September 12, 2022

Alejandro Reyes
Program Legal Director
Office of the Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

RE: Notice of Proposed Rulemaking; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance – Docket No. ED-2021-OCR-0166-0001

Dear Mr. Reyes:

On behalf of the American Psychological Association (APA), we write to offer public comments on the Notice of Proposed Rulemaking (NPRM) on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, published in the Federal Register by the Department of Education on July 12, 2022, Docket No. ED-2021-OCR-0166-0001.

APA is the nation’s largest scientific and professional organization representing the discipline and profession of psychology, with more than 133,000 members and affiliates who are clinicians, researchers, educators, consultants, and students in psychology. Through the application of psychological science and practice, the association’s mission is to have a positive impact on critical societal issues.

Sexual misconduct, including sexual assault, is an unfortunately common occurrence on college campuses. Estimates of sexual assaults of college women are remarkably consistent over time, despite efforts to address the problem.

Surveys regularly show that approximately 15 to 20 percent of college women report experiencing rape or attempted rape during their college career, and that over 50 percent report experiencing some form of unwanted sexual contact. Higher rates of victimization are found among women who are members of historically marginalized sexual and ethnic identities. Women of color report high levels of assault and harassment, with Native American and Alaskan Indian women at the highest risk. While men can be victims of sexual assault as well, most often by other men, it typically occurs at lower rates than women. Transgender and gender non-conforming college students appear to be at significantly higher risk for sexual assault and harassment compared to their cisgender counterparts. In addition, students with disabilities also report higher rates of sexual violence victimization compared to students without disabilities.

These phenomena have a significant negative impact on learning and academic success, compromising students’ ability to complete college and contribute to society. Experiencing sexual misconduct before entering or during their postsecondary education threatens to hamper or derail student development and success beyond higher education, with potential implications throughout their entire lives.
Upon its enactment 50 years ago, Title IX’s goal was to broadly guarantee all students equal educational opportunities free from discrimination based on sex. While Title IX largely lived up to its promise, a number of actions taken in the ensuing years weakened these crucial civil rights protections, including against sexual harassment. This includes the current Title IX rule finalized in 2020 that APA opposed due to its lack of grounding in psychological science, specifically by limiting the definition of “sexual harassment” to the most extreme cases and making it more difficult for victims of campus sexual misconduct to file complaints.\textsuperscript{xii}

To effectively create a climate on campus where all students are supported and have an opportunity to learn and succeed, Title IX must support student wellness and academic achievement, and its implementation should be guided by research on campus sexual assault and recovery. APA applauds the Department of Education for its new proposed Title IX rule on sexual harassment and other sex discrimination. This proposed rule restores Title IX’s purpose and is consistent with long-recognized law as well as with President Biden’s executive orders on gender equity.\textsuperscript{xiii} It is also reflective of psychological science and research, and if finalized will limit underreporting of sexual misconduct, revictimization, and traumatization of survivors, while protecting the due process rights of all parties.

APA is especially heartened that the NPRM explicitly clarifies protections in Title IX for LGBTQ+ and pregnant and parenting students. This is particularly critical in the face of the prevalent discrimination faced by LGBTQ+ students, including through various recently enacted and proposed legislation in states across the country, as well as the impact of the U.S. Supreme Court’s recent decision in \textit{Dobbs v. Jackson Women's Health Organization}.

As researchers, educators, and practitioners, psychologists are uniquely qualified to address the consequences and impact of sexual misconduct. APA’s comments will focus on six specific areas and offer several recommendations for the Department to consider as it works to finalize the rule and ensure equal access to educational programs and activities for all students:

1. Expanding the definition of sexual harassment.
2. Providing more flexibility for resolving complaints.
3. Restoring flexibility to the reporting process.
4. Providing a framework for student support and recovery.
5. Defining discrimination based on sex to include sexual orientation and gender identity.
6. Ensuring pregnant and parenting students receive more support to complete their education.

**APA supports proposed changes that expand the definition of sexual harassment**

Of all crimes, sexual assault is one of the most underreported. According to the Department of Justice, only 34 percent of sexual assaults were reported in 2019 and 23 percent in 2020.\textsuperscript{xiv} The false reporting rate for sexual assault is about 2 to 3 percent, which is no different than false reporting rates for other crimes.\textsuperscript{xv} These statistics do not include other forms of sexual harassment that are more common and less likely to be reported to authorities. Sexual victimization is caused by a wide array of sexual misconduct, including sexual contact with another person who could not or would not consent, and can result in decreased academic performance and higher levels of stress.\textsuperscript{xv \textsuperscript{xvii}} A reported 34 percent of college students who experience sexual assault drop out.\textsuperscript{xvii} Rape and other forms of sexual assault may also negatively impact survivors’ mental and physical health. Four out of five rape victims subsequently suffer from chronic physical and/or psychological conditions.\textsuperscript{xviii}
APA strongly supports the proposed rule reverting the definition of “sexual harassment” back to “unwelcome sex-based conduct that creates a hostile environment by denying or limiting” a person’s ability to participate in or benefit from a school’s education program or activity. Under this definition, schools will no longer be required to dismiss Title IX complaints without investigation or other action just because the reported harassment is not considered “extremely severe, widespread, or harmful enough,” as the current definition states. This change would greatly reduce barriers and stigma around reporting sexual misconduct and seeking assistance.

Students are less likely to report harassment when their experience does not match common beliefs about what it is, particularly when the incident involves alcohol and/or someone they know. A narrow definition of sexual harassment discourages survivors, who are often uncertain as to whether their experiences qualify as sexual misconduct, from considering it as a reportable incident. Experiences that are deemed “less severe” forms of victimization may also lead to negative outcomes and increase a survivor’s risk of further victimization.

APA also strongly supports the inclusion of sexual orientation, gender identity, and pregnancy in the proposed new definition of sex-based harassment.

**APA supports proposed changes to provide more flexibility for resolving complaints**

A process for resolving complaints related to sexual misconduct on campus must be one that builds trust between students and their institutions while also allowing survivors the greatest flexibility of resolution options. The current rule institutes a formal hearing or mediation process that mimics legal proceedings and is thus adversarial in nature. Specifically, the requirement to allow in-person cross-examination has the potential to re-traumatize victims and ultimately cause them to disengage with the systems that should be supporting them. Furthermore, there is no clear legal consensus as to whether a live cross-examination is necessary to protect due process rights.

APA strongly supports the proposed rule potentially limiting opportunities for in-person interaction between students accused of sexual assault or harassment and their accusers, which can be very retraumatizing and intimidating for survivors. The NPRM would not require schools to hold live hearings but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by state law. It also clarifies that, should they choose to do so, colleges and universities may conduct hearings remotely so that students bringing claims of harassment may avoid being in the same room as the person they are accusing. Such procedural changes would not only provide more psychological safety for survivors, but also protect due process rights, while ensuring the process is trauma-informed and fair to all parties.

Under the current rule, higher education institutions may also delay resolution of complaints while a law enforcement investigation is pending. By doing so, students may have to wait months or even longer for their complaints to be resolved, during which time they may be suffering serious harm, including reduced learning and psychological stress. Although the proposed rule does not specify a length of time for a grievance process, it requires colleges and universities to complete investigations in “prompt time frames” and for Title IX coordinators to be in regular communication with both the complainant and respondent about the status of the case. This is a necessary change that would make the process more transparent and provide both parties with more confidence in the fairness of the outcome.
APA supports proposed changes that restore the flexibility of the reporting process

Psychological science shows that regaining a sense of control is essential to survivors’ recovery. Survivors of sexual misconduct are unlikely to disclose the misconduct when they are distrustful of the process and fearful that it will be confusing, traumatizing, and futile. Thus, they need to be believed, validated, and supported to enhance disclosure, adaptive coping, and control. Approximately 59 percent of victims wait to disclose, and those that do so, typically first talk to their family or friends about their experience. Therefore, APA supports efforts in the proposed rule to increase the flexibility of the reporting process, including by:

- Allowing a student to voluntarily choose an informal resolution process to address a Title IX complaint offered by their institution. A formal process can often be overwhelming and burdensome for the survivor, causing them to disengage. An informal procedure presents less of a commitment for students, thereby increasing the chances of students coming forward to tell their story in their way.
- Enabling former students to file complaints after they have left college.
- Placing the burden on the school to gather evidence, using a “preponderance of the evidence standard,” unless it uses the “clear-and-convincing-evidence standard” in all other comparable proceedings.
- Making the Title IX grievance process less prescriptive than it is under the current rule, including by allowing institutions to reinstitute the “single-investigator model” where the Title IX coordinator may also serve as the decision-maker.

Additionally, the current rule inappropriately limits the geographic scope of reporting, requiring schools to ignore Title IX complaints of sexual harassment that occur during study abroad programs, outside of a school program or activity, or outside of a setting under the school’s “substantial control.” APA opposed this arbitrary jurisdictional distinction because it is not grounded in any data. Rather campus climate surveys show that the clear majority of sexual misconduct occurs off-campus.

APA strongly supports the proposed changes that would require colleges and universities to respond to instances of sexual harassment that occur off campus at educational programs or outside of the country, such as study abroad programs. The proposed rule would also no longer require institutions to dismiss Title IX sexual harassment complaints because the survivor is no longer enrolled at the school, even when the harasser is still enrolled or teaching there.

- **Recommendation:** As the Department works on a final rule, we encourage the inclusion of an additional clause providing that students may reach out to their home program while abroad and that the Title IX office will make every effort to coordinate with the host institution to address any complaints of sexual misconduct. Such a provision should also include support for the student in pursuing any additional course of action against the non-U.S. based institution where the alleged misconduct occurred.

APA supports an expanded framework for student support and recovery

Under the proposed rule, institutions must offer supportive measures to all students who report any type of sexual misconduct, regardless of whether they have requested an investigation or an informal resolution, and even if their complaint is dismissed. Supportive measures could include counseling, extensions of deadlines and other course-related adjustments, and leaves of absence. The school would also be required to provide all parties the opportunity to challenge its resolution of a complaint. Like the current rule, the proposal would require supportive measures for complainants be non-disciplinary, non-punitive, and at no cost to students. However, under the
NPRM, in the event of an on-going investigation, schools may take the necessary steps to protect the complainant’s safety, their educational environment, or to prevent further harassment, even if such steps are burdensome to the respondent, so long as the action is not disciplinary or punitive in nature and does not interfere with their education.

APA supports these proposed changes and urges the Department to also consider the following:

- **Recommendation:** We suggest that supportive measures offered by institutions include medical and psychological services for survivors to support recovery. Concern for their safety must be central to the proposed options and they should be assured a well-publicized and accessible pathway to confidential medical and psychological services that support recovery. Instituting such policies would promote the general safety of the entire campus community. Additionally, rehabilitation options should be provided for students who have been found responsible of sexual misconduct but are allowed to remain on campus. xxv

APA supports the inclusion of prohibitions against discrimination based on sexual orientation and gender identity in Title IX protections

LGBTQ+ students are much more likely than their peers to face pervasive discrimination in school, including sexual and verbal harassment, violence, bullying, and excessive discipline by faculty. xxi Nearly half of LGBTQ+ youth seriously considered suicide in the last year, xxvii an upsetting trend that increases among multiracial LGBTQ+ youth. xxi This is further compounded by the record number of states that enacted or proposed discriminatory laws targeting LGBTQ+ youth in the past two years, including by seeking to ban them from school restrooms, from participating in school sports, or targeting LGBTQ+ students through surveillance, censorship, and forced outing. xxviii Data show that such policies carry a great deal of danger to the health, safety, and psychological well-being of LGBTQ+ students, further increasing their already high risk of depression and suicidality. xxix

Federal protections are critical to the civil rights, safety, and educational opportunity of LGBTQ+ students, especially those identifying as transgender, non-binary, and intersex. This includes ensuring that students have the right to be free from being singled out for exclusion and bullying based on sexual orientation or gender identity. Such protections are more vital now than ever given the current political climate in many states facing LGBTQ+ youth, their families, and supportive educators and health care providers.

APA strongly supports the proposed rule stating, for the first time, that all forms of discrimination against LGBTQ+ students violate Title IX. It further clarifies that schools receiving federal funds will be expected to protect transgender, nonbinary, and intersex students from being singled out for exclusion from school facilities, subjected to public ridicule, or punished for expressing who they are. The proposed rule is consistent with the Department’s position after the U.S. Supreme Court decision in *Bostock vs. Clayton County*, holding that LGBTQ+ students must be protected from all forms of discrimination. xxxv

While APA applauds the Department for this proposal and urges its inclusion in the final rule, we offer several recommendations for consideration:

- **Inclusion of LGBTQ+ perspectives in campus safety policies.** As elucidated in the data above, LGBTQ+ youth generally experience greater stress and exist at the
intersections of multiple forms of oppression. Due to this, harassment that may not reach the point of persistently harming other students, may more significantly impact LGBTQ+ students. It is important to recognize that “de minimis harm” may be experienced by LGBTQ+ individuals differently compared to other students, so the measure for what is harmful should not be set by non-LGBTQ+ individuals. Therefore, when developing campus harassment and sexual misconduct policies, institutions should include the perspectives of LGBTQ+ students and faculty to ensure that their lived experiences are reflected in campus safety policies.

- **Transgender students’ participation in athletics.** The proposed rule does not address the participation of transgender students in athletics, and we encourage the Department to expeditiously release a Title IX athletics rule for public comment that would ensure that all students, including transgender, non-binary, and intersex students, may participate fully and equally in school sports. Without such regulations, much ambiguity will remain with respect to transgender students’ participation in school sports. APA recently joined coalition partners in a letter to President Biden urging him to swiftly issue this rule.xxxxvi

- **Appropriate implementation of Title IX’s religious exemption.** Although APA generally supports the proposed rule maintaining the current exemptions for religious colleges from Title IX requirements, we urge the Department to correct the current rule by ensuring that institutions claiming the exemptions be required to present advanced notice of their intent to current and prospective students. Allowing schools to not disclose a religious exemption is inconsistent with Title IX.xxxvii Many LGBTQ+ individuals may seek out an institution affiliated with a religious denomination.xxxviii therefore advanced notice of an institution’s intent to rely on the religious exemption from Title IX is necessary for students making critical decisions about their futures. This notice requirement imposes negligible burdens on the religiously-affiliated institutions compared with the potential for students relying on inaccurate information that may provide a basis upon which they may be disciplined, expelled, or denied a degree on the basis of sexual orientation or gender identity.

**APA supports proposed changes to ensure that pregnant and parenting students receive greater support to complete their education**

Despite the many barriers faced by pregnant and parenting students to completing their education, they are often overlooked when it comes to harassment, discrimination, and lack of institutional supports. According to the Centers for Disease Control and Prevention, while 90 percent of women who do not give birth during adolescence graduate from high school, only 50 percent of teen mothers are expected to receive a high school diploma by the time they are 22 years old and less than 2 percent graduate college by age 30.xxxix Additional data show that more than one in five college students are parenting.xi

Various factors make it challenging for pregnant and parenting students to finish high school, including lack of access to affordable quality child-care, stigma, medical complications, and financial insecurity. Without support, such as referrals to social workers, parenting classes, access to doctors, and college- and career-readiness workshops, pregnant or parenting students may often find it difficult to complete their education.

Furthermore, the recent decision by the U.S. Supreme Court in *Dobbs v. Jackson Women's Health Organization* to overturn nationwide access to legalized abortion is likely to have significant
implications for students on college campuses across the nation. Women under the age of 24 are most likely to seek abortion care. Because women in college are also three times more likely to experience sexual assault than women who are not in college, the impacts of Dobbs are likely to fall hardest on this population.

Additionally, students of color, particularly those attending Historically Black College and University’s (HBCUs), could be disproportionately affected. HBCUs are concentrated in states restricting access to reproductive care: nearly three-quarters are in states that have banned or mostly banned abortions, while another 21 are in states where abortion is currently legal but could be under threat. The evidence is clear that restricting access to abortion can be harmful to an individual’s mental health. With the data showing a deteriorating state of youth mental health, including among the college-aged population, the consequences of the Dobbs decision could be far-reaching.

Although Title IX regulations have applied to pregnancy-related medical conditions and parental status since 1975, they have not been substantively changed since and the current rule leaves definitional gaps concerning these conditions. APA strongly supports the Department’s efforts in the proposed rule to clarify and strengthen the protections of pregnant and parenting students under Title IX. Such changes will provide clear processes for schools to meet their responsibilities in a post-Dobbs world. This includes:

- A definition for lactation that also requires schools to provide reasonable accommodations to lactating students including time and a sanitary private space to express breastmilk and an opportunity to make up for work missed;
- Clarification that Title IX coordinators receive adequate training on the rights of pregnant and parenting students; and
- The requirement that schools provide reasonable modifications of equipment and services as requested by pregnant students, which may include elevator access, flexible class seating arrangements, or supports such as homebound instruction.

To further strengthen the proposed rule, APA offers several additional recommendations for consideration:

- We applaud the NPRM for not using gendered language regarding who is a pregnant person and providing protections for transgender and non-binary pregnant people, including by ensuring that lactation spaces are inclusive of transgender students. As the Department works to finalize the rule, we encourage the use of even more LGBTQ+ inclusive language—for example, “chest-feeding” rather than “breastfeeding.” In addition, there are many LGBTQ+ parents who are not a biological contributor to the child and there are families who conceive via reproductive technology, donor sperm or eggs, and so on. Such individuals are nonetheless parents and should also be recognized.

- APA also urges the Department to include more guidance to help schools understand their role in providing accommodations regarding abortion, including prohibiting discrimination against students and staff who have sought, received, or are recovering from an abortion; increasing oversight of institutions that fail to provide adequate protection and care to pregnant and parenting students, particularly in states with restrictive reproductive laws; and clarifying privacy rights under the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) for students either seeking an abortion or disclosing they had one.
APA appreciates the opportunity to weigh in on the proposed changes to Title IX. When finalized, the new rules will be critical to protecting the civil rights, educational attainment, and the physical and psychological safety of students. If APA can be of assistance, please contact Kenneth Polishchuk, Senior Director for Congressional and Federal Relations & Education Policy Lead, at kpolishchuk@apa.org.

Sincerely,

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4 CFR § 106.8(b).


