

September 12, 2022
Submitted via regulations.gov

The Honorable Miguel Cardona, Secretary of Education
The Honorable Catherine Lhamon, Assistant Secretary for Civil Rights
400 Maryland Avenue SW
Washington DC, 20202

RE: Nondiscrimination on the Basis of Sex (including Sexual Orientation, Gender Identity, Sex Characteristics, and Sex Stereotypes) in Federally Funded Education Programs or Activities (87 FR 41390)

Howard Brown Health is grateful to provide comment in support of the proposed rulemaking on Title IX. All students deserve safe educational environments without fear of discrimination or harassment, but all too often, LGBTQ+ students endure unsupportive and discriminatory educational environments. The proposed Title IX regulation addresses this critical issue, particularly as current political discourse perpetuates stigma around LGBTQ+ people's rights and lives. Anti-LGBTQ+ legislation about 'biological' males sharing bathrooms or locker rooms with 'biological' females is inaccurate and used to further segregate trans and non-binary (TNB) youth from their peers simply for being themselves. Anti-LGBTQ+ school policies foster an environment of harassment and can cause long-term harm to students. Discrimination and segregation increase the likelihood of peer victimization, which can lead to depression, anxiety, substance abuse, social isolation, poor academic performance, delinquency, and self-harm.^{1,2} We are encouraged to see the Department of Education taking action to better support all students.

1. Ensuring an Educational Environment Free from Discrimination in the form of Sex-Based Harassment

Research shows that LGBTQ+ students are disproportionately impacted by sexual harassment, bullying and physical harm. According to the CDC,³ sexual minority respondents experienced intimate partner violence at rates comparable to or higher than heterosexuals. With a particular focus on youth and Title IX's protections—48% of bisexual

¹ Rigby K. Effects of peer victimization in schools and perceived social support on adolescent well-being. *J Adolesc.* 2000;23(1):57–68.

² Juvonen J, Graham S, Peer Harassment in School: The Plight of the Vulnerable and the Victimized. New York, NY: Guilford Press; 2001.

³ Flores, A.R., Langton, L., et al. Victimization rates and traits of sexual and gender minorities in the United States: Results from the National Crime Victimization Survey, 2017. Research Article. *Science Advances*, v. 6, no. 40. Published October 2, 2020. DOI: 10.1126/sciadv.aba6910

women who reported sexual harm reported their first rape between the ages of 11 and 17, compared to 28% of heterosexual women. Other studies have shown similar disparities with LGBTQ+ people being nearly four times more likely than non-LGBTQ+ people to face violent victimization, with many experiencing their first assault at age 16.³ Transgender students are especially impacted. For example, in a survey of students from ten states and nine urban school districts, 23.8% of transgender students reported having been sexually assaulted (or "forced to have sexual intercourse"), compared to 4.2% of cis-male and 10.5% of cis-female peers. It is crucial to meet the needs of all students to ensure they have equal access to a safe and affirming education.⁴

We support this proposed rule as it takes steps to acknowledge and address disparities that LGBTQ+ students face in terms of sexual harassment in educational settings. We applaud the Administration for clarifying Title IX's protections and expanding the definition of hostile environments and sexual harassment. We are also encouraged to see that the proposed rule will expand educational institutions' responsibility to address harassment without delay. Students will be better protected and supported in a school environment that is committed to preventing, resolving, and eliminating a broader range of sexual harassment, allowing them to concentrate on learning in a safe environment.⁵

To effectively implement these new regulations, the Department should partner with the Office of Elementary and Secondary Education (OESE) to release best practice resources for supporting LGBTQ+ students,⁶ and preventing and responding appropriately to anti-LGBTQ+ bullying and harassment.⁷ To improve responses to student's reports of sexual harassment and assault, we recommend the Department provide training and technical assistance to school administrators to ensure that they are responding in prompt and appropriate ways to all survivors, regardless of sexual orientation or gender identity. Howard Brown Health's In Power program, is one of the nation's first LGBTQ+ focused sexual harm response programs specifically tailored to provide affirming, comprehensive

³ Flores, A.R., Langton, L., et al.

⁴ Johns, Michelle M., Lowry, R., et al. Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students, 2017. CDC, Morbidity and Mortality Weekly Report. Doi: 10.15585/mmwr.mm6803a3

⁵ Bonell C, Hinds K, Dickson K, et al. What is positive youth development and how might it reduce substance use and violence? A systematic review and synthesis of theoretical literature. BMC Public Health 2016;16:135. <https://doi.org/10.1186/s12889-016-2817-3>

⁶ GLSEN, "Four Supports," <https://www.glsen.org/four-supports> (Accessed August 18, 2022); GLSEN, "Improving School Climate for Transgender and Nonbinary Youth (Research Brief)," 2021, <https://www.glsen.org/research/improving-school-climate-transgender-and-nonbinary-youth>.

⁷ GLSEN, "Model Local Education Agency Bullying and Harassment Prevention Policy, Sept. 2020, <https://www.glsen.org/activity/model-district-anti-bullying-harassment-policy>; GLSEN, "Civil Rights Principles For Safe, Healthy, & Inclusive School Climates," 2021, <https://www.glsen.org/activity/civil-rights-school-climate-principles>.

care and support to survivors of sexual harm. We have designed the program to be inclusive to marginalized communities, and include culturally appropriate and gender-affirming training for all staff on transgender identities and the importance of correct name and pronoun usage. From our experience, we understand that coming forward to report sexual harm is not easy and can cause great stress or potentially risk of further harm. Therefore, it is crucial that the Department provide training and technical assistance to school administrators who may be the first point of contact to a reporting student. Training should include strategies on providing LGBTQ+ affirming care, inclusive language, supportive listening, safety planning, and referral to additional supports, should the student request them.

2. Ensuring an Educational Environment Free from Discrimination on the Basis of Sexual Orientation, Gender Identity, Sex Stereotypes, or Sex Characteristics (including Intersex Traits)

LGBTQ+ discrimination and exclusion in educational settings is linked to lower academic achievement and poorer well-being. According to GLSEN's 2019 National School Climate Survey, nearly three out of five LGBTQ+ students—and more than three out of four transgender students—reported experiencing anti-LGBTQ+ discrimination at school, such as being barred from using the bathroom or locker room that corresponds with their gender identity and being disciplined because they identify as LGBTQ+. Transgender, non-binary, and intersex students are especially vulnerable to discrimination. The proposed rule is critical to providing LGBTQ+ students with a safe learning environment.

Comprehensive nondiscrimination and anti-bullying policies that explicitly include sexual orientation, gender identity, and gender expression, and also include procedures for reporting incidents to school authorities can send a message that bullying, harassment, and assault are unacceptable and will not be tolerated. Unfortunately, only 13.5% of students surveyed reported that their school had a comprehensive anti-bullying or harassment policy that specifically mentioned both sexual orientation and gender identity or expression. Research has shown that having comprehensive policies in place to support LGBTQ+ students can have a significant impact on their well-being.⁸ The GLSEN 2019 National School Survey found that school policies that explicitly list sex-based student protections led to LGBTQ+ students being more likely to report harassment to school staff and more likely to say the school responded effectively.⁹

⁸ Hall, W.J. "The Effectiveness of Policy Interventions for school bullying: A Systemic Review," *Journal of the Society for Social Work and Research* 8, No. 1. <https://pubmed.ncbi.nlm.nih.gov/28344750/>.

⁹ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*. New York: GLSEN.

Students must be permitted to dress in accordance with their gender identity. We urge the Department to make clear that separate gender dress codes are in defiance of Title IX and enable discrimination and harassment. Additionally, the Department should describe more clearly that the few sex-segregated exceptions in Title IX are not to be used to justify discrimination from gendered facilities, especially as discrimination and segregation in schools are becoming a persistent problem. GLSEN's National School Climate Survey found that more than half of transgender students reported being prevented from using the school restroom and locker room that corresponds with their gender identity. The Department should consider providing informative examples of discrimination based on gender identity. This would help to establish that it is a violation of Title IX to prevent access or participation consistent with a student's gender identity in separate gender classes, restrooms, locker rooms, and housing accommodations for school trips. The Department should also supplement the final rule with technical assistance resources that explain various uses of the rule's core principles, including its connections to related education, civil rights, and disabilities acts.

The proposed rule includes ambiguous language about the level of harm transgender students must endure before it is considered discrimination; this language must be rewritten to state the parameters more explicitly for harm, discrimination, and harassment. Providing case studies and examples would also be beneficial to ensure that administrators and others understand the application of the rule. Additionally, we urge the Department to adjust the rule to clearly state that persistent, intentional misuse of a name, personal pronoun, or gendered title is prohibited sex-based harassment. Numerous education and medical associations agree that it is important to a person's wellbeing to use their correct pronouns. The Title IX common rule must also be amended to clearly state the same prohibitions on sexual harassment and anti-LGBTQ+ discrimination, including anti-LGBTQ+ harassment.¹⁰ Throughout the proposed rule, clear language is used to clarify what is prohibited sex-based harassment, including summarizing relevant case law and providing examples. We recommend the rule include language making it clear how purposefully mocking or misusing a name, pronoun, or title can create a hostile environment for transgender students.

We also understand that a separate and critical rulemaking is forthcoming regarding discrimination against transgender student athletes. All students should have the right to take part in school sports without discrimination. However, numerous anti-transgender

¹⁰ "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule," 65 FR 52857 (Aug. 30, 2000); U.S. Department of Energy, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 66 FR 4627 (Jan. 18, 2001).

sports bills that prohibit transgender girls from taking part in sports programs have been introduced this year in states across the country. Anti-trans sports legislation pose significant risks to the trans community. According to GLSEN's 2019 National School Climate Survey, queer students who were discouraged from participating in sports had lower self-esteem and higher rates of depression and absenteeism. A 2021 poll by the Trevor Project showed that TNB youth experience negative mental health symptoms, including an increase in suicide attempts, due to discriminatory anti-trans policies in their community.¹¹ Another study showed that outreach to Mental Health Crisis supports peaked on days when anti-LGBTQ legislation had been proposed or passed.¹² These anti-trans sports bills further compound the already high levels of depression, suicidal ideation, harassment, peer rejection, and violence that TNB people experience.¹³ We are hopeful to see a proposed rule specific to Title IX sports participation available for comment soon. After that proposed rule is published, we would encourage the Department to issue one final, consolidated rule combining this rule with the sports participation rule to better enforce nondiscrimination protections in the classroom, as well as in school activities and facilities access.

3. Ensuring a Fair, Prompt, and Effective Process for All Complaints of Sex-Based Discrimination, including anti-LGBTQI+ Harassment

Many schools do not respond effectively to reports of sex discrimination, including LGBTQ+ discrimination, bullying, and harassment. According to a national survey, 60.5% LGBTQ+ students who reported harassment to school staff said school staff did nothing or told them to ignore it, 20.8% said they were warned to change their behavior and how they dressed, and 7.3% were disciplined.¹⁴ This leads to a culture of underreported harms where students do not feel supported or protected. The same survey showed that 72.7% of students did not think staff would do anything about it if they report harassment or assault.¹⁵ The lack of a consistent, appropriate response to high risk populations is not acceptable, especially for marginalized populations in dire need of support.

¹¹ Trevor Project. Issues Impacting LGBTQ Youth. Polling Analysis. January 2022.

https://www.thetrevorproject.org/wp-content/uploads/2022/01/TrevorProject_Public1.pdf

¹² Parris, D., Fulks, E., Kelley, Claire. Anti-LGBTQ+ Policy Proposals Can Harm Youth Mental Health. 2021. Child Trends: Youth Development. <https://www.childtrends.org/publications/anti-lgbtq-policy-proposals-can-harm-youth-mental-health>

¹³ Perez-Brumer A, Hatzenbuehler ML, Oldenburg CE, Bockting W. Individual- and Structural-Level Risk Factors for Suicide Attempts Among Transgender Adults. *Behav Med.* 2015;41(3):164-71. <https://pubmed.ncbi.nlm.nih.gov/26287284/>

¹⁴ Kosciw, The 2019 National School Climate Survey, GLSEN.

¹⁵ Kosciw, The 2019 National School Climate Survey, GLSEN.

We support the rule for specifying that schools must "take prompt and effective action to end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects." Students who make reports of harassment must be informed of the wide range of supportive measures, remedies, and retaliation protections. It is also crucial that the "preponderance of the evidence" evidentiary standard is used for sexual harassment cases, as it acknowledges that reporters and the accused have equal responsibility to provide burden of proof in the investigation. We urge the Department to use the preponderance of evidence standard in all Title IX investigations to avoid opportunities for schools to use different standards of evidence for different reports. An inconsistent use of evidence standards in reports of harassment and harm can cause confusion or leave open the opportunity for schools to apply evidence standards that are too burdensome for some cases. An example of this would be a school using the preponderance of evidence standard for physical assault but using the convincing evidence standard for sexual assault, leaving the student making the report of sexual assault to have responsibility for burden of proof. To ensure a fair and effective process for reports of all types of harassment and discrimination, the Department should require the preponderance standard across all investigations. If the Department does not choose to require this standard, it should provide clarification and guidance to schools on what evidentiary standard is most appropriate and equitable.

We are encouraged to see the Department of Education taking steps to better support LGBTQ+ students, who have been disproportionately subjected to sex-based harassment, barred from school activities, or harmed further as a result of reporting an incident. We are grateful that the proposed rule makes it clear that LGBTQ+ discrimination is harmful and illegal. We applaud the Department for improving Title IX civil rights protections to ensure affirming, discrimination-free schools and that those who face discrimination have options for safety and support. These clarifications will help students, parents, and teachers understanding their responsibility under Title IX to create safe, inclusive schools free of sex-based discrimination. We thank the Department for its effort to ensuring that all students in our nation's schools is safe and has equal opportunities to reach their full potential. If you would like to discuss our recommendations further, please reach out to Tim Wang, the Director of Policy and Advocacy, at TimothyW@howardbrown.org.

Sincerely,

David Ernesto Munar
President and CEO