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Cc: Brenda Adams
Subject: CWLC & ERA Written Comment: Title IX Public Hearing
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Please see the attached written comment submission on behalf of the California Women's Law Center and Equal Rights Advocates.




Respectfully,

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Submitted via T9PublicHearing@ed.gov

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
Department of Education
400 Maryland Avenue SW
Washington, DC 2020

RE: Written Comment for Title IX Public Hearing

Dear Hon. Secretary Cardona,

The California Women's Law Center (CWLC) and Equal Rights Advocates (ERA) are pleased to submit this comment regarding the public hearing on the proposed Title IX regulations. We greatly appreciated President Biden's executive order affirming the Administration's commitment to enforcing Title IX's protections against all forms of sex discrimination, as well as the Department of Education's (Department) subsequent announcement of its plans to publish a new proposed Title IX rule. We write to share our concerns as organizations who support and advocate on behalf of women and girls in California, and work specifically on behalf of victims of sexual harassment and assault, regarding areas of particular concern and suggested solutions.

CWLC is a statewide nonprofit law and policy center whose mission is to create a more just and equitable society by breaking down barriers and advancing the potential of women and girls through transformative litigation, policy advocacy, and education. CWLC works across several areas of gender justice, including gender discrimination, economic security, women's health, and violence against women. We advocate for gender equity in all areas Title IX covers, including athletics, pregnancy, and sexual assault and harassment. CWLC closely monitors legislation and federal guidelines regarding Title IX. We have submitted many amicus briefs related to Title IX in state and federal appellate courts and extensive comments in response to proposed regulations.

ERA is a national non-profit civil rights organization dedicated to protecting and expanding educational access and opportunities for women and girls and people of marginalized gender identities. For the past 45 years, ERA has advocated for gender equity in education across the country through a unique combination of strategies including litigation, policy reform, direct services, and community engagement. We provide free legal information, advice, and assistance to individuals facing discrimination at school and at work through our Advice & Counseling

Program. ERA represents victims of sexual harassment and assault in cases brought pursuant to Title IX at all stages, from campus disciplinary proceedings through and including the United States Supreme Court. We also collaborate with students, schools, and worker and community organizations to provide Know-Your-Rights workshops on issues related to gender discrimination and Title IX. We publish reports, fact sheets, and other materials about sexual harassment and gender-based violence in education. ERA recently launched an initiative to End Sexual Violence in Education (“ESVE”) in order to narrow a rapidly expanding justice gap for survivors of sexual violence in schools. Through this initiative, ERA launched the nation’s first pro bono network of attorneys dedicated to representing student victims of gender-based violence in higher education. Students are ERA’s clients and our partners in this work; their experiences, input, and needs drive ERA’s commitment of resources, our search for solutions, and our fight for justice. Additionally, in 2019, ERA became the host of the nation’s first and only Equal Justice Fellowship focused on providing support to LGBTQI+ students experiencing sex discrimination based on sexual orientation and/or gender identity at school.

I. Introduction

California is home to hundreds of colleges and has the largest, most diverse, and most affordable state university system in the country. In 2020, 485,550 students were enrolled across the 23 campuses in the California State University (CSU) system.¹ An additional 226,125 students were enrolled at the nine undergraduate campuses that make up the University of California (UC) system.² And a total of 2.1 million students were enrolled in the 116 community colleges in the California Community College system, the largest system of higher education in America.³ Thus, California educates nearly 3 million students a year in just these three public school systems alone, not including the many private universities, trade schools, other institutes of higher learning, and the entire K-12 school system.

The proposed Title IX regulations will therefore impact a large number of Californians. Of course, gender-based violence is a problem throughout the nation. Approximately one in four female undergraduates and one in fourteen male undergraduates in the United States will experience sexual assault while enrolled in their college or university.⁴ Thirteen percent of undergraduate and graduate students “experience rape or sexual assault through physical force, violence, or incapacitation.”⁵ Among undergraduate students, 26.4% of females and 6.8% of males experience rape or sexual assault through force, violence, or incapacitation.”⁶ These issues are even worse for LGBTQI+ students: one survey of students at thirty-three colleges showed nearly

¹ Enrollment, THE CALIFORNIA STATE UNIVERSITY, <https://www2.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/enrollment> (last visited June 11, 2021).

² UC Office of the President, UC’s California Student Enrollment Climbs for Fourth Straight Year, UNIVERSITY OF CALIFORNIA (Jan 21, 2020), <https://www.universityofcalifornia.edu/press-room/uc-s-california-student-enrollment-climbs-fourth-straight-year>.

³ Key Facts, CALIFORNIA COMMUNITY COLLEGES, <https://www.cccco.edu/About-Us/Key-Facts> (last visited June 11, 2021).

⁴ Statistics at a Glance, CULTURE RESPECT, <https://cultureofrespect.org/sexual-violence/statistics-at-a-glance/> (last visited Jan. 27, 2021) (citing David Cantor et al., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, ASS’N AM. U. 1 (2019), <https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climatesurvey-2019>).

⁵ Campus Sexual Violence: Statistics, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Jan 27, 2021) (citing Cantor, *supra* note 5).

⁶ *Id.*

23% of undergraduate transgender, nonbinary, or gender-questioning students experienced nonconsensual sexual contact involving physical force or incapacitation.⁷

In California, reported incidences of sexual harassment are 5 percent higher for women and 10 percent higher for men than the national average.⁸ Given these statistics and the number of college students educated through California's public school systems, approximately 738,065 students experience some type of gender-based violence every year while attending public college in California, not including those educated in the private schools, which account for 20 percent of all undergraduate enrollments in California.⁹ Thus, this is a matter of critical importance in California.

II. The Regulations Should Establish a Timeline to Ensure Promptness in Resolution

Title IX's regulatory scheme has always recognized schools' obligation and ability to respond promptly and equitably to instances of sexual harassment, which makes sense given academic calendars and the need to ensure that students can continue to learn free from sex discrimination. The requirement that schools take prompt and effective action calculated to end sexual harassment, prevent its recurrence, and remedy its effects was included in the Department's 1997 Guidance and maintained in its 2001 Guidance.¹⁰

No data supported the Trump administration's underlying assumption in its Rule on Nondiscrimination on the Basis of Sex in Educational Programs or Activities Receiving Federal Financial Assistance, published in the Federal Register on May 19, 2020 (Final Rule), that schools have been stymied by the Department's previous longstanding standard (i.e., schools must take prompt and immediate corrective action when they know or reasonably should have known about sex-based harassment) because the standard purportedly failed to offer enough flexibility. The Final Rule's removal of this promptness requirement, coupled with the addition of other provisions, incentivizes schools to delay or postpone investigations, contravening Title IX's deterrence objectives and making it impossible to comply with the requirement that schools put an immediate end to the harassment and remedy its effects.

The Final Rule includes other provisions that significantly narrows the type of situations that fall under the protections of Title IX, limiting schools' obligations to respond to gender-based violence. For example, the Final Rule expressly does not apply to cases involving an unenrolled victim, even if the victim transferred to avoid their harasser, dropped out due to the trauma of the harassment suffered, graduated before filing a complaint, or was a high school student assaulted during a college admit weekend and decided to enroll in a different institution; cases involving a respondent who graduated, transferred, or retired;¹¹ or cases involving a respondent who is no longer a student or employee at the school—even if an investigation was ongoing. The Final Rule also allows schools to delay investigations for an unspecified period when there is an ongoing

⁷ *Id.*

⁸ Report Finds California Above National Average for Sexual Harassment Rates, UC SAN DIEGO HEALTH (May 21, 2019), <https://health.ucsd.edu/news/releases/Pages/2019-05-23-california-above-national-average-sexual-harassment-rates.aspx>.

⁹ Maps of College Enrollment Rates, PUBLIC POLICY INSTITUTE OF CALIFORNIA, <https://www.ppic.org/data-set/maps-of-college-enrollment-rates-in-californias-counties/>, (last visited June 11, 2021).

¹⁰ See 2001 Guidance at iii-vi.

¹¹ *Daimler Trucks North America LLC, v. Envtl. Prot. Agency*, 737 F.3d 95, 100 (D.C. Cir. 2013) (citations omitted).

parallel criminal investigation. These provisions incentivize schools to delay investigations in the hopes that one or more of the parties will transfer, drop out, or graduate, because nothing in the Final Rule required promptness. Promptness has been a primary tenet of Title IX adjudication for decades, and is necessary for an institution to uphold its obligations, stop the harassment, prevent its recurrence, and remedy its effects. This shift directly contravenes the Department's mandate to prevent sexual harassment, by instructing schools to ignore and not investigate known instances of sexual harassment by and against its students.

Prior guidance suggested a 60-day timeframe for investigations into sexual harassment complaints, with exceptions for good cause. Yet even under prior guidance, students experienced significantly longer timeframes. Student survivors noted in their comments to the 2018 Proposed Rule that many Title IX investigations are already exceedingly delayed, with some taking more than 180 days or even up to 519 days to resolve.¹² In fact, 193 State attorneys general also pointed out that creating additional grounds for delay will only further "re-victimize" survivors "as the process drags on without resolution or relief."¹³ Delays and suspensions of investigations also create a safety risk not only to the victim who reported the initial incident but also to other students who may be victimized by the same respondent during the delay.¹⁴

This impact is felt even more by our community college students. Most community college programs are designed to be completed within two years. Without requiring prompt investigations, community college students are more vulnerable to sexual harassment, as assailants have a higher chance of avoiding accountability. For example, in California, community colleges make up the largest higher education system in the nation and provide a gateway to higher education for over 2.1 million students per year. They offer associate's degrees, prepare students for transfer to four-year institutions, provide opportunities for lifelong learning, and train the workforce that sustains California's economy, the fifth largest economy in the world.¹⁵ Community colleges are becoming increasingly vital to their students' futures, and by eliminating the requirement for prompt investigation, the Final Rule stymies students' ability to pursue an education and future employment. Promptness remains crucial for institutions to meet Title IX obligations and must be required, and expressly defined, in the new regulations.

III. The Regulations Must Protect Students from Off Campus and Online Sexual Harassment

Title IX imposes a duty on schools to respond to incidents of sex discrimination that create a hostile environment on the basis of sex.¹⁶ Its primary purpose is to prevent such sex

¹² See Letter from Know Your IX to Kenneth Marcus, Ass't Sec'y for Civil Rights, Dep't of Educ., (Jan. 30, 2019), [https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_\(1\).pdf](https://actionnetwork.org/user_files/user_files/000/029/219/original/Know_Your_IX_Comment_on_Proposed_Title_IX_Rule_(1).pdf).

¹³ Letter from 20 Attorneys General to Betsy DeVos, Sec'y, Dep't of Educ., (July 19, 2017), <https://www.attorneygeneral.gov/taking-action/press-releases/20-ags-call-on-secretary-devos-to-maintain-protections-for-survivors-of-campus-sexual-assault>.

¹⁴ ATIXA, ATIXA Position Statement on the Proposed Legislation Entitled: Promoting Real Opportunity, Success, And Prosperity Through Education Reform (PROSPER) Act (Higher Education Act Reauthorization) (Jan. 18, 2018), <https://atixa.org/wordpress/wp-content/uploads/2015/03/ATIXA-POSITION-STATEMENT-ON-PROSPER-ACT-Final.pdf>.

¹⁵ Best States for Business 2019: California, FORBES, <https://www.forbes.com/places/ca/?sh=164436f3fefe>, (last visited June 11, 2021).

¹⁶ See generally 2011 Guidance.

discrimination from interfering with a students' academic opportunities. No matter where an incident of harassment takes place, including off campus or online, schools have a duty to respond to hostile environments created by discrimination on the basis of sex.¹⁷ When students are discouraged from coming forward and reporting their assaults, schools' ability to comply with their obligations under Title IX to create safe and inclusive learning environments and protect students from sex discrimination is jeopardized.

The Final Rule's severely narrowed definition of "sexual harassment" excludes substantial categories of sexual misconduct from its scope, leaving students unprotected and assailants undeterred. The Final Rule only covers harassment at locations where the school "exercised substantial control over both the respondent and the context in which the sexual harassment occurs," "includ[ing] any building owned or controlled by a student organization that is officially recognized by a postsecondary institution." 34 C.F.R. § 106.44(a). The Final Rule does not cover most off-campus locations, including off-campus apartments rented by students, and requires that schools ignore harassment that occurs off campus. §§ 106.30, 106.45(b)(3).

However, federal guidance has consistently recognized a school's obligation to respond to incidents that occur off campus where the effects of that harassment impact the victim's access to their education, and where the school exercises control over the respondent.¹⁸ The 2011 Dear Colleague Letter states that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, [and] outside a school's education program or activity," and the 2014 Dear Colleague Letter states that "a school must process all complaints of sexual violence, regardless of where the conduct occurred."¹⁹ Even the DeVos Department's 2017 Q&A on Campus Sexual Misconduct stated that "[s]chools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."²⁰

This exclusion substantially limits the effectiveness of the Final Rule in preventing and addressing sexual harassment, as off-campus activities are a substantial component of academic life for college students. "For nearly all types of sexual victimization, . . . off-campus victimization is more common [Off] campus sexual victimization may take place in bars and nightclubs or in student residents close to campus. Even if a student is victimized off campus, she may be engaged in activity that is connected to her life as a student at the college she attends."²¹ In order to be effective, a school's response to sexual misconduct must include "direct prevention efforts to high-profile groups, such as athletes and fraternities,"²² many of which have housing and events

¹⁷ *Id.*

¹⁸ U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Campus Sexual Misconduct (Sept. 2017) [hereinafter 2017 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> ("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.").

¹⁹ Office for Civil Rights, U.S. Dep't of Edu., *Questions and Answers on Title IX and Sexual Violence* 1-2 (Apr. 29, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

²⁰ Office for Civil Rights, U.S. Dep't of Edu., *Questions and Answers on Campus Sexual Misconduct* (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

²¹ Julie E. Samuels & Jan M. Chaiken, *Foreword* to Bonnie S. Fisher *et al.*, Nat'l Inst. of Just., *The Sexual Victimization of College Women*, iii (2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

²² United Educators, *Facts From United Educators' Report – Confronting Campus Sexual Assault: An Examination of Higher Education Claims* [hereinafter *United Educators*], https://www.ue.org/sexual_assault_claims_study; *Campus Sexual Violence*.

off campus. With 41% of sexual assaults taking place at off-campus parties or college bars, nearly half of all college sexual assaults will go unaddressed under the Final Rule.²³ In addition, all community college students and most 4-year college students—especially in California where cost of living is high²⁴—live off campus and oftentimes, at home. Thus, off-campus sexual harassment is a pervasive part of academic life and ignoring such harassment will do nothing to accomplish the Department’s goals of preventing and remedying sex discrimination.

The consequences of experiencing harassment and assault do not differ depending on where the harassment took place. Sex-based harassment harms students physically, psychologically, and academically. Research shows that the effects of sex-based harassment in school have long-lasting consequences when schools fail to protect student victims. For example, sexually victimized students are more likely to drop classes, have lower GPAs, lose scholarships, and change residences, all of which negatively affect professional success and earning potential.²⁵ One in three college survivors end up dropping out altogether.²⁶ Sexual assault survivors are three times more likely to suffer from depression, six times more likely to have Post Traumatic Stress Disorder, thirteen times more likely to abuse alcohol, twenty-six times more likely to abuse drugs, and four times more likely to contemplate suicide.²⁷

Women and girls bear the brunt of the negative effects of sexual harassment. They are more likely to miss school because they feel unsafe²⁸ and in some instances are forced to drop out of school altogether to avoid encounters with their assailant.²⁹ Those who do stay in school often have trouble focusing and maintaining their grades,³⁰ making it more difficult for them to access important opportunities like college, graduate school, and more lucrative careers. Women in college face additional financial hurdles, including being forced to pay out of pocket for off-campus housing when their on-campus housing becomes unsafe, and support services like private

²³ See Drinking “Settings” Tied to College Sexual Assault, Science Daily (Dec. 12, 2016) available at <https://www.sciencedaily.com/releases/2016/12/161212134631.htm> (noting that “findings, reported in the January 2017 issue of the Journal of Studies on Alcohol and Drugs, suggest that ‘drinking setting’—rather than drinking, per se—might be key” to a higher risk of sexual assault); see Emma Brown, et al., Drinking is Central to College Culture—and to Sexual Assault (June 14, 2015), available at https://www.washingtonpost.com/local/education/beer-pong-body-shots-keg-stands-alcohol-central-to-college-and-assault/2015/06/14/7430e13c-04bb-11e5-a428-c984eb077d4e_story.html?utm_term=.8dea00e18eb4.

²⁴ California’s High Housing Costs, <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.

²⁵ Cari Simon, “On top of everything else, sexual assault hurts the survivors’ grades” <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/>.

²⁶ Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) J.C. Student Retention: Res., Theory & Prac. 234, 244 (2015), <https://doi.org/10.1177/1521025115584750>.

²⁷ Feminist Majority Foundation, *Fast facts - Sexual violence on campus* (2018), <http://feministcampus.org/wp-content/uploads/2018/11/Fast-Facts.pdf>.

²⁸ National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* (Apr. 2017), available at <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence> (30% of survivors of sexual violence versus 14% of girls overall “have been absent from school because [they] felt unsafe at school or on their way to school”).

²⁹ E.g., Audrey Chu, *I Dropped Out of College Because I Couldn’t Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017) [hereinafter *I Dropped Out of College Because I Couldn’t Bear to See My Rapist on Campus*], available at https://broadly.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus.

³⁰ *Id.*

counseling to help them work through the emotional trauma of their experiences.³¹ Physical health also is affected, including common issues with sleeping and higher blood pressure brought on by stress and anxiety,³² compounding the mental and academic effects already discussed. These negative consequences impact student victims' ability to engage in their education regardless of whether the harassment took place on campus or not.

If not expressly corrected by the proposed rules, the Final Rule's provisions regarding off campus conduct will continue to lead to absurd and unfair results. For example, a school would be required to respond differently to similarly situated female students who attend the same school, the same classes, and live in the same dormitory, if one of the attacks happens to take place at an off-campus party and the other takes place on campus.³³ Yet these students are statistically likely to experience the same types of negative consequences and interruptions to their education, and other students would be equally at risk of experiencing harassment or assault by both attackers. But the Final Rule illogically instructs schools to ignore one assault and process the other. This precise scenario played out at Kansas State University a few years ago. There, the school was found not liable for failing to respond to the complaint of a woman who had been raped by a fraternity member at an off-campus event at a fraternity house, but the school was found liable for failing to respond to the complaint of another woman who was raped by the *same* fraternity member where her assault had occurred at an "off-campus apartment complex 'close to the [campus].'"³⁴

In addition to failing to address the interruption of many students' educations by ignoring incidents of sex discrimination that occur off campus, these provisions chill reporting, by reinforcing the common belief that schools will not take students' claims seriously.³⁵ Instead of stripping away protections for the very students intended to be protected by Title IX—those vulnerable to sex discrimination—the Department should be taking active steps to bolster Title IX. Failing to respond to sexual harassment and assault that occurs off campus fails to effectuate Title IX's intended purpose of preventing sex discrimination in education institutions, which in turn

³¹ *Violence Victimization on a College Campus* ("Not surprisingly, girls who suffer these forms of trauma are more likely to have serious behavioral, emotional and health problems.") (citing Yael Dvir, Julian Ford, Michael Hill and Jean Frazier, *Childhood Maltreatment, Emotional Dysregulations, and Psychiatric Commodities*, Harvard Rev. Psychiatry 22 (2014), 149-161, available at <http://ncbi.nlm.nih.gov/pmc/articles/PMC4091823/>); Kathryn J. Holland, Lilia M. Cortina, *The Evolving Landscape of Title IX: Predicting Mandatory Reporters' Responses to Sexual Assault Disclosures*, 41 Law & Hum. Behav. 429 (2017) [hereinafter *The Evolving Landscape of Title IX*] ("There can be devastating psychological and educational consequences of sexual assault, including depression, posttraumatic stress, suicidality, performance decline, and school withdrawal") (citing, e.g., Chang et al., 2015; Frazier et al., 2009; Kaltman, Krupnick, Stockton, Hooper & Green, 2005; Mengo & Black, 2016).

³² Caitlyn Bahrenburg, *Sexual Harassment Increases Blood Pressure and Poor Sleep in Women*, MD Magazine (Oct. 03, 2018), available at <http://www.mdmag.com/medical-news/sexual-harassment-increases-blood-pressure-poor-sleep-women>.

³³ Peter Baumann, *Deliberate Indifference: How to Fix Title IX Campus Sex-Assault Jurisprudence*, 106 Geo. L.J., 1139 (Apr. 2018) [hereinafter *Deliberate Indifference: How to Fix Title IX*].

³⁴ *Id.* (citing *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1180-81 (D. Kan. 2017), appeal filed, No. 17-3208 (10th Cir. Sept. 26, 2017) (noting also that the apartments where the second alleged assault occurred were equally as close to campus as the fraternity house and off-campus site, where the fraternity event took place.) (*Id.* at 1158-59, 1181).

³⁵ A belief that authorities cannot or will not do anything to help is an all too commonly cited reason by survivors for failing to report incidents of sexual harassment and assault. See, e.g., Campus Sexual Violence (9% of students who did not report did not do so because they "believed police would not or could not do anything to help" and 26% "believed it was a personal matter").

creates significant barriers to educational opportunities.³⁶

The Department also improperly abdicated its fundamental charge under Title IX to prevent and redress sex discrimination by ignoring sexual harassment that occurs online. In the specific context of higher education, online spaces have evolved from extra-scholastic, purely recreational forums into vital tools for enhancing the opportunities afforded by college.³⁷ Students now use online media for networking opportunities,³⁸ to connect with other students and faculty performing similar research,³⁹ and to secure jobs and internships.⁴⁰ Like other forms of harassment, girls are more likely than boys to experience online sexual harassment.⁴¹ Universities and colleges recognize these opportunities and often actively promote the use of the internet and social media sites.⁴² However, the proposed regulations would convert these spaces of opportunity into unprotected areas for sex discrimination. Allowing online spaces to become safe havens for perpetrators of sexual violence and harassment will cause women to have less access to academic and career opportunities than their male peers and will result in being cut off from important educational opportunities. Without the freedom to access valuable research opportunities and to make connections with others in their field of study—free from the fear of sexual harassment and assault—women and others experiencing sex discrimination will have fewer chances of securing positions in prestigious and competitive graduate programs. This, in turn, exacerbates the earning and promotion gap that exists between men and women in the workplace.

Women and girls who experience online sexual harassment are faced with the same harmful psychological and emotional effects that stem from other forms of harassment.⁴³ For example, a young girl who is sexually harassed online may miss school to avoid their harasser or may struggle to focus on their assignments in class due to anxiety and lack of sleep.⁴⁴ Despite the

³⁶ *Deliberate Indifference: How to Fix Title IX*, (citing extensively to the legislative history of the Bill including quotes from the opening debate on the senate floor in 1971 where Senator Bayh “repeatedly referenced access and opportunity when discussing the purpose of the legislation” and “referred to the legislation as ‘attempting to establish access to higher education as a basic Federal right’ and “encouraged his colleagues to ‘insure that no American will be denied access to higher education because of... sex.’”).

³⁷ NACE Center, *The Role of Social Media in the Job Search* (Dec. 11, 2017) available at <https://www.nacweb.org/talent-acquisition/student-attitudes/the-role-of-social-media-in-the-job-search/> [hereinafter *The Role of Social Media in the Job Search*].

³⁸ *Id.* (noting that 52% of students use social media in their job search and that one of the most common ways of doing so was “communicating with friends and/or family to discuss job openings and potential employers.”).

³⁹ Lee Watanabe, *4 Ways Students Can Use Social Media as a Classroom Research Tool* (Dec. 28, 2017) available at <https://globaldigitalcitizen.org/4-ways-students-use-social-media-research-tool>.

⁴⁰ *The Role of Social Media in the Job Search*, *supra* note 37.

⁴¹ Pew Research Center (July 11, 2017), <http://www.pewinternet.org/2017/07/11/online-harassment-2017>.

⁴² See, e.g., Berkeley Univ. of Cal. Career Center, *Using LinkedIn to Develop Your Career*, available at <https://career.berkeley.edu/Info/LinkedIn>; UC San Diego, *Social Media 101*, available at <https://ucpa.ucsd.edu/resources/social/social-101/>.

⁴³ *Teen Dating Violence* (noting that young women, who experience teen dating violence, which includes cyber dating abuse, are at a significantly higher risk for “depression and/or anxiety, tobacco, alcohol, and drug use or abuse, antisocial behaviors and aggression, suicide, sexual risk behaviors, pregnancy, sexually transmitted infections and future victimization during college and beyond.”) (citing California Adolescent Health Collaborative, *Teen Dating Violence: Keeping California Adolescents Safe in Their Relationships*, The Public Health Institute (2009); D.M. Ackard & D. Neumark-Sztainer, *Date Violence and Date Rape Among Adolescents: Associations with Disordered Eating Behaviors and Psychological Health*, 26 *Child Abuse and Neglect*, May 2002, at 455; Jay G. Silverman et al., *Dating Violence Against Adolescent Girls and Associated Substance Use, Unhealthy Weight Control, Sexual Risk Behavior, Pregnancy, and Suicidality*, 286 *J. of the Am. Med. Ass’n*, Aug. 2001, at 572).

⁴⁴ *Violence Victimization on a College Campus* (“Not surprisingly, girls who suffer these forms of trauma are more likely to have serious behavioral, emotional and health problems.”) (citing Yael Dvir, Julian Ford, Michael Hill and

fact that the original harassment occurred online, the fear, anxiety, and exhaustion brought on by the harassment remain present on-campus. Numerous organizations and institutions committed to gender justice have advocated that school misconduct policies should address “conduct such as bullying and hazing,”⁴⁵ which frequently occurs off school property and online. According to one study, nearly a third of teenage girls have been sexually harassed online, and 26% of teenagers have been a victim of online rumors about their sexual behavior.⁴⁶ Schools have a duty under Title IX to address these impediments to a student’s equal access to education on the basis of sex, even if—and often especially when—the harassing conduct occurs online. Scaling back protections for survivors forces them to co-exist with their assailant(s) on campus, which perpetuates hostile educational environments rather than eliminates them.

By requiring institutions to disregard complaints of sexual harassment and assault that occur off campus and online, the Final Rule draws an arbitrary and harmful distinction. Schools must be responsible for preventing and addressing all sexual misconduct in these contexts in order to fulfill their mandate under Title IX. We call upon the Department to restore and strengthen the protections against sex-based harassment that the Trump administration removed, including, but not limited to requiring schools to respond to all sex-based harassment regardless of where it occurs that interferes with or limits an individual’s ability to participate in or benefit from an education program or activity.

IV. The Regulations Should Expressly Prohibit Live Cross Examination

A goal of every institution of higher learning under California law is to provide a safe environment for its academic community.⁴⁷ Title IX also specifically requires educational institutions to prevent and address sexual harassment (including sexual assault and dating violence), eliminate any hostile environment, and remedy its effects to ensure that students—in particular, women—have equal access to education.⁴⁸ Gender-based discrimination is a leading impediment to that goal and has lifelong impacts on the survivors and the campus community. Underreporting is already a pernicious problem on campuses, where only 20% of female students who experience gender-based violence report it.⁴⁹ Requiring cross-examination at a live hearing with the opportunity for the respondent to confront the survivor exacerbates this already grave problem by making survivors less likely to report and re-traumatizes the survivors who do come forward.

Cross-examination undermines the mandate of Title IX that schools eliminate hostile

Jean Frazier, Childhood Maltreatment, Emotional Dysregulations, and Psychiatric Commodities, *Harvard Rev. Psychiatry* 22 (2014), 149-161, available at <http://ncbi.nlm.nih.gov/pmc/articles/PMC4091823/>; Kathryn J. Holland, Lilia M. Cortina, The Evolving Landscape of Title IX: Predicting Mandatory Reporters’ Responses to Sexual Assault Disclosures, 41 *Law & Hum. Behav.* 429 (2017) [hereinafter *The Evolving Landscape of Title IX*] (“There can be devastating psychological and educational consequences of sexual assault, including depression, posttraumatic stress, suicidality, performance decline, and school withdrawal”) (citing, e.g., Chang et al., 2015; Frazier et al., 2009; Kaltman, Krupnick, Stockton, Hooper & Green, 2005; Mengo & Black, 2016).

⁴⁵ *United Educators*, *supra* note 22.

⁴⁶ One-Third of Teenage Girls Sexually Harassed Online, *BBC NEWS* (Dec. 6, 2017), <https://www.bbc.com/news/technology-42238118>.

⁴⁷ See Cal. Educ. Code, §§ 200, 220.

⁴⁸ See 20 U.S.C. § 1681; See Recommendations for Improving Campus Student Conduct Processes for Gender-Based Violence, A.B.A. 6 (2019), <https://www.americanbar.org/content/dam/aba/publications/domestic-violence/campus.pdf> [A.B.A. Recommendations].

⁴⁹ See A.B.A. *Recommendations*, *supra* note 48, at p. 1.

environments. By permitting cross-examination in school misconduct proceedings, survivors will have to either experience re-traumatization through cross-examination or to co-exist with their assailant on campus.⁵⁰ Once again, neither option reduces a hostile environment, rather each perpetuates it. And because the rules of evidence do not apply, in many instances respondents may use a survivor's prior sexual history or unreliable hearsay statements to further attack an already-traumatized survivor. Under the Final Rule, this impact is exponential given that the cross-examination is conducted directly by the respondent's advisor, who could be an angry parent or a disgruntled ex.

This can have a real, tangible impact on survivors' ability to pursue an education. For example, survivors of sexual violence are much more likely to drop out of school.⁵¹ College students who are able to remain in school report an average grade point average (GPA) drop of 0.35.⁵² Thus, the students who have already been subjected to violence and subsequent re-traumatization through cross-examination are far more likely to be deprived of the ability to pursue their education, not respondents. Even the California Court of Appeal explained that "[i]n administrative cases addressing sexual assault involving students who live, work, and study on a shared college campus, cross-examination is especially fraught with potential drawbacks."⁵³

University disciplinary proceedings do not need to mirror the procedures required in criminal trials. Criminal procedures, such as cross-examination of witnesses at a live hearing, are neither required nor favored to resolve disciplinary proceedings in a university setting. The ABA's Commission on Domestic and Sexual Violence's Recommendations for Improving Campus Student Conduct Processes for Gender-based Violence examined in detail the different models for adjudicating gender-based misconduct at school and recommended *against* importing criminal-style proceedings into classrooms.⁵⁴ This report was the culmination of years of research and interviews with campus stakeholders across the United States and an extensive peer review process that involved law professors, criminal defense attorneys, prosecutors, private family law litigators, gender-based violence experts, school administrators, and many others. The end result was an unequivocal and unanimous recommendation for an *investigative* model without a hearing or an investigation paired with a panel review—not a traditional hearing model like those employed in criminal courts. The Commission found that the investigative models achieve the comprehensive prevention goal more effectively than other models by:

- Requiring any party or witness who has experienced trauma to undergo fewer potentially re-traumatizing events such as repeated recounting of the traumatic events; contact between complainant and respondent during proceedings; and direct

⁵⁰ While the U.S. Department of Education has promulgated new regulations governing disciplinary proceedings that impose more onerous procedural requirements in disciplinary proceedings, several states and national non-profit civil rights organizations, including ERA, have challenged the Final Rules. (See, e.g., *Victim Rights Law Center v. DeVos* (D.Mass. 2020) Case Number 1:20-cv-11104; *Pennsylvania v. DeVos* (D.D.C. 2020) Case Number 1:20-cv-1468; *Know Your IX v. DeVos* (D.Md. 2020) Case Number 1:20-cv-1224; *New York v. U.S. Dept. of Educ.* (S.D.N.Y. 2020) 1:20-cv-4260.) And, as USC's Petition notes, "the adverse practical consequences will persist even if the regulations take effect" because the regulations are limited to a certain "range of misconduct" and "do not apply to most instances of off-campus misconduct, like the kind at issue in this very case." (Petn. at pp. 37–38.).

⁵¹ Cecilia Mengo & Beverly M. Black, Violence Victimization on a College Campus: Impact on GPA and School Dropout, 18 J. COLL. STUDENT RETENTION RSCH. THEORY & PRAC. 1, 9 (2016).

⁵² *Id.* at 10.

⁵³ *Doe v. Univ. of S. Cal.*, 246 Cal. App. 4th 221, 245 (Cal. Ct. App. 2d 2016).

⁵⁴ See A.B.A. Recommendations, *supra*, at p. 35.

divulgences of deeply private information to the larger number of people inherent in a traditional hearing process, potentially including people with whom the complainant has an ongoing relationship that will be inevitably affected by such disclosures.

- Promoting greater sustainability as long-term responses to violence by being more affordable long-term for institutions of higher education.
- Facilitating post-proceeding psycho-social treatment of and education for accused students who are found responsible for committing gender- based violence by avoiding the adversarial structure of a traditional hearing.⁵⁵

The application of criminal procedural requirements to on campus disciplinary proceedings is misguided, inappropriate, and rooted in gender bias. Federal law also considers the investigatory model to be “fair enough for *critical* administrative decisions.”⁵⁶ For example, Social Security proceedings—which determine an individual’s eligibility for essential benefits—are investigatory rather than adversarial.⁵⁷ Title IX campus adjudications are administrative proceedings, not court cases. Their primary purpose is to determine whether sex discrimination occurred so that such discrimination can be terminated and its effects remedied. Cross-examination is not necessary, nor is it useful, in such circumstances.

Most importantly, it is entirely inappropriate and contrary to the Department’s mandate to prevent and address sex discrimination for it to require cross-examination only in cases involving gender-based misconduct. For no other type of misconduct—including other serious offenses such as racial harassment, plagiarism/cheating, stealing, or physical (non-gender-based) violence—does the Department require that schools hold a live hearing and allow for direct cross-examination of the victim. The reason for this is because of the commonly held and incorrect belief that victims—particularly women—lie about sexual assault and dating violence. Yet study after study shows that the rate of false allegations of sexual assault is no greater than any other crime.⁵⁸ For these reasons, we call upon the Department to expressly prohibit live cross examination in Title IX investigations.

V. The Regulations Should Ensure Protections for LGBTQI+ Students

Title IX prohibits discrimination “on the basis of sex” in educational institutions.”⁵⁹ In *Bostock v. Clayton County*,⁶⁰ the Supreme Court held that under Title VII, which prevents discrimination on the basis of sex in workplaces, “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.”⁶¹ Thus, “[s]ex plays a necessary and undisguisable role in the

⁵⁵ *Id.* at 63.

⁵⁶ *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68–71 (2019).

⁵⁷ *See Sims v. Apfel*, 530 U.S. 130, 110–11 (2000).

⁵⁸ Holly Yan & Nicole Chavez, Trump Says it’s a “Scary Time” for Men. Here are the Statistics on Sexual Assault Claims, CNN (Oct. 3, 2018), available at <https://www.cnn.com/2018/10/03/health/sexual-assault-false-reports/index.html> (citing False Reporting, National Sexual Violence Resource Center, available at https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf (noting that the prevalence of false reporting on sexual assault is between 2% and 10%)).

⁵⁹ 20 U.S.C. § 1681.

⁶⁰ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

⁶¹ *Id.* at 1737.

decision, exactly what Title VII forbids.” Thus, the Court explained that

homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because *to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.*⁶²

On January 8, 2021, as its last act, the DeVos Department issued a memorandum stating that the same rationale the *Bostock* court utilized did not apply to Title IX’s nearly identical bar on discrimination “on the basis of sex” in schools. In particular, it noted that the Department “construe[s] the term ‘sex’ in Title IX to mean biological sex, male or female.”⁶³ The Department went on to explain that areas like locker rooms and bathrooms may and in fact must, be segregated by biological sex, or sex assigned at birth, and mandated that schools are “required” to “regulate access” to these facilities “based on biological sex.”⁶⁴

On March 26, 2021, the U.S. Department of Justice’s Civil Rights Division issued a memorandum clarifying that “the best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.”⁶⁵ The memo emphasized that this conclusion was reached after reviewing the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this subject area. It noted that Title IX’s “on the basis of sex” language is interchangeable with Title VII’s “because of” language, and thus *Bostock*’s prohibition on discrimination based on gender identity or sexual orientation under Title VII must apply to Title IX as well.

We strongly agree with the Department of Justice’s memorandum and conclusion, and urge the Department to explicitly clarify in its regulations that discrimination based on gender identity or sexual orientation is prohibited under Title IX. While the existing regulations and guidance make clear that schools may offer certain sex-separated facilities, activities and programming, they still must be provided in a manner that does not exclude individual students from participation in, deny individual students the benefits of, or subject individual students to discrimination in an educational program receiving federal financial assistance. The Department should be explicit in the new regulation that none of those regulations authorize schools to exclude transgender students from such facilities and programming consistent with their gender identity. Promulgating such a rule is crucial to the lives of many LGBTQI+ students, for instance young transgender or non-binary youth who are currently facing exclusion from playing sports on teams of the gender that match their identity.⁶⁶ Ensuring the Department’s regulations expressly forbid this type of

⁶² *Id.* at 1742 (emphasis added).

⁶³ Memorandum for Kimberly M. Richey, Acting Assistant Secretary of the Office for Civil Rights, *Re: Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF THE GENERAL COUNSEL 3 (Jan. 8, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/other/ogc-memorandum-01082021.pdf>.

⁶⁴ *Id.* at p. 9.

⁶⁵ Principal Deputy Assistant General Pamela S. Karlan, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION 1 (March 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

⁶⁶ See, e.g., Katy Boose, *Anti-Trans Sports Bill Emerging Around the U.S.*, Legal Examiner (Apr. 27, 2021), <https://www.legalexaminer.com/health/anti-trans-sports-bills-emerging-around-the-u-s/>.

discrimination is critical.

VI. California's Laws Should Serve as a Model in Crafting New Regulations

California laws, including its ground-breaking law governing the adjudication of gender-based violence cases in higher education, Senate Bill 493 (effective January 1, 2022), can serve as models for the Department on many of the issues raised in this comment.⁶⁷

First, with regard to promptness, S.B. 493 expressly requires that educational institutions provide and communicate reasonably prompt timeframes for all of the major stages of the complaint process, including the investigation, the outcome, and the appeal.⁶⁸ Delays are only permitted for good cause.⁶⁹

Second, S.B. 493 expressly “finds and declares [that] ... [s]exual harassment occurs both on campus and in off-campus spaces associated with school. Nationwide, nearly 9 in 10 college students live off campus and 41 percent of college sexual assaults involve off-campus parties.”⁷⁰ S.B. 493 therefore requires that institutions “take reasonable steps to respond to each incident of sexual harassment involving individuals subject to the institution’s policies [if]... **there is any reason to believe that the incident could contribute to a hostile educational environment or otherwise interfere with a student’s access to education,**” regardless of whether the incident occurred in connection with any educational activity or other program of the institution, on campus, or off campus.⁷¹ This requirement exists regardless of whether the complainant or respondent are still enrolled.⁷²

Third, S.B. 493 provides that a live hearing may take place only when an institution decides that such a “hearing is *necessary* to determine whether sexual violence more likely than not occurred,” and it expressly prohibits direct cross-examination by any party or their advisor.⁷³

The University of California and California State University school systems—the two largest university systems in the country educating three quarters of a million students each year, supported the common-sense measures of S.B. 493 to protect California students’ civil rights and access to education, irrespective of federal rollbacks. The law divests in schools the appropriate amount of discretion and flexibility to resolve gender-based discrimination complaints, but within a framework that ensures the protection of students experiencing such misconduct. We urge the Department of Education to view this law as a guide and to adopt similar provisions requiring and defining promptness, prohibiting direct cross-examination and limiting or eliminating the use of adversarial hearings, and requiring institutions to respond to *all* complaints of sex-based discrimination, so long as the conduct could create a hostile environment or impact the victim’s access to education.

⁶⁷ 2020 Cal. S.B. 493.

⁶⁸ S.B. 493 §§ 3(4)(A)(x).

⁶⁹ *Id.*

⁷⁰ *Id.* at § 1(i).

⁷¹ *Id.* at § 3(b)(3)(B) (emphasis added).

⁷² *Id.*

⁷³ *Id.* at § 3(b)(3)(D)(vi)(IV)(viii).

Using S.B. 493 as a model will also help validate LGBTQI+ students' shared right to access education, since nearly one in four transgender and gender-nonconforming students are sexually assaulted during college,⁷⁴ in contrast with more than 1 in 5 cisgender women and nearly 1 in 18 cisgender men.⁷⁵ We also urge the Department to view California's other laws as a guide for ensuring the protection of LGBTQI+ students. Section 220 of California's Education Code mirrors Title IX and Title IX's elements govern an action under the Code.⁷⁶ Unlike Title IX, however, the California Education Code expressly states that "[n]o person shall be subjected to discrimination on the basis of disability, gender, **gender identity**, **gender expression**, nationality, race or ethnicity, religion, **sexual orientation** . . . in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance, or enrolls pupils who receive state student financial aid."⁷⁷ We urge the Department to use section 220 of the California Education Code as a model and to expressly state that Title IX's protections extend to all persons, regardless of gender, gender identity, gender expression, or sexual orientation.

VII. Conclusion

CWLC and ERA thank you for the opportunity to submit comments regarding the proposed Title IX regulations. As organizations that serve women and girls and individuals of marginalized genders throughout the state of California, we strongly urge the Department to take the following actions in its proposed regulations: (1) ensure that a timeline is established for prompt resolution of complaints; (2) confirm that all sexual harassment, including online and off-campus harassment, is prohibited under Title IX; (3) explicitly prohibit the use of live cross examination in Title IX investigations; (4) expressly affirm that Title IX applies to discrimination on the basis of gender identity and sexual orientation; and (5) utilize California's S.B. 493 and Education Code as a model.

Respectfully,

(b)(6)

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⁷⁴ *Id.* at § 1(e).

⁷⁵ *Id.* at § 1(d).

⁷⁶ Cal. Educ. Code § 220 (Deering 2021); *Donovan v. Poway Unified School Dist.*, 167 Cal. App. 4th 567, 581 (Cal. Ct. App. Oct. 2008).

⁷⁷ Cal. Educ. Code § 220 (emphasis added).