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June 11, 2021

SUBMITTED VIA EMAIL TO T9PUBLICHEARING@ED.GOV

The Honorable Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202-5076

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Ave, SW
Washington, DC 20202-5076

RE: Written Comment - Title IX Public Hearing (Sexual Harassment and LGBTQ Discrimination)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The National Education Association (“NEA”) appreciates the opportunity to offer testimony on how the U.S. Department of Education (“ED”) can improve enforcement of Title IX of the Education Amendments of 1972 (“Title IX”) to protect against all forms of sex discrimination. The NEA’s more than three million members play a crucial role in preventing and addressing sexual harassment of our K-12 students, as well as ensuring that all students can learn and thrive in school, regardless of sex, including sexual orientation and gender identity. We focus here on the K-12 environment because of the unique challenges it presents, and the particular expertise of the NEA as a representative of millions of K-12 educators across the country. The NEA believes that effective anti-harassment policies and early intervention to prevent and address harassment and discrimination are imperative to protecting child safety and well-being, ensuring full and equal access to education, and building the foundation for healthy relationships and positive attitudes of respect and inclusion among peers.

For purposes of this testimony, we incorporate by reference our comments to ED’s Notice of Proposed Rulemaking, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” Docket No. ED-2018-OCR-0064, available [here](#) and attached to this email. While we will not repeat the arguments made in that comment letter, we highlight some of our primary concerns and call ED’s attention to several additional areas of critical importance to students and educators in our K-12 schools. As explained in more detail below, the NEA believes that ED must take proactive steps to promote learning environments that are free from sexual harassment; engage in rulemaking to resolve problems created by the 2020 Title IX sexual harassment regulations, and provide interim guidance on addressing harassing behavior that may not be deemed actionable under those regulations; provide best practices on informal resolution, including how to best employ

restorative justice procedures; and issue guidance to help educators address discrimination and harassment of LGBTQ students.

ED must take proactive steps to help K-12 schools promote environments free from sexual harassment and supportive of healthy relationships.

Educators know that creating safe and equitable school environments for all our students requires far more than prohibiting impermissible conduct. Rather, it begins with understanding diverse school climates and providing the infrastructure, training, and resources that schools need to design and implement policies and provide ongoing, comprehensive support to students at various stages of development and with different needs.

As a general matter, ED should require schools to issue sexual harassment policies, provide educators and staff with sexual harassment training, and utilize anonymous surveys about sexual harassment and school climate. Schools should seek the input of educators, students, families, and members of the education community from diverse backgrounds when developing policies, trainings, and surveys. ED should require schools to issue clear statements about the rights of students and educators to a school environment free from sexual harassment and should require that schools ensure that students and educators are aware of and understand anti-harassment policies. This could include training educators on the policy, posting the policy in conspicuous locations around the school, making the policy easily accessible on the school's website, training students about the policy as part of school orientation events, and including copies of the policy in student materials, such as the student handbook.

Any sexual harassment training schools offer must go beyond just defining prohibited conduct. The training should be comprehensive. It should help students and educators understand what behavior constitutes sexual harassment, the harms of sexual harassment, and the school's procedures for reporting sexual harassment, options for students and educators who experience harassment, and information about supportive services for targets of harassment. The training should focus on services that are trauma-informed and take into account the unique experiences, harms and needs of students of color, students with disabilities, and LGBTQ students.¹

Schools and districts should also conduct surveys about sexual harassment and school climate.² These surveys may uncover gaps in reporting sexual harassment, reveal student and

¹ See, e.g., Thomas, M. Shelley, et al. "Trauma-Informed Practices in Schools Across Two Decades: An Interdisciplinary Review of Research." *Review of Research in Education*, vol. 43, no. 1, Mar. 2019, pp. 422–452: <https://journals.sagepub.com/doi/pdf/10.3102/0091732X18821123>; Mary Ellen Flannery, "How Trauma is Changing Children's Brains," *NEA Today*, May 17, 2016: <https://www.nea.org/advocating-for-change/new-from-nea/how-trauma-changing-childrens-brains> (discussing the impact of childhood trauma on schooling); Addressing Race and Trauma in the Classroom: A Resource for Educators. National Center for Child Traumatic Stress (2017): https://www.nctsn.org/sites/default/files/resources/addressing_race_and_trauma_in_the_classroom_educators.pdf see also VJ Felitti, et al. "Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults. The Adverse Childhood Experiences (ACE) Study." *American Journal of Preventative Medicine*, Vol 14 (1998).

² See White House Task Force to Protect Students from Sexual Assault "Climate Surveys: Useful Tools to Help Colleges and Universities in Their Efforts to Reduce and Prevent Sexual Assault," Department of Justice Archives, April 2014: <https://www.justice.gov/archives/ovw/page/file/910426/download>; [National Center on Safe Supportive Learning Environments](https://www.nctsn.org/sites/default/files/resources/addressing_race_and_trauma_in_the_classroom_educators.pdf), "School Climate Measurement," American Institutes for Research, (2021): <https://safesupportivelearning.ed.gov/topic-research/school-climate-measurement>.

educator misunderstandings about what constitutes sexual harassment or how the reporting procedures work, and provide important information about whether students and staff feel that the administration protects, respects, and supports them in preventing and responding to sexual harassment. Surveys that include demographic information, including race, gender, LGBTQ status, and special education status should be used to identify and respond to any disproportionate sexual harassment experienced by particular groups of students.

In addition, ED should encourage schools to offer comprehensive, age-appropriate sexual health education courses in all K-12 schools. Studies show that students who receive comprehensive sexual health education are less likely to experience or engage in sexual violence, including sexual harassment, and also that a majority of students want their school-based sexual health and education courses to cover emotional aspects of romantic relationships.³ The NEA believes that all students pre-K through adult should have access to such health curricula.⁴ Several states have sexual health education policies that either require or encourage sexual health education curriculum that covers healthy relationships, sexual decision making and self-discipline, refusal skills and personal boundaries, consent, dating and sexual violence prevention, and information about sexual orientation and gender identity.⁵

Educators also need the support of well-trained Title IX coordinators. ED should reinstate the Dear Colleague Letter on Title IX Coordinators issued in 2015 and rescinded during the Trump Administration. The guidance advised that every institution must have a Title IX Coordinator, that Title IX Coordinators must be adequately trained, be visible and accessible, have independence and authority, be free of conflicts of interest, have full-time roles with full-time resources, and maintain institutional knowledge.⁶ Knowledgeable and well-trained Title IX coordinators are necessary resources for educators who are already tasked with a broad array of responsibilities, and who need to have a local point of contact for navigating often-revised rights and responsibilities around sexual harassment.

Finally, ED should advise schools on how they can use American Rescue Plan funds and other federal grants to support students who have experienced sexual violence, including sexual harassment and assault, and other forms of trauma during the pandemic. As districts bring on additional counselors, social workers, and nurses, schools must ensure that support for students who have experienced sexual violence is explicitly included in its mental health supports. In addition to funds already allocated to districts under the American Rescue Plan, ED should set up grant programs or innovation programs to assist schools that are taking proactive steps to address student trauma.

³ Girls for Gender Equity, *How Comprehensive Sexual Health Education Can Decrease Sexual Harassment* (2019), https://campaigns.ggenyc.org/wp-content/uploads/2021/01/Sex-Ed-Prevents-Harassment_External-Copy.pdf.

⁴ NEA, 2020/2021 Handbook, Resolution B-52-54, Health Education, Sex Education, & HIV/AIDS Education, available at: https://www.nea.org/sites/default/files/2021-04/NEA_Handbook_2020-2021.pdf

⁵ See, e.g., sexual harassment policies in [California](#), [Colorado](#), [Maryland](#), [New Jersey](#), [Oregon](#), [Washington, D.C.](#), and [Washington State](#). The National Women's Law Center has also recommended model curriculum: [A K-12 Sexuality Education Curriculum by Advocates for Youth](#).

⁶ Dear Colleague Letter, April 24, 2015: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>.

ED should engage in rulemaking to resolve problems created by the 2020 Title IX sexual harassment regulations and provide guidance on addressing harassment that is not recognized as actionable under the 2020 regulations.

As explained in detail in the NEA’s Comments to the Trump Administration’s Notice of Proposed Rulemaking, the 2020 sexual harassment regulation’s narrowing the definition of sexual harassment and additional barriers to reporting and addressing harassment is at odds with Title IX’s mandate and destructive to the progress of schools toward creating safer, more inclusive, and equitable learning environments for all students.⁷ The NEA calls on ED to engage in rulemaking to address significant problems with the 2020 regulations.

ED must amend the definition of what conduct rises to the level of sexual harassment. In previous guidance, the Office of Civil Rights defined harassment as “unwelcome conduct of a sexual nature,” but the Trump Administration regulation limits actionable harassment to “unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access” to education. Under this definition, adults in the workplace are more protected against harassment than children in schools are.⁸ The definition also creates a higher standard for alleging harassment based on sex, as compared to harassment based on other protected categories, including race. Sexual harassment and violence disproportionately impact girls of color, LGBTQ students, and students with disabilities.⁹ For children who experience intersectional harassment -- for example, sexual harassment that draws on racial stereotypes -- having competing standards makes it significantly more difficult and confusing to seek relief for harassing behavior.

ED should amend its definition of actionable sexual harassment so that a single, consistent standard applies to all unwelcome conduct and harassment, whether sexual or racial in nature. We agree with the position of survivor advocate and civil rights organizations, as articulated in the written testimony of the National Women’s Law Center, that ED should apply uniform standards for other forms of sex-based harassment, including harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions; as well as harassment based on other protected traits, including race, color, national origin, and disability.

A new rule must also include recourse for students who suffer any form of off-campus harassment that effectively denies them access to or the benefit of education programs or activities. Holding schools responsible for off-campus behavior is particularly important in the context of higher education, where students often gather off-campus to study, work, and socialize. However, off-campus conduct also impacts K-12 students, particularly when it occurs online.¹⁰ Cyberbullying and online harassment is a persistent problem for children and teens.

⁷ See [NEA Comment](#).

⁸ See [NEA Comment](#) pages 7-8.

⁹ See, e.g., *Let Her Learn: Sexual Harassment and Violence*, *supra* note 16 at 2-3; Human Rights Campaign, *Growing Up LGBT in America* (2012) at 16, available at http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf; Gay, Lesbian, and Straight Educ. Network, *The 2013 National School Climate Survey* (2014) at xvi, available at http://www.glsen.org/sites/default/files/2013%20National%20School%20Climate%20Survey%20Full%20Report_0.

¹⁰ See [NEA Comment Letter](#) pages 7-8.

During the pandemic, the prevalence of cyberbullying dramatically increased. Unfortunately, for approximately half of students experiencing cyberbullying, the perpetrators were their own classmates.¹¹ Notwithstanding this clear connection between online harassment and the education environment, the 2020 Title IX sexual harassment regulations largely excluded online harassment from the definition of sexual harassment that would be actionable under Title IX. ED should specifically address sexual harassment in online forums that impact a student's equal access to education based on sex.

ED must also protect students who report sexual harassment from retaliation and discipline. Title IX already prohibits direct retaliation, *see Jackson v. Birmingham Bd. Of Education*, 544 U.S. 167, 173-74 (2005), but ED should also ensure that students who come forward about experiencing sexual harassment or assault do not suffer additional consequences as a result of reporting.¹² ED should prohibit schools from disciplining students for conduct disclosed in their complaints. For example, schools must not punish students for substance use violations when they disclose that they were drinking alcohol before an assault. ED should also prohibit schools from punishing students for conduct resulting from the sexual harassment or assault they report. For example, schools must not discipline students for unexcused absences when they avoid attending classes with someone who has assaulted or harassed them. In addition, students who have been forced to transfer schools due to sexual harassment should not be shut out from relief under Title IX; ED should amend the definition of sexual harassment contained in the 2020 regulations to incorporate harassment of former students, including those who transferred or dropped out due to the sexual harassment they experienced.

Until these problems can be fully addressed in new rulemaking, ED must issue guidance regarding forms of harassment that may be outside the scope of the 2020 regulation, and provide clear standards by which schools may address harmful conduct before it rises to the level of actionable sexual harassment under the current regulation. Specifically, ED should provide schools and educators with guidance and tools to address online harassment. ED should also provide detailed guidance on how, as suggested in the 2020 Rule, schools can develop codes of conduct and other policies that prohibit and address harassing behavior that may not rise to the level of actionable sexual harassment or fit within the narrow definition of harassment under the 2020 Rule.

ED should provide guidance on and best practices for using appropriate informal procedures for addressing sexual harassment, including restorative justice practices.

In the 2020 regulation § 106.45(b)(9), ED provided for the use of informal procedures in sexual harassment cases, noting in the preamble to the final rule that recipients “retain the right and ability to use the disciplinary process as an educational tool rather than a punitive tool.” However, ED provided little guidance or examples of alternative procedures. ED should provide guidance on when recipients can address sexual harassment under less formal procedures than a full Title IX investigation, and what procedures are acceptable.

¹¹ Rachel Parker, “2020 Special Report: Cyberbullying in the Age of COVID-19,” *vpnMentor.com*, 2021: <https://www.vpnmentor.com/blog/special-report-cyberbullying-in-the-age-of-covid-19/>.

¹² *See* Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting* (2021), <https://www.knowyourix.org/thecostofreporting>.

Specifically, ED should issue guidance that discusses ways that schools may use restorative justice practices to address sexual harassment, which have been shown to have better outcomes for all involved.¹³ Over the last few decades, school districts across the country have turned to restorative justice practices as alternatives to harsh and racist zero tolerance policies and other forms of exclusionary discipline.¹⁴ But a successful restorative justice program is not simply a replacement for punitive discipline programs. It is a comprehensive transformation of the entire school culture, aligned with restorative justice values of “respect, dignity, and mutual concern for all members of the learning community; a commitment to justice and equity; and a belief in the value and worth of each person.”¹⁵

ED should encourage districts to adopt and implement restorative justice practices and offer guidance and models for how to do so. For example, in California, the Oakland Unified School District has integrated restorative justice principles into the all aspects of the school, including professional development, relationships with community partners to implement trauma-informed practices and conflict resolution, use of positive behavioral supports, inclusion of parents and families in school climate and discipline issues, and peer-to-peer programs.¹⁶ The NEA’s Center for Advocacy and Outreach also partnered with Denver Public Schools and other allies to develop a guide to restorative justice practices.¹⁷

ED must issue guidance on discrimination and harassment of LGBTQ students pursuant to the Supreme Court’s *Bostock* decision and executive actions to support LGBTQ rights.

Lesbian Gay Bisexual Transgender Queer/Questioning (“LGBTQ”) students experience high rates of bullying, victimization, and harassment at school on the basis of their actual or perceived sexual orientation or gender identity, or that of their associates.¹⁸ This bullying, victimization, and harassment has led to negative educational outcomes for LGBTQ students, including higher rates of dropping out, higher rates of absenteeism, and lower postsecondary school aspirations.¹⁹ LGBTQ students also report higher rates of anxiety, depression, and suicide attempts.²⁰

¹³ See discussions about restorative justice by ED in the preamble to the final rule [here](#) (longer discussion of restorative justice in SH context), [here](#), [here](#) and [here](#).

¹⁴ See NEA, [2020/2021 Handbook](#), *Discipline and the School-to-Prison Pipeline*, pp 411-415.

¹⁵ Anne Gregory & Katherine R. Evans. *The Starts and Stumbles of Restorative Justice in Education: Where Do We Go from Here?* Boulder, CO: National Education Policy Center (Jan. 2020): <http://nepc.colorado.edu/publication/restorative-justice>.

¹⁶ For more information on restorative justice in Oakland, visit the Oakland Unified School District’s page on Restorative Justice: <https://www.ousd.org/Page/12326>.

¹⁷ Yolanda Anyon, *Taking restorative practices school-wide: Insights from three schools in Denver*. Denver, CO: Denver School-Based Restorative Practices Partnership (2016).

¹⁸ GLSEN, The 2019 National School Climate Survey, Experiences of Discrimination at School, pp. 39-43: <https://www.glsen.org/research/2019-national-school-climate-survey>.

¹⁹ GLSEN, The 2019 National School Climate Survey, Hostile School Climate, Educational Outcomes, and Psychological Well-Being, pp. 45-54: <https://www.glsen.org/research/2019-national-school-climate-survey>.

²⁰ Anxiety & Depression Assoc. of America, Find Help | LGBTQ+ | Facts and Statistics, <https://adaa.org/find-help/by-demographics/lgbtq#Facts>; Julia Raifman, et al. “Sexual Orientation and Suicide Attempt Disparities Among US Adolescents: 2009–2017,” *PEDIATRICS* Volume 145, number 3, March 2020: <https://pediatrics.aappublications.org/content/pediatrics/145/3/e20191658.full.pdf>.

NEA members know that educators play an important role in the lives of LGBTQ youth, as they often “come out” or disclose their LGBTQ identities to others during their adolescence. Creating a welcoming and safe school environment for our LGBTQ students, staff, and families makes our school community more welcoming and safe to all. Educational personnel are often sources of support, resources, and information to assist and support students and student learning, which includes their emotional health.²¹ Our members want to protect LGBTQ students from discrimination and harassment but need clear rules, particularly as the legal landscape shifts following the Supreme Court’s decision last summer in *Bostock v. Clayton County*, ___ U.S. ___, 140 S. Ct. 1731, 1737 (2020).

ED must issue detailed guidance on what constitutes discrimination and harassment against students based on sexual orientation and gender identity. We agree with the position of LGBTQ advocates, as articulated in the written testimony of the Gay, Lesbian and Straight Education Network (GLSEN), that ED must define “on the basis of sex” to include discrimination based on gender identity, gender expression, transgender status, sexual orientation, sex stereotypes, and sex characteristics.

The guidance should also, at a minimum, clarify that discrimination includes excluding students from any educational activity because of their sexual orientation or transgender status; misgendering transgender students by using the wrong pronouns; refusing to use a name selected by a transgender student to affirm his or her gender identity; disclosing a student’s transgender or nonbinary status to other members of the school community or the student’s family without the student’s consent; prohibiting students from participating in sports and other sex-segregated activities that match their gender identity; prohibiting students from using restrooms, locker rooms, and other sex-segregated facilities that align with their gender identity; imposing dress codes that prohibit students from wearing clothing that is consistent with their gender identity; and bullying or harassing students based on their actual or perceived sexual orientation or gender identity, or the actual or perceived sexual orientation and gender identity of their associates.

This guidance is crucial to protect LGBTQ youth from discrimination and harassment, especially in light of the attacks on transgender youth in state legislatures across the country.

In addition to issuing guidance, ED should encourage schools to create an inclusive and supportive environment for their LGBTQ educators and students, by adopting gender-affirming policies, creating Gender & Sexualities Alliances (GSAs), abolishing their dress codes or adopting gender-neutral dress codes, incorporating LGBTQ history into school curricula, and ensuring that sexual health education is inclusive of LGBTQ concerns and relationships.²²

Conclusion

The NEA believes that all students, regardless of sex, race, special education status, sexual orientation, and gender identity, deserve a chance to learn in an environment free from sexual harassment. By issuing new guidance that protects the rights of LGBTQ youth, clarifies

²¹ GLSEN, The 2019 National School Climate Survey, Availability of School-Based Resources and Supports, pp. 61-62: <https://www.glsen.org/research/2019-national-school-climate-survey>.

²² Comprehensive sexual health education may be especially important for LGBTQ youth and for preventing harassment of LGBTQ youth. See Hannah Slater, LGBTQ-Inclusive Sex Education Means Healthier Youth and Safer Schools, *Center for American Progress*, Jun. 21, 2013: <https://www.americanprogress.org/issues/lgbtq-rights/news/2013/06/21/67411/lgbt-inclusive-sex-education-means-healthier-youth-and-safer-schools/>.

and resolves issues created by the 2020 sexual harassment regulations, and promotes the use of restorative justice practices in all school communities, ED will provide schools with the tools they need to create those environments.

Sincerely,

/s/

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/s/

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