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Submitted via www.regulations.gov

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

Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights
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Re: ED Docket No. ED-2021-OCR-0166, RIN 1870-AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

Dear Secretary Cardona and Assistant Secretary Lhamon,

Family Equality is the nation’s leading organization for lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+)-headed families and those who wish to form them. For over 40 years, Family Equality has worked to advance legal and lived equality for LGBTQI+ families. Family Equality is the only national organization exclusively dedicated to securing justice and equality for LGBTQI+ parents and their children by advancing legal and lived equality for all families, including in schools. As such, we are pleased to submit this comment letter in response to the Department of Education’s (“the Department”) proposed rulemaking on Title IX of the Education Amendments of 1972 (Title IX), that would protect the rights of LGBTQI+ students and families by expressly affirming that anti-LGBTQI+ discrimination is prohibited in schools that receive federal funding.¹

The proposed rules are imperative in addressing widespread discrimination against LGBTQI+ students and families in K-12 schools, and advance the education equity priorities laid out by President Biden’s Executive Orders on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals; Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity; and Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.² Specifically, among other things, the proposed rules reaffirm that Title IX’s

¹ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Proposed Title IX Rule), 87 Fed. Reg. 41390, 41571 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), available at <https://federalregister.gov/d/2022-13734>.

² Executive Order 14075 of June 15, 2022, “Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals,” 87 Fed. Reg. §118 (June 21, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-06-21/pdf/2022-13391.pdf>; Executive Order 14021 of March 8, 2021, “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity,” 86 Fed. Reg. §46 (March 11, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>; Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). 86 Fed. Reg. §14 (January 25, 2021) <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>.

protection of students and families from discrimination based on sex, includes sexual orientation, and gender identity. They also make key changes to harmful rules put in place by the Trump administration by strengthening protections for LGBTQI+ students and parents who face sexual harassment both on and off campus. Finally, these proposed rules strengthen protections for pregnant and parenting students and clarify the responsibility of educational institutions to provide reasonable accommodations to allow pregnant and parenting students to succeed in their educational program.

In addition to the comments below, Family Equality also has signed onto comment letters submitted by the National Woman’s Law Center (“NWLC”),³ the Gay, Lesbian & Straight Education Network (“GLSEN”)⁴, and the Leadership Conference on Civil and Human Rights.⁵ We both echo and agree in full with the comments and recommendations set forth in these letters.

LGBTQI+ Students and Families

Approximately 2 million LGBTQI+ youth in the United States identify as LGBTQI+,⁶ and a significant number of children have a LGBTQI+ parent, many of whom are school-aged. In 2015, it was estimated that between 2 million and 3.7 million children under age 18 had a LGBTQI+ parent.⁷ And, a 2019 Family Equality study revealed that 77% of LGBTQI+ Millennials (ages 18-35 in 2019) are either already parents or are considering having children, with up to 3.8 million LGBTQI+ Millennial Americans considering expanding their families in the coming years.⁸ LGBTQI+ families will continue to be more prevalent in educational institutions and thus more impacted by historical inequalities and ongoing discrimination and harassment which LGBTQI+ people face when interacting with the education system.

Sex-based discrimination and harassment is an all-too-common experience for LGBTQI+ students and families. According to GLSEN’s 2019 National School Climate Survey, nearly 3 in 5 LGBTQI+ students reported experiencing discrimination at school and 86% reported bullying and harassment.⁹ Students with LGBTQI+ parents also face harassment and discrimination in schools, with a 2008 report finding that 40% of these students reported verbal harassment at school based on their LGBTQ parents.¹⁰ Anti-LGBTQI+ discrimination and harassment directly harms the ability of

³ NWLC Comment Letters, Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

⁴ GLSEN Comment Letter, RE: Nondiscrimination on the Basis of Sex (including Sexual Orientation, Gender Identity, Sex Characteristics, and Sex Stereotypes) in Federally Funded Education Programs or Activities (87 FR 41390).

⁵ Leadership Conference on Civil and Human Rights, Comment Letter RE: Docket ID ED-2021-OCR-0166.

⁶ Conron, K.J., *LGBT Youth Population in the United States*, The Williams Institute, UCLA, (September 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

⁷ Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, The Future of Children, (Fall 2015), https://futureofchildren.princeton.edu/sites/futureofchildren/files/media/marriage_and_child_wellbeing_revisited_25_2_full_journal.pdf.

⁸ Family Equality (2019) *LGBTQ Family Building Survey*, <https://www.familyequality.org/fbs>.

⁹ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools*. New York: GLSEN, https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

¹⁰ Kosciw J. G., Diaz E. M., *Involved, Indivisible, Ignored: The Experiences of Lesbian, Gay, Bisexual, and Transgender Parents and Their Children in Our Nation’s K-12 Schools* (2008), New York, NY: GLSEN, <https://files.eric.ed.gov/fulltext/ED500474.pdf>.

students to thrive in schools, both academically and in their mental wellbeing.¹¹

Anti- LGBTQI+ discrimination will intensify in the wake of state policy proposals aimed at stigmatizing LGBTQI+ people. Over 300 anti-LGBTQI+ state bills were introduced in 2022 alone,¹² including several bills that target LGBTQI+ students and families in schools. At least a dozen states introduced so called “Don’t Say Gay and Trans Bills,” which clearly aim to exclude and erase LGBTQI+ students and families from educational programming and the classroom. The first of these laws to pass is being applied so conservatively that at least one school district has instructed teachers to remove “safe space” stickers denoting their classroom and themselves as safe for LGBTQI+ students in need of support.¹³ Ultimately the “Don’t Say Gay and Trans Bills” have promoted a hostile environment that seeks to force LGBTQI+ students into the closet and undermines the ability of LGBTQI+ parents to be involved in their children’s education.¹⁴ As Secretary Cardona stated when the Florida “Don’t Say Gay and Trans Bills” went into effect, these laws simply put “students in danger of bullying and worse mental health outcomes.”¹⁵

In this environment, Title IX protections are important to ensure that no one is denied equal access to their education because of anti-LGBTQI+ discrimination and harassment. The Title IX rules promulgated under the Trump administration in May 2020 hollowed out the rights of individuals who were impacted by sex discrimination, harassment, and assault by creating unnecessary obstacles to reporting and investigations and by acknowledging only the most extreme cases of discrimination and harassment. We opposed those changes at the time, just as we celebrate the following changes that the Department has proposed that will undo the harm of these prior regulations, while clearly articulating that Title IX protections apply to LGBTQI+ students and families.

Definition of Sex-Based Discrimination

Discrimination against LGBTQI+ students and families is a harmful and common occurrence in our educational system. It can create an environment so difficult to learn that it has been described as “like walking through a hailstorm.”¹⁶ Nearly three in five LGBTQI+ students reports being impacted by institutional discrimination in their school.¹⁷ These practices include unfair disciplinary measures, aggressive enforcement of school dress codes, preventing the creation of LGBTQI+ clubs or safe spaces, and direct exclusion from academic programs. And yet, some courts and previous administrations have declined to apply Title IX protections to LGBTQI+ individuals despite this

¹¹ *Id.*

¹² Freedom for All Americans, Anti-LGBTQ Legislative Tracker, <https://freedomforallamericans.org/legislative-tracker/anti-lgbtq-bills/>.

¹³ Sachs, Sam, “Pasco Schools order removal of ‘safe space’ stickers showing support for LGBTQ students,” NBC News, September 2, 2022, <https://www.wfla.com/news/pasco-county/pasco-schools-order-removal-of-safe-space-stickers-showing-support-for-lgbtq-students/>.

¹⁴ Hatzipanagos, Rachel, “After Florida Passes Bill, LGBTQ Parents Ask: Which Parents’ Rights?,” The Washington Post, May 9, 2022, <https://www.washingtonpost.com/nation/2022/05/09/lgbtq-parents-dont-say-gay/>.

¹⁵ “Statement from U.S. Secretary of Education Miguel Cardona on “Don’t Say Gay” Law Going into Effect Today,” US Department of Education, July 1, 2022, <https://www.ed.gov/news/press-releases/statement-us-secretary-education-miguel-cardona-dont-say-gay-law-going-effect-today>.

¹⁶ <https://www.hrw.org/report/2016/12/08/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools>

¹⁷ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools. New York: GLSEN, https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

discrimination being a clear case of discrimination based on sex. While the language of Title IX has always encompassed these protected characteristics, the Supreme Court’s ruling in *Bostock v. Clayton County* has made it even more clear that discrimination based on sexual orientation and gender identity is sex-based discrimination. Department of Justice took the position, based on *Bostock*, that sexual orientation and gender identity were included in Title IX protections in a 2021 memorandum, and this was further affirmed by the “White House’s Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.”¹⁸ Even in the wake of this, challenges to Title IX’s applicability to sexual orientation and gender identity have continued.¹⁹ As such, it is important for the Department to clearly articulate that sexual orientation and gender identity are protected characteristics under Title IX in order to eliminate the continued uncertainty that LGBTQI+ students and families face as they seek remedies for discrimination and harassment.

The Department’s new proposed regulation Section 106.10, affirming that discrimination based on sex includes discrimination on the basis of “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity” is imperative to combat these incorrect interpretations of Title IX and to enshrine these protected characteristics into codified law. By providing this clarity, millions of people throughout the country who are LGBTQI+ or part of a LGBTQI+ family will be able to assert their Title IX rights with no question that their rights are a vital part of Title IX’s prohibition of sex-based discrimination.

Furthermore, proposed Section 106.31 is a lifeline for transgender and gender non-conforming students who continue to face disproportionate rates of discrimination in schools. It is estimated that 77% of transgender students have faced some level of institutional discrimination at school.²⁰ This number is startling, but not surprising given a relentless political focus against transgender people in many parts of the country. Examples of discrimination can include being forced to use bathrooms, locker rooms, and other facilities which do not align with the student’s gender identity. They also include unfair disciplinary measure which may punish transgender students for behaviors consistent with their gender identity. The proposed rule clarifies that adopting a policy or practice which prevents a person from participating in an education program or activity consistent with the person’s gender identity is prohibited discrimination. We support these changes and hope that as these rules are implemented schools will be held accountable to end the remarkably high levels of discrimination that transgender students face.

Definition of Sex-Based Harassment

According to the GLSEN’s 2019 National School Climate Survey, LGBTQI+ students who experience discrimination at school are significantly more likely to have missed school, have lower GPAs, and faced disciplinary measures at school.²¹ LGBTQI+ students who consider dropping out of

¹⁸ Karlan, Pamela S., Department of Justice, “Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972,” March 26, 2021.

¹⁹ <https://www.politico.com/news/2022/07/16/education-departments-title-ix-guidance-transgender-students-00046209>

²⁰ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools*. New York: GLSEN, https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

²¹ *Id.*

school cite harassment and discriminatory practices as reasons for doing so.²² Despite being impacted so negatively by discrimination, many LGBTQI+ students show great resiliency and continue to persist despite their challenges, a fact which can currently be used against them if they wanted to report a case of harassment. In 2020 the Trump administration changed Title IX rules stating that harassment in schools must be severe, pervasive, objectively offensive and must effectively deny someone access to a school program to be classified as sexual harassment. This standard ignores an entire range of difficulties that LGBTQI+ students and families face when subjected to harassment by making it difficult to demonstrate a hostile environment unless the student dropped out or was unable to go to school. It implies that LGBTQI+ individuals must endure multiple severe incidents of harassment which directly impact their ability to learn before they can seek relief under Title IX.

Under the proposed rules, LGBTQI+ students and families will be protected from harassment that restricts their ability to learn in a safe environment. Proposed Section 106.2 defines hostile environment harassment as “unwelcome sex-based conduct that is sufficiently severe or pervasive, that... [it] denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.” Notably, the harassment does not need to be so severe as to cause a student to drop out of school to receive Title IX protections. This would be a return to the clear and sensible standard used by the Department for over a decade before the Trump administration changes to Title IX rules in 2020.

Furthermore, for LGBTQI+ students and families, some of the most pernicious forms of discrimination and harassment happen off-campus at school related events. For example, aggressive and harassing behaviors that directly impact the ability of students and families to exercise their academic rights have been recorded at school board meetings.²³ And, sexual harassment often occurs over social media or other online venues, and can severely damage a student’s ability to learn.²⁴ Proposed Section 106.11 requires educational institutions to address all sex-based discrimination and sex-based hostile environments which occur in their educational programs or activities, whether on- or off-campus. This is a much-needed change which will encourage LGBTQI+ students and families to report these incredibly harmful forms of discrimination and harassment.

Prevention of Sex-Based Discrimination and Harassment

Despite the clear and persistent danger that anti-LGBTQI+ discrimination and harassment poses in schools, the majority of reports of harassment by students are ignored.²⁵ Over half of the victims of sex-based harassment never report incidents of harassment to school staff, and almost three in four students who are targeted by sex-based harassment believe that school staff will do nothing about the harassment even if reported.²⁶ LGBTQI+ students who reported discrimination often continue to face

²² *Id.*

²³ <https://www.nbcwashington.com/news/local/northern-virginia/loudoun-school-board-transgender-student-policy-race-equity/2708185/>, <https://news.yahoo.com/gay-student-talking-bullying-massachusetts-202301304.html>.

²⁴ Hill, Catherine & Kearn, Holly, “Crossing the Line”: Sexual Harassment at School at 11, 25. American Association of University Women (Nov 2001), available at <https://www.aauw.org/research/crossing-the-line/>.

²⁵ Kosciw, J. G., Clark, C. M., Truong, N. L., & Zongrone, A. D. (2020). The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation’s schools. New York: GLSEN, https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

²⁶ *Id.*

discrimination throughout the school year and were less likely to receive a formal investigation than other complainants.²⁷ Acknowledging sex-based discrimination and harassment in the law is only meaningful if school officials are held accountable for protecting LGBTQI+ students and families. We believe in a world where sex-based discrimination and harassment are not only condemned, but also eliminated through rigorous enforcement of civil rights protections. As such, we applaud the Department in taking steps to ensure that institutions and school-based officials are held accountable in addressing and ending sex-based harassment and discrimination related to their school activities.

Proposed Section 106.44 would require schools to take “prompt and effective action” to any sex-based discrimination that has occurred, prevent its recurrence, and remedy its effects. We strongly support this proposed rule and urge the Department to continue to provide guidance to schools on ways to prevent LGBTQI+ discrimination and harassment through clear enforcement of Title IX and inclusive practices which build a safe space for all students. Furthermore, we agree with the recommendation in GLSEN’s comment letter that the Department adopt a preponderance of evidence standard for all Title IX investigations.²⁸ Adopting this standard would recognize that LGBTQI+ students and families have historically been unable to successfully seek redress for the pain and suffering caused by sex-based discrimination and harassment and would empower those facing harassment in schools to speak out and report it. Finally, we believe that the Department’s proposed rule 106.8(c) requiring schools to provide a notice of nondiscrimination will make it easier for LGBTQI+ families to file discrimination and harassment complaints. We urge the Department to require that the notice explicitly states that Title IX covers sexual orientation and gender identity to ensure that students and families are aware of their rights. We hope the Department’s implementation of the rule will include family-facing resources such as FAQs which will further ensure the process of filing complaints is clear and easy to understand.

Protections for Pregnant and Parenting Students

There are many students, including LGBTQI+ students, who are pregnant and parenting while in school whose education may be impeded by discrimination or a lack of accommodation. While often overlooked, LGBTQI+ youth can be at higher risk of unintended pregnancy than their peers, or are least as likely as their peers to be pregnant or parenting while in school.²⁹ The Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization* eliminating the constitutional right to abortion access and reproductive care for millions of Americans is certain to have an impact on the pregnancy and parenting status of LGBTQI+ youth who will require federal protections to ensure that they can continue to pursue their education.

Proposed Section 106.40 clarifies that educational institutions cannot discriminate on the basis of a student’s “current, potential, or past parental, family, or marital status” as well as a student’s “current, potential, or past pregnancy or related conditions.” The proposed rule also enumerates accommodations and modifications that schools must make to allow pregnant and parenting students to participate in educational programs, including individualized accommodations, voluntary leaves

²⁷ *Id.*

²⁸ GLSEN Comment Letter, RE: Nondiscrimination on the Basis of Sex (including Sexual Orientation, Gender Identity, Sex Characteristics, and Sex Stereotypes) in Federally Funded Education Programs or Activities (87 FR 41390).

²⁹ <https://journalistsresource.org/health/teen-pregnancy-bisexual-lesbian-heterosexual-women/>; <https://nwlc.org/resource/a-call-to-action-to-support-lgbtqi-pregnant-expectant-and-parenting-students/>.

of absences, and clean, private space for lactation. We support the proposed rule for strengthening protections for all pregnant and parenting students, and we will continue to support the implementation of this rule to ensure that pregnant and parenting LGBTQI+ students receive the benefit of these protections alongside their peers. We also agree with recommendations outlined in NWLC’s comment letters which suggest additional clarifications to ensure that all parenting types both perceived and actual are protected under Title IX.³⁰

Implementation of the Proposed Rules

We strongly support the proposed Title IX rules and believe that the impact of these rules to reduce harassment and discrimination against LGBTQI+ students and families will depend on implementation and further guidance from the Department. With that in mind, we offer the following recommendations for implementation of the proposed rules:

- **Provide Technical Guidance to Schools on Identifying and Preventing Sex-Based Discrimination and Harassment:** We applaud the proposed rules which require schools to take “prompt and effective” action to end and prevent discrimination. The Department should continue to issue technical guidance and provide support to schools to uplift best practices to create school environments free from discrimination against LGBTQI+ students and families. Resources like Family Equality’s Toolkit for Creating LGBTQI+ Friendly Classrooms and GLSEN’s Safe Space Kit provide examples of policies and practices that guidance can help promote.³¹
- **Clarify Title IX Guidance for Educators and School Administrators Impacted by Anti-LGBTQI+ Legislation:** The recent series of anti-LGBTQI+ legislation, sometimes referred to as the “Don’t Say Gay and Trans Bills,” target and seek to erase LGBTQI+ students and families from all aspects of school. For example, Florida’s newly enacted law is a “near-categorical ban on addressing LGBT people and issues in virtually every aspect of the life of Florida’s schools.³²” These laws put educators in difficult situations when state law and policy suggest actions that would run afoul of Title IX protections. These revisions to Title IX will require clear guidance to educators and school administrators on discriminatory practices and policies that must be avoided to ensure Title IX compliance.
- **Ensure LGBTQI+ Students and Families Are Informed of their Rights:** The proposed Title IX rules specifically clarify that discrimination and harassment based on sexual orientation, gender identity, sex characteristics, and sex stereotypes are violations of Title IX. LGBTQI+ students and families must be informed that they are expressly protected by Title IX. This is especially true in states, like Florida, where newly enacted laws run afoul of Title IX protections. The Department should collaborate with advocacy organizations to inform students and families of their rights under Title IX. The Department also should provide guidance to schools to ensure that the Title IX notices they are required to provide to students and families specifically enumerate these protected characteristics.

³⁰ NWLC Comment Letters, Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

³¹ Toolkit: Creating LGBTQI+ Friendly Classrooms, Family Equality, <https://www.familyequality.org/resources/creating-safe-inclusive-schools-for-lgbtq-families-2/>; The Safe Space Kit: Guide to Being an Ally to LGBT Students, GLSEN (2016), <https://www.glsen.org/sites/default/files/GLSEN%20Safe%20Space%20Kit.pdf>.

³² Plaintiffs’ Memorandum of Law In Opposition To Defendants’ Motions To Dismiss, *Equality Florida v. DeSantis*, 4:22-cv-00134-AW-MJF (Northern District of Florida, 2022)

- **Engage Students, Parents, and Advocates to Inform Implementation:** The recent Executive Order on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals directs the Department to create a Working Group on LGBTQI+ Students and Families, we urge that this working group meet with students, families, and advocates to better understand their lived experiences and needs and the challenges that exist despite federal protections. The working group also should be involved in implementation, outreach, and engagement efforts surrounding the new Title IX rules.

We appreciate the administration’s ongoing efforts to ensure that all LGBTQI+ students and families can pursue an education in a safe and affirming environment. We hope to continue working with the Department as the new Title IX rules are finalized and implemented, and we are always more than happy to discuss our comments and recommendations. Please contact Nikhil Vashee at nvashee@familyequality.org with any question or if we can provide you with additional information. Thank you for considering our comments.

Respectfully submitted,

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