

To President-Elect Biden and Vice President-Elect Harris's Transition Team:

For many years, President-Elect Biden has sought to end sexual violence in schools, and we are grateful for his continued commitment to support student survivors as President. As advocates for the rights of student survivors of sexual violence, we know too well the harm the Trump Administration has caused to student survivors and their communities. While the federal government was once a place for students to turn to when schools violated their civil rights, under Secretary DeVos's leadership the Department of Education has weakened civil rights protections, particularly those for student survivors. Secretary DeVos' recent changes to the Department's rules implementing Title IX of the Education Amendments of 1972 ("Title IX") forbid schools from investigating many complaints of sexual harassment, require schools to utilize unfair grievance procedures, and significantly undermine protections against sexual harassment and assault in schools. All of the changes fundamentally make our nation's schools less safe for all students, and make more vulnerable those who experience sexual violence.

Survivors of sexual assault deserve justice, healing, and dignity – and student survivors deserve to feel safe continuing their education. While individuals who commit sexual harassment or assault should be held accountable so they can learn from their mistakes, make amends, and change their behavior, it's equally important that we work to change our institutions and culture to the prevention of sexual harassment and assault long term. The federal government has a strong role in sexual harassment prevention and accountability in schools.

Below are recommendations for how the Biden-Harris Administration can support survivors through stronger and more effective Title IX enforcement and other policy changes, through the provision of resources and support for key projects and initiatives, and through the appointment of key personnel. We look forward to working with the Biden-Harris Administration to ensure schools are safe and supportive places for survivors and all students.

The Biden-Harris Administration Should Strengthen Title IX Enforcement

The Department of Justice and the Department of Education Should Enter into a Voluntary Stay and Agency Remand for Reconsideration in the Litigation Challenging the DeVos Title IX Sexual Harassment Rule, and Issue Interim Guidance.

As soon as President-Elect Biden takes office, the Department of Education should announce that because the overwhelming majority of the over 124,000 comments submitted during the rulemaking process were opposed to the proposed rule, and considering the multiple lawsuits brought against the Department challenging the new Title IX rule, the agency will work with the Department of Justice to seek a voluntary stay of the rule and remand for reconsideration in the litigation challenging the legality of the rule. The Department of Education should then undertake a review and revision of the rule. The Department should also announce that as part of that process (1) it will issue a Request for Information in the Federal Register to learn about schools' concerns and challenges with implementing the new rule since it took effect on August 14, 2020; and (2) it will conduct listening tours with students and advocates - with a focus on students from underserved communities - to understand the experiences and needs of students who are sexually harassed and the impact that the new Title IX rule has had on them and their

education, including during the remote learning environment. Further, the administration should meet with survivors who have recently spoken out against their schools to learn from them about their experiences with Title IX and how some institutions are retaliating against survivors and betraying them when they report—we would be happy to facilitate those introductions.

Staying the Title IX Rule

The Department of Education and Department of Justice should, as early as possible, stay enforcement of DeVos’s Title IX regulations and/or enter into a voluntary stay of the regulation pursuant to litigation challenging the rule and seek that the rule be remanded to the agency for reconsideration.

Issuing Interim Guidance

Pending new rulemaking, the Secretary should release a 2021 Revised Harassment Guidance. The guidance should be drawn from key portions of the 2001 Revised Sexual Harassment Guidance, the groundbreaking 2011 Dear Colleague Letter, the 2014 Questions and Answers, and the 2017 Interim Guidance. The 2021 interim guidance should also address new challenges not addressed in those documents, including (1) sexual harassment incidents and responses unique to the remote learning environment and (2) the growing rate of retaliatory cross-complaints filed against student survivors by their harassers.

We are ready to advise the Department on the substance of the guidance, which should address the availability of accommodations to student survivors, the definition of sexual harassment, the application of Title IX to off-campus and online harassment that creates an on-campus hostile environment, how school grievance procedures must be equitable, and the standards the Department uses to evaluate Title IX sexual harassment complaints.

During the First 30 Days, the Department of Education Should Make Changes to the Case Processing Manual to Allow for Robust Enforcement of Discrimination Complaints.

OCR should promptly announce changes to its case processing rules, including a return to its practice of conducting investigations into systemic discrimination, a reversion to the pre-DeVos statute of limitations (180 days from the last act of discrimination rather than 180 days from each act of discrimination), and a change of the requirement giving institutions, but not complainants, access to draft letters of findings to make corrections or revisions.

During the First 100 days, the Administration Should Propose New Regulations on Discriminatory Harassment and Other Changes to the Title IX Rule Clarifying Protections Against Sex Discrimination.

The substance of those rules should, of course, be informed by OCR’s stakeholder meetings (to include a group of students from communities at highest risk of sexual harm) and listening tours with students. There are a few key principles, however, that we hope will guide the Department’s drafting:

- New harassment regulations should be promulgated under Title IX. The Department should also consider promulgating parallel regulations under other civil rights laws, with the input of relevant stakeholders, to apply to harassment based on race, ethnicity, and

disability. Definitions of different forms of harassment might vary slightly—for example, because of the “welcomeness” standard applicable to sexual harassment but not harassment based on race, ethnicity, disability, or other types of sex-based harassment (e.g., based on sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype)—but standards under regulations addressing discriminatory harassment should otherwise be uniform. That is consistent with the Obama Administration’s approach with the 2010 Harassment and Bullying Guidance, and it will ensure that incidents of sexual harassment will be analyzed under the same set of rules as harassment based on race, ethnicity, disability, or non-sexual sex-based harassment. This is important because all students deserve protections from harassment of all forms; because some students experience harassment on multiple bases; and because higher standards for sexual harassment can perpetuate the longstanding myth that claims of sexual harassment are fabricated, requiring heightened scrutiny.

- New harassment regulations should restore previous definitions and liability standards from the 2001, 2011, and 2014 guidance documents. For example, sexual harassment should be defined as “unwelcome conduct of a sexual nature”¹; schools should be required to respond promptly, effectively, and equitably to harassment²; schools are liable for all harassment by school employees³ as well as all harassment by peers or other third parties about which the school knew or should have known and which it failed to address⁴; and schools should be required to address harassment that causes a hostile environment at school even if the misconduct occurred off-campus or online.⁵
- New harassment regulations should include robust accommodation and remedies requirements, as articulated in the previous guidance documents.⁶
- New harassment regulations should clarify that Title IX’s coverage includes dating violence, domestic violence, and gender-based stalking as specified in the DeVos regulations, and also other forms of sexual harassment, such as sexual exploitation through revenge porn.⁷
- New harassment regulations should explicitly provide protections to survivors whose harassers file retaliatory cross-complaints against them.
- New harassment regulations should not require a specific model for school investigation and adjudication of harassment allegations. Instead, the regulations should include a basic requirement that schools provide parties equal procedural rights, consistent with the 2011 Dear Colleague Letter—that is, where a school’s disciplinary procedures provide a certain opportunity (e.g., appeal) to one side, it must provide it to the other.⁸
- As part of this joint rulemaking, the Department should promulgate new regulations under Title IX to address a number of other issues distinct from sexual harassment, including:

¹ 2011 Dear Colleague Letter at 3; 2001 Revised Sexual Harassment Guidance at 2.

² 2014 Q&A at 1; 2011 Dear Colleague Letter at 8; 2001 Revised Sexual Harassment Guidance at 9.

³ 2001 Revised Sexual Harassment Guidance at iv, 10.

⁴ 2014 Q&A at 2; 2001 Revised Sexual Harassment Guidance at 11-14.

⁵ 2014 Q&A at 29-30.

⁶ 2017 Q&A at 2-3; 2014 Q&A at 32-36; 2011 Dear Colleague Letter 15-17. To some extent, these requirements are also reflected in the DeVos regulations. 34 C.F.R. § 106.44(b).

⁷ 34 C.F.R. § 106.30(a)(3).

⁸ 2011 Dear Colleague Letter at 12-13.

- Title IX’s protections for LGBTQ students, reflecting the reasoning in *Bostock*;
- Title IX’s protections for pregnant, parenting, and breastfeeding students;
- Title IX’s application to dress code rules and enforcement; and
- The scope of Title IX’s religious exemption and the procedures for noticing an exemption.

The Administration Should Take Additional Actions to Protect Against Sexual Harassment in Schools

Create a White House Interagency Task Force that Addresses Sexual Harassment Prevention and Response in Schools.

Within the first month, the Biden-Harris Administration should establish a White House Task Force, consisting of key personnel and agencies working on gender equity issues in schools, and including current K-12 and college students as a student advisory committee within the Task Force. The Task Force would take a gender justice approach to make students in school feel safe and respected and prevent school pushout from harassment, including sexual assault, dating violence, and stalking, and would focus on both K-12 and institutions of higher education. It should explicitly include a focus on race, ethnicity, gender, LGBTQ status, disability, national origin, and the intersections between these identities. The Task Force should center the needs of women and girls of color, LGBTQ students, and women and girls with disabilities and develop resources to support greater training and education on understanding, responding to, and preventing gender-based discrimination in schools, including model policies and other resources focused on:

- Comprehensive and free accommodations and remedies that restore and preserve student survivors’ access to education, regardless of whether they file a formal harassment complaint with their schools, and that respect students’ gender identities. For example, if harassment has made it harder for a student to learn, the school can offer counseling, tutoring, excused absences, continued eligibility for scholarships and honors, additional time for homework or tests, calculating grades without factoring in missing assignments, opportunities to resubmit homework or retake an exam, grade modification, removing impacted courses from transcripts, tuition reimbursement and/or credit, opportunities to withdraw or re-enroll in a course without academic or financial penalty, and other academic supports.
- Comprehensive sex education that is evidence-based, age appropriate, culturally and linguistically responsive, LGBTQ affirming, and includes consent education.
- Training school employees to effectively understand and respond to sex-based discrimination in schools, including intersectional forms of sex-based discrimination (e.g., harassment motivated by both race and gender).
- Different discipline models, appropriate for different kinds of institutions, which are prompt, equitable, and trauma-informed and are fair to both complainants and respondents. For example, concurrent with the release of new Title IX guidance or regulations, the Task Force might release a report that features a model used effectively by a small, rural K-12 school in California as well as another process fitting for a public university in a jurisdiction that requires cross-examination. But schools should not be

required to adopt any of these models so long as their disciplinary procedures comport with requirements imposed by Title IX, constitutional due process, and any other applicable legal requirements.

- Data collection on the prevalence of gender-based harassment within schools, including climate surveys and other ways to gather input from students and employees on how to improve schools' responses to gender-based harassment.

Fund Climate Surveys and Restorative Justice Pilots for K-12 and Higher Education.

In their first budget, the Biden-Harris Administration should request increased appropriations for the Department of Justice's Office on Violence Against Women's (OVW) campus grant program and funding for K-12 schools, in order to fund climate surveys on sexual harassment in schools. The Administration should also reinstate priority areas for discretionary grants at OVW, focusing on institutions with the highest need. Climate surveys are critical for understanding the prevalence of sexual harassment in schools and the ongoing and evolving needs of survivors to heal, including intimate partner violence, sexual assault, and online harassment, and for understanding whether students feel supported and safe in their school community. The survey data should inform programs, policies, and practices at schools for preventing and responding to sexual harassment.

Due to additional barriers to reporting for the most at-risk survivors, in addition to the funding for climate surveys, the Department of Justice should establish a new grant funding program for the development of restorative justice and transformative justice pilot programs in K-12 schools and higher education addressing harm caused by incidents of student misconduct. The pilots must include, but should not be limited to, restorative justice and transformative justice approaches to sexual harassment complaints with well-trained and trauma-informed facilitators. The funding should encourage institutions to establish memoranda of understanding with outside groups and/or facilitators to facilitate the pilot programs, rather than require schools to implement the programs themselves. This funding will not require the grant recipients to work with police or other local, state, or federal law enforcement agencies

Fund Significant Pilot Projects Addressing Sexual Harassment Prevention and Employee Training.

Sexual health education is one of the most effective tools in preventing sexual harassment. Providing sexual health education for K-12 students decreases the likelihood that a student will be a victim and/or perpetrator of sexual harassment, sexual violence, or dating violence. It also gives students the knowledge and language to identify and report misconduct; whereas abstinence-only education that is cloaked in shame makes students hesitant to come forward when they are abused or assaulted. Through a budget request for increased appropriations for the U.S. Department of Health and Human Services, increased funding for the Teen Pregnancy Prevention Program, and support for legislation like the Real Education for Healthy Youth Act (S. 1524 and H.R. 2720) the Biden-Harris Administration should support funding and resources for comprehensive sex education that is evidence-based, medically accurate, age and developmentally appropriate, culturally and linguistically responsive, trauma-informed, non-shaming, and affirming of LGBTQ individuals. Such instruction should address a wide range of

topics, including consent, healthy relationships, dating violence, child sexual abuse, and reproductive rights, health, and justice. The federal government has wasted millions of dollars on ineffective, misleading, and harmful abstinence-only education and those funds should be redirected to what we know works.

Moreover, schools are far too often not responding appropriately to sexual harassment because their staff are not trained on how to recognize sexual harassment (including indicators of grooming and child sexual abuse), how to respond in the moment when it is reported or witnessed, how to notify the district's Title IX coordinator of sexual harassment, where to find the school's grievance procedure(s) for sexual harassment, the difference between staff's Title IX obligations and state law mandatory reporting obligations, and how to provide effective academic, mental health, and safety accommodations for students who report sexual harassment.

Through an increased appropriation request for OVW and supporting legislation such as the Stop Sexual Harassment in K-12 Act (H.R. 8290), the Biden-Harris Administration should ensure there is adequate funding and resources for schools to be able to effectively and regularly train employees on the prevalence, dynamics, and underreporting of sexual harassment; the impact of trauma on sexual harassment victims and how to respond to sexual harassment in a trauma-informed way; and how to recognize and avoid relying on rape myths and other stereotypes when responding to harassment.

Listen Directly to Survivors and Students About Their Experiences and Needs.

Students and survivors of sexual violence have become a marginalized voice as schools shape policy that directly affects them, particularly over the past four years. The recent, drastic Title IX rollbacks and loss of survivor protections and support have further alienated students and led to a huge, pent-up student demand for immediate action and change. It is vitally important that from the start of the Biden-Harris Administration's time in office, that students have a say in shaping what impacts their educational and personal experiences. To do so, students' voices must be sourced in an effective, thorough, and inclusive manner and that considers diverse experiences. The most effective way to do so is to create a process that allows the Administration to hear directly from the communities, movements, and organizations that are leading the fight against sexual violence in schools and from student survivors themselves. We would recommend that in addition to the listening tour that the Task Force convene regular virtual town hall events that will allow for students to participate from across the country to receive updates on the Title IX rulemaking process and other actions being taken by the Biden-Harris Administration to protect students from sexual violence and support them when it does occur.

We are also available to assist in connecting transition team members with student survivors to meet with them during this transition period, particularly as several survivors have recently gone public with their experiences and would be able to provide critical insight as to how the Biden-Harris Administration could be supportive of student survivors and hold institutions accountable.

Increase Funding to the Department of Education’s Office for Civil Rights to Enable the Office to Expand Staff and Enforcement Capacities.

The FY 2022 budget request should include at least \$260 million for the Office for Civil Rights (OCR) —a two-fold increase from what was appropriated in FY2020. This will ensure that OCR has the resources to process complaints in a timely manner and effectively enforce civil rights laws, including by providing technical assistance to recipients.

Improve Agency Data Collection of Sex-Based Harassment in Schools and Restore and Update the Clery Handbook.

The Department of Education should strengthen its data collection processes to improve the accuracy and reliability of collections like the Civil Rights Data Collection (CRDC) and the Campus Safety and Security Survey (CSS). Although studies have repeatedly and consistently indicated that sexual harassment and violence are widely prevalent in both elementary and secondary schools and institutions of higher education, this is not reflected in the CRDC and CSS. For example in 2015-16, 79% of public schools with students in grades 7-12 reported zero allegations of sex-based harassment to the CRDC, and 89% of colleges and universities reported zero allegations of rape to the CSS.⁹ The Department should hold schools accountable for these considerable inaccuracies, which deprive students and families of important safety information when they make decisions about which school district or college to attend and disincentivize school administrators from taking much-needed action to address and prevent sexual harassment on their campuses.

Restore and Update the Clery Handbook

In October 2020, the Trump Administration rescinded the Clery Handbook, which provided valuable guidance to campus administrators on how to submit data to the CSS, and replaced the detailed 265-page document with a 13-page appendix to a financial aid handbook.¹⁰ The Department’s reasons for the rescission of the Clery Handbook are contradictory and continue to sow confusion among campus administrators.

The Department should restore the Clery Handbook to ensure that schools provide timely and transparent data on the crime on and around campus, and amend it as necessary to reflect any new Title IX guidance and rules.

Update and Expand the Civil Rights Data Collection

The CRDC should include additional questions about both student-on-student and staff-on-student sexual misconduct, both on- and off-campus, to provide greater transparency around school responses to sexual harassment. For example, school districts should be required to submit annual data about the number of allegations of sexual harassment that result in a

⁹ AAUW, *Schools Are Still Underreporting Sexual Harassment and Assault* (Nov. 2, 2018), <https://ww3.aauw.org/article/schools-still-underreporting-sexual-harassment-and-assault>.

¹⁰ Department of Education., Federal Student Aid Office, “Rescission of and Replacement for the 2016 Handbook for Campus Safety and Security Reporting (Oct. 9, 2020), <https://ifap.ed.gov/electronic-announcements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting>.

voluntary withdrawal, transfer, resignation, or retirement of the student or staff respondent prior to final discipline; the number of allegations that result in a finding of responsibility or non-responsibility; and the number of allegations that remain pending. The CRDC’s definitions of “rape” and “sexual assault” should also be updated so that they are consistent with the definitions of those terms under the Clery Act and no longer require the use of “force.”

Support Legislation that Protects Survivors and Aims to Prevent Harassment in Schools.

HEA / VAWA reauthorization addressing sexual harassment in schools and specifying protections for student survivors

There are additional ways that the Biden-Harris Administration can address sexual harassment schools, especially for those who live at the intersections of multiple, marginalized identities, and ensure school grievance procedures are equitable and non-discriminatory. This includes the reauthorization of the Higher Education Act of 1965 with stronger anti-sexual harassment protections, including those found in the Hold Accountable and Lend Transparency on Campus Sexual Violence Act (The “HALT Act” H.R. 3381), the Tyler Clementi Higher Education Anti-Harassment Act (H.R. 2747), and Safe Equitable Campus Resources and Education Act (H.R. 2026); and additional resources for campus programs through reauthorization of the Violence Against Women Act.

Protections for students in K-12 schools

The Biden-Harris Administration should also support federal legislation expanding protections against sexual harassment for students in K-12 schools. Over the last ten years we have seen a focus on protections for students in higher education because of the efforts of survivor-activists, but students in K-12 schools are also vulnerable to experiencing sexual harassment. Therefore, it is critical that the Biden-Harris Administration champion legislative efforts at the federal level to expand protections, programs, and resources for students experiencing sexual harassment in their elementary, middle, and high school educational programs, and to ensure schools collect climate data to inform policy and practice. This includes provisions found in the Stop Sexual Harassment in K-12 Act (H.R. 8290), and the Supporting Survivors of Sexual Harassment in Schools Act of 2020 (H.R. 8193).

Title IX Coordinator funding and resources

By supporting legislation, such as the Patsy T. Mink and Louise M. Slaughter Gender Equity in Education Act of 2019 (H.R. 3513), or through the creation of a grant program through the Department of Justice Office on Violence Against Women and/or the Office for Civil Rights of the Department of Education, the Biden-Harris Administration should ensure there is adequate funding for training and capacity building of Title IX Coordinators. The funding could be used for, but not limited to, training of new Title IX Coordinators, continuing education for existing Title IX Coordinators, and/or training in new Title IX compliance-related issues. The federal government should be working to ensure the quality and breadth of the training Title IX Coordinators receive, as they are the individuals primarily responsible for coordinating the investigation and adjudication of reports of sexual misconduct in both K-12 and higher

education. This also includes restoring OCR's 2015 Dear Colleague Letter on Title IX Coordinators and also supporting H.R. 8290 and H.R. 8193 noted above.

Ensure Key Administration Positions Are Filled with Diverse and Highly Qualified Individuals Committed to Gender Justice and Ending Sexual Violence

The president will not be able to achieve the policy goals of ending and addressing sexual harassment in schools without committing to hire diverse, highly qualified individuals who are committed to gender justice to serve in key administration and agency positions.

Across these goals, the Biden-Harris Administration's overarching purpose should be to advance equity and close disparities based on race (including ethnicity and national origin), sex (including sexual orientation and gender identity), disability, and any other status on the basis of which people have been marginalized and excluded from shared prosperity.

For example, this Administration should fill the long empty position of Special Assistant for Gender Equity within the Department of Education, who is responsible for the promotion, coordination, and evaluation of gender equity programs including, but not limited to the dissemination of information, technical assistance, and coordination of research activities on behalf of the Department. This individual will advise the Secretary and Deputy Secretary of Education on all matters relating to gender equity in education. The individual selected to fill this role should have a deep history of connecting with and representing students, experience working on the issue of gender-based violence in schools, and a track record of taking an intersectional approach to their work to ensure the most marginalized students are centered by the Department of Education.

The Administration should also robustly resource a strong White House Council on Gender Equity that will build on the past successes of the White House Council on Women and Girls under President Obama's leadership. The Biden-Harris Administration should also create a dedicated Senior Advisor on gender equity, appoint staff who are committed to gender justice to the Domestic Policy Council and Council of Economic Advisors, and designate staff in each agency at the Deputy Secretary level with reporting authority on gender justice issues to the Council. The Council should be staffed with different issue area experts, including one on education. The individual selected for the senior role of leading the Council should possess a strong record of advocating for the rights of women and girls, including working with young women on the issues that affect them most. It is critical that the Council on Gender Equity include individuals with experience working with young women and girls on issues of educational access and gender-based violence. We are happy to provide a list of potential candidates to fill these roles.

Conclusion

We appreciate your consideration of our requests for the Biden-Harris Administration to effectively address sexual harassment in schools, and we will follow up with specific recommendations for interim guidance interpreting Title IX's protections against sexual harassment in schools.

To discuss these further, we welcome the opportunity to meet with the transition team. If you are available for a meeting to discuss our recommendations or have any questions, please contact Shiwali Patel at spatel@nwlc.org and Alexandra Brodsky at abrodsky@publicjustice.net.

Sincerely,

American Association of University Women
End Rape On Campus
Every Voice Coalition
Cari Simon, Esq., Fierberg National Law Group
Girls Inc.
Girls for Gender Equity
Human Rights Campaign
It's On Us
Know Your IX, a project of Advocates for Youth
National Alliance to End Sexual Violence
National Women's Law Center
Public Justice