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**U.S. House Committee on Education and Labor
Subcommittee on Civil Rights and Human Services**

**"On the Basis of Sex: Examining Gender Bias in the Trump Administration's Policies"
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Thank you for the opportunity to submit testimony to the U.S. House Committee on Education and Labor, Subcommittee on Civil Rights and Human Services about gender bias in the Trump Administration's policies. The National Women's Law Center has worked for more than 45 years to advance and protect women's and girl's equality and opportunity and has long worked to remove barriers for women and girls in education, childcare, income security, the workplace, and healthcare. Robust protections against and responses to sex discrimination are key to achieving equality for women and girls.

I. Introduction

Since the beginning of the Trump Administration, this Administration has taken action to dismantle key equity protections for women and girls that are especially damaging for women and girls of color, LGBTQ individuals, women with disabilities, and others facing intersecting forms of discrimination. It has attacked the rights to education for survivors of sexual assault, access to reproductive and other health care, equal pay in the workplace, and more. For example, the Trump Administration finalized a rule that gutted protections under Section 1557 of the Affordable Care Act, the nation's first federal law to broadly prohibit sex discrimination in health care. It has also refused to take steps to implement the U.S. Supreme Court's June 2020 decision in *Bostock v. Clayton County*, *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC*¹ that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation and gender identity as unlawful sex discrimination. And this Administration has severely undermined civil rights protections for transgender students and for survivors of sexual harassment in schools. In the midst of a pandemic that has an acute effect on Black families and in this critical moment of historic uprisings against anti-Black racism, it has been astonishing to witness the Administration's failure to address the needs of our communities and instead support those in power who have perpetrated attacks through its calls for "law and order." The nation is demanding an end to state violence against Black communities and #JusticeforBreonna. Each of these topics deserve detailed consideration by the Committee but I will focus my testimony today on the Administration's dismantling of Title

IX sexual violence protections and its attempts to exclude transgender students from Title IX's protections.

II. Trump Administration's Weakening of the Title IX Regulations and Protections Against Sexual Harassment

In May 2020, the U.S. Department of Education ("Department") announced changes to its regulations implementing Title IX of the Education Amendments of 1972 ("Title IX") by weakening protections against sexual harassment in schools, including protections against sexual assault. This discriminatory and illegal rule was opposed not only by survivors' advocates and women's rights organizations, but also by colleges and universities, superintendents, principals, mental health professionals, and many other stakeholders. The new rule, which went into effect on August 14, 2020, explicitly seeks "a reduction in the number of Title IX investigations" schools undertake by making it harder for sexual harassment victims to come forward, requiring schools to ignore victims in many instances when they do ask for help, and denying victims fair treatment when they try to use the system that is supposed to protect them.

a. The Reality of Sexual Harassment Against Students

Over the past several years, while some schools have made major strides to address sexual assault against students, others still fail to make adequate efforts to support survivors' opportunities to learn in the wake of sexual harassment. Students are still regularly urged to leave school until their assailants graduate,² discouraged from filing formal disciplinary reports or even telling friends about their experience,³ and denied essential accommodations like dorm changes to allow them to live separately from their assailants.⁴ Survivors sometimes still face severe retaliation, including suspension or expulsion, for speaking out about the abuse they faced.⁵

Survivors often experience heavy financial costs, including lost scholarships, additional loans to finance additional semesters, reduced future wages due to diminished academic performance, and hefty expenses for housing changes and medical care that should be provided, free of cost, by colleges and universities.⁶ The harm that inadequate school responses imposes on a survivor's continued education can have a particularly grave impact and long lasting impact for survivors without significant financial means.

Because of the pressure from student advocates⁷ and past administrations,⁸ schools have recently begun to rise to their legal and ethical duty to preserve survivors' educational opportunities.⁹ Without a doubt, there is still much work to be done. Unfortunately, rather than meet calls to strengthen protections against sexual harassment and for survivors, the Department has moved to weaken Title IX's protections.

i. Sexual Harassment is Pervasive in Schools Across the Country and Is Consistently and Vastly Underreported

Students experience high rates of sexual harassment, including sexual assault. In grades 7-12, 56 percent of girls and 40 percent of boys are sexually harassed in any given school year.¹⁰ More than one in five girls ages 14 to 18 are kissed or touched without their consent.¹¹ A 2019 study found that about one in four women and 1 in 15 men experience sexual assault while in college.¹² Native, Black, and Latina girls are more likely than white girls to be forced to have sex when they do not want to do so.¹³ Fifty-six percent of girls ages 14-18 who are pregnant or parenting are kissed or touched without their consent.¹⁴ More than half of LGBTQ students ages 13 to 21 are sexually harassed at school.¹⁵ Nearly one in four transgender and gender-nonconforming students are sexually assaulted during college.¹⁶ Students with disabilities are 2.9 times more likely than their peers to be sexually assaulted.¹⁷

When schools fail to provide effective responses, the impact of sexual harassment and assault can be devastating.¹⁸ Too many individuals who experience sexual assault or other forms of sexual harassment end up dropping out of school because they do not feel safe on campus; some are even expelled for lower grades in the wake of their trauma.¹⁹ Thirty-four percent of college student survivors of sexual assault drop out of college.²⁰

Reporting sexual assault is hard for most survivors. Only 12 percent of college survivors who experience sexual assault report to their schools or the police.²¹ Only 2 percent of girls ages 14 to 18 report sexual assault or harassment.²² Students often choose not to report for fear of reprisal, because they believe their abuse was not important enough,²³ because they are “embarrassed, ashamed or that it would be too emotionally difficult,”²⁴ because they think the no one would do anything to help,²⁵ and because they fear that reporting would make the situation even worse.²⁶ Common rape myths that victims could have prevented their assault if they had only acted differently, wore something else, or did not consume alcohol, only exacerbate underreporting.

Survivors of sexual assault are also less likely to make a report to law enforcement because criminal reporting often does not serve survivors’ best interests or address their most pressing needs. Even when survivors do report to the police, the police cannot provide supportive measures (e.g., counseling services, academic accommodations or adjustments, or changes to dormitory assignments) to survivors to make sure that they feel safe at school and that their access to school is not impeded and police are also often not able to resolve investigations in a timeline within which a student may be seeking a resolution. And some students—especially students of color, undocumented students,²⁷ LGBTQ students,²⁸ and students with disabilities—can be expected to be even less likely than their peers to report sexual assault to the police due to increased risk of being subjected to police violence and/or deportation and negative community experiences with police.

ii. Students Who Do Report Campus Sexual Assault Are Often Ignored and Sometimes Even Punished by Their Schools

Unfortunately, students who reasonably choose not to turn to the police or who report to both their schools *and* the police, often face hostility from their schools when they try to report. Reliance on common rape myths that blame individuals for the assault and other harassment they experience²⁹ can lead schools to minimize and discount sexual harassment reports. An inaccurate perception that false accusations of sexual assault are common³⁰—despite the fact that men and boys are far more likely to be victims of sexual assault than to be falsely accused of it³¹—can also lead schools to dismiss reports of assault and assume that complainants are being less than truthful. Indeed, many students who report sexual assault and other forms of sexual harassment to their school face discipline as the result of speaking up, for engaging in so-called “consensual” sexual activity³² or premarital sex,³³ for defending themselves against their harassers,³⁴ or for merely talking about their assault with other students in violation of a “gag order” or nondisclosure agreement imposed by their school.³⁵ The Center regularly receives requests for legal assistance from student survivors across the country who have been disciplined by their schools after reporting sexual assault.³⁶

Women and girls of color, particularly Black women and girls, already face discriminatory discipline due to race and sex stereotypes.³⁷ Schools are more likely to ignore, blame, and punish women and girls of color who report sexual harassment due to harmful race and sex stereotypes that label them as “promiscuous,”³⁸ and less deserving of protection and care.³⁹ For example, Black women and girls are commonly stereotyped as “Jezebels,” Latina women and girls as “hot-blooded,” Asian American and Pacific Islander women and girls as “submissive, and naturally erotic,” and a history of colonization leads to Native women and girls being sexually objectified.⁴⁰

Studies show that adults view Black girls as more adult-like and less innocent than their white peers, a phenomenon referred to as “adultification,” and that Black girls are stereotyped as “hypersexualized”; as a result, schools are likely to treat their reports of sexual harassment with less seriousness, and more likely to place blame on Black girls for their victimization.⁴¹ Indeed, Black women and girls are especially likely to be punished by schools for their behaviors.⁴²

Similarly, LGBTQ students are less likely to be believed and more likely to be blamed due to stereotypes that they are more “promiscuous,” “hypersexual,” “deviant,” or bring the “attention” upon themselves.⁴³ Students with disabilities, too, are less likely to be believed because of stereotypes about people with disabilities being less credible⁴⁴ and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.⁴⁵

b. Legal and Policy Background of Title IX’s Protections Against Sexual Harassment

For many decades the Department has recognized that sexual harassment is a form of sex discrimination prohibited by Title IX and, accordingly, has accepted administrative complaints by students and school employees against their schools regarding sexual harassment in

education.⁴⁶ In 1992, the Supreme Court held that students who have experienced sexual harassment can seek money damages from their schools in private Title IX lawsuits.⁴⁷ In 1997, with the understanding that Title IX's prohibition against sex discrimination is hollow if a student can be subjected to sexual harassment with impunity, the Department issued its first guidance to educational institutions on the standards that govern their response to sexual harassment.⁴⁸ A year later, in 1998, and then in 1999, the U.S. Supreme Court issued two decisions articulating more stringent liability standards for private Title IX lawsuits seeking money damages in sexual harassment litigation.⁴⁹ The Court, however, explained that even if a recipient's actions in response to sexual harassment do not meet the stringent standards for *monetary liability* in private Title IX lawsuits, the Department can appropriately *administratively enforce* Title IX against a recipient for failing to adequately address sexual harassment as part of its "authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate."⁵⁰

Subsequently, the Department carefully reviewed the Supreme Court's decisions—and in particular focused on whether to apply the Court's stringent standards to the Department's administrative enforcement of Title IX. The Department underwent a notice and comment process before issuing revised harassment guidance in 2001, ultimately deciding that "the administrative enforcement standards reflected in the 1997 guidance remain valid in [the Department's Office for Civil Rights ("OCR")] enforcement actions."⁵¹

The Department's 2001 Guidance was enforced in both Democratic and Republican administrations.⁵² It defined sexual harassment as "unwelcome conduct of a sexual nature."⁵³ The 2001 Guidance required schools to address student-on-student harassment if *any employee* "knew, or in the exercise of reasonable care should have known" about the harassment. In the context of employee-on-student harassment, the 2001 Guidance required schools to address harassment "whether or not the [school] has 'notice' of the harassment."⁵⁴ Under the 2001 Guidance, the Department considered schools that failed to "take immediate and effective corrective action" to be in violation of Title IX.⁵⁵ These standards had appropriately guided the Department's Office for Civil Rights' (OCR) enforcement activities for almost twenty years.

Both the 1997 Guidance and 2001 Guidance were reaffirmed, elaborated upon, and clarified through the Department's 2011 Dear Colleague Letter on Sexual Violence and a series of Questions and Answers issued in 2014.⁵⁶ The 2001 Guidance was also reaffirmed by the Bush Administration in 2006 in a Dear Colleague Letter reminding recipients of their obligations under the 2001 Guidance.⁵⁷ These documents provided additional details and examples to help schools comply with their Title IX obligations when responding to sexual violence, including clarifying that schools were required to respond to a hostile educational environment caused by off-campus incidents. The Department's guidance led to more meaningful action by schools to address sexual harassment and support victims, an increase in reporting by victims to their schools and the Department, more transparency, and greater accountability when institutions failed to comply with Title IX.

Starting in 2017, however, the Trump administration’s Department of Education began removing significant protections for students and employees who experience sexual harassment, rescinding the 2011 and 2014 Title IX guidances in September of that year and issuing “interim guidance” in their place. Just weeks before this rescission, Secretary DeVos minimized the impact of sexual harassment that deprives students of equal access to educational opportunities, claiming, “if everything is harassment, then nothing is.”⁵⁸ Former Acting Assistant Secretary Candice Jackson reinforced the myth of false accusations, claiming that “90 percent” of her office’s Title IX investigations were the result of “drunk[en]” sexual encounters and regret.⁵⁹ Indeed, President Trump himself has repeatedly publicly dismissed and disputed allegations of sexual harassment and violence made by women.⁶⁰ Tellingly, these officials have not expressed the same skepticism of the denials made by men and boys accused of sexual harassment, including sexual assault. Rather, administration officials appear to have been motivated by unlawful sex stereotypes that women and girls are likely to lie about sexual assault and other forms of harassment and by the perception that sexual harassment has a relatively trivial impact on those who experience it. In fact, there has been recent reporting revealing that extremist organizations that advocate on behalf of men’s rights and respondents communicated frequently with Department officials, helping them undo Title IX protections and rewrite the regulations.⁶¹

A year later, on November 29, 2018, the Department issued a Notice of Proposed Rulemaking (“Proposed Rule”) seeking to formally amend the rules implementing Title IX and departing from decades of Department guidance as to Title IX’s requirements and significantly weakening Title IX protections.⁶² The Department received over 124,000 comments on the Proposed Rule—the overwhelming majority in opposition. Numerous commenters reiterated that sexual harassment in education remains highly prevalent yet continues to be vastly underreported and under-investigated, and underscored that many victims are ignored or punished by their schools instead of receiving the help they need to ensure equal educational access. Many commenters expressed deep concern that the Proposed Rule would exacerbate these existing inequities and encourage a climate where significant sexual harassment goes unchecked.

a. The Title IX Final Rule

Nevertheless, in May of this year, in the midst of the COVID-19 pandemic and national emergency, when this Administration should have instead been prioritizing providing much needed resources and relief for students and schools, it made schools less safe by issuing its dangerous Title IX Final Rule. The new rule diverted schools’ already sharply limited resources as many scrambled to design new programs to operate remotely toward creating and implementing complex new policies before the August 14, 2020, effective date. It has unnecessarily exacerbated confusion and uncertainty for students who are currently in pending Title IX investigations and hearings, which have already been disrupted by the pandemic. Because of this, numerous stakeholders urged the Department to suspend this Title IX rulemaking until after the national emergency ends and schools have resumed regular operations—including around 200 survivor advocate and civil rights organizations, 33 higher education associations representing thousands of two- and four-year public and private

colleges and universities, 53 Members of Congress, and 18 state attorneys general. The Department of Education was unmoved.

The Final Rule reverses decades of efforts by Congress, the Executive Branch, and state and local governments, to combat the effects of sexual harassment on equal access to education. As explained further below, without adequate justification or explanation, the Final Rule not only removes protections against sexual harassment and imposes disproportionate burdens on survivors, but also reduces schools' responsibility to respond to sexual harassment—in some cases requiring schools not to respond at all – in contravention of Title IX's mandate to eradicate sex discrimination in schools

The Final Rule is currently being challenged in four separate lawsuits filed by advocacy and direct service organizations, student survivors, and 18 states and the District of Columbia. NWLC is representing four organizations and seven individual survivors in a lawsuit filed in Massachusetts. These lawsuits assert that the Final Rule is unlawful because it is arbitrary and capricious, and NWLC's lawsuit additionally claims that the Final Rule violates the constitution's equal protection guarantee. The Final Rule is also as confusing as it is lengthy; while the Department has attempted to alleviate the confusion it created by providing additional guidance in blog posts and litigation documents, these post hoc pronouncements have only raised even more questions about the Final Rule's applicability.⁶³ Further, by issuing ever-changing and evolving guidance, in some cases just days before the Final Rule took effect, and in other cases several weeks after the Final Rule took effect,⁶⁴ the Department has made it extremely difficult for schools to create policies that comply with the Final Rule and for students to even understand what their Title IX rights are.

Below is a description of only some of problems with the Final Rule.

i. Ignores Costs to Survivors and Aims to Reduce School Investigations of Sexual Harassment Complaints.

Contrary to the unequivocal purpose of Title IX, to prevent and redress sex discrimination in education, the Department's Final Rule will significantly reduce the number of investigations of sexual harassment that schools conduct. Although the Department trumpets that the Final Rule will save schools about \$179 million each year by drastically reducing the number of sexual harassment investigations that schools conduct, it acknowledges that the Department "does not have evidence to support the claim that the final regulations will have an effect on the underlying number of incidents of sexual harassment." Thus, the Department admits the Final Rule will make schools less responsive to sexual harassment, while leaving the incidence of harassment unchanged. As a result, many victims of sexual harassment will find themselves without redress for the discrimination they face. Indeed, in its calculation of costs and benefits, the Department entirely failed to account for the tremendous costs of the Final Rule to students who experience sexual harassment but will no longer be able to report it, obtain fair investigations and outcomes, and/or receive necessary remedies. This failure is particularly inexcusable given that the harms of sex discrimination are precisely those that Title IX seeks to

prevent. The Final Rule also fails to account for medical costs for physical and mental injuries; lost tuition and lower educational completion and attainment for victims who are forced to change majors or drop out of school; lost scholarships for victims who receive lower grades as a result of the harassment or violence; and defaults on student loans as a result of losing tuition or scholarships.⁶⁵

In fact, numerous studies show that a single rape can cost a survivor more than \$240,000,⁶⁶ that the average lifetime cost of dating and domestic violence can exceed \$100,000 for women and \$23,000 for men,⁶⁷ and that the average lifetime cost of rape results in an annual national economic burden of \$263 billion and a population economic burden of nearly \$3.1 trillion over survivors' lifetimes.⁶⁸

ii. Abandons the Requirement that Schools Respond “Reasonably” to Sexual Harassment

Previously, when alerted to sexual harassment, schools were required to respond “reasonably” by investigating, providing remedies, and preventing the harassment from occurring again.⁶⁹ Under the new rule, schools' responses are deemed acceptable as long as their response is not “*clearly unreasonable in light of the known circumstances*” or “*deliberately indifferent*”⁷⁰—regardless of whether the response is effective in restoring the victim's equal access to education. This deliberate indifference standard, established by the Supreme Court in the context of a private right of action against a school for monetary damages, is significantly more forgiving of institutional failures than the Department's previous standard and will substantially undercut schools' responsibility to adhere to Title IX's requirements.⁷¹ The Department itself has admitted that it is “not required to adopt the liability standards applied by the Supreme Court in private suits for money damages,”⁷² yet it has nevertheless chosen to hold schools to a lower standard in addressing sexual harassment than its longstanding precedent requires.

iii. Requires School Action Only When the School Has “Actual Knowledge” of Sexual Harassment

Previously, schools were required to address: (i) any employee-on-student or student-on-student sexual harassment if a “responsible employee” knew or should have known about it, and (ii) all employee-on-student sexual harassment that occurred “in the context of” the employee's job duties, regardless of whether a “responsible employee” knew or should have known about it.⁷³ A “responsible employee” was defined broadly as anyone whom “a student could reasonably believe” had the authority to redress sexual harassment or had the duty to report student misconduct to appropriate school officials.⁷⁴ Under the new rule, institutions of higher education will be allowed to ignore all incidents of sexual harassment unless the Title IX coordinator or a school official with “the authority to institute corrective measures” has “actual knowledge” of the incident.⁷⁵

This means under the new rule, colleges and universities can ignore all sexual harassment by a student or school employee unless one of a small subset of high-ranking school employees

actually knows about the harassment. Colleges and universities won't have any obligation to respond when a student tells a residential advisor, teaching assistant, or professor that they are experiencing sexually harassment. They will not even be obligated to address sexual abuse of a college student by a professor—even if the abuse occurs “in the context of” the professor’s job duties—*unless* the student reports it to the Title IX coordinator or an undefined official with “authority to institute corrective measures.”

As survivors from Michigan State University, University of Southern California, and Ohio State University have pointed out, had the proposed rule previously been in place, their schools would have had no responsibility to stop serial predators like Larry Nassar, George Tyndall, or Richard Strauss—just because the victims reported the abuse to coaches and trainers instead of the “right” employees—even though Nassar, Tyndall, and Strauss sexually abused countless students in the context of their jobs as medical doctors.⁷⁶

iv. Prohibits Schools from Addressing Sexual Harassment Occurring Outside Narrowly-Defined School Programs or Activities

Previously, Department of Education policy required schools to investigate all student complaints of sexual harassment, regardless of where the harassment occurred, to determine if the harassment had affected the student’s ability to participate in classes and other school activities.⁷⁷ This recognized that a survivor’s ability to feel safe in school and learn could be impacted by sexual harassment no matter where it occurs. Under the new rule, however, schools will be required to dismiss⁷⁸ all complaints of sexual harassment that occurs during study abroad programs or that occurs outside of a school program or activity.⁷⁹ According to the Department, the only incidents that occur within a school program or activity (and therefore are not required to be dismissed) are those where the school has “substantial control” over both the respondent and the context of the harassment, or those that occur in a building owned or controlled by a student organization that is officially recognized by a college or university.

Many students experience sexual harassment in off-campus locations. For example, according to a 2014 U.S. Department of Justice report, 95 percent of sexual assaults of female students ages 18-24 occur outside of a school program or activity.⁸⁰ Yet this change in the Final Rule means that a student or teacher who sexually assaults a student after school and in a private location is almost certainly beyond the reach of institutional discipline. In addition, these provisions will limit a recipient’s ability to address sexual harassment occurring on social media or outside of school, even if the conduct results in the victim becoming too afraid to walk around campus out of concern of running into their assailant, or attend class and face their harasser, who could be another student or the instructor. This will have drastic consequences as nearly 9 in 10 college students live off campus,⁸¹ including all community and junior college students, and 41 percent of college sexual assaults involve off-campus parties.⁸² Moreover, nearly all teenagers are online and of individuals ages 12-17, about 20 to 40 percent have been cyber-bullied, which often includes sexual harassment.⁸³

This change will also create inconsistent policies for sexual harassment relative to other student misconduct, prohibiting schools from addressing off-campus sexual harassment even as they address other forms of off-campus behavior that threatens to harm the educational environment, such as drug use or physical assault. Under the Final Rule, schools can continue to respond to underage alcohol consumption at an off-campus party, but will be prohibited from responding to a complaint of sexual harassment that occurs at the same party.

v. Narrows the Definition of “Sexual Harassment” to Exclude Many Harmful Behaviors

Previously, schools were required to investigate all complaints of sexual harassment, which was defined as “unwelcome conduct of a sexual nature.”⁸⁴ Under the new rule, schools will be required to dismiss all complaints that do not meet one of DeVos’s three stringent definitions of “sexual harassment”: (i) unwelcome “quid pro quo” sexual harassment by a school employee (e.g., “I’ll give you an A if you have sex with me”); (ii) an incident that meets the definition of “sexual assault,” “dating violence,” “domestic violence,” or “stalking” under the Clery Act; or (iii) “unwelcome conduct” on the basis of sex that is “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to a school program or activity.⁸⁵

This means under the new rule, schools will arguably be required to ignore many complaints of sexual harassment unless the victim can show that the harassment has been so severe and pervasive that it is affecting their ability to concentrate, do their schoolwork, or attend classes. As a result, victims may be forced to endure repeated and escalating levels of abuse before their complaint can be investigated. Rather than allowing schools to respond to all complaints of sexual harassment, the rule will require victims to first claim that their access to education has suffered as a result of the harassment before their school can investigate.

The revised sexual harassment definition will also create inconsistent requirements for sexual harassment relative to other categories of student or staff misconduct, and confusion for schools responding to intersectional forms of harassment against students, who, for example, are targeted for sexual harassment because of their race or disability. The Department still requires schools to respond to harassment of students based on race, ethnicity, national origin, or disability under the more inclusive standard for creating a hostile educational environment, which is conduct that is “severe, pervasive, or persistent so as to *interfere with or limit* a student’s ability to participate in or benefit from the services.” Further, sexual harassment of individuals protected under both Title IX and Title VII, including students who are employed by their schools and school employees in both K-12 and higher education—will be subject to two conflicting standards given that employees, under Title VII standards, must only show that sexual harassment is severe *or* pervasive – not both as required by the Final Rule.

vi. Prohibits Schools from Investigating Many Complaints When the Victim Has Transferred, Graduated, or Been Pushed Out of School

Under this new rule, students will only be able to file a sexual harassment complaint with a school where they are still “participating in or attempting to participate in the education program or activity” when they file the complaint.⁸⁶ This means that schools will not be allowed to investigate a complaint of sexual harassment—even if the respondent is still enrolled or teaching at the school—if the victim has already graduated, transferred, or dropped out because of the harassment when the victim doesn’t want to re-enroll or stay involved in alumni programs. Similarly, if a visiting high school student is sexually assaulted by a college student or a professor during an admit weekend, the survivor will not be able to file a complaint with that college unless they still wish to enroll there. This provision is particularly egregious given the unequal power dynamic between students, on the one hand, and teachers, coaches, and administrators on the other. A student suffering from sexual harassment at the hands of a coach, for example, may be reluctant to file a formal complaint while the student remains a participant in the program led by the coach.

This rule will tie the hands of schools, preventing them from responding to known sexual harassment, including harassment by individuals who are still affiliated with the school and who could pose a risk of harm or assault to others.

vii. Allows Schools to Dismiss Complaints Because the Respondent Has Graduated, Transferred, or Retired

Under the new rule, schools will be allowed to dismiss complaints—even during a pending investigation or hearing—because the respondent is no longer enrolled in or employed by their school.⁸⁷ This means if a student graduates or transfers to another school after sexually assaulting another student, the school will no longer have to investigate or provide supportive measures to help the survivor continue their education. Similarly, if a teacher retires or resigns after his sexual abuse of many students over several years comes to light, the school will no longer have to investigate to determine the scope of the abuse, the impact of the abuse on students, and whether other employees knew about the abuse but ignored it. Without such an investigation, the school will no longer be required to remedy the hostile environment for the survivors and possibly the broader school community, or take steps to prevent such abuse from happening again.

viii. Establishes an Unfair Presumption of No Sexual Harassment

Under the new rule schools will be required to start all sexual harassment investigations with the presumption that no sexual harassment occurred⁸⁸—even though no such presumption is required for other school investigations of student or employee misconduct, such as physical assault or religious harassment. In other words, schools will effectively be required to presume that all students who report sexual harassment are lying *and* will have to inform complainants and respondents of this when providing them with written notice after the filing of a complaint. This presumption, which improperly imports a criminal law standard into a non-criminal school

discipline process, perpetuates the sexist myth that women and girls frequently lie about sexual assault and other forms of sexual harassment.

This presumption is also inconsistent with parts of the Final Rule requiring “equitable” resolution of complaints of sex discrimination in an educational program or activity;⁸⁹ a presumption in favor of one party against the other is plainly inequitable. Moreover, it conflicts with the Final Rule’s own requirement that “credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.”⁹⁰

ix. Requires Retraumatizing Live Cross-Examination, Removes Schools’ Discretion Over Hearings, and Imposes Sweeping Exclusionary Rules of Relevant Evidence and Testimony

In higher education, survivors and witnesses in sexual harassment investigations will be forced to submit to cross-examination “directly, orally, and in real time” by the respondent’s “advisor of choice” if they want any of their statements to be considered as evidence by the school.⁹¹ The respondent’s advisor could be an angry parent or fraternity brother of the respondent, a faculty member who oversees the survivor’s academic work, or an “attack dog” criminal defense lawyer.

Neither the Constitution nor federal law requires cross-examination in public school proceedings and the majority of courts that have reached the issue have agreed that live cross-examination is not required in public school disciplinary proceedings, as long as there is a meaningful opportunity to have questions posed by a hearing examiner or some other neutral third party. Indeed, the Department “acknowledges that constitutional due process does not require the specific procedures included in the § 106.45 grievance process.”⁹²

Although the Final Rule does not require live cross-examination for children in K-12 institutions, in part based on an acknowledgment that cross-examination is traumatizing and may not yield reliable results when minor children are involved, the Final Rule continues to require live cross-examination of minor children who are sexually harassed if that misconduct occurs in the context of a post-secondary institution. Thus, for example, the Final Rule will require that children attending summer programs or athletic or academic programs at post-secondary institutions or even toddlers in daycares at higher educational institutions, be forced to submit to live cross-examination if they complain of sexual abuse by an adult classmate, professor, or daycare provider and participate in a formal process to resolve their complaint. There is no rational reason why the location of the harassment or assault, rather than the age of the complainant, should mandate that direct, live cross-examination is required. The Department declined to include any exception to live cross-examination for higher education investigations, even for minor children, though data shows that hostile, leading questions are not effective methods of eliciting accurate testimony from children.⁹³

The Final Rule also requires schools to disregard all oral and written statements of any party or witness who declines to testify at a live hearing or who declines to answer every single question

they receive during cross-examination.⁹⁴ This provision, which permits no exceptions, represents a sweeping exclusion of relevant evidence, far above and beyond the Federal Rules of Evidence hearsay rules. It also bears no relationship to the due process and truth-seeking goals that purport to animate them, and in fact, will only serve to reduce the quantum of relevant evidence that a school can consider in sexual harassment investigations. For example, if a survivor refuses to answer or is unable to answer even a *single* cross-examination question—perhaps because it is too traumatizing—then the school will be required to disregard *all* of the survivor’s statements in the formal complaint, at the live hearing, and in all other written or oral evidence—even statements in a video of the incident clearly indicating that the survivor said “no.”⁹⁵ Similarly, if a police officer, nurse, or other witness is unavailable for cross-examination, even if that is for a very good reason, then *none* of their previous written or oral statements in a police report, medical record, or text or email message can be considered as evidence by the school.⁹⁶ The Final Rule acknowledges that schools lack subpoena power, and further acknowledges that “witnesses also are not required to testify and may simply choose not to testify because the determination of responsibility usually does not directly impact, implicate or affect them.”⁹⁷ As a result, schools will frequently be forbidden from relying on relevant, probative evidence in sexual harassment investigations simply because witnesses choose not to testify.

The Final Rule forbids college and graduate schools from designing procedures for hearings that account for the fact that the adversarial and contentious nature of cross-examination will further traumatize those who seek help to address sexual harassment and will discourage many students—both parties and witnesses—from participating in the sexual harassment grievance process. Over 900 mental health experts who specialize in trauma told the Department that subjecting a student survivor of sexual assault to cross-examination by their respondent’s advisor of choice was “almost guaranteed to aggravate their symptoms of post-traumatic stress,” and was “likely to cause serious harm to victims who complain and to deter even more victims from coming forward.”⁹⁸ According to the president of the Association of Title IX Administrators, the requirement of live cross-examination by a respondent’s advisor of choice, “even with accommodations like questioning from a separate room[,] would lead to a 50 percent drop in the reporting of misconduct.”⁹⁹ After the Final Rule was published, the American Psychological Association expressed disappointment in the Final Rule, stating that it was “concerned that provisions in the final rule could lead to underreporting of sexual misconduct, revictimization and/or traumatization of all parties involved,”¹⁰⁰ and added that the Final Rule “lacks the foundation of psychological research and science needed to address acts of sexual misconduct on college campuses.”¹⁰¹

Perhaps most concerning, a requirement that schools conduct live, quasi-criminal trials (without the actual protections of a criminal trial) with live cross-examination only in sexual misconduct investigations—and not in investigations of other types of student or staff misconduct—communicates the toxic and false message that allegations of sexual harassment are uniquely unreliable. This selective requirement is contrary to Title IX’s mandate to prohibit sex discrimination in schools. In sum, the Rule’s unjustified targeting of sexual harassment complainants ensures that many student survivors will be retraumatized or deterred from

coming forward at all, and that many witnesses will refuse to participate in investigatory processes.

x. Requires a Standard of Proof Unfair to Complainants

Previously, schools were required to use a “preponderance of the evidence” standard (i.e., “more likely than not”) in all sexual harassment investigations.¹⁰² This is the same standard that is used by courts in all civil rights cases¹⁰³ and is the only standard of proof¹⁰⁴ that treats both sides equally.

Under the new rule, schools will be able to choose between using the preponderance standard or the much higher standard of “clear and convincing evidence” (i.e., “*highly and substantially* more likely than not”) to determine responsibility for sexual harassment, as long as they use the same standard against student and staff respondents.¹⁰⁵ Because some school employees’ collective bargaining agreements require use of the “clear and convincing evidence” standard for all employee misconduct investigations, some schools will thus be required to use the “clear and convincing evidence” standard in student sexual harassment investigations, even if they continue to use the preponderance standard for all other investigations of student misconduct, like a fist fight or religious harassment.

The Final Rule is a departure from at least twenty-five years of Department policy across three administrations requiring schools to use the preponderance standard to determine whether sexual harassment occurred.¹⁰⁶ It is also a departure from the use of the preponderance standard in campus sexual assault proceedings by the vast majority of educational institutions over the past two decades.¹⁰⁷ Allowing schools to use a “clear and convincing evidence” standard that tilts the scales in favor of respondents and to apply this standard only in sexual harassment investigations is inequitable and discriminatory.

xi. Prohibits Many Supportive Measures for Victims of Sexual Harassment

Supportive measures (or “interim measures”) are reasonable steps that schools are required to take—before, during, or without an investigation—to ensure that sexual harassment does not interfere with a student’s education. Supportive measures can include, for example, changes to class schedules or housing assignments to separate the students, counseling services, or tutoring services.¹⁰⁸ Previously, schools were instructed to minimize the burden of these measures on the complainant.¹⁰⁹ Under the new rule, schools will be prohibited from providing supportive measures that are “disciplinary,” “punitive,” or that “unreasonably burden” the respondent.¹¹⁰ Some schools will likely force victims to change their own classes and dorms to avoid their rapist or abuser, because to avoid making any changes that could burden the respondent.¹¹¹ This is a sharp departure from the policy spanning the entire history of Title IX regulation: that schools must provide the supportive measures that enable a complainant to retain access to educational opportunities, not just the ones that prevent the respondent from being inconvenienced.

xii. Purports to Preempt State and Local Laws That Provide Greater Protections Against Sexual Harassment

The Final Rule claims to preempt any state or local law to the extent that there is a conflict. This means that even if schools are required by state or local law to provide stronger protections for victims of sexual harassment, they will be prohibited from doing so to the extent that such protections conflict with the Final Rule.

For example, state and local laws that require schools to investigate complaints of sexual harassment that: (i) fall short of the Final Rule's narrow definition of harassment, (ii) occur outside of a school program or activity or in a school program or activity outside of the United States, or (iii) are filed by a complainant who is no longer participating in the school's program or activity are purportedly preempted by the Final Rule.

Even if a complainant is able to survive the Final Rule's stringent dismissal rules and is able to initiate a Title IX investigation, their school will be prohibited from following state or local laws providing certain types of protections in investigation procedures. For example, schools will be prohibited from: (i) making no presumptions about the respondent's responsibility, (ii) allowing parties in higher education to ask questions of each other through a neutral third party, (iii) allowing parties and witnesses in postsecondary proceedings to submit written or oral evidence without being subjected to cross-examination at a live hearing, (iv) excluding cross-examination questions that are misleading or unduly prejudicial or that relate to a complainant's "dating or romantic" history, or (v) applying a preponderance of the evidence standard in student investigations where staff investigations are required by a collective bargaining agreement to use a more burdensome standard.

By creating a ceiling on the protections from sexual harassment that states and localities can provide to students and employees who are sexually harassed, the Final Rule radically departs from the longstanding interpretations of Title IX and other federal civil rights laws, as providing a floor of protection from discrimination upon which states and local governments are able to construct additional protections.

xiii. Allows Religious Schools a License to Discriminate on the Basis of Sex Without Notice to Students

Under the previous Rule, religious schools were able to claim religious exemptions from particular Title IX requirements by notifying the Department in writing and identifying which Title IX provisions conflict with their religious beliefs. Under the new rule, the Department of Education has assured schools that they will not be required to give the Department notice they are claiming a religious exemption from Title IX, or give students or their families any notice that they are claiming a religious exemption, *before* they engage in sex discrimination.¹¹² Schools can simply assert a religious exemption *after* they are already under investigation for violating Title IX.¹¹³ Additionally, in another Title IX rule that was published earlier this year,¹¹⁴ DeVos has proposed expanding the religious exemption to allow many more schools to

discriminate based on sex in the name of religion.¹¹⁵ This new proposed rule would allow schools that have only a tangential relationship—or even no relationship—to religion to claim a right to discriminate simply because they subscribe to “moral beliefs or practices.”¹¹⁶ This means that in DeVos’s view, a school could assert a license to discriminate in violation of Title IX based on not only moral principles that often have religious undertones like “modesty” or “purity,” but also common secular principles like “fairness,” “honesty,” or “intellectual freedom.”¹¹⁷ These two Title IX rules, separately and together, will be especially dangerous for women and girls, LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion.

III. Trump Administration’s Attacks Against Transgender Students

In February 2017, one of Secretary DeVos’s first actions was to rescind key civil rights guidance providing best practices for schools on how to comply with Title IX by protecting transgender students from discrimination, including treating students consistent with their gender identity.¹¹⁸ While rescission of the guidance did not change Title IX’s protections against discrimination based on gender identity, it was one of the first indications that the Trump Administration did not care about protecting all students, and in particular, transgender students. The rescinded guidance affirmed what a number of federal courts had already said and continue to say¹¹⁹ – that Title IX protects against discrimination based on gender identity, including in sex-segregated facilities. Rescinding that guidance immediately confused school obligations to protect transgender students, putting their safety and well-being at risk. This is particularly egregious given how vulnerable transgender students are to experiencing harassment, violence, and other forms of discrimination.¹²⁰

On June 15, 2020, the Supreme Court held in the consolidated cases *Bostock v. Clayton County, Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC*¹²¹ that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation and gender identity as unlawful sex discrimination. Not surprisingly, the Trump Administration was on the wrong side of the case and of history, despite the fact that for years the U.S. Equal Employment Opportunity Commission has consistently taken the position that Title VII’s prohibition against discrimination on the basis of sex includes discrimination based on sexual orientation and gender identity.¹²² The Trump Department of Justice, which also enforces Title VII against public employers, argued in support of discrimination against LGBTQ individuals, and in one federal case deciding the issue went so far as to argue that the EEOC did not represent the government and that EEOC’s interpretation of Title VII was not entitled to deference.¹²³ In line with decades of precedent, the U.S. Supreme Court’s decision in *Bostock* has already been extended by federal courts to ensure that Title IX provides that educational environments are safe and affirming places for LGBTQ students.¹²⁴

To date the Administration has not correctly interpreted the *Bostock* decision or acknowledged its application to sex discrimination provisions of other federal antidiscrimination statutes, despite the holdings by our federal courts. The Supreme Court’s holding as to the textual meaning of sex discrimination within our laws applies to protections against sex discrimination contained within all federal civil rights statutory and regulatory provisions. Indeed, federal

courts have routinely relied on the scope of sex discrimination protection provided by the Civil Rights Act of 1964 to inform decisions regarding sex discrimination coverage under the Equal Credit Opportunity Act,¹²⁵ the Fair Labor Standards Act,¹²⁶ the Fair Housing Act,¹²⁷ Title IX of the Education Amendments of 1972,¹²⁸ and many other statutes. Despite the urging of several civil rights organizations,¹²⁹ the Department of Justice has failed to coordinate full implementation of the *Bostock* decision across the federal government, including by instructing federal agencies to withdraw any guidance or instruction that is inconsistent with the Court's holding that discrimination on the basis of sexual orientation, gender identity, and transgender status is unlawful sex discrimination. The Trump Administration is deliberately allowing discriminatory regulations and guidance to persist to permit continuing attacks on the civil rights of LGBTQ people.

Indeed, in two recent Title IX enforcement letters, OCR attempted to limit the reasoning in *Bostock* to only workplaces. Yet, in one letter, OCR opens an investigation tied to discrimination based on sexual orientation stating that the student should not be excluded from participation.¹³⁰ However, in a second letter, it threatens to take the federal funding of a school that has a policy that refuses to exclude transgender students from participation. These decisions are legally incoherent as OCR decides to apply the Supreme Court's holding as to one group of students and not another.

In the matter regarding transgender students, OCR concluded that Title IX does not allow transgender girls to compete against other girls on a sex-segregated team or in a sex-segregated league."¹³¹ This revised decision, citing *Bostock*, follows the Department's May 15, 2020 decision in response to a complaint against the Connecticut Interscholastic Athletic Conference and the Glastonbury Board of Education. In these decisions, the Department threatened to take the extraordinary and rare step of removing federal funding because of an inclusive policy for transgender athletes that allows students to compete on teams consistent with their gender identity. The Department had wrongly concluded that the policy violated Title IX in May, and then reaffirmed its decision after *Bostock* on August 31, 2020. OCR concluded that Title IX regulations authorize single-sex teams based on "biological sex" - presumably one's sex as assigned at birth, as opposed to a person's gender identity, and so Title IX prevents schools from allowing transgender students to participate on sports teams in accordance with their gender identity.¹³² OCR's letter is not only legally incorrect but also, throughout the document, it erases the identities of transgender students and does so through its offensive language and tone. In threatening to remove funding from the Connecticut association and school board, the Department also sends a dangerous message to transgender students that they do not have the right to be affirmed in their gender identity and protected from discrimination, and essentially, threatens schools that are trying to do the right thing, legally and in support of their transgender students, with similar consequences.

OCR's wrong assertion that Title IX's guarantee of equal access to athletics excludes transgender students ultimately hurts all girls and undermines the long legacy of work of ending sex discrimination in sports. As noted, OCR's decision is inconsistent with the growing

number of federal courts, both before and after *Bostock*, that have affirmed Title IX's protections for transgender students, and this OCR decision is inconsistent with ending sex discrimination in schools.

IV. Conclusion

Under the Trump Administration, the Department of Education has only weakened civil rights protections for students, especially for the most vulnerable students. The Department's Title IX Final Rule ignores the devastating impacts of sexual harassment, imports inappropriate legal standards into agency enforcement, relies on sexist stereotypes about survivors, and imposes procedural requirements that force schools to tilt their Title IX investigation processes in favor of respondents to the detriment of survivors and other harassment victims. It will make schools more dangerous for all students, with especial risk to students experiencing sexual harassment who are students of color, pregnant and parenting students, LGBTQ students, and/or students with disabilities, as they are more likely to experience sexual harassment and more likely to be ignored, punished, and pushed out of school entirely.

The Department's attacks against transgender students, who continue to be particularly vulnerable to discrimination and mistreatment, is also unconscionable as well as illegal. Taking swift action in the beginning of the Administration to rescind key civil rights guidance is indefensible and reprehensible given the many experiences of mistreatment that transgender students face, which demands more, not less, protection against discrimination. When students are not safe and protected from discrimination at school, they are denied an education. The Trump Administration's actions ignore this devastating reality, causing greater harm to students who need civil rights protections the most.

¹ *Bostock v. Clayton Cty., Georgia*, 590 U.S. ___, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020).

² Dana Bolger, *Where Rape Gets a Pass*, N.Y. DAILY NEWS (July 6, 2014), <http://www.nydailynews.com/opinion/rape-pass-article-1.1854420> ("In 2011, my sophomore year of college, I was raped and then stalked by a fellow student. When I went to report my assault to my college dean, he encouraged me to take time off, go home, be "safe," focus on my own healing, and put my education on hold - so that the man who raped me could comfortably conclude his.").

³ Anonymous, *On Assault Narratives*, YALE DAILY NEWS (Feb. 1, 2010), <http://yaledailynews.com/blog/2012/02/01/anonymous-on-assault-narratives/>.

⁴ Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

⁵ Annie-Rose Strasser, *University of North Carolina rape victim may be expelled for speaking about her case*, THINKPROGRESS (Feb. 23, 2013), <https://thinkprogress.org/university-of-north-carolina-rape-victim-may-be-expelled-for-speaking-about-her-case-2d6e6b0eb24e>.

⁶ See generally Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106 (2016) (describing the financial impact of gender violence on student survivors).

⁷ Libby Sander, "Quiet no longer, rape survivors put pressure on colleges," *the Chronicle of Higher Education* (Aug. 12, 2013), <http://www.chronicle.com/article/Quiet-No-Longer-Rape/141049>.

⁸ Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2138-39 (2016); Robin Wilson, *2014 Influence List: Enforcer*, *Chronicle of Higher Education* (Dec. 15, 2014), available at

<http://www.chronicle.com/article/enforcer-catherine-e-lhamon/150837> (describing Assistant Secretary for Civil Rights' Catherine Lhamon's efforts to strengthen OCR's Title IX enforcement).

⁹ Letter from the National Women's Law Center, *et al.* to Education Secretary John King (July 13, 2016), *available at* <https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/> ("These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.").

¹⁰ Am. Ass'n of Univ. Women (AAUW), *Crossing the Line: Sexual Harassment at School 2* (2011) [hereinafter *Crossing the Line*], <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

¹¹ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 1* (Apr. 2017) [hereinafter *Let Her Learn: Sexual Harassment and Violence*], *available at* <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence/>.

¹² Ass'n of Am. Univ., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, at ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>.

¹³ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* at 12 (2017) [hereinafter *Let Her Learn: Pregnant or Parenting Students*], *available at* https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf.

¹⁴ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Have Experienced Sexual Harassment* at 3 (2018) [hereinafter *Let Her Learn: Sexual Harassment*], *available at* <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/2018-10-01-SH-toolkit-FINAL.pdf>.

¹⁵ GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools 26* (2018) [hereinafter 2017 National School Climate Survey], *available at* <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

¹⁶ *AAU Campus Climate Survey*, *supra* note 12, at 13-14.

¹⁷ Nat'l Women's Law Ctr., *Let Her Learn: Stopping School Pushout for Girls With Disabilities 7* (2017) [hereinafter *Let Her Learn: Girls with Disabilities*], *available at* <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

¹⁸ *E.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

¹⁹ *E.g.*, Alexandra Brodsky, *How much does sexual assault cost college students every year?*, WASH. POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year>.

²⁰ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015), *available at* <https://doi.org/10.1177/1521025115584750>.

²¹ Nick Anderson and Scott Clement, *College Sexual Assault: 1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015) [hereinafter Washington Post Poll], <https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/>.

²² *Let Her Learn: Sexual Harassment*, *supra* note 14 at 2.

²³ *AAU Campus Climate Survey*, *supra* note 12 at 36.

²⁴ *Id.*

²⁵ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

²⁶ 2017 National School Climate Survey, *supra* note 15, at 27.

²⁷ See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, N.Y. TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

²⁸ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey: Executive Summary 12* (Dec. 2016) [hereinafter *2015 U.S. Transgender Survey*], <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

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- ³² See, e.g., Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Nora Caplan-Bricker, *“My School Punished Me”*, SLATE (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, *‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped.
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- ³⁴ NAACP Legal Defense and Educ. Fund, Inc. & Nat’l Women’s Law Ctr., *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014) [hereinafter *Unlocking Opportunity*], https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf.
- ³⁵ See, e.g., Tyler Kingkade, *When Colleges Threaten To Punish Students Who Report Sexual Violence*, HUFFINGTON POST (Sept. 9, 2015), https://www.huffingtonpost.com/entry/sexual-assault-victims-punishment_us_55ada33de4b0caf721b3b61c.
- ³⁶ For example, NWLC recently litigated on behalf of three student survivors who were punished or otherwise unfairly pushed out of their high schools when they reported sexual harassment, including sexual assault. Nat’l Women’s Law Ctr., *Miami School Board Pushed Survivor of Multiple Sexual Assaults Out of School, Says NWLC* (Jan. 15, 2019), <https://nwlc.org/press-releases/miami-school-board-pushed-survivor-of-multiple-sexual-assaults-out-of-school-says-nwlc>; Nat’l Women’s Law Ctr., *Pennridge School District Consistently Pushes Survivors of Sexual Harassment Out of School, Says NWLC* (Aug. 9, 2017), <https://nwlc.org/press-releases/pennridge-school-district-consistently-pushes-survivors-of-sexual-harassment-out-of-school-says-nwlc>; Nat’l Women’s Law Ctr., *NWLC Files Lawsuit against PA School District for Failing to Address Sexual Assault of High School Student* (May 31, 2017), <https://nwlc.org/press-releases/nwlc-files-lawsuit-against-pa-school-district-for-failing-to-address-sexual-assault-of-high-school-student>.
- ³⁷ Nat’l Women’s Law Ctr., *Let Her Learn: A Toolkit To Stop School Pushout for Girls of Color* 1 (2016) [hereinafter *Let Her Learn: Girls of Color*], available at <https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color>.
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- ⁴⁰ Cantalupo, *supra* note 38, at 24-25.
- ⁴¹ *Girlhood Interrupted*, *supra* note 39, at 2-6.
- ⁴² For example, The Department’s 2013-14 Civil Rights Data Collection (CRDC) shows that Black girls are five times more likely than white girls to be suspended in elementary and secondary school, and that while Black girls represented 20 percent of all preschool enrolled students, they were 54 percent of preschool students who were suspended. U.S. Dep’t of Education, Office for Civil Rights, *A First Look: Key Data Highlights on Equity and Opportunity Gaps in Our Nation’s Public Schools*, at 3 (June 7, 2016; last updated Oct. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>.

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- ⁴³ See, e.g., Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2118 (2018), <http://cardozolawreview.com/heterosexism-rules-evidence>; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>.
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- ⁴⁶ U.S. Dep't of Educ., Office for Civil Rights, Policy Mem., Antonio J. Califa, Director for Litigation Enforcement and Policy Services (Aug. 31, 1981) ("Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex . . . that denies, limits, provides different, or conditions the provision of aids, benefits, services, or treatment protected under Title IX."); Dep't of Educ., Office for Civil Rights, *Sexual Harassment: It's Not Academic Pamphlet* 5-6 (1988), available at <https://files.eric.ed.gov/fulltext/ED330265.pdf> (requiring education institutions, where sexual harassment is found, to "take immediate action to stop and prevent further harassment, as well as initiate appropriate remedial measures").
- ⁴⁷ *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75-76 (1992).
- ⁴⁸ 62 Fed. Reg. 12,034 (Mar. 13, 1997) ("1997 Guidance").
- ⁴⁹ See *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).
- ⁵⁰ *Gebser*, 524 U.S. at 292.
- ⁵¹ See U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- ⁵² These standards have been reaffirmed time and time again, in 2006 by the Bush Administration, in 2010, 2011, and 2014 in guidance documents issued by the Obama Administration, and even in the 2017 guidance document issued by the current Administration. U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Harassment* (Jan. 25, 2006) [hereinafter 2006 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* (Oct. 26, 2010) [hereinafter 2010 Guidance], <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201010.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* at 4, 6, 9, &16 (Apr. 4, 2011) [hereinafter 2011 Guidance], <https://www2ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; U.S. Dep't of Educ. Office for Civil Rights, *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017) [hereinafter 2017 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.
- ⁵³ 2001 Guidance, *supra* note 51, at 2.
- ⁵⁴ *Id.*
- ⁵⁵ *Id.*
- ⁵⁶ 2011 Guidance, *supra* note 52; 2014 Guidance, *supra* note 52.
- ⁵⁷ U.S. Dep't of Educ. Office for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.
- ⁵⁸ Dep't of Educ., *Secretary DeVos Prepared Remarks on Title IX Enforcement* (Sept. 7, 2017) [hereinafter *DeVos Prepared Remarks*], available at <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.
- ⁵⁹ Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.
- ⁶⁰ When White House officials Rob Porter and David Sorensen resigned amidst reports that they had committed gender-based violence, the president tweeted: "Peoples [sic] lives are being shattered and destroyed by a mere

allegation. ... There is no recovery for someone falsely accused—life and career are gone. Is there no such thing any longer as Due Process?” Donald Trump (@realDonaldTrump), TWITTER (Feb. 10, 2018, 7:33 AM), <https://twitter.com/realDonaldTrump/status/962348831789797381>. See also Jacey Fortin, *Trump’s History of Defending Men Accused of Hurting Women*, N.Y. TIMES (Feb. 11, 2018), <https://www.nytimes.com/2018/02/11/us/trump-sexual-misconduct.html> (about harassment claims against former Fox News host, Bill O’Reilly, Trump said: “I don’t think Bill did anything wrong,” adding, “I think he’s a person I know well. He is a good person,” and about sexual harassment claims against former chairman of Fox News, Roger Ailes, Trump said he “felt very badly” for him and that “I can tell you that some of the women that are complaining, I know how much he’s helped them.”); Lisa Bonos, *Trump asks why Christine Blasey Ford didn’t report her allegations sooner. Survivors answer with #WhyIDidntReport*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/news/soloish/wp/2018/09/21/trump-asks-why-christine-blasey-ford-didnt-report-her-allegation-sooner-survivors-answer-with-whyididntreport/?utm_term=.3ca0d0017c36 (about sexual assault claims against Justice Brett Kavanaugh, Trump doubted Dr. Ford’s account, stating “if the attack on Dr. Ford was as bad as she says, charges would have been immediately filed with local Law Enforcement Authorities”); Allie Malloy, et al., *Trump Mocks Christine Blasey Ford’s Testimony, Tells People to ‘Think of Your Son’*, CNN (Oct. 3, 2018), <https://www.cnn.com/2018/10/02/politics/trump-mocks-christine-blasey-ford-kavanaugh-supreme-court/index.html> (reporting on Trump mocking Dr. Ford’s testimony before the Senate Judiciary Committee);⁶¹ Hélène Barthélemy, *How Men’s Rights Groups Helped Rewrite Regulations on Campus Rape*, THE NATION (Aug. 14, 2020), <https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/>.

⁶² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (Nov. 29, 2018).

⁶³ The text of the Final Rule, which took effect on August 14, 2020, is silent as to whether the Final Rule applies retroactively. While the rule preamble provided some clarity by stating that schools cannot reopen *previously completed* investigations to re-adjudicate them under the Final Rule, it too failed to address how schools should handle investigations that were *still pending* as of August 14, 2020 and how schools should handle new investigations of sexual harassment that *occurred* before August 14, 2020 but were *reported* after August 14, 2020. 85 Fed. Reg. at 30,061. On August 5, 2020, nine days before the Final Rule went into effect, the Department published a blog post announcing that the Final Rule applies only to alleged sexual harassment that occurred on or after August 14, 2020, and that “[w]ith respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.” *The Title IX Rule Is Effective on August 14, 2020, and Is Not Retroactive*, U.S. Dep’t of Education (Aug. 5, 2020), <https://www2.ed.gov/about/offices/list/ocr/blog/20200805.html>. This blog guidance, however, raises further questions as to whether this means the Department will enforce the 2001 Title IX guidance (which it rescinded in August 2020) or the 2011 and 2014 Title IX guidances (which it rescinded in September 2017) for incidents that occurred during the applicable time periods.

⁶⁴ U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers Regarding the Department’s Final Title IX Rule* (Sept. 4, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf>.

⁶⁵ Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), <http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf> (The cost to survivors is beyond financial. Survivors are three times more likely to suffer from depression, six times more likely to have post-traumatic stress disorder, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs, and four times more likely to contemplate suicide).

⁶⁶ White House Council on Women and Girls, *Rape and Sexual Assault: A Renewed Call to Action* 15 (Jan. 2014), https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf.

⁶⁷ Inst. for Women’s Policy Research, *Dreams Deferred: A Survey on the Impact of Intimate Partner Violence on Survivors’ Education, Careers, and Economic Security* 8 (2018), https://iwpr.org/wp-content/uploads/2018/10/C474_IWPR-Report-Dreams-Deferred.pdf.

⁶⁸ Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52(6) AM. J. PREV. MED. 691, 698, (2017), available at https://stacks.cdc.gov/view/cdc/45804/cdc_45804_DS1.pdf.

⁶⁹ 2001 Guidance, *supra* note 51, at 15-16.

⁷⁰ 34 C.F.R. § 106.44(a); see also § 106.44(b)(2).

⁷¹ 2001 Guidance, *supra* note 51, at 15–16.

⁷² Proposed Rule at 61,468, 61,469 (citing *Gebser*, 524 U.S. at 292); *see also* *Davis*, 526 U.S. at 639 (distinguishing “the scope of the behavior that Title IX proscribes” from behavior that “can support a private suit for money damage”).

⁷³ 2001 Guidance, *supra* note 51, at 10, 12, 13.

⁷⁴ *Id.* at 13.

⁷⁵ 34 C.F.R. § 106.30(a) (defining “actual knowledge”); *see also* § 106.44(a).

⁷⁶ Letter from 21 Ohio State University Survivors to Betsy DeVos, Sec’y, Dep’t of Educ., and Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 3 (Jan. 30, 2019), <https://www.publicjustice.net/wp-content/uploads/2019/01/Comments-of-Ohio-State-Survivors-on-Title-IX-NPRM.pdf>; Letter from 82 Student Survivors of Larry Nassar at Michigan State University, George Tyndall at University of Southern California, and Richard Strauss at Ohio State University to Betsy DeVos, Sec’y, Dep’t of Educ., and Kenneth L. Marcus, Ass’t Sec’y for Civil Rights, Dep’t of Educ., at 2 (Nov. 1, 2018), <https://www.publicjustice.net/wp-content/uploads/2018/11/November-1-Survivor-Letter-to-ED.pdf>.

⁷⁷ 2017 Guidance, *supra* note 52, at 1 n.3; 2014 Guidance, *supra* note 52, at 29; 2011 Guidance, *supra* note 52, at 4; 2001 Guidance, *supra* note 51, at 5.

⁷⁸ Although the Department has “clarified” that “dismissal of a formal complaint because the allegations do not meet the Title IX definition of sexual harassment, does not preclude a recipient from addressing the alleged misconduct under other provisions of the recipient’s own code of conduct,” this so-called clarification creates even more confusion. *See* 85 Fed. Reg. at 30,037–38. Permitting the use of other grievance procedures under a school’s code of conduct creates uncertainty for complainants and respondents alike, as well as potential liability for schools if their classification of conduct as outside of the definition of sexual harassment is challenged.

⁷⁹ 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i).

⁸⁰ U.S. Dep’t of Justice, Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* at 6 (Dec. 2014), <https://perma.cc/8VZL-H6F5>.

⁸¹ Rochelle Sharpe, *How Much Does Living Off-Campus Cost? Who Knows?*, N.Y. Times (Aug. 5, 2016), <https://www.nytimes.com/2016/08/07/education/edlife/how-much-does-living-off-campus-cost-who-knows.html> (87 percent).

⁸² United Educators, *Facts From United Educators’ Report - Confronting Campus Sexual Assault: An Examination of Higher Education Claims* (2015), https://www.ue.org/sexual_assault_claims_study.

⁸³ *Crossing the Line*, *supra* note 10, at 8.

⁸⁴ 2001 Guidance, *supra* note 51, at 2.

⁸⁵ 34 C.F.R. § 106.30(a) (defining “sexual harassment”); *see also* § 106.45(b)(3)(i). Note: The new rule does *not* create new Title IX protections against domestic violence, dating violence, and stalking. Title IX prohibits all forms of *sexual* harassment, which includes non-sexual conduct associated with domestic violence, dating violence, and stalking.

⁸⁶ 34 C.F.R. § 106.30(a) (defining “formal complaint”).

⁸⁷ § 106.45(b)(3)(ii).

⁸⁸ 34 C.F.R. § 106.45(b)(1)(iv).

⁸⁹ § 106.8(c).

⁹⁰ § 106.45(b)(1)(ii).

⁹¹ 34 C.F.R. § 106.45(b)(6)(i).

⁹² 85 Fed. Reg. at 30,053.

⁹³ Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children’s Coached Reports*, 21 *Psychology, Pub. Policy, & L.* 10 (2015) (cross-examination led children to recant their initial true allegations of witnessing transgressive behavior and significantly reduced children’s testimonial accuracy for neutral events); Saskia Righarts et al., *Young Children’s Responses to Cross-Examination Style Questioning: The Effects of Delay and Subsequent Questioning*, 21(3) *Psychology, Crime & L.* 274 (2015) (cross-examination resulted in a “robust negative effect on children’s accuracy”; only 7% of children’s answers improved in accuracy); Fiona Jack and Rachel Zajac, *The Effect of Age and Reminders on Witnesses’ Responses to Cross-Examination-Style Questioning*, 3 *J. of Applied Research in Memory and Cognition* 1 (2014) (“adolescents’ accuracy was also significantly affected” by cross-examination-style

questioning); Rhiannon Fogliati & Kay Bussey, *The Effects of Cross-Examination on Children's Reports of Neutral and Transgressive Events*, 19 *Legal & Crim. Psychology* 296 (2014) (cross-examination led children to provide significantly less accurate reports for neutral events and actually reduced the number of older children who provided truthful disclosures for transgressive events); Joyce Plotnikoff & Richard Woolfson, *'Kicking and Screaming': The Slow Road to Best Evidence*, in *Children and Cross-Examination: Time to Change the Rules?* 21, at 27 (John Spencer & Michael Lamb eds. 2012) (a hostile accusation that a child is lying "can cause a child to give inaccurate answers or to agree with the suggestion that they are lying simply to bring questioning to an end").

⁹⁴ § 106.45(b)(6)(i).

⁹⁵ 85 Fed. Reg. at 30,346, 30,347, 30,349.

⁹⁶ *Id.* at 30,349.

⁹⁷ *Id.* at 30,356.

⁹⁸ Letter from 902 Mental Health Professionals and Trauma Specialists to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 4-5 (Jan. 30, 2019) ("Letter from 902 Mental Health Professionals and Trauma Specialists"), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-104088>.

⁹⁹ Andrew Kreighbaum, *New Uncertainty on Title IX*, *INSIDE HIGHER EDUCATION* (Nov. 20, 2018).

¹⁰⁰ Press Release, Am. Psychological Ass'n, More Difficult to File Claims of Campus Sexual Assault Under New Education Dept. Title IX Rule (May 6, 2020), https://www.apa.org/news/press/releases/2020/05/campus-sexual-assault?utm_source=facebook&utm_medium=social&utm_campaign=apa-press-release&utm_content=title-ix-statement-may6.

¹⁰¹ *Id.*

¹⁰² 2014 Guidance, *supra* note 52, at 13, 26; 2011 Guidance, *supra* note 52, at 10-11.

¹⁰³ Letter from Leadership Conference on Civil and Human Rights to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 7 (Jan. 30, 2019) [hereinafter Letter from Leadership Conference on Civil and Human Rights], <http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf>.

¹⁰⁴ Letter from National Women's Law Center to Kenneth L. Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., at 33 (Jan. 30, 2019) [hereinafter Letter from National Women's Law Center], <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf>.

¹⁰⁵ 34 C.F.R. § 106.45(b)(1)(vii).

¹⁰⁶ *See, e.g.*, 2003 OCR Letter to Georgetown University, at 1; 1995 OCR letter to Evergreen College, at 8.

¹⁰⁷ Heather M. Karjane, et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 120 (2002).

¹⁰⁸ 2014 Guidance, *supra* note 52, at 32-33; 2011 Guidance, *supra* note 52, at 16-17; 2001 Guidance, *supra* note 51, at 16.

¹⁰⁹ 2014 Guidance, *supra* note 52, at 33; 2011 Guidance, *supra* note 52, at 15-16.

¹¹⁰ 34 C.F.R. § 106.30(a) (defining "supportive measures").

¹¹¹ Letter from 36 U.S. Senators to Betsy DeVos, Sec'y, Dep't of Educ., at 6-7 (Jan. 30, 2019) [hereinafter Letter from 36 U.S. Senators], <https://www.help.senate.gov/imo/media/doc/013019%20Proposed%20Title%20IX%20reg%20caucus%20letter.pdf>.

¹¹² 34 C.F.R. § 106.12(b).

¹¹³ *Id.*

¹¹⁴ 85 Fed. Reg. 3190.

¹¹⁵ National Women's Law Center, *NWLC Submits Comment Opposing Betsy DeVos's Title IX Proposal to Enable Sex Discrimination in the Name of Religion* (Feb. 18, 2020), <https://nwlc.org/resources/nwlc-submits-comment-opposing-betsy-devos-title-ix-proposal-to-enable-sex-discrimination-in-the-name-of-religion>.

¹¹⁶ *Id.* at 15, 21.

¹¹⁷ *Id.* at 21.

¹¹⁸ Andrew Kreighbaum, *Transgender Protections Withdrawn*, *INSIDE HIGHER EDUCATION* (Feb. 23, 2017), <https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections>; "Civil and Human Rights Community Condemns Rescission of Title IX Guidance Clarifying Protections

for Transgender Students,” (Feb. 22, 2017), <https://civilrights.org/2017/02/22/civil-and-human-rights-community-condemns-rescission-of-title-ix-guidance-clarifying-protections-for-transgender-students/>.

¹¹⁹ *E.g., Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430, at *21 (4th Cir. Aug. 26, 2020), *as amended* (Aug. 28, 2020) (holding school board’s application of restroom policy against transgender plaintiff violated Title IX); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) (holding that “Title IX protects students from discrimination based on their transgender status,” including against the school board’s discriminatory bathroom policy).

¹²⁰ Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts*, 2017, 63 MORBIDITY AND MORTALITY WEEKLY REPORT 67, 69 (Jan. 25, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf> (finding that transgender students, who represented 1.8% of high school respondents, faced far higher rates of assault and harassment and dating violence than their peers: nearly one-quarter (24%) of transgender students had been forced to have sexual intercourse, compared to 4% of male cisgender students and 11% of female cisgender students; nearly one-quarter (23%) experienced sexual dating violence, compared to 4% of male cisgender students and 12% of female cisgender students; More than one-quarter (26%) experienced physical dating violence, compared to 6% of male cisgender students and 9% of female cisgender students).

¹²¹ *Bostock v. Clayton Cty.*, Georgia, 590 U.S. ___, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020).

¹²² See *Baldwin v. Dep’t of Transp.*, EEOC Appeal No. 0120133080 (July 15, 2015); *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

¹²³ <https://www.reuters.com/article/us-otc-doj/once-again-trump-doj-busts-convention-splits-government-in-high-profile-employment-case-idUSKBN1AC32U>

¹²⁴ *Grimm*, No. 19-1952, 2020 WL 5034430, at *21; *Adams*, 968 F.3d at 1286.

¹²⁵ *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000).

¹²⁶ *Hall v. BNSF Railway Co.*, Case No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878 (W.D. Wash. Sept. 22, 2014).

¹²⁷ *Wetzel v. Glen St. Andrew Living Community*, 901 F.3d 856 (7th Cir. 2018); *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017).

¹²⁸ *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Miles v. New York University*, 979 F. Supp. 248, 250 n.4 (S.D.N.Y. 1997).

¹²⁹ https://assets2.hrc.org/files/assets/resources/DOJ-BostockEnforcement-Letter-07162020.pdf?_ga=2.2166064.1083509169.1598544249-207335731.1598544249

¹³⁰ U.S. Dep’t of Educ., Office for Civil Rights, Letter from Kimberly M. Richey, Acting Ass’t Sec’y for Civil Rights, to Shelby County Schools, OCR Complaint No. 04-20-1409, at 1 (Aug. 31, 2020) [hereinafter OCR Letter to Shelby County], <https://www2.ed.gov/about/offices/list/ocr/letters/20200831-letter-of-notification.pdf>.

¹³¹ U.S. Dep’t of Educ., Office for Civil Rights, Letter from Kimberly M. Richey, Acting Ass’t Sec’y for Civil Rights, to Connecticut Schools, Case No. 01-19-4025, at 34 (Aug. 31, 2020) [hereinafter OCR letter to Connecticut Schools], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>.

¹³² OCR Letter to Connecticut Schools, *supra* note 131, at 33-36; OCR Letter to Shelby County, *supra* note 131, at 2 n.1.