



September 12, 2022

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

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

Submitted via www.regulations.gov

Re: ED Docket NO. 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,

On behalf of the 170,000 members and supporters of the American Association of University Women (AAUW), we are pleased to submit this comment regarding the Department of Education's (the Department) Notice of Proposed Rulemaking (NPRM or proposed rule) on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, as published in the Federal Register on July 12, 2022.¹ AAUW has long advocated for educational equity for women and girls and supports the strengthening and vigorous enforcement of Title IX. We applaud the Department's NPRM to amend the rules implementing Title IX of the Education Amendments of 1972 (Title IX), which would I) restore protections for students against all sex-based harassment, including sexual harassment; II) clarify protections for lesbian, gay, bisexual, transgender, and queer (LGBTQ+) students; and III) strengthen supports for pregnant and parenting students. We appreciate the Department's commitment and efforts to restore the promise and protections of Title IX.

I. Restore protections against sex-based harassment

When education environments are hostile due to sexual harassment, assault, or violence, students cannot learn and end up missing out on true educational opportunities. Yet sexual harassment, including sexual assault, remains prevalent in K-12 schools and in higher education. AAUW's own research found that nearly half of students in grades 7-12 and two-thirds of college students

¹ U.S. Department of Education, Proposed Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," *Federal Register* 87, no. 132 (July 12, 2022): 41390, <https://www.federalregister.gov/d/2022-13734>.

face sexual harassment.² Further, studies have shown that around 1 in 4 women and 1 in 15 men are sexually assaulted in college³—and incidences are often higher for LGBTQ+ students, Black and Brown women, and other marginalized students.⁴ Sexual harassment and assault in schools continues to be underreported, however, and research shows that when survivors do report their assaults, many are ignored or punished rather than receive the support they need.⁵ Educational equity for women and girls requires fair, responsive, fully-developed campus sexual harassment and assault policies; knowledgeable administrators; and ultimately an end to sexual harassment and violence on campuses.

Title IX regulations implemented in 2020 narrowed the definition of sexual harassment to potentially exclude many students' experiences and altered when and how schools must respond to reports of sexual harassment, applying more burdensome standards in these cases and requiring live hearings and cross-examination.⁶ The 2020 rules made it harder for students to come forward about sexual harassment or assault and to get the support they need from their schools. On behalf of our members and supporters, AAUW submitted a comment to the Department strongly opposing these changes.⁷

The proposed rule restores many of the protections against sexual harassment that were gutted by the harmful regulations implemented in 2020, and broadens the scope of harassment to which schools are required to respond. Under the proposed rule, schools are required to respond to complaints of *all* sex-based harassment, including sexual harassment, and to prevent sex-based harassment and discrimination from reoccurring.⁸ Importantly, schools would be required to address sex-based harassment that occurs in educational programs and activities on or off-campus—including study abroad programs outside of the United States, if the harassment contributes to a hostile environment.⁹ Schools would also be required to address complaints of sex-based harassment if the complainant was participating or trying to participate in a school

² Catherine Hill and Holly Kearn, *Crossing the Line: Sexual Harassment at School*, (Washington: American Association of University Women, 2011), <https://www.aauw.org/resources/research/crossing-the-line-sexual-harassment-at-school/>.

³ David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, (Rockville: Association of American Universities, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aaucampus-climate-survey-2019>.

⁴ Elizabeth Tang et al., *Title IX at 50: A Report by the National Coalition for Women and Girls in Education*, (Washington: National Women's Law Center, 2022), <https://nwlc.org/resource/newge-title-ix-at-50/>.

⁵ Sarah Nesbitt and Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout*, (Washington: Advocates for Youth, 2021), <https://www.knowyourix.org/thecostofreporting/>.

⁶ U.S. Department of Education, Final Rule, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," *Federal Register* 85, no. 97 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

⁷ American Association of University Women, *AAUW Comments to Department of Education Opposing Proposed Regulatory Changes Regarding Title IX*, January 30, 2019, <https://www.aauw.org/app/uploads/2020/02/AAUW-Comments-to-Department-of-Education-Opposing-Proposed-Regulatory-Changes-Regarding-Title-IX-nsa.pdf>.

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

⁹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.11); The proposed rule returns to the definition of "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 educational program or activity, as was the standard prior to 2020 (proposed 34 C.F.R. § 106.2(2)).

program or activity at the time they experienced harassment, even if they are not currently a student or employee of the school.¹⁰ Lastly, we support the provision in the proposed rule that would allow schools to comply with a state or local law that provides greater protections against sex discrimination, including harassment.¹¹

The proposed rule similarly strengthens retaliation protections, which would extend to all reports of sex-based harassment.¹² Schools would be required to investigate complaints of retaliation, if requested, and to offer supportive measures to individuals who report retaliation.¹³ We urge the Department to clarify that retaliation includes disciplining a complainant for conduct that the school knows or should know “results from” the harassment or discrimination (e.g. missing school, expressing trauma, telling others about being harassed); disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation; requiring a complainant to leave an education program after reporting sex-based harassment or other sex discrimination; and requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations.

Under the proposed rule, schools would be allowed to dismiss a complaint where a respondent has transferred, graduated, or retired, as long as they provide supportive measures and take other “prompt and effective steps”¹⁴ to ensure the harassment or discrimination does not continue or recur. We urge the Department to clarify that when a school chooses to dismiss a complaint because the respondent has left the school, such “steps” may include, but are not limited to, determining whether there were other victims and whether school staff knew about the incident(s) but ignored it, or took steps to cover it up.

The proposed rule further requires schools to provide supportive measures for students regarding all complaints of sex-based harassment, even if the complaint is dismissed.¹⁵ We urge the Department to explicitly clarify that if a party requests a certain supportive measure and it is “reasonably available,”¹⁶ 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. We further urge the Department to require, rather than simply allow, schools to designate “confidential employees,”¹⁷ who would not be obligated to report to their Title IX coordinator but who could offer students confidential support.

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

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

¹² 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2 (“retaliation”)).

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

¹⁴ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. §§ 106.44(f)(6)), 41576 (§ 106.45(d)(4)(iii)).

¹⁵ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(g)); 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(d)(4)(i)).

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

¹⁷ 87 Fed. Reg. at 41573 (proposed 34 C.F.R. § 106.44(d)).

The proposed rule includes provisions that would ensure a fair, prompt, and effective process for all complaints of sex-based discrimination,¹⁸ and would remove the harmful requirement of live cross-examination while allowing schools more flexibility in how they conduct questioning. We urge the Department to provide further guidance as to how institutions of higher education can conduct questioning while minimizing reliance on cross-examination and live hearings.

The proposed rule would require institutions of higher education to offer appeals to both parties based on a procedural irregularity, new evidence, or a Title IX official's bias or conflict of interest that affected the outcome, and allow them to offer additional bases to both parties equally.¹⁹ We urge the Department to afford the same rights to appeals to students in K-12 schools that would be granted to students at higher education institutions.²⁰

We oppose, and urge the Department to remove, the requirement for schools to presume that the respondent is not responsible for sex-based harassment (or other sex discrimination) until a determination is made and to inform both parties of this presumption²¹—which is not required in any other school proceeding. Instead, 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.

We also oppose the provision that includes an exclusionary rule allowing a survivor's oral and written statements to be dismissed in their Title IX case if they do not respond to a question "related to their credibility,"²² and urge the Department to remove this provision from the final rule.

Lastly, we urge the Department to, at minimum, clarify regulations on schools' requirement to apply the same standard of proof across "comparable"²³ cases of discrimination, specifically regarding cases of sex-based discrimination including sexual harassment and assault so that schools do not adopt an inappropriately stringent standard for those cases. We further encourage the Department to consider requiring the preponderance of evidence standard in all Title IX investigations, as it is the only standard that recognizes complainants and respondents have equal stakes in the outcome of an investigation.

II. Clarify protections for LGBTQ+ students

For LGBTQ+ students, going to school often includes experiencing bullying and harassment on a regular basis, which impacts their ability to access education and harms their health and

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

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

²⁰ 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(i)).

²¹ 87 Fed. Reg. at 41575 (proposed 34 C.F.R. §§ 106.45(b)(3)), 41577 (§ 106.46(c)(2)(i)).

²² 87 Fed. Reg. at 41578 (proposed 34 C.F.R. § 106.46(f)(4)).

²³ 87 Fed. Reg. at 41576 (proposed 34 C.F.R. § 106.45(h)(1)).

wellbeing.²⁴ In 2019, around 7 in 10 LGBTQ students experienced verbal harassment at school based on sexual orientation, and more than half experienced harassment based on gender or gender expression.²⁵ AAUW research also found that students in grades 7-12 are often targeted for failing to follow norms that are typical for their gender.²⁶ Transgender and nonbinary students face especially hostile school climates compared to their cisgender peers—13 percent of transgender adults were sexually assaulted when they were in grades pre-K-12,²⁷ while 1 in 4 transgender, nonbinary, and gender-nonconforming students are sexually assaulted during their time in college.²⁸

A wave of anti-LGBTQ+ legislation continues across state legislatures—as of July 2022, legislators in 23 states have introduced anti-LGBTQ+ legislation.²⁹ Currently, two states have enacted laws that prohibit transgender students from using school facilities, including restrooms and locker rooms, in accordance with their gender identity.³⁰ This discriminatory legislation puts LGBTQ+ students at even greater risk of physical, mental, and emotional harm.³¹

The proposed rule importantly affirms protections for LGBTQ+ students under Title IX by clarifying that prohibited sex discrimination includes discrimination based on sexual orientation, gender identity, sex-related characteristics (including intersex traits), and sex stereotypes (in addition to pregnancy or related conditions).³² The Department should ensure that these forms of prohibited discrimination are explicitly enumerated in school nondiscrimination policies and required notices of nondiscrimination. Policies which specifically enumerate these protections would provide necessary clarity to students, families, educators, and Title IX coordinators, and are associated with less hostile school climates for LGBTQ+ students.³³

²⁴ U.S. Government Accountability Office, *K-12 Education: Students' Experiences with Bullying, Hate Speech, Hate Crimes, and Victimization in Schools*, GAO-22-10434, Washington: GAO, 2021. <https://www.gao.gov/assets/gao-22-104341.pdf>.

²⁵ Joseph G. Kosciw et al., *The 2019 National Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*, (New York: GLSEN, 2020), <https://www.glsen.org/research/2019-national-school-climate-survey>.

²⁶ Hill and Kearn, *Crossing the Line: Sexual Harassment at School*.

²⁷ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, (Washington: National Center for Transgender Equality, 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

²⁸ Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*.

²⁹ “Anti-LGBTQ+ Bills in 2022,” Human Rights Campaign, accessed September 7, 2022, <https://www.hrc.org/resources/state-maps/anti-lgbtq-bills-in-2021>.

³⁰ Alabama H.B. 322 (2022) and Oklahoma S.B. 615 (2022) ban transgender youth from using restrooms or changing areas aligned with their gender identity.

³¹ The Trevor Project, *LGBTQ & Gender-Affirming Spaces*, (West Hollywood: The Trevor Project, 2020), <https://www.thetrevorproject.org/research-briefs/lgbtq-gender-affirming-spaces/>.

³² 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10); These proposed changes are consistent with President Biden's executive orders on the implementation of the Supreme Court's 2020 ruling in *Bostock v. Clayton County* (140 S. Ct. 1731, 1747 (2020)), which confirmed that workers are protected against discrimination based on sexual orientation or gender identity under Title VII.

³³ 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 et al., “Effectiveness of

The proposed rule also clarifies that all students must have access to school facilities consistent with their gender identity (where facilities are separated) as a component of their full participation in schools.³⁴ We further urge the Department to clarify in plain language that this standard applies to all sex-separated programs and activities, including, but not limited to, restrooms, locker rooms, and overnight accommodations for school trips.

The proposed rule importantly clarifies that harassment and bullying based on sexual orientation, gender identity, sex-related characteristics, and sex stereotypes is prohibited under Title IX. However, the proposed rule fails to explicitly address mocking, ridiculing or the persistent, intentional misuse of names, personal pronouns, or gendered titles as a form of sex-based harassment. Nearly 1 in 4 LGBTQ students in grades 6-12 report being prevented from using their chosen name and pronouns.³⁵ The use of gender-affirming language, including pronouns, is vital to students' wellbeing—studies have shown that for transgender and nonbinary youth, having their pronouns respected improves mental health outcomes.³⁶ We strongly urge the Department to include guidance in the final rule that explicitly prohibits the persistent, intentional misuse of names, personal pronouns, or titles as a form of sex-based harassment under Title IX.

Secondly, the proposed rule does not provide regulatory guidance on dress and appearance codes, which effectively leaves room for discriminatory policies and enforcement practices in schools. Where gendered dress codes are enforced, students must be allowed to dress in accordance with their gender identity, and such policies should not be enforced more stringently on certain groups.³⁷ These clarifications are critical for LGBTQ+ students, particularly transgender and nonbinary students, who may face disciplinary measures for clothing perceived as “inappropriate” according to their sex assigned at birth.³⁸ The Department should clearly communicate that, where dress or appearance codes are in use, gender-neutral codes best support students' wellbeing and schools' compliance with Title IX, and that schools may nonetheless risk violating Title IX even when a separate gender dress code permits students to dress in accordance with their gender identity.

Lastly, we are deeply concerned that the proposed rule does not address access to athletics, which represents a key component of educational equity under Title IX. Regulations that affirm and protect the inclusion and participation of all students, including transgender and nonbinary students, in school athletics are urgently needed—state legislators introduced 70 transgender

school district antibullying policies in improving LGBT youths' school climate,” *Psychology of Sexual Orientation and Gender Diversity* 3, no. 4 (2016): 407; Terri Phoenix et al., “Homophobic Language and Verbal Harassment in North Carolina High Schools,” Safe Schools North Carolina, 2006, <https://eric.ed.gov/?id=ED491454>.

³⁴ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.10, 106.31(a)(2)).

³⁵ Kosciw et al., *The 2019 National Climate Survey*.

³⁶ The Trevor Project, *Pronouns Usage Among LGBTQ Youth*, (West Hollywood: The Trevor Project, 2020), <https://www.thetrevorproject.org/research-briefs/pronouns-usage-among-lgbtq-youth/>.

³⁷ See “Model Local Education Agency Policy on Transgender and Nonbinary Students,” GLSEN, <https://www.glsen.org/activity/model-local-education-agency-policy-on-transgender-nonbinary-students>.

³⁸ Kosciw et al., *The 2019 National Climate Survey*.

athlete bans in the first half of 2022 alone, and such bans are currently enacted in 18 states.³⁹ These discriminatory policies also harm students who do not conform to sex stereotypes, intersex students (whether transgender or cisgender), and will likely disproportionately harm Black women and girls and other women and girls of color owing to racist and sexist standards which associate femininity with whiteness.

We strongly urge the Department to move swiftly in their rulemaking on athletics—affirming that all students, including transgender, nonbinary, and intersex students, have rights under Title IX to participate in school sports in accordance with their gender identity—so that a single, consolidated rule may be finalized at the beginning of 2023. We further urge the Department to clarify in the final rule that state sports bans against transgender, intersex, or nonbinary students constitute prohibited sex discrimination under Title IX, and that Title IX preempts any state law or policy that categorically bans transgender, nonbinary, and intersex students from playing sports or their ability to play sports consistent with their gender identity.

III. Strengthen supports for pregnant and parenting students

Pregnant and parenting students continue to face discrimination and barriers in access to education, and are often steered toward separate, less rigorous schools or programs. More than 1 in 5 college students—or nearly 4 million undergraduates—are parents, including 1.7 million single mothers.⁴⁰ Student parents, 44 percent of whom work full time while enrolled,⁴¹ may also lack other vital supports like paid leave and affordable child care that make it harder for them to complete their education while supporting themselves and their families. Pregnant and parenting students’ access to education and completion is not only a gender equity issue but also a racial equity issue, as 51 percent of student parents are people of color.⁴² While parenting college students tend to have higher grade-point averages than their non-parenting peers,⁴³ they are less likely to graduate,⁴⁴ largely due to lack of institutional supports and other barriers to completion.

The proposed rule importantly improves regulatory language prohibiting discrimination on the basis of “current, past, or potential pregnancy or related conditions,”⁴⁵ including termination of pregnancy, childbirth, lactation, or recovery from any of these conditions. We urge the Department to include “expected” and “perceived” pregnancy or related conditions, as well as explicitly add lactation, childbirth, and termination of pregnancy as a non-exhaustive list of

³⁹ “Trans and Nonbinary Athletic Inclusion Policies,” GLSEN, accessed September 7, 2022, <https://maps.glsen.org/trans-and-nonbinary-athletic-inclusion-policies/>.

⁴⁰ Institute for Women’s Policy Research, “Parents in College by the Numbers,” accessed September 7, 2022, <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers/>.

⁴¹ U.S. Government Accountability Office, *K-12 Education*.

⁴² Institute for Women’s Policy Research, “Parents in College by the Numbers.”

⁴³ Institute for Women’s Policy Research, “Parents in College by the Numbers.”

⁴⁴ Renee Ryberg, Rachel Rosenberg, and Jessica Warren, *Higher Education Can Support Parenting Students and Their Children with Accessible and Equitable Services*, (Bethesda: Child Trends, 2021), <https://www.childtrends.org/publications/higher-education-support-parenting-students-and-their-children-with-accessible-equitable-services>.

⁴⁵ 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)).

“pregnancy or related conditions.” We further urge the Department to expressly state that schools may not discriminate based on a person’s “current, potential, *perceived*, *expected*, or past parental, family, marital, or *caregiver* status.”⁴⁶ These clarifications would affirm protections for students who may be harmed by gender norms related to caregiving, including expectant non-birthing parents, students who are perceived to be parents, and caregivers who are not parents.

The proposed rule strengthens supports for pregnant and parenting students, including ensuring students’ access to a clean, private lactation space that is not a bathroom.⁴⁷ We urge the Department to clarify that private lactation spaces should include a chair, a flat surface, and access to an electrical outlet, with nearby access to running water and a refrigerator, and that such spaces should be in reasonable proximity to students’ specific place of study. The Department should further clarify that pregnant and parenting employees also have a right to these lactation spaces, and that students and employees still have a right to pump or breastfeed in non-designated lactation spaces.

The proposed rule requires schools to provide voluntary and “reasonable modifications”⁴⁸ to policies, practices, or procedures for students experiencing pregnancy or related conditions. Supportive attendance policies are particularly critical given caregiving responsibilities, which fall disproportionately onto women. We urge the Department to extend the affirmative right to modifications to both parenting and caregiving students, as well as employees.

The proposed rule would allow, as under current regulations, for student to participate “voluntarily” in a separate portion of their school’s program or activity which is “comparable” to that offered to their peers.⁴⁹ We urge the Department to clarify that separate programs or activities must be substantially equal “in purpose, scope, and quality” to those offered to students who are not pregnant or parenting and do not have a pregnancy related condition, and to explicitly prohibit schools from requiring pregnant or parenting students to participate separately.

Further, the proposed rule expands leave beyond the minimum period deemed medically necessary by a healthcare provider, if school policy allows.⁵⁰ We urge the Department to require schools to presume that medically necessary absences (e.g. for prenatal care, lactation breaks, abortion care) are inherently “reasonable” modifications and must be granted, and to make such absences available to parenting and caregiving students and to employees.

Lastly, the proposed rule expands training requirements for Title IX coordinators and clarifies their responsibilities regarding prevention and responses to discrimination against pregnant and parenting students. Specifically, the proposed rules would require employees who know of a

⁴⁶ We urge the Department to further define “family status,” ensuring the definition is inclusive of non-traditional families including LGBTQ+ families.

⁴⁷ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. §§ 106.40(b)(3)(iv), 106.40(b)(4)(iii)), 41579 (proposed 34 C.F.R. § 106.57(e)).

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

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

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

student’s pregnancy or related condition to give them the Title IX coordinator’s contact information⁵¹ and would require Title IX coordinators to then notify the student of their rights.⁵² We ask the Department, however, to instruct schools in the final regulations and in supplemental guidance on how to protect student privacy to ensure that, in states where abortion is criminalized, school records, including school health records, are not used to prosecute students who have been documented as being pregnant in the past but are not currently pregnant. Finally, we urge the Department to clarify that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy.

We urge the Department to expand data collection on pregnant and parenting students, including experiences of harassment and discipline, in the Civil Rights Data Collection (CRDC) in order to continue to improve these students’ access and success in education. AAUW appreciates that the CRDC includes important, school-specific gender equity points—including data on pregnant and parenting students—that are helpful to advocates, parents, students, educators, and Title IX coordinators nationwide.

IV. Appropriate implementation of religious exemptions

Under Title IX statute, schools that are receiving federal funds and controlled by religious organizations may claim religious exemptions where the application of Title IX is inconsistent with their religious tenets. Unfortunately, religious exemptions have allowed schools to discriminate on the basis of sex, disproportionately harming women, pregnant and parenting students, LGBTQ+ students, and students who access or seek access to abortion or birth control.

Harmful Title IX regulations implemented in 2020 expanded the number of schools that are eligible for religious exemptions⁵³ and allowed schools to claim religious exemptions without providing any advance notice to the Department of Education or students and their families, including even if a school is under investigation for violating Title IX at that time.⁵⁴ This regulation is inconsistent with the Title IX rule requiring schools to provide notice of their nondiscrimination policies,⁵⁵ and makes it more difficult for prospective students and their families to make fully informed decisions when choosing a school.

As the proposed rule fails to address religious exemptions, we urge the Department to swiftly issue proposed Title IX regulations that would rescind the 2020 rule inappropriately expanding eligibility for religious exemptions, require schools to notify the Department of any religious exemption claims, and to publish claimed exemptions in their nondiscrimination policies and required notices.

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

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

⁵³ 34 C.F.R. § 106.12(c).

⁵⁴ 34 C.F.R. § 106.12(b).

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

Conclusion

We urge the Department to implement the recommended changes as outlined in this comment and to finalize the proposed rule swiftly, as students across the country continue to be subject to the harmful Title IX regulations implemented in 2020 under the previous administration. We look forward to working with the Department on the implementation of the final Title IX rule.

Thank you for your consideration of our comment and recommendations for the proposed rule. Please do not hesitate to contact me at blackwellg@aauw.org if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Gloria Blackwell".

Gloria L. Blackwell
Chief Executive Officer, American Association of University Women