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Submitted via www.regulations.gov

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

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

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

Dear Secretary Cardona and Assistant Secretary Lhamon:

The Education Law Center of Pennsylvania (“ELC-PA”) submits this comment in response to the Department of Education’s (the Department) Notice of Proposed Rulemaking (“NPRM” or “proposed rules”) on Title IX of the Education Amendments of 1972 (“Title IX”). We echo many of the concerns raised by our partners at the National Women’s Law Center (NWLC), GLSEN, The Leadership Conference on Civil and Human Rights and the Center for WorkLife Law. We write separately to share our particular concerns regarding the impact of the proposed amended regulations on students in Pennsylvania’s publicly-funded PreK-12 schools, including Black girls who are more likely to be subject to sexual harassment and to be stereotyped and disciplined for defending themselves against such harassment in school.¹

About Education Law Center-PA

ELC-PA is a statewide non-profit legal advocacy organization dedicated to ensuring access to a quality public education for all children in Pennsylvania. We advocate on behalf of the most underserved students, including children living in poverty, children of color, children with disabilities, English learners, those who are in the child welfare and juvenile justice systems, LGBTQI+ youth, and students experiencing homelessness.

We work in three strategic areas: enforcing equal access to a quality education, ensuring adequate and fair funding, and dismantling the school-to-prison pipeline. ELC’s work includes individual and impact litigation, statewide, local, and individual advocacy, and providing

¹ See, e.g., Crenshaw, K., Ocen, P., Nanda, J. (2015). *Black girls matter: Pushed out, overpoliced, and underprotected*. Center for Intersectionality and Social Policy Studies, Columbia University. https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf; Onyeka-Crawford, A., Patrick, K., Chaudhry, N. (2017). Let her learn: Stopping school pushout for girls of color. National Women’s Law Center. https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsOfColor.pdf.

technical assistance to families and students. We participate in partnerships with grassroots community organizations, as well as with local and statewide organizations and agencies. Our advocacy aims to ensure that decisions made by policymakers serve the needs of students who are most marginalized. Over its history, ELC has drafted statewide and federal legislation, regulations, and regulatory guidance. Our recommendations emanate from ELC's nearly fifty years of on-the-ground experience working to ensure fair and equitable access for all students, including the providing a free and appropriate public education for all students with disabilities. ELC urges that any amendments promulgated by the Department reflect the varied experiences and intersectionality of students with disabilities and clarify both the rights of students and the responsibilities of schools and districts to narrow widening educational inequalities.

Impacted Students

While we celebrate the progress that has been made in the 50 years since Title IX was passed, sex-based harassment and discrimination remains a very significant problem in PreK-12 schools in Pennsylvania and across the country. Sexual harassment in K-12 schools is understudied, but “nearly half (48%) of students experience sexual harassment at school, either in person or online, and 87% of those students said that the harassment had a negative effect on them.”² In particular, Black girls are often ignored or punished when they complain to their schools about sex-based harassment and discrimination, which reinforces the under-reporting of these incidents.³ Pennsylvania’s LGBTQI+ students face high rates of harassment, assault and other discrimination based on their sexual orientation and/or gender identity, through unchecked peer harassment and discriminatory school district policies and statewide proposed legislation.⁴ Additionally, pregnant, parenting and lactating students routinely face barriers to continuing their high school education due to lack of necessary resources and supports and discrimination.

We appreciate the Department’s efforts to correct the harms caused by the previous administration’s changes to the Title IX regulations and properly effectuate the broad purpose of Title IX, and we highlight herein many of the important changes in the proposed rules. We also urge the Department to take additional steps described in these comments to most effectively protect against sex discrimination and harassment in education. It is also essential to disaggregate data to understand trends at the intersection of race, gender, class, disability, and other student characteristics.

² Hill, C., Kearl, H. (2011). *Crossing the line: Sexual harassment at school*. American Association of University Women; Hines, D. E., Wilmot, J. M. (2018). *From spirit-murdering to spirit-healing: Addressing anti-black aggressions and the inhumane discipline of Black children*. Multicultural Perspectives, 20(2), 62–69.

³ Crenshaw, K., Ocen, P., Nanda, J. (2015). *Black girls matter: Pushed out, overpoliced, and underprotected*. Center for Intersectionality and Social Policy Studies, Columbia University. https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf

⁴ GLSEN, 2019 State Snapshot: School Climate for LGBTQ Students in Pennsylvania, Jan. 2021, <https://www.glsen.org/sites/default/files/2021-01/Pennsylvania-Snapshot-2019.pdf>

Protections for Black Girls

Black girls are suspended at a rate of six times that of white girls without exemplifying a difference in behavior.⁵ Black girls have the highest rate of overrepresentation compared to white youth of any other race and gender group.⁶ In Pennsylvania, Black girls are five times more likely to be arrested in schools than white girls and Pennsylvania ranks second in the nation in the arrest rates for Latino students and Black students alike.⁷ Research reflects that Black girls are stereotyped by adults in schools as being more sexually provocative because of their race and are assumed to be more sexually active.⁸ Educators also perceive Black girls as encouraging sexual harassment by the way they dress and act.⁹ Moreover, Black girls are perceived to be less innocent and more dangerous than their white counterparts.¹⁰ As a result of such racist stereotyping, rather than being recognized as the victim of sexual harassment, Black girls are constructed as the aggressor and disciplined for defending themselves.¹¹ ELC-PA has witnessed this first-hand in several individual cases we have handled on behalf of Black girls. This pattern is especially devastating because of the severity of sexual harassment that Black girls experience in school: unlike white girls who report experiencing more indirect harassment (e.g., being subject to jokes, gestures, name-calling), Black girls face far more direct harassment and assaults in schools.¹²

These intertwining factors create hostile school environments for Black girls who are punished and disciplined rather than supported and affirmed for reporting sexual harassment. ***Title IX's regulations must provide for a fair, equitable, non-discriminatory, and prompt complaint process to address documented systemic racism and increase support for Black girls to challenge sexual harassment.***

⁵ Data Snapshot: 2017-2018 National Data on School Discipline by Race and Gender (2020), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/12/National-Data-on-School-Discipline-by-Race-and-Gender.pdf>. (Analysis by Georgetown Law Center on Poverty and Inequality's Initiative on Gender Justice & Opportunity and the RISE Research team at New York University based on Civil Rights Data Collection, U.S. Department of Education Office for Civil Rights (2020))

⁶ *Id.*

⁷ *Disparate and Punitive Impact of Exclusionary Practices on Students of Color, Students with Disabilities and LGBTQ Students in Pennsylvania Public Schools A Report of the Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights* (April 2021) at p. 131 at 04-09-Pennsylvania-Public-Schools.pdf (usccr.gov)

⁸ Epstein, R., Blake, J. J., González, T. (2017). Girlhood interrupted: The erasure of Black girls' childhood. Georgetown Law School Center on Poverty and Inequality.

⁹ Rahimi, R., Liston, D. (2011). Race, class, and emerging sexuality: Teacher perceptions and sexual harassment in schools. *Gender and Education*, 23(7), 799–810.

¹⁰ Epstein, R., Blake, J. J., González, T. (2017). Girlhood interrupted: The erasure of Black girls' childhood, Georgetown Law School Center on Poverty and Inequality; Evans-Winters, V. E. , with Girls for Gender Equity (2017), Flipping the script: The dangerous bodies of girls of color. *Cultural Studies ↔ Critical Methodologies*, 17(5), 415–423.

¹¹ Wun., C. (2016). Against captivity: Black girls and school discipline policies in the afterlife of slavery. *Educational Policy*, 30(1), 171–196; Tonnesen, S. C. (2013), Commentary: “Hit it and quit it”: Responses to Black girls’ victimization in school, *Berkeley Journal of Gender, Law & Justice*, 28(1), 1–29.

¹² Espelage, D. L., Hong, J. S., Rinehart, S., Doshi, N. (2016), Understanding types, locations, & perpetrators of peer-to-peer sexual harassment in US middle schools: A focus on sex, racial, and grade differences, *Children and Youth Services Review*, 71, 174–183.

Protections for LGBTQI+ Students

For students to learn and thrive, schools must be safe places where all students are valued, their individual learning needs are met, and they are given the room to grow into adulthood. But it is a frightening time for LGBTQI+ students in our schools.

The 2019 responses to GLSEN's survey of Pennsylvania students reported a wide variety of anti-LGBTQ discrimination and harassment in schools:¹³

- LGBTQ students in Pennsylvania were harassed in school on the basis of sexual orientation via verbal harassment (71%), physical harassment (24%) or physical assault (10%).
- LGBTQ students in Pennsylvania were harassed in school on the basis of their gender expression via verbal harassment (56%), physical harassment (20%) or physical assault (10%).
- The vast majority of LGBTQ students in Pennsylvania regularly (sometimes, often, or frequently) heard anti-LGBTQ remarks in schools.
- A quarter of LGBTQ students (24%), and 56% of transgender students, were unable to use the school bathroom aligned with their gender. Additionally, 22% of LGBTQ students, and 48% of transgender students, were prevented from using their chosen name or pronouns in school.
- A quarter of LGBTQ students in Pennsylvania (23%) were disciplined for public displays of affection (PDA) that did not result in similar action for non-LGBTQ students.

In the past year, in Pennsylvania, as across the country, we are facing an unprecedented coordinated political attack against LGBTQI+ students, and in particular transgender and nonbinary or gender non-conforming (GNC) students. Educators and parents who stand up for these students have been harassed, instructed to remove gay pride flags and any mention of ‘gender identity’ or gay people in their classrooms, targeted with meritless lawsuits and pushed out of our schools.¹⁴ Parents of LGBTQI+ students have told ELC-PA that they are fearful to enroll their children in these neighborhood public schools due to the likelihood of children being harassed and the failure of schools to provide a supportive, affirming learning environment.

¹³ GLSEN, 2019 State Snapshot: School Climate for LGBTQ Students in Pennsylvania, Jan. 2021, <https://www.glsen.org/sites/default/files/2021-01/Pennsylvania-Snapshot-2019.pdf>

¹⁴ Two parents in Mt. Lebanon School District sued their district and an educator who read a storybook to children that included a transgender character, arguing their child must be excused from any mention of gender identity, and only books and lessons describing the lives of straight cisgender people are acceptable in public schools. The school district defended the educator but settled the case in a manner that perpetuates discrimination against transgender students. See <https://www.newsweek.com/outraged-parents-lawsuit-alleges-gender-dysphoria-lesson-given-kids-1714899>. The school board and administration at Central Bucks School District has sought new policies banning books, instructed educators to remove LGBTQ pride flags from classrooms, and reportedly instructed educators they cannot use a transgender student’s name and pronoun unless approved by a parent. See <https://www.inquirer.com/news/central-bucks-lenape-middle-school-pride-flag-andrew-burgess-lgtbq-20220511.html>

Sex based discrimination and harassment includes sexual orientation, gender identity, sex characteristics. In this chilling context, we welcome the Department's strong affirmation that: prohibited discrimination on the basis of sex includes discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits) and sex stereotypes;¹⁵ and any sex based harassment that creates a hostile school environment is prohibited under Title IX, including harassment or bullying on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits) and sex stereotypes.¹⁶

Notification of nondiscrimination policy. We support the Department's proposed revisions to clarify a school's responsibility to publish a nondiscrimination policy,¹⁷ but in those notifications the Department should enumerate that sexual orientation, gender identity, sex characteristics, sex stereotypes and pregnancy or related conditions are detailed within the nondiscrimination policy and required notice. Without this addition, a parent or student seeking recourse may be confused and could mistakenly conclude that there is no recourse available to them for discrimination or harassment on the basis of sexual orientation, gender identity, sex characteristics, sex stereotypes and pregnancy or related conditions. Further, studies have found that explicitly enumerating these protections in school policies improves conditions for LGBTQI+ students and is associated with less hostile school climates.¹⁸

Gendered dress or appearance codes. We join GLSEN's recommendation that the Department add plain language discussion and examples of how school dress and appearance codes that impose different rules for boys and girls have facilitated sex discrimination in violation of Title IX, as case law has demonstrated.¹⁹ This is particularly important for transgender, nonbinary and intersex students who are especially vulnerable to discrimination where a dress or appearance code imposes separate rules based on binary gender categories. The Department should clearly state that where a dress or appearance code is used, a gender-neutral code best supports all students' well-being and compliance with Title IX. If a school uses a dress or appearance code with separate rules based on gender binary, students must be permitted to dress in accordance with their gender identities and school staff must not enforce a dress or

¹⁵ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

¹⁶ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

¹⁷ 87 Fed. Reg. at 41569-70 (proposed 34 C.F.R. §106.8(b) and (c)).

¹⁸ See William J. Hall, "The effectiveness of policy interventions for school bullying: A systematic review," *Journal of the Society for Social Work and Research*8, no. 1: 45-69. <https://pubmed.ncbi.nlm.nih.gov/28344750/> ;

Mark L. Hatzenbuehler and Katherine M. Keyes, "Inclusive Anti-bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth," *Journal of Adolescent Health*53, no. 1 (2021): S21-S26, <https://www.sciencedirect.com/science/article/pii/S1054139X12003540> ; Ryan M. Kull, Emily A. Greytak, Joseph G. Kosciw, and Christian Villenas, "Effectiveness of school district antibullying policies in improving LGBT youths' school climate," *Psychology of Sexual Orientation and Gender Diversity*3, no. 4 (2016): 407; Phoenix, Terri, Will Hall, Melissa Weiss, Jana Kemp, Robert Wells, and Andrew Chan, "Homophobic Language and Verbal Harassment in North Carolina High Schools," Safe Schools North Caroline, 2006, <https://eric.ed.gov/?id=ED491454>

¹⁹ See Rehearing En Banc Brief for the United States as Amicus Curiae at 28 n.5, *Peltier v. Charter Day School, Inc.*, No. 20-1001(L), 20-1023 (4th Cir. Nov. 18, 2021); *Hayden v. Greensburg Cnty. Sch. Corp.*, 743 F.3d 569, 583 (7th Cir. 2014). See also, *Peltier v. Charter Day School, Inc.*, Brief of National Women's Law Center and Coalition of Civil Rights and Public Interest Organizations as Amici Curiae in Support of Plaintiff-Appellees, July 13, 2020, <https://nwlc.org/resource/challenge-to-skirts-required-dress-code-policy-peltier-et-al-v-charter-day-school-inc-et-al/>

appearance code more strictly against any group of students, including transgender, nonbinary and intersex students.

Persistent, intentional misuse of a name or pronoun constitutes prohibited sex-based harassment. ELC-PA has been contacted by concerned parents in multiple school districts in Pennsylvania that have enacted or proposed policies that refuse to recognize or change the school record to reflect the name and pronoun of transgender students, or require staff to report to the parent a student's request to use a name or pronoun other than that in the official school record. We join our partners to strongly urge the Department to clarify in the regulations that harassment based on a student's gender identity clearly includes persistent, intentional misuse of a name or pronoun, and mocking or publicly ridiculing a student using terms of address that are known to be offensive and harmful to the student.²⁰ The Department's examples can clarify that a simple mistake, like a teacher's inadvertent use of the wrong pronoun for a student that is quickly corrected, is distinct from intentional harassment of students through repeated misgendering or public ridicule that can create a hostile environment for students and interfere with their ability to learn.

Separate gender facilities, programs, activities. We welcome the Department's clarification in proposed revisions that narrow exceptions under Title IX to permit sex-segregated programs or activities "must not carry out such different treatment or separation in a manner that discriminates on the basis of sex by subjecting a person to more than de minimis harm."²¹ It is helpful to have the Department's clear statement that a policy or practice that "prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm on the basis of sex."²² In Pennsylvania, we have continuing concerns about students being denied access to school restrooms and locker rooms, separate gender health classes, and sports teams consistent with their gender identity. We ask that the Department further specify with examples that it is a violation of Title IX to prevent access or participation consistent with a student's gender identity in the context of separate gender classes, school restrooms and locker rooms, and overnight accommodations for school trips.

Athletics. We join our partners in strongly urging the Department to provide much-needed clarity with revised regulations on athletics. Transgender students in Pennsylvania are under attack with proposed statewide legislation and multiple school districts considering or working on proposed policies that prevent students from participating in a school sports team that align with their gender identity.²³ These policies' foundational premise - that trans girls are

²⁰ Title VII caselaw indicates that mocking or ridiculing a transgender person by intentionally misgendering or deadnaming can create a hostile environment in violation of Title VII. *See Doe v. Triangle Doughnuts, LLC.*, 472 F.Supp.3d 115 (E.D.Pa. 2020) (citing *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) (applying *Bostock*, the court held that, "in addition to being misgendered," an employer deadnaming a transgender woman "was sufficiently severe or pervasive to support her [hostile work environment] claim").

²¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §106.31(a)(2)).

²² 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §106.31(a)(2)).

²³ [HB 972](#) and [SB 1191](#) are bills in the Pennsylvania legislature that would single out transgender athletes for discrimination by denying them the ability to play on teams that align with their gender identity. Federal courts have

not ‘real’ girls and trans boys are not ‘real’ boys - are based on discriminatory stereotypes prohibited by Title IX and antithetical to the mission of public schools to provide safe environments and equitable opportunities to all students. These policies harm transgender students and students who do not conform to sex stereotypes and intersex students as well. Significantly, these policies are likely to disproportionately harm Black girls and other girls of color who are also subjected to racist and sexist stereotypes associating “femininity” with whiteness. The proposed revision’s current language is confusing and could be misinterpreted to authorize schools to inflict more than de minimis harm as “allowed under current § 106.41(b).”²⁴ School districts need to see clear and strong proposed revisions from the Department that ensure all students have equal access and opportunities to participate in separate gender school athletics in accord with their gender identity. The Department should also clarify that Title IX preempts any state law or policy that categorically bans transgender, nonbinary or intersex students from playing sports or their ability to play sports consistent with their gender identity. The Department should move without delay on a separate rulemaking so a single, consolidated final rule can be issued at the beginning of 2023.

Protections for Pregnant, Parenting and Lactating Students

It is well documented that pregnant and parenting students struggle academically: they are far less likely to graduate from high school and more likely to be unemployed. For example, one study in 2010 estimated that 70 percent of teen mothers in Philadelphia dropped out of high school.²⁵ ELC-PA collected information about the educational needs and trajectories of pregnant and parenting students across the School District of Philadelphia over two years of surveys, focus groups and interviews with youth, parents, school nurses, and service providers who work with 900 pregnant and parenting students each year. Our findings included:²⁶

- Students who become pregnant often experience significant absenteeism during their pregnancy and begin to withdraw from school during that time.

found that discrimination based on gender identity and expression violates Title IX and similar bans have already been struck down by federal courts. HB 972 was approved by the General Assembly in June and vetoed by Governor Wolf on July 8, 2022. See <https://www.governor.pa.gov/newsroom/gov-wolf-vetoes-discriminatory-transphobic-legislation/>. School districts are also taking up policies targeting transgender youth. On July 14, 2022 the Hempfield School District approved a transgender sports ban over vigorous parent and community opposition, and other districts are considering similar bans. See https://lancasteronline.com/news/local/hempfield-school-board-passes-long-debated-athletics-policy-on-transgender-athletes/article_68857a92-024b-11ed-90d5-8b332381df5e.html.

²⁴ The proposed rule states that “the exclusion from a particular male or female athletics team may cause some students more than de minimis harm, and yet that possibility is allowed under current § 106.41(b).”

²⁵ “Pregnant and Parenting Teens in Philadelphia - Academic and Social Outcomes” February 2010 at <https://2x63ge2hikon46tn6lfrb338-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/Pregnant-and-Parenting-Teens-in-Philadelphia-Academic-and-Social-Outcomes.pdf>; See McCauley-Brown, C. “Pregnant and parenting youth: Do we know how they fare in school?” The Notebook, September 21, 2009

²⁶ Clearing the Path: Creating School Success For Pregnant and Parenting Students and their Children, ELC-PA (2019), <https://www.elc-pa.org/wp-content/uploads/2022/09/Clearing-the-Path-ELCs-Pregnant-and-Parenting-Students-Report-FINAL.pdf>

- Students typically are out of school from 4-6 weeks after giving birth and typically receive no academic instruction during that time. In fact, they often lack any connection to teachers or school.
- Students who return to school often find themselves lagging far behind their peers, unable to make up for the lost instruction time, tests, and projects.
- Students face challenges securing childcare, obtaining childcare subsidies, and obtaining transportation.
- Upon returning to school, in the absence of a formal reintegration process, students are unaware of the supports available to them in school, the credits needed to graduate, and unable to make informed decisions about school placement options or formulate a graduation plan. Some students report being on waiting lists for accelerated programs with no educational programming while others report that the District's Educational Options Programs they attend lack sufficient academic support to meet their educational needs.

Pregnancy or related conditions. We support the proposed rules prohibiting schools from discriminating against any person based on “current, potential, or past” pregnancy or related conditions.²⁷ We support the proposed rule explicitly adding “lactation” as a related condition alongside childbirth and termination of pregnancy,²⁸ though the Department should clarify this is not an exhaustive list of “pregnancy or related conditions.” The proposed rules’ requirement that employees who know of a student’s pregnancy or related condition give them the Title IX coordinator’s information²⁹ to notify them of their rights will undoubtedly help support some students.³⁰ However, we urge the Department to instruct schools on how to protect student privacy to ensure, *inter alia*, that in states where abortion is criminalized, school records are not used to prosecute students who have been documented as being pregnant but are not currently pregnant. Relatedly, it is urgent that the Department clarify it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy.

Participation. While we support the proposed rules permitting students who are pregnant or have a related condition to participate “voluntarily” in a separate portion of their school’s program or activity that is “comparable” to that of their peers,³¹ too often we hear of pregnant and parenting students being pushed into alternative inferior programs. The Department must specifically prohibit schools from *requiring* that these students participate separately. We also support the proposed rule prohibiting schools from requiring students to provide a certification from their healthcare provider that they can physically participate in a program or activity, except where all students must provide such certification.³²

²⁷ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”), 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(ii), 106.40(b)(1)), 41579 (proposed 34 C.F.R. § 106.57(b)).

²⁸ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”).

²⁹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(2)).

³⁰ 87 Fed. Reg. at 41571-72 (proposed 34 C.F.R. § 106.40(b)(3)(i)).

³¹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(1)).

³² 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(6)).

Absences. We welcome the proposed rule’s requirement to allow students who are pregnant or have a related condition to take a voluntary leave of absence for as long as deemed medically necessary by their healthcare provider or for as long as the school’s policy allows, whichever is longer, and to reinstate students when they return to their prior academic status and, as practicable, extracurricular status.³³ Many students living in poverty do not have easy access to a physician, so we support the proposed change to allowing any healthcare provider (not just a physician) to determine how much leave is medically necessary. We join our partners in concern that the proposed rule would create an arbitrary and harmful distinction between medically necessary “leave” (e.g. for recovery from pregnancy) which would have to be granted if requested, and short “breaks during class” (e.g. for lactation breaks) or “intermittent absences” (e.g. for abortion or recovery therefrom), which would be classified as “reasonable modifications” and could be approved or denied subject to a Title IX coordinator’s discretion.³⁴ This would also exclude non-birthing parents and caregivers who are not parents but may need to provide medically necessary care for a child or other dependent. We urge the Department to make medically necessary “absences” (not merely a “leave of absence”) available to parenting and caregiving students (not just to students who are pregnant or have a related condition) for as long as they need to care for a minor child or disabled adult who is sick.³⁵ At a minimum, schools should be required to presume that medically necessary absences (e.g. prenatal care, lactation breaks, abortion care) are “reasonable modifications” and must be granted.

Accommodations and modifications. The proposed rules would require schools to “promptly” make “voluntary and reasonable modifications”³⁶ to their policies, practices, or procedures because of a student’s pregnancy or related condition, unless a modification is “so significant” that it “alters the essential nature” of the school’s program or activity.³⁷ We are concerned that the proposed “essential nature” qualifier is vague and could encourage schools to deny students who are pregnant, lactating, or accessing abortions of necessary accommodations. In our experience, many students were not aware of their rights to accommodations and found it challenging to negotiate for their needs or convince staff their requests were reasonable. We join our partners in urging the Department to require schools to presume that medically necessary absences are *inherently* “reasonable” modifications and must be granted. Schools must also proactively inform students of their right to reasonable modifications and provide examples of available accommodations. We urge the Department to expressly reference that such accommodations include but are not limited to: changing a student’s schedule, providing opportunities to make up for work missed, and providing academic support for a student to remain connected to a school during extended absences. The Department should also state in the regulations that a school shall not force a student to accept a modification that the student does

³³ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(3)(iii)).

³⁴ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)(i), (iii)).

³⁵ Under the proposed rules, the only parents entitled to absences would be those who are pregnant, lactating, or recovering from childbirth. This recommendation is consistent with the proposed rules’ definition of “parental status,” which applies to all parents of minor children and disabled adults. See 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2).

³⁶ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

³⁷ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

not want or need, and if it becomes clear that a modification is not effective or “fundamentally alters” the program or activity, the school must engage in good faith, interactive dialogue to meet the student’s needs with other modifications.

Lactation space and breaks. We commend the Department for addressing a common need with the proposed requirement to provide a space “other than a bathroom that is clean, shielded from view, free from intrusion of others, and may be used by a student for expressing breast milk or breastfeeding as needed.”³⁸ We join partners in urging the Department to identify additional lactation space requirements to ensure sufficient functionality including a seat, table-top, access to electricity to operate a pump, and access to a sink for cleaning pump parts. We also encourage the Department to adopt language making clear that schools must allow a student a safe space in which to store expressed milk, for example by permitting the use of a cooler or providing access to a refrigerator. As described above, we urge the Department to adopt a presumption that providing lactation breaks (including travel time to reach the lactation space) during classes and exams is a reasonable academic adjustment and making clear that lactation breaks are medically necessary absence that must be provided as needed. We join our partners in urging the Department to clarify that lactating students do not need to provide medical documentation specifying how long or when someone must express milk in order to access lactation breaks. It remains challenging for many students to obtain healthcare and it is overly burdensome to require lactating students to document their need to express milk when such needs are common and easily anticipated.

Fair, Prompt and Effective Processes for Complaints

ELC-PA receives many complaints from students and families in Pennsylvania throughout the year describing that their child’s school is not responding effectively to sex-based bullying, harassment and discrimination. Too often, school staff are even less responsive to complaints from LGBTQI+ students and Black and Brown students due to homophobic and racist biases of staff and subjective and unclear policies.³⁹ As described above, our schools have failed to protect Black girls and instead cause further harm when educators adultify Black girls, accusing them of ‘encouraging’ sexual harassment and blaming them with discipline for self-defense.⁴⁰ Black LGBTQ+ students who live at the intersection of these identities often experience even higher rates of harassment and discipline related to being a victim of harassment.⁴¹ Additionally, girls

³⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(3)(iv)).

³⁹ GLSEN, 2019 State Snapshot: School Climate for LGBTQ Students in Pennsylvania, Jan. 2021, <https://www.glsen.org/sites/default/files/2021-01/Pennsylvania-Snapshot-2019.pdf>; Kosciw, et al., *The 2019 National School Climate Survey*, 112.

⁴⁰ Epstein, R., Blake, J. J., González, T. (2017), Girlhood interrupted: The erasure of Black girls’ childhood. Georgetown Law School Center on Poverty and Inequality; Wun., C. (2016), Against captivity: Black girls and school discipline policies in the afterlife of slavery. *Educational Policy*, 30(1), 171–196; Tonnesen, S. C. (2013), Commentary: “Hit it and quit it”: Responses to Black girls’ victimization in school. *Berkeley Journal of Gender, Law & Justice*, 28(1), 1–29.

⁴¹ See GLSEN and Nat'l Black Justice Coalition, Erasure and Resilience: The Experiences of LGBTQ Students of Color - Black LGBTQ Youth in U.S. Schools (2020), <https://www.glsen.org/sites/default/files/2020-06/Erasure-and-Resilience-Black-2020.pdf>

with disabilities are at greater risk of sexual abuse and violence.⁴² When they experience harassment or violence, students with disabilities may have difficulty communicating what happened or convincing others to believe them, or they may decide not to report because it would cause further conflict or stigma with their peers.⁴³

We strongly support proposed revisions that would ensure complaints are handled fairly, promptly and effectively, including:

Revisions to the definition of sex-based harassment to include sexual harassment and other harassment on the basis of sex (including sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity) when this harassment takes the form of “quid pro quo harassment,” “hostile environment harassment,” sexual assault, dating violence, domestic violence, or stalking;⁴⁴ and defining “hostile environment” harassment as sufficiently “severe or pervasive” sex-based harassment that “denies or limits” a person’s ability to participate in or benefit from an education program or activity.⁴⁵

Requiring schools to respond to all sex-based harassment “occurring under their education program or activity,” including conduct that a school has disciplinary control over.⁴⁶ We urge the Department to expressly state in the regulations that Title IX covers conduct at off-campus school sponsored activities that contributes to a hostile environment in school. In addition, the regulation should reference that no school can refuse to investigate or respond to allegations of sex-based harassment asserted by or concerning students of color, students who identify as LBGTQI+ or students who pregnant and/or parenting.

Requiring schools to address complaints by all individuals, even if they are not current students so long as the individual was participating or trying to participate in the school’s program or activity at the time they experienced the harassment or discrimination.⁴⁷

Allowing schools to designate some employees as confidential resources under Title IX (while notifying students of their identities).⁴⁸ Upon a report of possible sex-based harassment, this confidential source must tell that student how to report it to the Title IX coordinator and how that coordinator can help them. This option would protect victim’s autonomy and privacy if they want to speak to a confidential resource for support and to understand their options before

⁴² See Emily M. Lund and Jessica E Vaughn-Jensen, “Victimisation of Children with Disabilities,” *The Lancet* 380 (July 2012), 867–869, cited in Nancy Smith and Sandra Harrell, Vera Institute of Justice, *Sexual Abuse of Children with Disabilities: A National Snapshot* (2013), 4,

<http://archive.vera.org/sites/default/files/resources/downloads/sexual-abuse-of-children-with-disabilities-national-snapshot.pdf>; Erika Harrell, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, “Crime Against Persons with Disabilities, 2009-2014 - Statistical Tables” (2016), 4,
<https://www.bjs.gov/content/pub/pdf/capd0914st.pdf>

⁴³ Schulman, et al. (2017) Let Her Learn: Stopping School Pushout for Girls with Disabilities, National Women’s Law Center, https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_GirlsWithDisabilities-1.pdf

⁴⁴ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2), 41571 (proposed 34 C.F.R. § 106.10).

⁴⁵ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2(2)).

⁴⁶ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11).

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

⁴⁸ 87 Fed. Reg. at 41567 (proposed 34 C.F.R. § 106.2 (“confidential employee”)), 41573 (proposed 34 C.F.R. § 106.44(d)).

deciding whether to formally make a complaint. This is particularly important for Black girls who are often afraid to make reports or who are not believed or subject to school discipline due to racist stereotyping.

We support the proposed rules that would require all non-confidential employees in a K-12 school to report possible sex-based harassment to the Title IX coordinator.⁴⁹ Employees' different reporting obligations should be clearly indicated on office doors, email signatures, directories and other relevant locations in schools. All non-confidential employees should be required to tell the reporting student: (i) how to report to the Title IX coordinator, who can offer supportive measures and, if requested, an investigation or informal resolution; and (ii) how to reach a confidential employee, who can provide confidential supports and services. These employees should also be required to ask if the student would like them to report the incident to the Title IX coordinator, and if so, to report it as requested.

Requiring schools to take “prompt and effective action” to end sex-based harassment or other sex discrimination, prevent it from recurring and remedy its effects on all people harmed.⁵⁰ The current “deliberate indifference” standard is unduly harsh and nearly impossible for many students to meet. In addition, we recommend that the regulation expressly reference taking prompt and effective action that must be “free from race-based and other forms of discrimination.”

Requiring schools to offer supportive measures at no cost to students who report sex-based harassment or other sex discrimination, regardless of whether they request an investigation or an informal resolution⁵¹ and even if their complaint is dismissed.⁵² We support the proposed rules explaining that schools are allowed to change a respondent’s schedule in order to protect a complainant’s safety or the school environment or to prevent further incidents.⁵³ We support the Department’s language that schools are allowed to impose a “one-way no-contact order” against a respondent,⁵⁴ but as schools are commonly confused about this issue we urge the Department to clarify this in the regulations directly. It is also important that the Department clarify in the regulations that if a party requests a certain supportive measure and it is “reasonably available,”⁵⁵ then the school must provide it; and that if the school is aware that the supportive measure offered are ineffective, then the school must modify it or offer additional supportive measures.⁵⁶ The list of examples of supportive measures are very helpful and we ask the Department to include further examples, so that students and educators are aware of additional

⁴⁹ We acknowledge that schools may be limited in keeping some reports of sex-based harassment confidential because of obligations imposed by state mandatory reporting laws requiring many school employees to report possible child abuse to law enforcement.

⁵⁰ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.44(a)).

⁵¹ 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.44(g)).

⁵² 87 Fed. Reg. at 41575-76 (proposed 34 C.F.R. §§ 106.45(d)(4)(i)).

⁵³ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 (“supportive measures”)); *id.* at 41573 (proposed 34 C.F.R. § 106.44(g)(1)).

⁵⁴ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)(1)); *id.* at 41450 (“one-way no-contact orders”).

⁵⁵ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.2 (“supportive measures”)).

⁵⁶ *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d 1248, 1261 (11th Cir. 2010) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

options to consider, including supports such as counseling for students who have experienced significant trauma. We support the NWLC's recommendations to add at proposed § 106.44(g)(1): allowing a complainant to resubmit an assignment or retake an exam; adjusting a complainant's grades or transcript; if the instructor is the harasser, independently re-grading the complainant's work; preserving a complainant's eligibility for a scholarship, honor, extracurricular, or leadership position, even if they no longer meet a GPA, attendance, or credit requirement; and reimbursing tuition or providing a tuition credit to a complainant who does not complete a course due to harassment.

Allowing schools to use informal resolution to resolve student-on-student sex based harassment or other discrimination, subject to certain safeguards.⁵⁷ To protect students in this process, however, we urge the Department to require all parties to give written consent to an informal resolution and clarify in regulations that this is optional and that schools may not use mediation or other conflict resolution process to resolve sex based harassment or discrimination on the ground that there is no "conflict" where the victim and harasser share blame. This is particularly important to include because of the significant evidence that Black girls are commonly told that they "share blame" for sexual harassment perpetrated against them.

Adding an explicit reference to "authorized legal representative" recognizes the role of an educational representative, surrogate parent, or court-appointed education decision maker for youth in out-of-home care. As an organization that represents students in the foster care and juvenile justice systems, we support adding the term "authorized legal representative" to § 106.6(g) to empower these individuals to act on behalf of another students in matters addressed by the proposed regulations.

Protections Against Retaliation

In Pennsylvania, as across the country, K-12 schools often punish student survivors - especially students of color, LGBTQI+ students and those with disabilities - when they most need their schools' support. Some students are disciplined for physically defending themselves against their harassers, missing school to avoid their harasser, or engaging in other conduct in response to the pain of harassment. Other students are punished for sexual contact on school grounds based on educators' subjective conclusion that contact was or must have been consensual or "invited" by the victim, which disproportionately impacts Black girls due to racist stereotyping as discussed above.

We support proposed revisions that strengthen protections against retaliation, including:

⁵⁷ The proposed rules would allow schools to use an informal process as long as all parties receive written notice of their rights and obligations, give consent to the process, can withdraw at any time before the end to do a traditional investigation, and are not required to participate in an informal resolution or to waive their right to an investigation in order to continue accessing any educational benefit; and as long as the school believes an informal resolution is appropriate (e.g., the alleged conduct would not pose a future risk of harm to others). 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(1)-(2)). The proposed rules also include a ban on using any information obtained solely through an informal resolution in an investigation. 87 Fed. Reg. at 41574 (proposed 34 C.F.R. § 106.44(k)(3)(vii)).

Prohibiting schools from disciplining students for non-harassing conduct that “arises out of the same facts and circumstances” as the reported incident (e.g. alcohol or drug use, self defense).⁵⁸

Prohibiting schools from disciplining students for making a false statement or engaging in consensual sexual conduct based solely on the school’s decision of whether sex-based harassment or other sex discrimination occurred.⁵⁹

Requiring schools to offer supportive measures to students who report retaliation and to investigate complaints of retaliation, including among peers.⁶⁰

We urge the Department to clarify in the regulations that retaliation includes: (i) disciplining a complainant for conduct that the school knows or should know “results from” the harassment or other discrimination (e.g., missing school, expressing trauma, telling others about being harassed); (ii) disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g., a disciplined respondent files a counter-complaint against their victim alleging the victim was the actual harasser); (iii) requiring a complainant to leave an education program (e.g., to take leave, transfer, enroll in “alternative school” or cyber school); and (iv) requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, conducting an investigation, entering into an informal resolution, or securing any other Title IX rights, unless otherwise permitted by the Title IX regulations.⁶¹

Fair Disciplinary Procedures

Schools must investigate allegations of sexual harassment using disciplinary procedures that are fair to all parties and one which recognizes the inherent racial bias that must be addressed directly by those who implement these procedures. Schools need to be aware of and correct for the combined racism and sexism that too often lead educators to “adultify” Black girls and characterize them as more sexual and less deserving of protection than their peers.⁶² Harmful stereotypes labeling LGBTQI+ students as “hypersexual,” “deviant” or “craving attention” bias educators to be less likely to believe LGBTQI+ student survivors or blame them for their assault. Students with disabilities also face challenges when reporting sexual harassment based on stereotypes that they are less credible or if they have difficulty describing or communicating the details about the harassment they experienced, their allegations are deemed less trustworthy.

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

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

⁶⁰ 87 Fed. Reg. at 41579 (proposed 34 C.F.R. § 106.71).

⁶¹ See Letter from Equal Rights Advocates, L.L. Dunn Law Firm, PLLC, and 35 Other Survivor Advocate Organizations to Catherine Lhamon, Ass’t Sec’y for Civil Rights (June 2, 2022), <https://www.equalrights.org/wp-content/uploads/2022/06/20220602-Letter-to-OCR-Regarding-Title-IX-Unconscionable-Agreements.pdf>.

⁶² Georgetown Law Center on Poverty and Inequality. *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*. 2017. <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf>; McClellan, C. *Our Girls, Our Future: Investing in Opportunity & Reducing Reliance on the Criminal Justice System in Baltimore*. 2018. https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf

Schools can and must protect student survivors' educational opportunities while ensuring fair disciplinary procedures. We *support* proposed revisions that would ensure fair disciplinary procedures, including:

Requiring schools to conduct “prompt” investigations and set “reasonably prompt timeframes” for all major stages of investigation of sex-based harassment or discrimination.⁶³ We urge the Department to clarify what situations may constitute “good cause” for schools to impose a “reasonable” delay and prohibit schools from imposing more than a “temporary” delay due to a concurrent law enforcement investigation.

Flexible investigations and trained decisionmakers. We support the proposed rules addressing K-12 investigations as they allow K-12 schools the flexibility needed to address sex-based harassment (and other sex discrimination) promptly and appropriately.⁶⁴ We urge the Department to provide further description and examples of how this can be implemented effectively and appropriately for different age groups in K-12 schools. We support employing the techniques identified in proposed 34 C.F.R. §§ 106.45(f)(2) for assessing credibility in post-secondary institutions, but recommend that a student in the K-12 context should be permitted to have anyone (not limited to an advisor) to support them during a hearing or informal meeting. In addition, we strongly urge the Department to add a separate provision requiring any decisionmakers to be trained in understanding implicit racial and gender bias and to utilize debiasing strategies and techniques to aid them in making credibility determinations regarding witnesses and parties. This is a critical protection to ensure a fair process for Black girls and LGBTQ+ students.

We *oppose* the Department’s proposals that would create an unfair procedure and urge the Department to:

Reject the presumption of non-responsibility that currently requires schools to presume that the respondent is not responsible for sex based harassment or discrimination until a determination is made and to inform both parties of this presumption.⁶⁵ This formal presumption and notice is not required in any other type of school proceeding and exacerbates the harmful and false rape myth that people who report sex based harassment or discrimination tend to be lying, which also deters complainants, particularly Black girls from initiating or continuing with an investigation. The Department should simply require schools to notify parties that a determination about responsibility will not be made until the end of an investigation and that neither party is presumed to be telling the truth or lying at the outset.

⁶³ 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(4), 106.46(e)(5)).

⁶⁴ Under the proposed rules, K12 schools would be required to allow all parties to present their witnesses and evidence and, if credibility is at issue, to use a process that enables the decision-maker to assess the credibility of the parties and witnesses. 87 Fed. Reg. at 41576 (proposed 34 C.F.R. §§ 106.45(f)(2), 106.45(g)).

⁶⁵ 87 Fed. Reg. at 41575, 41577 (proposed 34 C.F.R. §§ 106.45(b)(3), 106.46(c)(2)(i)). See also 34 C.F.R. §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B).

Require the preponderance of the evidence standard of review in all Title IX investigations.⁶⁶ It is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation and is the same standard used by courts in all civil rights and other civil proceedings. If not required in all investigations, the Department must provide further clarification to ensure schools do not adopt an inappropriately stringent standard, for example, using preponderance of the evidence to investigate *physical* assault and the clear and convincing evidence standard to investigate *sexual* assault and other forms of harassment.

Require K-12 schools to provide the same appeal rights that the Department proposes for students at higher education institutions.⁶⁷ It is imperative that this process, including applicable timelines and evidence to be considered is made known to students and their families as there is currently a presumption that no appeal process exists or is required.

Clarify and Strengthen the Role of Title IX Coordinators

We support the Department's proposed revisions permitting the Title IX Coordinator to assign one or more designees to carry out some of the recipient's responsibilities, though one Title IX Coordinator must retain ultimate oversight of the responsibilities.⁶⁸ In Pennsylvania, being able to designate responsibilities for a subset of schools would be particularly helpful for our largest school districts (such as Philadelphia with enrollment of 114,000 students across 216 schools) as well as our small rural districts that cover hundreds of square miles. We urge the Department to strongly encourage the appointment of school-level coordinators or designees in each elementary and secondary school. The district Title IX Coordinator would still provide leadership, training and coordination to the individual school level coordinators and identify any trends among the schools to provide responsive trainings and address barriers. The Title IX Coordinator should also receive racial and gender bias training and ensure that those who investigate and act as decisionmakers at the school building level receive such trainings and know how to use anti-bias strategies and techniques. The Department should undertake a comprehensive review and reissue Title IX Coordinator Guidance after the new regulations are issued.

Ensure Appropriate Implementation of Title IX's Religious Exemption

We urge the Department to rescind two 2020 changes to Title IX regulations which have allowed more schools to discriminate based on sex by claiming a religious exemption. First, the 2020 regulations allow schools that are not actually "controlled by a religious organization" to claim a religious exemption from Title IX if, for example, they are a divinity school, they require students to follow certain religious practices, or their mission statement refers to religious beliefs.⁶⁹ Second, the 2020 regulations assure schools they may assert a religious exemption after

⁶⁶ The proposed rule would require schools to use the preponderance of the evidence standard to investigate sex-based harassment (or other sex discrimination), unless the school uses the clear and convincing evidence standard in all other "comparable" investigations, including for all other types of harassment and discrimination. 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).

⁶⁷ See 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)(1)-(2)).

⁶⁸ 87 Fed. Reg. at 41569 (proposed 34 C.F.R. § 106.8(a)(2)).

⁶⁹ 34 C.F.R. § 106.12(c).

they are already under investigation by the Department for violating Title IX.⁷⁰ This allows schools to conceal their intent to discriminate by providing no prior notice to students and employees that a school will not follow Title IX - despite the Title IX regulations requiring schools to notify students, families, employees and applicants of schools' anti-sex discrimination policies.⁷¹ In practice, this exposes students to harm, especially women and girls, LGBTQI+ students, pregnant or parent students (including those who are unmarried), and students who access or attempt to access birth control or abortion services.

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 created a system that enables schools to actively mislead students. Women, LGBTQI+ students, married or unmarried pregnant and parenting students, and students who access or attempt to access birth control or abortion services could be subject to discrimination or expulsion from school without any notice, thereby affecting their ability to make an informed decision about where to go to school. Unfortunately, the proposed rules do not address these changes. We urge the Department to swiftly issue proposed Title IX regulations that:

Rescind the rule inappropriately expanding eligibility for religious exemptions and

Require schools to notify the Department of any religious exemption claims and to publicize any exemptions in their required nondiscrimination notices.

Clarify that Title IX Regulations Preempt State and Local Laws

We strongly support the proposed removal of the current provision that prevents schools from complying with a state or local law that conflicts with the 2020 regulations and the proposed change to expressly allow schools to comply with a state or local law that provides greater protections against sex discrimination, including harassment.⁷² This proposed change would return Title IX to its proper role as a floor—not a ceiling—for civil rights protections. We support the proposed elimination of § 106.6(h) entirely and simplifying § 106.6(b) to make clear that all of the Title IX regulations would preempt state or local law. This change will ensure that state and local laws cannot undermine the important protections of Title IX while allowing state and local jurisdictions to develop and enforce additional protections for victims of discrimination.

Clarify the Intersection Between Title IX and FERPA

The Department has specifically requested comments regarding the intersection between the proposed Title IX regulations and the Family Education Rights and Privacy Act (“FERPA”)⁷³ and any challenges that may exist as a result of the intersection between the two laws and steps the Department might take to address those challenges in the Title IX regulations. ELC-PA supports the Department’s interpretation of existing regulations and recommends that the

⁷⁰ 34 C.F.R. § 106.12(b).

⁷¹ 34 C.F.R. § 106.8(b)(1); 87 Fed. Reg. at 41570 (Proposed 34 C.F.R. § 106.8(c)(1)).

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

⁷³ 20 U.S.C. 1232g, 34 CFR part 99.

regulations state specifically that “FERPA continues to apply in the context of Title IX enforcement, but if there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.”⁷⁴ One of those conflicts arises when a student requests that a school refer to the student by their preferred pronouns but the student has not disclosed this to a parent or the parent uses the gender the student was assigned at birth. Consistent with case law and the Department’s resolutions that recognize deadnaming and misgendering to create a hostile environment,⁷⁵ we recommend that Title IX regulations reference explicitly that prohibitions against sex discrimination include the right of a student to be referred to by their preferred pronouns and that their education records accurately reflect those pronouns and gender identity, even in the cases where a parent/guardian does not request or consent to the change in education records.

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The students of Pennsylvania and across the country are entitled to attend schools free from sex-based discrimination and harassment, and we appreciate the Department’s consideration of these comments to ensure these rights are safeguarded and fully implemented.

Respectfully submitted,



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⁷⁴ 85 Fed.Reg. at 30424.

⁷⁵ See *Doe v. Triangle Doughnuts, LLC.*, 472 F.Supp.3d 115 (E.D.Pa. 2020) (citing *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) (applying *Bostock*, the court held that, “in addition to being misgendered,” an employer deadnaming a transgender woman “was sufficiently severe or pervasive to support her [hostile work environment] claim”); see also Dep’t of Educ., Office for Civil Rights, Office for Civil Rights Announces Resolution of Sex-Based Harassment Investigation of Tamalpais Union High School District (June 24, 2022), <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-announces-resolution-sex-based-harassment-investigation-tamalpais-union-high-school-district>; Willits Unified School District Resolution Agreement, Case No. No. 09-16-1384 (2017) (district will ensure “referring to the Student by other than her female name and by other than female pronouns is considered harassing conduct”); City College of San Francisco, Resolution Agreement, Case No. 09-16-2123 (2017) (school policy should reflect that harassment “can include refusing to use a student’s preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes”).