the surrounding community.

The 2020 rules posed particular risks to students at community colleges and vocational schools. Because none of these students live on campus, when they are harassed by other students or by faculty members, it is more likely to occur off campus. Stripping protections from community college students has an especially negative impact in California, home to the most diverse college student population in the nation, whose community college system educates over 2.1 million students and consists of 114 non-residential colleges. For example, in one of our cases, a community college professor who harassed several students demanded that certain female students answer his calls after hours, meet him off campus to go over their coursework, and allow him to drive them home after class. Under the 2020 rules, these students would have no recourse to hold their schools accountable because the harassment happened off campus.

Our organization sees firsthand the prevalence of off-campus sexual harassment is and how it negatively impacts students' access to educational programs and activities. We receive daily requests for assistance from victims of harassment who must face their harassers or assailants in class, on athletic teams, and in on-campus housing. ERA applauds and supports the Department in ensuring that these vulnerable students will be protected and schools will be required to investigate these matters regardless of where the harassment takes place if it could interfere with their access to education.

ERA Supports Expansion of Pregnancy and Lactation Protections, but Urges More Protections Regarding Abortion Status and Care. ERA supports the proposed expansion of protections against discrimination based on pregnancy and pregnancy-related conditions under existing Title IX regulations. Specifically, ERA supports that the proposed regulations explicitly define discrimination based on pregnancy or pregnancy-related conditions — including lactation and current, potential, or past pregnancy and related conditions — as sex discrimination. This update correctly aligns Title IX with protections provided by the Pregnancy Discrimination Act, Title VII and the Affordable Care Act, and is particularly important in light of the unique challenges facing students following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.[6]

ERA urges the Department to further amend the regulations to clarify that Title IX protects students from discrimination or retaliation related to seeking or obtaining an abortion. The Department is meaningfully positioned to ensure schools understand their legal obligations not to discriminate against students who have sought or are seeking reproductive health care.

ERA supports the proposed regulations that require schools to provide adequate space for lactation and urges the Department to strengthen this requirement by treating lactation breaks as medically necessary absences and clarifying that students should not be forced to provide medical documentation for this accommodation. ERA supports proposed regulations requiring reasonable break time and lactation space for lactating employees. ERA also supports the proposed rule explicitly adding "lactation" as a related condition with childbirth and termination

[6] *See* 142 S. Ct. 2228 (2022).

of pregnancy and seeks for the Department to clarify whether this is a non-exhaustive list of "pregnancy or related conditions."

ERA supports the rule permitting students who are pregnant or have related conditions to participate voluntarily in school's programs and activities, comparable to those offered to their peers. ERA supports the proposed rule allowing students who are pregnant or have a related condition to take voluntary leave of absence for as long as deemed medically necessary, and that this duration can be decided by any health care provider.

ERA urges the Department to include harassment on the basis of parental, family, caregiver, or marital status in the definition of sex-based harassment and to make medically necessary "absences" available to parenting and caregiving students.

ERA Supports the Supportive Measures Provisions of the Proposed Regulations but Urges the Department to Clarify and Expand. While proposed language in §106.44(g) would require supportive measures upon the school's notification of misconduct, ERA requests that the Department clarify that these supportive measures would continue if a given complainant chooses not to complete their informal resolution or formal grievance process. Parties should be permitted to voluntarily withdraw from such processes and continue to receive supportive measures to ensure their continued access to education. These supportive measures may potentially present a burden upon the respondent, where appropriate, to facilitate the restoration or preservation of a complainant's access to equal educational opportunities or benefits. ERA is concerned that if a respondent disagrees with their informal process and forces the complainant into a formal grievance procedure, the complainant will lose access their supportive measures if they choose to withdraw from the process at that point. We also ask that the Department clarify that some supportive measures, such as having a respondent switch dorms or classrooms, while burdensome, are not punitive, and that they are enacted to ensure needed physical distance between respondent and complainant.

ERA Remains Concerned with the Proposed Religious Exemption. ERA is concerned that the religious exemption to Title IX protections in these proposed rules remains vague. While qualifying religious institutions have always been exempt from certain components of Title IX, the 2020 regulations expanded the relevant exemption — broadening the definition of "religion" and allowing institutions to claim exemption after failing to respond to a complaint, instead of being required to qualify for religious exemption in advance. The proposed regulations fail to include instruction on these issues. Without requiring pre-authorization for religious exemption or providing a more concrete definition of religion or religious tenet, students may not have warning that their institution will fail to protect them from sex discrimination by retroactively weaponizing religious grounds. ERA urges the Department to rescind the 2020 extra-statutory provision of what it means to "be controlled by a religious organization." ERA urges the Department to require schools claiming religious exemptions to publish those exemptions in their non-discrimination policy under section 106.8(b)(1) and their notice of non-discrimination under section 106.8(c)(1)(i).

ERA Urges the Department to Adopt a Constructive Notice Standard. When it comes to students' ability to report harm to school representatives, ERA encourages the Department to

codify constructive notice as a sufficient form of notice more affirmatively. This addition is particularly relevant for students who are unsure to whom they must officially report their harm, and would prevent staff and faculty miscommunications from adversely impacting the timeliness of students' claims.

ERA Urges the Department to Not Return to an Exclusionary Evidentiary Standard. ERA joined several of our survivor-clients and two fellow survivor-serving organizations as co-plaintiffs in filing suit against the Department and former Secretary Betsy DeVos less than one month after the Department issued its final rule containing the evidentiary exclusion provisions.[7] The U.S. District Court of Massachusetts held that the provisions were arbitrary and capricious under the APA because the DOE "failed, even implicitly, to consider the consequences" of the provisions on survivors.[8] The court pointed out that excluding absentee statements and classifying evidence like rape kits as statements would "render the hearing a hollow exercise."[9] In holding that these provisions were arbitrary and capricious, the court recognized that the evidentiary exclusion provisions made it all but impossible for survivors to win their Title IX case.

We are alarmed to see that the proposed regulations contain a different, but similarly harmful and unnecessary, evidentiary exclusion rule.[10] The new proposed provision stipulates that if a party or witness at an institution of higher education does not respond to even one question "related to their credibility," their school "must not rely on any statement of that party that supports that party's position."[11] This concerning provision has the power to render all of a given survivor's oral and written statements unusable simply because they declined to answer merely one question about their credibility. This would then force the survivor to rely on witness statements, if any.[12]

The credibility of survivors of sexual harassment and assault is often challenged on dubious grounds.[13] Myths pervasive in American culture include notions that only "promiscuous" victims suffer harm, that victims who choose to consume alcohol are deserving of harm, that victims regularly lie about harm they have experienced, and that certain hypothetical actions on a victim's part could have prevented the harm altogether.[14] The data do not support these myths and biases, and neither should the Title IX regulations promulgated by this Department. The rate

---

[7] *See* Complaint for Injunctive and Declaratory Relief, Victim Rights Law Center v. Cardona, 552 F. Supp. 3d 104 (D.Mass. 2021) No. 1:20CV11104 (filed June 10, 2020); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30026-01 (2020) (published May 19, 2020).
[8] *Victim Rights Law Center*, 552 F. Supp. 3d at 134.
[9] *Id.*
[10] *See* Proposed Rules, 87 Fed. Reg. 41,390, 41,578 (July 12, 2022) (proposed 34 C.F.R. § 106.46(f)(4)).
[11] *Id*.
[12] *See id.*
[13] *See* WOMEN'S LAW PROJECT, POLICY BRIEF: ADVOCACY TO IMPROVE POLICE RESPONSE TO SEX CRIMES 5-7 (2013), https://www.womenslawproject.org/wp-content/uploads/2017/06/Policy_Brief_Improving_Police_Response_to_Sexual_Assault_Feb2013_FINAL-revd-2016.pdf.
[14] *Id.*

of false allegations of sexual violence is believed to be under 10%, between 2% and 7%. This is a rate comparable to false allegations of other crimes.[15]

In an amicus brief ERA and the California Women's Law Center recently submitted to the California Supreme Court in *Boermeester v. Carry*, we argued that credibility is at the heart of all cases concerning gender-based violence and is regularly interpreted in ways that are grounded in rape myths.[16]

Accordingly, ERA strongly suggests that the Department remove the proposed provision.

ERA Supports Equitable Appeal Rights and Urges the Department to Include the Ability to Appeal the Finding for Complainants. ERA urges the Department to amend proposed § 106.46 so that institutions must offer post-adjudication appeals to all parties regardless of the outcome, rather than only mandating that schools allow appeals from a determination that sex-based harassment occurred.[17] As written, the rule effectively denies complainants the right to appeal an unfavorable resolution to their complaint, suggesting that a complainant's right to learn in an environment free from sex discrimination is less important than a respondent's right to not be held responsible for the alleged conduct. This imbalance is not only inequitable, but continues the 2020 regulations' harmful legacy of creating a Title IX process that improperly mirrors the criminal legal system.[18] In order to establish Title IX grievance procedures that "treat complainants and respondents equitably" and recognize the equal stakes both parties have in the outcome's effect on their access to education, it is vital for complainants to be guaranteed equal opportunity to appeal a decision that is not in their favor.[19]

ERA Urges an Explicit Prohibition on the Use of Unconscionable Agreements by Recipients in the Title IX Process. In June 2022, ERA and a coalition of partner organizations submitted a letter to the Department detailing our concerns related to the improper use of non-disclosure agreements and other unduly burdensome confidentiality requirements in the Title IX process at a number of institutions of higher education.[34] We use this opportunity to reiterate our position on the issue, especially in light of the response we received from OCR's Program Legal Group on August 18, 2022 indicating that the concerns we raised are addressed in the NPRM and should be handled through the comment process.

As described at length in our June letter, ERA is aware of some schools conditioning their sexual misconduct complaint processing on students signing coercive, chilling, and overly broad nondisclosure agreements. Although the proposed regulations indicate that efforts to protect the privacy of the parties and witnesses to a Title IX process should "not restrict the ability of the

---

[15] See NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, FALSE REPORTING OVERVIEW 3 (2012), https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf.

[16] *See* Amici Curiae, *Boermeester v. Carry*, 263 Cal. Rptr. 3d 261 (Ct. App. 2020) (No. S263180).

[17] Proposed 34 C.F.R. § 106.46(i)

[18] While both parties have the right to appeal the verdict in federal civil court, the prosecution is not entitled to appeal a not-guilty verdict in a federal criminal case. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, UNDERSTANDING FEDERAL COURTS 19, https://www.uscourts.gov/sites/default/files/understanding-federal-courts.pdf.

[19] Proposed 34 C.F.R. § 106.46(b)(1)

parties to present and obtain evidence . . . or otherwise defend their interests" and that recipients should provide a reasonable opportunity for the parties to review and respond to the evidence or a description thereof, they do not explicitly address the concerns we raised: namely, that forcing parties and their advisors to sign unconscionable confidentiality agreements as a precondition for participating in necessary stages of the grievance process undermines their ability to have complaints fully and equitably resolved, as is their right.[35]

Although ERA understands the Department's assertion that "reasonable steps" to prevent the unauthorized disclosure of information may vary in different settings and circumstances, conditioning a party's full participation in the grievance process on overly restrictive non-disclosure agreements is never reasonable. Accordingly, we reiterate our June 2022 recommendation that the Department explicitly prohibit Recipients from using confidentiality agreements and contracts as prerequisites to providing accommodations, investigations, resolutions, or otherwise during the school's sexual misconduct grievance process, other than where regulations already permit such an agreement. Additional information, including further recommendations on how this concern may be addressed—including by incorporating proposed changes in the new regulations—are available in the full text of our June 2022 letter.[36]

ERA Urges Removal of the Provision that Allows for Live Hearings and Direct Cross Examination at the K-12 Level.[20] ERA is very concerned that, under the proposed regulations, recipients could opt to conduct live hearings and conduct cross-examination of young students at the K-12 level in order to assess "credibility." While §106.45 provides some useful guidance on the consideration of evidence, it does not prohibit a live hearing and/or cross-examination as methods to either investigate or determine whether sex discrimination occurred.[39] Given that the requirement of a live hearing and cross-examination was eliminated in the higher education context,[40] it is puzzling that the Department would now permit the use of such methods at the K-12 level.[41]

---

[20] ERA has a history of pursuing Title IX claims at the K–12 level as a regular feature of our legal services docket and we receive thousands of calls a year on our national Advice and Counseling line from K–12 students seeking Title IX information and redress.

Beyond mere litigation, ERA has developed a regular practice of staying in the schools we confront, whether that relationship with the school developed from an adversarial or a collaborative matter, to help schools get it right for their K–12 students, follow the lead and needs expressed by students in real time and in school right now, and move toward a culture of sex equity and commitment to gender equality regardless of minimal legal requirements. This has uniquely positioned us as an expert in this area of Title IX implementation from the advocacy perspective.

We therefore want to stress to the Department that K-12 schooling environments deserve and demand specific attention and applaud these proposed regulations as the first time in Title IX regulatory history that any practical address was provided to this educational level. Sexual harassment at the K-12 level is dramatically underreported; one study found that fewer than 10 percent of students who had experienced harassment at school reported the experience to a teacher, counselor, or another adult. Many students are not educated about the fact that Title IX applies to them, positioning bullying and sexual harassment as inevitable parts of the school day that must simply be endured. Schools at the K-12 level often do not realize that Title IX applies to them, or that Title IX covers more than equal participation in athletic programs. Many districts and schools do only the bare minimum to comply with Title IX, or openly fall short of Title IX requirements.

While we are pleased that the Department is signaling a move toward acknowledging the unique needs of K–12 students and schools, we have an immediate concern with the current proposed regulations.

Especially concerning is §106.45(g), which requires a recipient to "provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination." A recipient could conclude that an acceptable process to assess credibility includes a live hearing and/or cross-examination of the parties and witnesses.[42] ERA's hope is that this is simply a drafting oversight and strongly urges the Department to insert a provision clarifying that "a recipient may not conduct a live hearing or employ cross-examination as a method to determine credibility under this section."

Live hearings and cross-examination, whether direct or indirect, of children in the K-12 context are harmful and not likely to lead to accurate information. Child complainants who are cross-examined find the experience "distressing" and "frightening."[43] Students with lower self-esteem and self-confidence and students with disabilities are even more likely to be negatively impacted by cross-examination.[44] "[C]ross-examination [also] contravenes most well-established principles for eliciting accurate evidence from children," which is to ask open-ended questions in an informal, friendly, non-aggressive setting.[45]

For these reasons, ERA strongly urges the Department to follow these well-established best practices and expressly prohibit K-12 schools from using live hearings or cross-examination to assess credibility or determine whether the sex discrimination occurred.

ERA Applauds the Explicit Inclusion of Protections for LGBTQI+ Students and Encourages Specific Expansions. ERA strongly supports the explicit clarification that the definition of sex discrimination under Title IX includes discrimination on the basis of sexual orientation, gender identity, sex stereotypes, and sex characteristics.[46] We call on the Department to bolster this protection by clearly establishing prohibited forms of harassment and discrimination that are unique to LGBTQI+ students.

LGBTQI+ students sit at the dangerous intersection of higher risk of harm and lower rates of institutional empathy. For example, transgender youth are 3.6 times more likely to experience physical dating violence than their cisgender peers,[47] and more than three in four transgender students report experiencing anti-LGBTQ+ discrimination at school in the form of discriminatory rules and practices.[48] Even in California, where state education law includes explicit anti-discrimination protections for LGBTQI+ students, ERA has worked with numerous students whose reports of harm were dismissed or minimized when their schools failed to recognize their experiences as valid forms of sex-based discrimination. As anti-LGBTQI+ rhetoric and legislative attacks become increasingly pervasive nationwide, students and recipients need clear directives from the Department to understand the full scope of applicable protections.

Accordingly, ERA encourages revising § 106.8(b)(1) and § 106.8(c)(1)(i) regarding notice of school anti-discrimination policies to require recipients to specify that "discrimination on the basis of sex" includes the forms of prohibited sex-based discrimination enumerated under § 106.10 for the sake of providing greater clarity around the scope of Title IX protections to

students, staff, parents, and other interested parties.

Most importantly, ERA urges the Department to provide greater clarity around conduct and practices that may constitute prohibited discrimination on the basis of gender identity, sexual orientation, sex stereotypes, and sex characteristics. Proposed 34 C.F.R. § 106.2 should be amended to include definitions of prohibited anti-LGBTQI+ harassment, including but not limited to misgendering, deadnaming, and willful use of language that is known to be disturbing or offensive to an LGBTQI+ individual.[49] This definition should distinguish between genuine mistakes, such as a student using the wrong pronouns for a peer and then correcting themselves, and repeated and intentional conduct. The Department should also clarify that the "de minimis" harm standard created in proposed § 106.31(a)(2) applies to *all* of a recipient's sex-segregated programs and activities, including but not limited to locker rooms, restrooms, dress codes, and housing. This clarification should extend to specifying that separate gender dress or appearance codes violate Title IX even when the code allows students to dress according to their gender identity.

ERA Urges the Department to Include Regulations Regarding Cultural Competence Training in the Title IX Context in Addition to Trauma Informed Training. ERA supports the proposed regulations requiring all school employees to be trained on Title IX issues.[50] ERA urges the Department to require that schools provide mandatory training on trauma-informed *and* culturally competent practices as a critical part of the overall Title IX training requirement. When students experience trauma, it can greatly impact their ability to learn and hinder their access to education. School employees need to understand trauma and respond to it appropriately, especially employees with Title IX-related responsibilities, as trauma may impact a student's participation in an investigation and/or inform the supportive measures they need to stay safe and engaged at school.[51] Employees cannot "serve impartially" and accurately assess a complaint if, for example, they think a traumatized student who cannot remember the details of sexual harassment is lying instead of recognizing the results of trauma on memory.[52]

Cultural competence is a core principle of trauma-informed practice.[53] Providing trauma-informed care to sexual assault survivors requires understanding survivors' histories, the contexts of their experiences, and intersectionality. Intersectionality proposes that complex systems of discrimination and bias (racism, heterosexism, sexism, etc.) that function on numerous levels (structurally, interpersonally) combine causing disproportionate risks amongst communities who are traditionally marginalized.[54]

Further, the meaning one gives to trauma and the impact it has on an individual and their community, can vary greatly by culture. Healing takes place within an individual's cultural context and support network, and different cultural groups may require unique resources that support healing.[55] Also, students from racial, gender, and sexual minority communities face increased barriers to accessing assistance and reporting their assault. Many of these obstacles are deeply rooted in cultural pressures, language barriers, fear of discrimination and harassment when seeking out services, and deep mistrust of campus authorities and law enforcement.[56] To truly understand and anticipate what supportive measures a student may require to safely maintain their access to education while participating in the Title IX process,[57] trauma-informed

and culturally competent practices in Title IX procedures are essential. ERA urges the Department of Education to further amend its proposed Title IX regulations to make explicit the requirement that all school employees receive training on trauma-informed and culturally competent practices as a part of their Title IX training [*Proposed 34 C.F.R § 106.8(d)*].[58]

ERA Urges the Department to Issue Regulations Regarding Title IX and Athletics Promptly:

ERA appreciates the broadened understanding of "sex-based harassment" set forth in the proposed regulations, which includes harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. We recognize the usefulness of creating separate regulations to address policies surrounding transgender people in athletics and urge the Department to promptly promulgate proposed regulations including anti-discrimination protections for transgender students to ensure their equal access to educational programs and activities. ERA urges the Department to issue its forthcoming rule addressing transgender participation in athletics by the end of 2022 for the sake of issuing all final regulations at the same time. In less than three years, 18 states have passed laws that ban transgender students from participating in the athletic team that corresponds to their gender identity. In 2021, 83% of transgender and nonbinary youth said that they have worried about transgender people being denied the ability to play sports due to state or local laws. It is imperative that the Department swiftly issue proposed regulations to ensure that trans and nonbinary student athletes' rights are protected.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Noreen Farrell, Executive Director, at nfarrell@equalrights.org or Maha Ibrahim, Senior Attorney, Policy & Litigation and Managing Attorney of ERA's Ending Sexual Violence in Education (ESVE) Program, at mibrahim@equalrights.org to provide further information to you as to our comment or the work that we perform in this area of civil rights law.

Sincerely,

Maha Ibrahim
Senior Attorney, Policy & Litigation
Managing Attorney, Ending Sexual Violence in Education (ESVE) Program