COMMITTEE ON
EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 12th, 2022

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202

Re: Docket ID ED-2021-OCR-0166

Dear Secretary Cardona:

I write to express my views on the U.S. Department of Education's (Department's) proposed rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,[1] published on June 23, 20022, the 50th anniversary of the passage of Title IX of the Educational Amendments Act of 1972 (Title IX).[2] This proposed rule marks a fundamental and necessary revision of policy to address sexual harassment, assault, and discrimination in K-12 and higher education—all while preserving the rights of the accused. I commend the Department for conducting a review of the current regulations and soliciting feedback from stakeholders to help inform the drafting of the proposed rule. The current Title IX rule promulgated by the previous administration ("2020 rule") eroded some key protections for students' safety, weakened accountability for schools, and made it more difficult for survivors to get justice. In contrast, I am encouraged by this Department's proposed rule, which will expand the critical protections under Title IX and ensure that all students, including LGBTQI+ students, are fully protected from discrimination based on sex, sexual orientation, and gender identity. While this comment will include suggestions as to how the rule could be improved as it moves towards finalization, I support the rule generally and urge the Department to continue moving forward in this critical area of civil rights policy for the reasons below.

[1] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), *available at* https://federalregister.gov/d/2022-13734 (hereinafter "Title IX NPRM").

[2] Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-07, 86 Stat. 235, 373–74 (1972).

All forms of sex discrimination are included. While previous rulemaking on Title IX focused on sexual harassment, I am encouraged by the Department's view to write a rule not restricted strictly to harassment, but to Title IX's stated purpose—prohibition of discrimination "on the basis of sex."[3] As such, the proposed rule seeks to ban all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. As the Department notes, while the text of Title IX does not plainly indicate such discrete forms of sex discrimination are covered, the Supreme Court made clear 30 years ago that the law's protection must be interpreted broadly.[4] Even more recently, the Court's 2020 opinion in *Bostock v. Clayton County* held that the prohibition on sex-based discrimination in Title VII of the *Civil Rights Act of 1964* includes acts of discrimination based on sexual orientation and gender identity.[5] Consistent with this decision, the Department issued a Notice of Interpretation to prohibit schools receiving federal funds from discriminating against students on the basis of sexual orientation and gender identity.[6] While this interpretation is currently unenforceable in certain states due to a Federal court order,[7] such an interpretation remains consistent with Supreme Court precedent and matters of fundamental fairness and protections, and I commend the Department for including language that would codify such protections.

"Sex-Based Harassment," a term broader than "sexual harassment," is defined. I support the Department's proposal to replace the current definition of "sexual harassment" with a definition of "sex-based harassment."[8] This definition encompasses activity that was considered "sexual harassment" in 2020 rule but makes crucial additions. Specifically, I support the Department's proposed revisions to the "hostile environment harassment" portion of the definition: "unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity."[9] Such a definition is a welcome change from the 2020 rule, which limits hostile environment harassment only to conduct which is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[10] The 2020 rule abandoned a definition with a similar standard to the one proposed, that had been in effect at the Department since at least 2001.[11] The 2020 rule created an arbitrary and unnecessarily high threshold for which actions constituted hostile environment harassment and

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[3] 20 U.S.C. § 1681.
[4] *See* Title IX NPRM, *supra* n.1 at 41528; *North Haven Board of Education* 456 U.S. 512, 521 (1982).
[5] 140 S. Ct. 1731 (2020).
[6] *See* "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County," Interpretation, 86 Fed. Reg. 32637 (June 22, 2021).
[7] *See State of Tenn., et al. v. U.S. Dep't of Educ.,* No. 3:21-cv-308 (E.D. Tenn.) (July 15, 2022).
[8] Title IX NPRM, *supra* n.1 at 41568-69.
[9] *Id.*
[10] 34 C.F.R. § 106.30 (2020).
[11] U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (hereinafter 2001 Guidance) at v, (2001) *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

allowed a school to escape the responsibility of taking action in the case of solitary events, regardless of their severity.

Protections for pregnancy and pregnancy-related conditions are guaranteed and extended to students who choose to terminate their pregnancies. In addition to explicitly naming discrimination based on "pregnancy or related conditions" as a form of sex discrimination, the proposed rule illustrates what those protections mean at this critical time for the rights of pregnant persons. For example, the proposed rule requires schools to provide reasonable modifications for pregnant students.[12] Further, the proposed rule requires Title IX Coordinators to permit a student to take a voluntary leave of absence for medical reasons and to be reinstated upon their return.[13] In addition, the Department should make institutions of higher education aware of potential Title IX violations if the institution invokes suspension or expulsion proceedings against a student who chooses to terminate their pregnancy. Similarly, the Department should provide guidance as to whether any potential Title IX violations may arise in cases where an institution reports a student's choice to terminate a pregnancy to local authorities.

Arbitrary geographic limits on Title IX liability are removed. The Department also proposes to ensure that schools address all sex discrimination in their education programs or activities, regardless of where it takes place.[14] The 2020 rule only requires schools to address offending behavior in education programs or activities where schools exercise "substantial control" over the alleged offender and the context in which the behavior occurred.[15] On many campuses, the line between on-campus and off-campus, private space and public, official activity and campus tradition, are all blurred, so returning to a standard that does not distinguish between these locations will reflect the reality of life in and around college campuses. The proposed rule also corrects the 2020 rule's policy limiting Title IX's application to actions perpetrated against a person in the United States. This standard left a U.S. school-sponsored program abroad free from responsibility for a Title IX violation, even if taught by U.S. faculty.

Liability and notice standards for schools are strengthened to ensure accountability for sex discrimination claims. The proposed rule would heighten the standards for when a school should be expected to take notice of an instance of sex discrimination and what their response should be. Specifically the standard under the 2020 rule only holds schools liable in cases of deliberate indifference, defined as action "clearly unreasonable in light of the known circumstances."[16] This standard is abandoned, and in its place the proposed rule would require schools to take "prompt and effective" action to end all instances of sex discrimination, including taking actions to prevent such instances from happening again and remedying any impact such activity may have had.[17] Further, the draft rule creates a system where specific employees are required to inform the Title IX Coordinator of possible instances of sex discrimination.[18] For K-12 schools, the proposal would require all employees who are *not* confidential employees, a new

[12] Title IX NPRM, *supra* n.1 at 41571-72.
[13] *Id.*
[14] *Id.* at 41571.
[15] 34 C.F.R. § 106.44(a).
[16] *Id.*
[17] Title IX NPRM, *supra* n.1 at 41572-75.
[18] *Id.*

category of employees that schools can designate as a "confidential resource for the purpose to provide services in connection with sex discrimination,"[19] to report such potential activity to the Title IX Coordinator.[20] However for postsecondary schools, the proposal seems to require non-confidential employees to report depending upon their responsibilities and level of authority as well as whether such possible sex discrimination has potentially impacted a student or employee.[21] This interpretation may not align with intended policy, so I urge the Department to simplify these requirements for postsecondary schools to help both students and employees to easily understand who is required to report and when.

Complainants' autonomy would be respected. The proposed rule intends to ensure that a school's programs and activities are free from sex discrimination while also safeguarding complainants' autonomy. Specifically, it requires schools to provide clear information and training[22] on when their staff must inform the Title IX Coordinator about possible sex discrimination[23] and ways students can report such discrimination to seek confidential support[24] or to request the opening of a complaint.[25] It also protects a complainant's right to file a complaint, regardless of whether they remain at the school.[26] The Department is also proposing that schools require their Title IX Coordinators watch for potential barriers to reporting sex discrimination and take reasonable steps to address those barriers.[27]

Schools would regain flexibility in determining the structure of their grievance process. When the previous administration put the 2020 rule in place, it abandoned years of Department reasoning that provided schools with the ability to determine the structure of their grievance process.[28] Specifically, the 2020 rule requires schools to conduct live hearings and cross examination for proceedings at the postsecondary level, while allowing for either party to be cross examined remotely (in another room) via electronic means. The Department's proposal would restore school's flexibility to create such grievance processes, including the ability to create an "informal resolution" process, without requiring that a complainant first file a formal complaint.[29] However, a school cannot compel participation in such a process. This will allow schools to offer a step prior to a formal hearing which may determine whether such a hearing is necessary, or the will of the complainant.

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[19] *Id.* at 41567.
[20] *Id.* at 41572-73.
[21] *See Id.*
[22] *Id.* at 41570.
[23] *Id.* at 41572-73.
[24] *Id*. at 41573.
[25] *Id*. at 41575.
[26] *Id.* at 41567-69; 41575.
[27] *Id*. at 41572.
[28] U.S. Dep't of Educ., Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* at 10, (1997) (hereinafter "1997 Guidance") ("The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors.").
[29] Title IX NPRM, *supra* n.1 at 41573.

Schools would still be required to ensure impartiality in grievance procedures. As the Department notes, 2020 Title IX regulations have mandated that schools "adopt and publish grievance procedures that provide for the prompt and equitable resolution"[30] of sex discrimination complaints.[31] Under the 2020 rules, comprehensive requirements for grievance procedures are included only for accusations of sexual harassment.[32] The Department's proposal would make such procedures apply to all sex discrimination complaints. However, it would include certain changes, such as the need to guarantee that schools create grievance procedures that include ensure fairness and consistency for all parties.[33] For example, the proposed rule requires schools to treat the accuser and accused equitably,[34] take reasonable steps to protect the privacy of the parties and witnesses,[35] and requires that major stages in the process advance forward under reasonably prompt timeframes.[36] The proposed rule also includes additional changes for grievance procedures for sex-based harassment complaints involving a postsecondary student. For example, one major difference between the 2020 rule and the proposed rule (mentioned above) is the 2020 rule's requirement for a school to conduct a live hearing and cross examination for proceedings at the postsecondary level, allowing for either party to be cross examined remotely (in another room) via electronic means.[37] The proposed rule will *allow*, but not *mandate*, a live hearing.[38] The proposed rule should ensure that, when there is a dispute of facts, both sides are provided an effective opportunity to ascertain the facts through vigorous fact-finding.[39]

The standard of proof would once again be under schools' control. The 2020 rule, which purports to provide schools a choice in evidentiary standards of proof when deciding sexual discrimination claims, practically forces many schools to adopt the higher clear and convincing standard when considering accompanying provisions in the 2020 rule.[40] The proposed rule ends that scheme; specifically, schools will now be required to use the preponderance of the evidence standard of proof, but may use the clear and convincing evidence standard if such standard utilized in all other analogous proceedings, including other discrimination complaints.[41] This will ensure that sexual discrimination claims are not treated differently than other civil rights and disciplinary measures on college campuses.

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[30] 34 C.F.R. § 106.8(c).
[31] *See* Title IX NPRM, *supra* n.1 at 41456.
[32] 34 C.F.R. § 106.45.
[33] Title IX NPRM, *supra* n.1 at 41575.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] 34 C.F.R. § 106.45(b)(6).
[38] Title IX NPRM, *supra* n.1 at 41578.
[39] *Id.*
[40] *Id.* at 41575; *see* R. Shep Melnick, Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct, Brookings Inst. Jun. 11, 2020, available at https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.
[41] Title IX NPRM, *supra* n.1 at 41575.

Retaliation is recognized as an area where further regulation is needed. I am encouraged by the Department's proposals to further define and clarify retaliation within the context of Title IX. The proposed definition of retaliation importantly highlights the protections offered under Title IX, by including an action taken to interfere with an individual's rights or privileges under Title IX, such as participating or refusing the participate in an investigation, proceeding, or hearing.[42] Further, I commend the inclusion of the concept of peer retaliation in the proposed regulations. Too often, it is assumed that retaliation can only occur based on action from superiors. As the Department and courts have recognized, peer retaliation can chill reporting of potential Title IX violations and also could prevent individuals from participating or refusing to participate a Title IX proceeding.[43] Action or inaction by peers can be just as harmful to create a toxic environment which prevents an individual from participating in an educational program or activity.

However, in finalizing the rule, the Department should consider whether the definition of peer retaliation should go beyond peer-to-peer *student* retaliation. I urge the Department to consider whether peer retaliation should extend beyond students to also include employees of an institution to ensure similar protections against peer retaliation of faculty and staff. Similar to peer-to-peer student retaliation, coworker-to-coworker retaliation is also problematic, but not covered specifically under either Title IX or jurisprudence under Title VII of the *Civil Rights Act of 1964*. For example, coworkers can create a hostile work environment in many different ways such as excluding an individual from formal and informal networks or by influencing management actions, such as achieving tenure. The Supreme Court in *Vance v. Ball State University* found that many employees who are considered peers or coworkers may have quasi-supervisory responsibilities over others.[44] As such, in that case, the Court held that such coworkers who can take employment actions against another could be considered supervisors for the purposes of liability under Title VII.[45] Considering the relationships between Title VII and Title IX, the Department should consider expanding the definition of peer retaliation to include coworker retaliation.

Further transparency is necessary when institutions seek exceptions from Title IX. Lastly, in finalizing the rule, the Department should require transparency in the publication of notice of nondiscrimination policies and seek to improve transparency about an institution's policies to students in higher education programs. In the proposed rule, the Department seeks to strengthen and clarify the existing requirements related to the notice of nondiscrimination under Title IX.[46] The requirement to provide notice to students and other affected recipients is longstanding.[47] Requiring notice is meant to disseminate critical information to students and others about their right not to be discriminated against on the basis of sex in an education program or activity as

[42] *Id.* at 41568.
[43] *Id. at* 41452.
[44] *See* 570 U.S. 421, 424 (2013).
[45] *See id*.
[46] Title IX NPRM, *supra* n.1 at 41569-71.
[47] 45 C.F.R. § 86.9.

well as to provide information about how to report instances of conduct that may constitute sex discrimination.

However, the current regulation and the proposed rule fail to fully inform students and others of instances where exceptions are permitted under the statute, which may result in limited educational opportunities and access to grievance procedures.[48] I urge the Department to incorporate more transparency in the notice requirement provisions as the failure to do so may lead students to access education programs without the full knowledge their rights are not protected. The Department should require recipients of federal assistance to fully inform individuals of exceptions they have successfully sought to Title IX.[49] Such transparency should include information about any claimed exception and the impact of that claimed exception on an individual's ability to access education programs and activities, including information, where relevant, that an individual may face removal from that program or activity.

I also urge the Department to take additional steps to ensure that there is full transparency to students and others about an institution's nondiscrimination policies by incorporating notice and transparency requirements about those policies in institutions' Program Participation Agreements.[50] It is not enough for institutions of higher education to assure compliance with Federal civil rights laws, including Title IX, as part of their receipt of significant funding from the Federal government through student loans and other programs.[51] A college degree remains the surest path to achieving the American Dream for students seeking to secure economic opportunity. As a result, many students are willing to take on debt even in the face of soaring costs for college. By making such a financial commitment, students are making an investment in themselves, their future, and the institution that they attend. As consumers, students deserve transparency from institutions of higher education about an institution's nondiscrimination policies and any claimed exceptions to Federal civil rights laws to understand how policies might affect their access to an education program or activity, including the possibility that they may lose access to an education program and incur debt while facing discrimination. The *Higher Education Act* requires institutions of higher education to disseminate information to students including the rights and responsibilities of students receiving financial assistance.[52] Potentially incurring debt and losing access to an education program while facing discrimination should surely qualify as an important piece of information that is critical for students making these financial decisions related to their Federal financial aid.[53]

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[48] 20 U.S.C. § 1681(a).
[49] 20 U.S.C. § 1681(a)(1)-(9).
[50] 20 U.S.C. § 1094.
[51] *2020-2021 Federal Student Aid Handbook*, U.S. Dep't of Educ., available at https://fsapartners.ed.gov/sites/default/files/2021-11/2122FSAHbkVol2Master.pdf#page=32.
[52] 20 U.S.C. § 1092(a)(1)(D).
[53] One avenue may be to require institutions to report such information as part of the Program Participation Agreements outlined in 20 U.S.C. §1094 which includes the requirement that participating institutions comply with 20 U.S.C. §1092 regarding dissemination of information for students.

In conclusion, I thank you for the chance to offer my thoughts on this groundbreaking revision of such pivotal civil rights regulations, and I am sure the finalized rule will protect the rights of all students to access educational programs free from discrimination on the basis of sex, recognizing the intent of the law first established fifty years ago. I encourage the Department to robustly enforce these requirements to ensure that all students benefit from these important protections.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman