

From: Caroline Medina
Sent: Fri, 11 Jun 2021 18:15:05 +0000
To: T9PublicHearing
Cc: Sharita Gruberg
Subject: Written Comment: Title IX Public Hearing (sex-based harassment and anti-LGBTQ+ discrimination)
Attachments: CAP Final Title IX Comment.pdf

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Good afternoon,

Attached for your consideration is the Center for American Progress' written comment for the Department's public hearing on improving enforcement of Title IX. If I can provide any additional information, please let me know. Thank you for your consideration.

All the best,
Caroline

Caroline A. Medina (they/she)
Policy Analyst, LGBTQ Research and Communications Project
Center for American Progress

June 11, 2021

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

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

Submitted via T9PublicHearing@ed.gov.

Re: Written Comment: Title IX Public Hearing (sex-based harassment and anti-LGBTQ+ discrimination)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

We write to submit a comment as part of the U.S. Department of Education's Office for Civil Rights (OCR) public hearing to gather information on improving enforcement of Title IX of the Education Amendments of 1972 (Title IX) (86 FR 27429).¹

The Center for American Progress (CAP) is an independent non-partisan think tank committed to improving the lives of all Americans through bold, progressive ideas as well as strong leadership and concerted action. Our policy teams conduct valuable research and engage in meaningful advocacy on a wide range of issues to promote the safety, wellbeing, and success of students and educational institutions across the country. Our deep interest and expertise in these areas compel us to

¹ U.S. Department of Education, "Announcement of Public Hearing: Title IX of the Education Amendments of 1972" *Federal Register* 86 (96) (2021): 27429-27430, available at <https://www.govinfo.gov/content/pkg/FR-2021-05-20/pdf/2021-10629.pdf>

communicate the need for the OCR to improve enforcement of Title IX to ensure that all individuals have access to quality education, free from sexual harassment, violence, and discrimination.

I. Background on the notice for the public hearing

Title IX prohibits sex discrimination in any education program or activity that receives federal financial assistance. The current comment period is dedicated to the OCR gathering information with the aim of improving enforcement of Title IX and addressing steps the U.S. Department of Education (“the Department”) can take to:²

1. Ensure schools provide students with educational environments free from discrimination in the form of sexual harassment, including sexual assault and other forms of sexual violence
2. Ensure schools have grievance procedures that promote fair, prompt, and equitable resolution of sexual harassment and sex discrimination reports
3. Address discrimination based on sexual orientation and gender identity in educational environments

The Department’s decision to conduct a public hearing on these topics is motivated by the enactment of Executive Order 14021, *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity* (EO 14021).³ EO 14021 directs the Department to review all agency actions that may be inconsistent with the aim of ensuring that all students in educational environments are protected from discrimination, sexual harassment, and sexual violence on the basis of sex, including sexual orientation and gender identity (SOGI). Specifically, the executive order directs the Secretary of Education to review the 2020 rule entitled “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,”⁴ and other agency actions that may be inconsistent with the policy set forth in EO 14021 and governing law, including Title IX.⁵ As explained in CAP’s public comment during the proposed rulemaking, the 2020 rule violated the Administrative Procedure Act; failed to account for or appropriately estimate associated costs and benefits in its analysis;⁶ and undermined Title IX protections in many significant ways.⁷

² Ibid.

³ Executive Office of the President, Executive Order 14021: Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity,” *Federal Register* 86 (46) (2021): 13803-13804, available at <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>

⁴ U.S. Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” *Federal Register* 85 (97) 2020: 30026-30579, available at <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>

⁵ U.S. Department of Education, “Announcement of Public Hearing: Title IX of the Education Amendments of 1972” *Federal Register* 86 (96) (2021): 27429-27430, available at <https://www.govinfo.gov/content/pkg/FR-2021-05-20/pdf/2021-10629.pdf>

⁶ For example, see Declaration of Michael Madowitz in support of plaintiff’s (State of California) motion for preliminary injunction, available with the State of California’s Department of Justice.

⁷ See Center for American Progress, “RE: Public Comment in Response to the Notice of Proposed Regulation ED-2018-OCR-0064, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” (Washington: 2019), available at <https://www.regulations.gov/comment/ED-2018-OCR-0064->

Instead of effectuating Title IX's purpose of protecting students and creating educational environments free of sex discrimination – including sexual abuse and other forms of sexual harassment – the rule undermines Title IX protections by making it harder for students to report abuse, allowing schools to ignore reports when they are made, and unfairly tilting the investigative process in favor of respondents, with the effect of discouraging survivors from reporting sex discrimination.⁸ We appreciate the Department's willingness to improve enforcement of Title IX and hope that it will take action to reverse the harms promulgated by the previous administration and strengthen Title IX protections for students across the country.

II. The need to protect students from all forms of sex-based harassment, including sexual harassment, sexual assault, and dating violence.

Sexual harassment of students is widely prevalent in K-12 schools and higher education. In grades 7 through 12, 56 percent of girls and 40 percent of boys are sexually harassed in any given school year.⁹ In college, one in four women, one in fifteen men, and one in four transgender, non-binary, and gender-nonconforming students are sexually assaulted during their time as undergraduates.¹⁰ In addition, one in three college women and one in six college men are survivors of dating violence or domestic violence,¹¹ and one in six women and one in nineteen men have experienced stalking.¹² Survivors also generally underreport instances of sexual harassment and assault. Already, only 12 percent of college survivors¹³ and 2 percent of girls ages 14 through 18¹⁴ report sexual assault to their schools or the police. Students often choose not to report for fear of reprisal, because they believe

⁸ 31283 and see National Women's Law Center, "DeVos' New Title IX Sexual Harassment Rule, Explained," (Washington: 2020), available at <https://nwlc.org/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.28.20-v3.pdf>

⁹ See Victoria Yuen and Osub Ahmed, "4 Ways Secretary DeVos' Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault," (Washington: Center for American Progress, November 16, 2018), available at <https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/>; Shabab Ahmed Mirza and Frank J. Bewkes, "Secretary DeVos is Failing to Protect the Civil Rights of LGBTQ Students," (Washington: Center for American Progress, July 29, 2019), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/>; GLSEN, "GLSEN Denounces new Department of Education Proposed Title IX Rules for Schools Handling Sexual Harassment and Assault," press release, November 16, 2018, available at <https://www.glsen.org/news/we-condemn-decision-preventing-title-ix-protect>; National Women's Law Center, "DeVos' New Title IX Sexual Harassment Rule, Explained," (Washington: 2020), available at <https://nwlc.org/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.28.20-v3.pdf>

¹⁰ Catherine Hill & Holly Kearn, *Crossing the Line: Sexual Harassment at School*, AAUW (2011) [hereinafter *Crossing the Line*], available at <https://www.aauw.org/research/crossing-the-line>.

¹¹ AAU, Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct, ix (Oct. 15, 2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019>

¹² Knowledge Networks, 2011 College Dating Violence and Abuse Poll, at 15 (2011), http://www.loveisrespect.org/pdf/College_Dating_And_Abuse_Final_Study.pdf

¹³ National Center for Victims of Crime, Stalking Fact Sheet (2015), https://victimsofcrime.org/docs/default-source/src/stalking-fact-sheet-2015_eng.pdf.

¹⁴ Poll: One in 5 women say they have been sexually assaulted in college, WASHINGTON POST (June 12, 2015), <https://www.washingtonpost.com/graphics/local/sexual-assault-poll>.

¹⁵ *Let Her Learn: Sexual Harassment and Violence*, *supra* note at 1.

their abuse was not important enough or because they think no one will do anything to help.¹⁵ Some students – especially students of color, undocumented students,¹⁶ LGBTQ+ students,¹⁷ and students with disabilities – are less likely than their peers to report sexual assault to the police due to an increased risk of being subjected to police violence and/or deportation. Survivors of color may not want to report to the police and add to the criminalization of men and boys of color. For these students, schools are often the only avenue for relief, but when schools fail to provide effective responses, the impact can be devastating.¹⁸ Survivors may 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

Instead of addressing these problems, the Trump administration violated longstanding procedural rules to make sweeping changes to the Title IX regulations last year that have made it exceedingly more difficult for student survivors to receive help and have made it more likely for survivors to be retraumatized or isolated following their harassment or assault.²⁰ Among these changes, the rule attempted to limit schools' enforcement obligations to a narrowly defined subset of sexual harassment cases that meet the highest standard of severity, thereby limiting schools' potential liability and making it less likely that survivors will report incidents of sexual harassment. It also sought to allow institutions to employ an unnecessarily demanding burden of proof when investigating Title IX sexual harassment cases, setting an unreasonably high bar for evidence that will be difficult to satisfy in cases and further stack the process against the survivor.

It is for these reasons that we urge the Department of Education to undo the Trump administration's harmful changes and restore and strengthen Title IX protections against sexual harassment and other forms of sex-based harassment, which can be achieved by incorporating the following provisions into the forthcoming Title IX rule:

- Restore and strengthen protections against harassment:
 - Restore language to define sexual harassment as unwelcome conduct of a sexual nature to encompass the full range of harmful conduct and not just a narrow subset of cases.

¹⁵ RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.

¹⁶ See Jennifer Medina, *Too Scared to Report Sexual Abuse. The Fear: Deportation*, NY TIMES (April 30, 2017), <https://www.nytimes.com/2017/04/30/us/immigrants-deportation-sexual-abuse.html?mcubz=3>.

¹⁷ 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*], available at <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>

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?*, WASHINGTON POST (Nov. 18, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/18/how-much-does-sexual-assault-cost-students-every-year>.

²⁰ Department of Education, Office for Civil Rights, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

- Affirm that sex-based harassment includes sexual harassment, sexual assault, dating violence, domestic violence, and sex-based stalking, and harassment based on sexual orientation, gender identity, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
- Require schools to respond to sex-based harassment, regardless of where it occurs (including off campus or abroad), that creates a hostile educational environment or interferes with or limits an individual's ability to participate in or benefit from an education program or activity;
- Require schools to address sex-based harassment that they know or should know about, as well as all harassment by school employees that occurs in the context of their job duties;
- Require schools to provide a prompt, effective, and reasonable response to sex-based harassment, including by providing supportive measures to complainants no later than five school days after receiving notice, and prohibit schools from conditioning a complainant's access to supportive measures on their agreement to a nondisclosure agreement or waiver of legal claims against the school;
- Allow schools to use non-investigative processes (such as a restorative justice process) to resolve complaints of sex-based harassment where the facts indicate that such processes would be useful and appropriate and as long as participation is truly voluntary and informed. Parties must also be able to withdraw at any time before the process concludes, and the facilitators should be adequately trained;
- Allow states and schools to provide additional protections beyond those in the Title IX rule; and
- Clarify that Title IX protects all persons, including those who are neither students nor employees, who seek to access or benefit from an education program or activity.
- Develop robust protections against retaliation:
 - Explicitly prohibit common forms of retaliation, including disciplining a complainant for collateral conduct that is disclosed in a complaint or investigation or that occurs as a result of the reported harassment; disciplining a complainant for a "false report" solely because the school has decided there is insufficient evidence for a finding of responsibility; or disciplining a complainant for discussing the allegations that gave rise to their complaint.
 - Allow schools to dismiss, without a full investigation, a complaint of sex-based harassment that is patently retaliatory (e.g., a disciplined harasser files a countercomplaint against their victim).
- Ensure fair disciplinary procedures:
 - Require schools to resolve complaints using grievance procedures that are fair and afford both parties the same procedural rights, including by applying a preponderance of evidence standard rather than the clear and convincing standard the previous administration pursued;

- Otherwise allow schools flexibility in implementing grievance procedures, particularly when addressing complaints that, if substantiated, would not result in serious sanctions;
- Do not foreclose schools from forgoing live hearings attended jointly by the parties and direct cross-examination, where not otherwise required by law; and
- For schools that rely on direct cross-examination, do not foreclose schools from considering past statements by parties or witnesses who are not available for direct cross-examination.

III. The need to address discrimination based on sexual orientation and gender identity in educational environments.

LGBTQ+ students experience high rates of discrimination which can be both interpersonal among peers and educational staff, as well as institutional in the form of non-inclusive policies that adversely affect their socialization and education. While safe and supportive school settings foster a positive climate for student wellbeing and success; exclusionary, unsafe, and discriminatory learning environments negatively impact the mental and behavioral health of LGBTQ+ students and make it increasingly difficult to succeed in academic settings, often leading to higher rates of absence, lower GPAs, and poorer educational outcomes.²¹ These experiences also have long-term consequences in terms of educational attainment, as well as occupational achievement, and socioeconomic status.²²

Though there is increasing awareness and support for LGBTQ+ youth, particularly given that 1 in 6 members of Generation Z now identify as LGBTQ+,²³ gender and sexually diverse students still face unique challenges. For one, 71 percent of LGBTQ+ youth have experienced discrimination, and 2 in 3 report that someone has tried to convince them to change their sexual orientation or gender identity.²⁴ This population still experiences rejection from parents at high rates, and consequentially is overrepresented in both homeless²⁵ and foster care populations.²⁶

²¹ National Academies of Sciences, Engineering, and Medicine, “Understanding the Wellbeing of LGBTQI+ Populations” (Washington: 2020), available at <https://www.nap.edu/read/25877/chapter/1> ; GLSEN, “Safe Space Kit: A Guide to Supporting Lesbian, Gay, Bisexual, Transgender and Queer Students in Your School,” (Washington: 2019), available at <https://www.glsen.org/sites/default/files/2019-11/GLSEN%20English%20SafeSpace%20Book%20Text%20Updated%202019.pdf>

²² National Academies of Sciences, Engineering, and Medicine, “Understanding the Wellbeing of LGBTQI+ Populations” (Washington: 2020), available at <https://www.nap.edu/read/25877/chapter/1>

²³ Samantha Schmidt, “1 in 6 Gen Z adults are LGBT. And this number could continue to grow.” (Washington: The Washington Post, 2021), available at <https://www.washingtonpost.com/dc-md-va/2021/02/24/gen-z-lgbt/>

²⁴ The Trevor Project, “National Survey on LGBTQ Youth Mental Health 2019” (West Hollywood, CA: 2019), available at <https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf>

²⁵ Lesley University, “The Cost of Coming Out: LGBT Youth Homelessness,” available at <https://lesley.edu/article/the-cost-of-coming-out-lgbt-youth-homelessness> (last accessed December 2020).

²⁶ Amanda Rosa, “What Happens to Some L.G.B.T.Q. Teens When Their Parents Reject Them,” *The New York Times*, November 11, 2020, available at <https://www.nytimes.com/2020/11/11/nyregion/nyc-lgbtq-foster-care.html>

These challenges are compounded by discrimination and harassment in the classroom. According to GLSEN's 2019 National School Climate Survey, 95% of LGBTQ+ students have heard homophobic remarks at school, and nearly half of the time students report that these remarks went unchallenged by teachers or staff – in fact, more than half of students reported hearing homophobic remarks and negative remarks about gender expression from school personnel.²⁷ More than 4 in 5 LGBTQ+ students reported experiencing harassment or assault at school, including 3 in 5 who reported experiencing sexual harassment. This has led to nearly 4 in 5 avoiding school functions because they felt unsafe, and 1 in 3 missing school because they felt unsafe.²⁸

School policies create additional difficulties for LGBTQ+ students. Three in 5 LGBTQ+ students have reported experiencing discriminatory policies at school, which have harmed their ability to succeed in the classroom.²⁹ Such policies can take the form of being prevented from using the locker room or bathroom appropriate for their gender (nearly 3 in 10 students); being disciplined for PDA that was not enforced for non-LGBTQ+ students (nearly 3 in 10 students); being prevented from using their chosen name or pronouns (more than 1 in 5 students); or being prevented from forming or promoting a school GSA.³⁰ Other discriminatory and harmful school policies include being prevented from discussing LGBTQ+ topics in school assignments, the restriction of pro-LGBTQ+ clothing, or being prohibited from bringing someone of the same gender to a school dance or function. While 1 in 5 students reported being taught positive perceptions of LGBTQ+ people in the classroom, a similar rate reported being taught negative perceptions.³¹

These adverse experiences contribute to disparate educational outcomes for LGBTQ+ students. Those experiencing high rates of victimization based on sexual orientation reported GPAs an average of .31 points lower than those experiencing low rates of victimization; those reporting high rates of victimization due to gender identity reported GPAs an average of .38 points lower than those experiencing low rates.³² Students experiencing discrimination reported having a sense of belonging at school half as often as those not experiencing discrimination, have high self-esteem at a rate 20% lower than those not experiencing discrimination, and experienced depression at a rate 27% higher.³³ LGBTQ+ students deserve dignity, respect, and to learn in educational environments free from harassment, violence, and discrimination.

Concerns are amplified for LGBTQ+ students of color, who face compounded levels of discrimination. More than 1 in 4 Black LGBTQ+ students, and 1 in 5 Latinx LGBTQ+ students, report feeling unsafe at school because of their race and ethnicity, and nearly half of both groups

²⁷ Joseph G. Kosciw and others, "The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools" (New York: GLSEN, 2019), available at <https://www.glsen.org/research/2019-national-school-climate-survey>

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

experienced bullying or harassment related to their race or ethnicity.³⁴ Meanwhile, nearly half of Black LGBTQ+ students, and more than half of Latinx LGBTQ+ students, reported feeling unsafe due to their sexual orientation. High rates of harassment from students are often coupled with high rates of bias from administration and staff - 2 in 5 Black LGBTQ+ students, and a similar number of Latinx LGBTQ+ students, experienced either in-school or out-of-school discipline, rates higher than those experienced by white LGBTQ+ students.³⁵

Unfortunately, under the previous administration, the Department adopted numerous policies that directly harmed LGBTQ+ students and transgender students in particular. For example, the Department:

- Withdrew³⁶ the May 13, 2016, Obama-era trans-inclusive Title IX guidance that informed schools that the U.S. Department of Education and the U.S. Department of Justice (DOJ) interpreted Title IX as protecting all students on the basis of their gender identity, including by guaranteeing access to sex-segregated activities and facilities in accordance with their gender identity.³⁷
- Declined to investigate complaints from transgender students regarding access to bathrooms and locker rooms, as well as a range of other complaints of anti-transgender discrimination³⁸
- Released an internal memo³⁹ arguing that “sex” in Title IX refers only to biological sex, the *Bostock* decision does not apply to Title IX, and that schools are not in violation of the law if they refuse to permit transgender students to use restrooms and locker rooms or participate in sports consistent with their gender identity.
- Issued the Title IX final rules in, which, among other harms, reduced school liability by narrowing the definition of sexual harassment and expanding religious exemptions; created procedural barriers for students seeking to report harassment; and loosened burden of proof requirements for sexual assault cases.⁴⁰ Overall, the rule implemented policies that ignore and

³⁴ Ibid.

³⁵ Ibid.

³⁶ Sandra Battle and T.E. Wheeler II, “Dear Colleague Letter: Notice of Language Assistance,” U.S. Department of Justice and U.S. Department of Education, February 22, 2017, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

³⁷ Catherine E. Lhamon and Vanita Gupta, “Dear Colleague Letter on Transgender Students: Notice of Language Assistance,” U.S. Department of Justice and U.S. Department of Education, May 13, 2016, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

³⁸ The Washington Post, “Trump administration's guidance to Office for Civil Rights on transgender student complaints,” available at http://apps.washingtonpost.com/g/documents/local/trump-administrations-guidance-to-office-for-civil-rights-on-transgender-student-complaints/2474/?itid=lk_inline_manual_2

³⁹ U.S. Department of Education, Office of the General Counsel, “Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock* b. Clayton Cty., 140 S. Ct. 1731 (2020)” (Washington: U.S. Department of Education, 2021), available at <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>

⁴⁰ Victoria Yuen and Osub Ahmed, “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault,” (Washington: Center for American Progress, November 16, 2018), available at <https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/>; GLSEN, “Re: ED Docket No. ED-2018-OCR-

mistreat victims; promote unfair investigation and hearing procedures; and fail to provide survivors with meaningful support.⁴¹

In 2019, CAP released a study investigating 8 years' worth of SOGI-related complaint records from the OCR through Freedom of Information Act (FOIA) requests. The report provides insight into the disproportionate harassment and discrimination that LGBTQ+ students encounter in educational environment both before and after the 2020 rule was finalized. The CAP study found that:⁴²

- Transgender students were overrepresented in the data: 42.6 percent of all SOGI-related complaints were filed based on gender identity, even though transgender students constitute between 6 and 21 percent of the LGBTQ+ student population.
- 75.9 percent of all complaints alleged sexual (56.9 percent) or gender harassment (19.5 percent), meaning that harassment was the most frequently occurring allegation in the dataset. Comparing the data with other publicly available Department information from fiscal years 2013 through 2016, allegations of harassment appeared more frequently in complaints based on LGBTQ+ identity than in the general population—72.5 percent versus 19.9 percent.
- Of the complaints with resolution type data available, only 14.8 percent of complaints resulted in corrective action to the school's policies or practices to benefit the student.

The data also showed noticeable differences in how complaints were resolved under DeVos' leadership of the Department during the previous administration:

- The share of complaints resulting in a dismissal or administrative closure under the Trump administration (91.5 percent) was much higher than it was under the Obama administration (65.4 percent).
- Under the Trump administration, complaints were more than nine times less likely to result in corrective action than they were under the Obama administration. Only 2.4% of LGBTQ+-related complaints resulted in an agreement with the school or some other action to correct for the alleged discrimination against the student—compared with 22.4% under the previous administration.
- Using upper- and lower-bound estimates, the OCR was between 54 percent and 356 percent more likely to investigate a SOGI-related complaint under the Obama administration than it was under the Trump administration. Some complaints may not merit corrective action per the OCR's case processing standards, but any such decision should be based on fact. The lower rate of investigations raises concerns about whether allegations of discrimination are receiving adequate time and attention prior to the decision not to take corrective action.

0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” available at <https://www.regulations.gov/comment/ED-2018-OCR-0064-18311>

⁴¹ National Women's Law Center, “DeVos' New Title IX Sexual Harassment Rule, Explained,” (Washington: 2020), available at <https://nwlc.org/wp-content/uploads/2020/05/Title-IX-Final-Rule-Factsheet-5.28.20-v3.pdf>

⁴² Shabab Ahmed Mirza and Frank J. Bewkes, “Secretary DeVos is Failing to Protect the Civil Rights of LGBTQ Students,” (Washington: Center for American Progress, July 29, 2019), available at <https://www.americanprogress.org/issues/lgbtq-rights/reports/2019/07/29/472636/secretary-devos-failing-protect-civil-rights-lgbtq-students/>

Overall, these data highlight the dire need for the current Department to take action to improve enforcement of Title IX to better protect LGBTQ+ students in educational environments across the country. As noted in the Federal Register posting,⁴³ conducting the current public hearing on bettering enforcement of Title IX with respect to discrimination, sexual harassment, and sexual violence on the basis of sex, including SOGI, is a step towards fulfilling the directives of Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (EO 13988).⁴⁴ Implementing the U.S. Supreme Court ruling in *Bostock v. Clayton County*⁴⁵ throughout federal civil rights enforcement, EO 13988 directs all federal agencies that enforce federal laws prohibiting sex discrimination to also prohibit discrimination based on SOGI.⁴⁶

To fulfil its mandate under both EO 14021 and EO 13988, we urge the Department to take the following robust actions to reverse the harms perpetrated by the last administration and strengthen Title IX enforcement for LGBTQ+ students. We strongly support all of the recommendations to better protect LGBTQ+ students under Title IX issued by our partners at GLSEN, American School Counselor Association, Human Rights Campaign, National Association of School Psychologists, National PTA, National Women's Law Center, and PFLAG National. In particular we wish to emphasize our support for the following actions:

- To better protect LGBTQ+ students against sexual harassment, violence, and discrimination, the Department should codify Title IX regulations to define “on the basis of sex” to include “on the basis of sexual orientation, gender identity, transgender status, sex stereotypes, or sex characteristics, including intersex traits.”
- To prevent entities from improperly justifying unlawful sex discrimination against LGBTQ+ students, the Department should clarify that neither Title IX nor the current rules that authorize the provision of programs or activities on the basis of sex or for members of one sex do not permit or require the recipient to treat an individual in a manner incongruent with their gender identity.
- Take action to ensure that LGBTQ+ students know they are protected and that educational institutions are aware of their responsibility under the law, which can be facilitated by issuing updated technical assistance and training materials, as well as information campaigns.
- Regarding religious exemptions:
 - The Department should ensure that LGBTQ+ students are aware if their educational institutions have sought a religious exemption from Title IX and may be at risk of discrimination:

⁴³ U.S. Department of Education, “Announcement of Public Hearing: Title IX of the Education Amendments of 1972” *Federal Register* 86 (96) (2021): 27429-27430, available at <https://www.govinfo.gov/content/pkg/FR-2021-05-20/pdf/2021-10629.pdf>

⁴⁴ Executive Office of the President, Executive Order 13988: Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,” *Federal Register* 86 (14) (2021): 7023-7025, available at <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>

⁴⁵ *Bostock v. Clayton County*, 590 U.S. ____ (June 15, 2020), p. 1, available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

⁴⁶ Ibid.

- The Department should reverse the change of the 2020 Title IX rule and require, as an independent procedural requirement, that institutions provide advance notice to the Department of their intention to rely on the religious exemption from Title IX.
- To promote transparency, the Department should ensure that its Religious Exemption Index, which provides records of institutions filing religious exemptions is kept up to date.⁴⁷
- To effectuate Title IX's remedial purpose, the Department should adopt a narrower interpretation of the category of institutions eligible for the religious exemption than that set forth through separate 2020 rulemaking.⁴⁸ An overly broad interpretation provides a convenient loophole for institutions who wish to discriminate by allowing them to claim a religious identity in order to be exempted from Title IX, despite having no relationship to a religious organization or denomination.
- Regarding data collection, the OCR should:
 - Annually report disaggregated OCR complaint data, including disaggregated data on claims involving discrimination based on sexual orientation, gender identity or transgender status, sex characteristics (including intersex traits), or sexual harassment or violence.
 - Enhance the Department's Civil Rights Data Collection by adding questions about respondent demographics, incidents, policies, and overall environment regarding sexual harassment, violence, and equal opportunities for LGBTQ+ students
- Finally, the Department should supplement the final rule with guidance to address and strengthen protections for LGBTQ+ students and survivors of sexual harassment and violence in the Equal Access Act and the Family Educational Rights and Privacy Act.
- The OCR should immediately resume the investigation of complaints related to transgender students' ability to access all appropriate facilities—including bathrooms and locker rooms. Because many complaints to the OCR have been closed prematurely, the office should request that individuals resubmit rejected complaints for additional review.

Thank you for considering these recommendations. Please contact Caroline Medina, cmedina@americanprogress.org, for any additional information.

Sincerely,

Center for American Progress

⁴⁷ See U.S. Department of Education, Office for Civil Rights, "Religious Exemptions Index 2009-2016," available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/z-index-links-list-2009-2016.html>

⁴⁸ See Direct Grant Programs, State-Administered Formula Grant Programs, Non Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Developing Hispanic-Serving Institutions Program, Strengthening Institutions Program, Strengthening Historically Black Colleges and Universities Program, and Strengthening Historically Black Graduate Institutions Program; Final rule, 85 FR 59916, 59946-62 (Sept. 23, 2020).