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To: T9PublicHearing
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Attachments: EQCA-Title IX-public comments-June 11 2021.pdf

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Equality California is pleased to submit the attached comments for the public hearing on Title IX.

I would be pleased to answer any questions you may have.

Respectfully,
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With more than 900,000 members, Equality California is the nation's largest statewide lesbian, gay, bisexual, transgender, and queer plus (LGBTQ+) non-profit civil rights organization. Dedicated to the creation of a more fair and equitable society, we work within California, at the federal level, and with other state entities to ensure the political, social, and economic equality of LGBTQ+ people - and as a part of our mission engage in a number of political, educational, and mobilized efforts within our communities and with our partner organizations. We exist to bring the voices of LGBTQ+ people to institutions of power within California and Washington D.C.

Title IX exists to ensure that educational institutions work to eliminate discrimination on the basis of sex and prevent sexual harassment. Periodically, in order to bring about that goal, the Department of Education will promulgate new rules and guidelines on what it believes institutions must do in order to comply with that mission. If those institutions fail to comply, they risk a complete loss of federal funding. Given that the State of California receives over 17 billion dollars in federal funding for K-12 and higher education,³ California schools have no choice but to comply when new rules are promulgated - even if those rules do not actually adhere to the stated goals of Title IX. Furthermore, with over 2.2 million students in 146 public higher education institutions across the state,⁴ and 6.1 million students in California's K-12 system,⁵ individual Californians stand to be especially impacted when changes to Title IX rules are made.

As such, at Equality California we feel that it is imperative to advocate for a Title IX regime that best benefits Californians, and particularly LGBTQ+ Californians. The rules promulgated by then-Secretary DeVos in the Final Rule eliminated critical protections relied on by the many LGBTQ+ Californians covered by Title IX and undermined the goals of Title IX itself. Rather, the Final Rule serves, by its own admission, to reduce the number of Title IX investigations.⁶ In no world will such an outcome reduce sex discrimination or sexual harassment, or encourage educational institutions to take steps to achieve that end. Instead, this rule disadvantages survivors of sex-based discrimination, harassment, and assault. The harm caused by that rule will fall disproportionately on LGBTQ+ survivors and students. As such, we believe that the May 2020 Final Rule should be rescinded, and that Title IX regulations should include specific protections for LGBTQ+ individuals. This change should explicitly include a rule that defines "on the basis of sex" to include "on the basis of sexual orientation, gender identity, gender expression, transgender status, or sex characteristics (including intersex traits)."

Sec. DeVos' Final Rule disadvantages survivors and makes it harder for institutions to protect their students.

³ U.S. Department of Education, Fiscal Years 2020-2022 State Tables for the U.S. Department of Education (May 26, 2021) (Accessed June 3, 2021) <https://www2.ed.gov/about/overview/budget/statetables/index.html>.

⁴ See College Simply, *List of Public Colleges and Universities in California*, (Accessed June 3, 2021) <https://www.collegesimply.com/colleges/california/public-colleges/>.

⁵ California Department of Education, *Fingertip Facts on Education in California* (April 29, 2021), (Accessed June 3, 2021) <https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp>.

⁶ Osub Ahmed, Shilpa Phadks, and Diana Boesch, "Women Have Paid the Price for Trump's Regulatory Agenda," *Center for American Progress* (Sep. 10, 2020), (Accessed June 3, 2021) <https://www.americanprogress.org/issues/women/reports/2020/09/10/490241/women-paid-price-trumps-regulatory-agenda/>.

As a general matter, Secretary DeVos' Final Rule is decidedly anti-survivor. The Final Rule serves to limit an institution's ability to investigate sexual harassment if it occurs in the wrong place, is reported to the wrong person, or comes to them in the wrong form. It disadvantages survivors by making it harder for their cases to go forward if the harassment isn't sufficiently pervasive, by denying survivors basic protections in proceedings against perpetrators, and by making it harder for them to find justice. It also lacks meaningful support for survivors by creating processes that will retraumatize them and by denying them remedial measures prior to final resolution.

Limitations on institutions' ability to prosecute sexual harassment. Secretary DeVos' Final Rule presents a number of significant challenges to an institution's ability to meaningfully combat and prosecute sexual harassment. First, the Final Rule limits institutions' jurisdiction. Under the Final Rule, institutions are required to dismiss complaints if the alleged harassment did not occur in the right place.⁷ These "right places" are limited to those areas in which the school retains significant control or is an area owned and operated by a recognized student organization.⁸ In practice this means that any harassment that occurs at off-campus locations (bars, apartments, trips, etc.), in unofficial sororities or fraternities, or during study abroad trips cannot be prosecuted by an institution. This means that in the majority of places where assault and harassment are likely to occur,⁹ institutions are prohibited from taking action to protect their students.

Second, under the Final Rule, institutions are no longer required to investigate sexual harassment if it is reported to the wrong person. Previously, institutions had broad responsibility to investigate any claim of harassment made to an employee that a student reasonably believed could address the problem.¹⁰ However, the new Final Rule requires that a school investigate claims of harassment only if either an official Title IX coordinator or an employee who "has the authority to issue corrective measures" has "actual knowledge" of the incident.¹¹ These limitations severely restrict the number of people within an institution that can obligate the institution to respond to such report. Requiring that level of authority also means that those people are often higher-level administrators, who tend to be far removed from most interactions with students. In practice, this means that institutions will avoid responsibility to investigate a large number of claims, as many claims are reported to advisors, professors, or other mentors who are employed by the institution but do not carry the ability to issue corrective measures. As a result, far too many students are likely to fail to receive the help they desperately need.

Third, under the new Final Rule, institutions are no longer required to investigate harassment unless they receive a formal written complaint.¹² Given that survivors may be wary to come forward, this requirement presents a new barrier to them that previous guidance did not. If institutions are allowed to ignore complaints that do not come to them in a particular written form, a majority of survivors may well go without redress. What's more, this will have a particularly harmful effect on K-12 students and students with disabilities who may face

⁷ 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i) (2020).

⁸ *Id.*

⁹ See Letter from 76 Student Body Presidents to Dept. Of Education Sec. Betsy DeVos (Jan. 30, 2019), (Accessed June 8, 2021) https://assu.stanford.edu/sites/g/files/sbiybj6236/f/student_body_presidents_comment_on_title_ix_proposal_1.pdf.

¹⁰ Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, at 10, 12, 13 (Jan. 2001) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

¹¹ 34 C.F.R. §§ 106.30(a) (2020).

¹² *Id.*; see also §§ 106.44(b), 106.45.

difficulty reading, writing, and signing complaints. It will also significantly limit the ability of third parties to assist survivors.

Disadvantages survivors both in process and in outcome. Perhaps one of the most egregious changes in Secretary DeVos' Final Rule was the heightening of the standard for what constitutes harassment. Previously, students could seek redress if they had been the victim of "unwelcome conduct of a sexual nature."¹³ Under the new Final Rule, however, institutions will be required to dismiss any complaint of unwelcome sexual conduct that is not "determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access" to educational opportunities.¹⁴ The use of an "and" standard makes it so that survivors would have to endure significant and ongoing harassment before an institution is required to act upon a properly reported complaint. Under previous language, singular acts of severe harassment - which could be enough to have a significant effect on an individual's life - would have been enough to trigger institutional responsibility. Under this standard, survivors will have to be repeatedly traumatized and harmed before they can seek protection.

The Final Rule will make it harder for survivors to succeed on the merits because it raises the standard of proof for claims from a "preponderance of the evidence" standard to a "clear and convincing evidence" standard.¹⁵ Furthermore, it requires that institutions presume that complainants are not being truthful in their complaints by requiring institutions to presume innocence on behalf of the perpetrator.¹⁶ This presents a higher standard of proof than nearly all civil trials and requires more rigor in procedure than any other institutional disciplinary procedure. Collectively, these changes stack the deck against survivors. It requires them to go above and beyond survivors of other violent offenses to prove that they have been harmed.

Lacks meaningful support for survivors. Assuming that a survivor is able to bring a complaint and possibly prevail under the new standards, Secretary DeVos' Final Rule creates a number of procedural requirements for institutions that serve to significantly harm the survivors further. The first of these is a requirement that respondents be able to question their survivors. Previously, institutions were encouraged to adopt procedures that routed questioning and examination through carefully trained third parties.¹⁷ The goal of this was to avoid retraumatization of survivors. However, the new Final Rule reverses course on this progress. Under the Final Rule, higher education institutions are required to include in their investigations a procedure where survivors and witnesses must submit to cross-examination "directly, orally, and in real time" by the respondent's "advisor of choice" if the survivor wants any of their statements to be admissible as evidence in the proceeding.¹⁸ If a survivor refuses to answer even one of the questions, perhaps because it is too traumatizing or they do not remember, then *all* of their statements - related or not to that question - are inadmissible as evidence.¹⁹

¹³ 2001 Guidance, *supra* note 10, at 2.

¹⁴ 34 C.F.R. §§ 106.30(a) (defining "sexual harassment") (2020).

¹⁵ 34 C.F.R. § 106.45(b)(1)(vii) (2020).

¹⁶ *Id.* at § 106.45(b)(1)(iv).

¹⁷ Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, 31 (Apr. 29, 2014) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Dep't of Educ., Office of Civil Rights, *Dear Colleague Letter: Sexual Violence*, 12 (Apr. 4, 2011) [hereinafter 2011 Guidance], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁸ 34 C.F.R. § 106.45(b)(6)(i) (2020).

¹⁹ 85 Fed. Reg. at 30346, 30347, 30349.

This change has a couple of practical implications for survivors. First, it will subject survivors to questioning that will retraumatize them. Often times survivors of sexual harassment and assault relive the trauma of their mistreatment multiple times in the initial stages of an investigation. Requiring them to submit to real-time questioning during the proceedings - which may happen several months after the initial incident - will make them relive and re-experience the harm and pain once more. Second, the rule will also open survivors up to hostile situations. Under this procedural change, respondents can choose anyone to do the questioning - including defense attorneys, angry parents, defensive fraternity brothers, or faculty members that may supervise the complainant's work. This immediately puts survivors in a situation where they are not only at a disadvantage, but could have new and pernicious trauma inflicted upon them. As a result, this rule will only serve to make the lives of survivors even worse.

Additionally, the Final Rule strips away an institution's ability to protect survivors through remedial and supportive measures while a complaint and adjudication process is ongoing. Traditionally, institutions can take reasonable steps to protect complainants from further harm. These steps can include changes to class schedules or housing arrangements, providing counseling services, providing tutoring services, creating one-way no-contact orders from harasser to survivor, and other supportive measures. However, the new Final Rule requires that institutions not take measures that are "disciplinary" or "unreasonably burden" the respondent.²⁰ In practice, this means that institutions may be forced to take actions that further materially disrupt the lives of survivors, in order to avoid burdening their harassers. This could include forcing survivors to change their living or class arrangements or imposing mutual no-contact orders (which harassers could manipulate to get the survivor into trouble). This will serve to only continue a cycle of harm, for which survivors will pay the price.

The DeVos Final Rule disproportionately burdens LGBTQ+ students.

All of the foregoing would be bad enough on its own, but it is crucial that the Department take into account the ways in which the changes made by the Final Rule will have a disproportionately negative impact on LGBTQ+ students. Despite being less than twenty percent of the student body,²¹ LGBTQ+ students are far more likely than their counterparts to be the targets of sexual harassment and assault.²² As a result, the Final Rule will generally have a significantly worse effect on them as a general matter. However, the Final Rule will also serve to make discrimination against LGBTQ+ students more likely to occur. It will also continue to ensure that they are at a disadvantage within higher education, it will further marginalize LGBTQ+ students, and it will make sure they are even less likely to get help than they already were.

Make discrimination against LGBTQ+ students more likely. First and foremost, the changes to the Final Rule will serve to only make discrimination against LGBTQ+ students more likely. If we assume that anti-LGBTQ+ harassment is cognizable under current understandings of Title IX (or if there is blatant sexual harassment that relates in part to someone's sexual orientation or gender identity), then the heightening of the standards in the

²⁰ 34 C.F.R. §§ 106.30(a) (defining "supportive measures") (2020).

²¹ Postsecondary National Policy Institute, *Factsheet: LGBTQ Students in Higher Education*, Postsecondary National Policy Institute (June 12, 2020), (Accessed June 6, 2021) <https://pnpi.org/LGBTQ+-students-in-higher-education/>.

²² Zenen Jaimes Pérez and Hannah Hussey, *A Hidden Crisis: Including the LGBT Community When Addressing Sexual Violence on College Campuses*, Center for American Progress (Sep. 19, 2014), (Accessed June 6, 2014) <https://www.americanprogress.org/issues/lgbtq-rights/reports/2014/09/19/97504/a-hidden-crisis/>.

Final Rule will make it harder for LGBTQ+ people to bring a claim. Discrimination against LGBTQ+ people is often not obvious to non-LGBTQ+ people.²³ That means that the type of discrimination/harassment that an LGBTQ+ person may face may not be objectively offensive, severe, or pervasive to a non-LGBTQ+ outside observer. So, when there is a rule that requires harassment to be all three of those things to reasonable, average persons, it may very well make it harder for LGBTQ+ people to prove to non-LGBTQ+ people that they are being harassed. The result of this heightened hurdle is that LGBTQ+ people are put at a disadvantage when they try to get institutions to step in and stop the harassment they are facing. This inability to seek redress will only serve to perpetuate discrimination against LGBTQ+ people.

Additionally, the changes to the standard of the proof in hearings and the presumption against the survivor will have outsized effects on LGBTQ+ people. There is a general distrust of LGBTQ+ people's lived experiences, particularly in fields related to sexual assault and harassment.²⁴ In fact, when LGBTQ+ people are assaulted or harassed they are less likely to be believed by non-LGBTQ+ people - or even other members of their community.²⁵ Much the same as with the heightening of the standard for sexual harassment, LGBTQ+ people will be at a particular disadvantage from the raising of the evidentiary burden of proof standard and from the switching of the presumption of innocence. In a situation where they are already entering the hearing and adjudication process at a disadvantage due to just being who they are, adding additional burdens will serve to set them back even further in their quest for justice. As a result, these two new burdens could stack the deck against LGBTQ+ survivors to an almost impossible degree.

Further disadvantages and marginalizes LGBTQ+ students. Beyond just a general perpetuation of discrimination, the new Final Rule will further disadvantage LGBTQ+ people in higher education. Starting with the changes to how a claim can be brought, the new Final Rule makes it harder for LGBTQ+ people to actually bring a claim of harassment. First, the rule barring off-campus jurisdiction will have a greater impact on LGBTQ+ students. LGBTQ+ students are more likely per capita to live off campus than their non-LGBTQ+ counterparts.²⁶ This means that they are more disadvantaged by a rule that limits a school's ability to prosecute off-campus harassment than other students.

²³ See generally Human Rights Campaign, *Sexual Assault and the LGBTQ Community*, Human Rights Campaign, (Accessed June 6, 2021) <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community>.

²⁴ There are multiple different examples of those in law enforcement, healthcare, and other fields not trusting or believing LGBTQ+ people and believing that they are lying. For some examples, see: Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, The Williams Institute (March 2015), (Accessed June 6, 2021) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>; Shabab Ahmed Mirza and Caitlin Roone, *Discrimination Prevents LGBTQ People From Accessing Health Care*, Center for American Progress (Jan. 18, 2018), (Accessed June 6, 2021) <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>; Human Rights Campaign, *supra* note 23.

²⁵ See Human Rights Campaign *supra*, note 23.

²⁶ See generally: TBS Staff, *Key Issues Impacting LGBTQ+ College Students*, The Best Schools (Apr. 28, 2021), (Accessed June 6, 2021) <https://thebestschools.org/resources/lgbtq-college-students-issues/>; Elliott Kozuch, *New Report Highlights Food and Housing Needs for LGBTQ College Students*, Human Rights Campaign (Apr. 17, 2018), (Accessed June 6, 2021) <https://www.hrc.org/news/new-report-highlights-food-and-housing-needs-for-lgbtq-college-students>.

Second, the rule limiting who students can report to will have an outsized effect on LGBTQ+ students (not to mention other marginalized students). Generally speaking, LGBTQ+ and other marginalized students have less access to campus resources and administrators, and often form informal bonds with professors and advisors.²⁷ In times of crisis at the institution, it stands to reason that LGBTQ+ students are far more likely to turn to these informal advisors, mentors, and professors than they are to an unknown Title IX coordinator or administrator. Under the new Final Rule's change to reporting responsibilities, these mentors, advisors, and professors will be less likely to be able to actually assist students in getting help. As a result, there will be more times where LGBTQ+ survivors believe they are getting help from these informal sources that they are more likely to trust, but in reality the new Final Rule may very well stop them from getting help that they would have otherwise gotten under the previous guidance. Once again, this places LGBTQ+ students, and any student in this same informal mentoring situation, at a disadvantage.

Furthermore, the process for adjudicating claims will also have outsized impacts on LGBTQ+ people. First, requirements that survivors participate fully in hearings and the complaint process will disadvantage LGBTQ+ people. These communities are more likely to be distrustful of these kinds of adjudication processes. This can be either from a belief that those involved in the process do not believe them,²⁸ or from just the general belief by marginalized people that institutions are not designed to support them. Either way, some LGBTQ+ students may just be generally more wary of participating, and requiring them to in order to get justice means that less of their claims are likely to be adjudicated.

Second, the requirement that students be cross-examined during hearings is likely to harm LGBTQ+ survivors far more than other students. As discussed earlier, LGBTQ+ students are less likely to be believed. The natural result of this will be that those who question them may be more aggressive and less likely to believe them on their answers, therefore subjecting them to harsher questioning. Additionally, as a general matter, general discrimination against LGBTQ+ people, homophobia, and lived experiences instruct us that LGBTQ+ people are more likely to be in a more precarious situation during questioning than non-LGBTQ+ persons. While we cannot say for certain that LGBTQ+ survivors are more likely than others to be harassed during questioning, what we can say is that they will always be running that risk in hearings. Also, questioning processes and the retraumatization that follows can have significantly worse effects on those within the community who may be suffering from gender dysphoria. Sexual assaults and harassment against trans* individuals can often cause them significant and painful dysphoria that can be hard to overcome.²⁹ Forcing them to relive that particular trauma, on top of the other traumas of assault and harassment, is especially harmful.

As a final matter, any marginalized student is likely to be more affected as a general matter by the changes in the Final Rule than their counterparts. When a student comes into an institution in a situation that is already disadvantageous, anything that makes their lives harder will have more of an impact on them than those better off. LGBTQ+ people are no different, and this is particularly true in K-12 schools and higher education. Any and all changes to Title IX that make it harder for survivors to bring or succeed on claims, inherently will have a dramatically worse effect on LGBTQ+ students. When we remember that

²⁷ See Pérez, *supra* note 22; See also, TBS Staff, *supra* note 26.

²⁸ See generally, Mallory; Mizra; et. al., *supra* note 24.

²⁹ Pérez, *supra* note 22.

LGBTQ+ students are more likely to be assaulted or harassed,³⁰ then it becomes quite clear how they will be the ones to bear the brunt of these changes.

Merely rescinding the DeVos Rule is not enough, Title IX protections must be clarified to protect against discrimination and harassment on the basis of sexual orientation and gender identity.

While we believe that the Department should reverse course and repeal the Final Rule, the above discussion makes it clear that the regulations must go further. First, the Department should take all reasonable and necessary steps to craft a new rule that accounts for the many unique barriers LGBTQ+ students experience when reporting incidents of sexual harassment and assault. Second, the Department should explicitly include a rule that defines “on the basis of sex,” to include “on the basis of sexual orientation, gender identity, gender expression, transgender status, or sex characteristics (including intersex traits).” Finally, the Department should clarify that no provision of Title IX is a safe harbor for anti-LGBTQ+ discrimination.

Crafting LGBTQ+ inclusive rules. The preceding discussion should make clear that LGBTQ+ students face special challenges in the Title IX sphere. Furthermore, President Biden’s March 2021 Executive Order makes it clear that the Department of Education should, “account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender, and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence; to ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination; and to ensure that their school procedures are fair and equitable for all.”³¹ As a result, the Department of Education must take special steps to ensure that the needs of these students are met in the crafting of new rules. We therefore, recommend the following changes to the guidance laid down by Secretary DeVos’ final rule:

First, the changes to the definition of harassment, the scope of an institution’s jurisdiction and obligation to investigate, the list of personnel to whom a student may file a complaint, and the means by which a student can submit a complaint should be returned to their previous form. Most importantly, the language requiring harassment to be pervasive, severe, *and* objectively offensive should be returned to the 2014 language requiring only unwelcome conduct. This change will ensure that LGBTQ+ survivors are not left out in the cold for being unable to prove under a heightened standard the subtle and often unrecognized harassment they endure on a daily basis. Further, institutions should be responsible for adjudicating any complaint of sexual assault or harassment that comes to them in any form, that occurs either on or off-campus (regardless of their control over the space/individuals), and that is reported to any employee. On top of this, changes to the rule should make clear that the school should be especially sensitive to the circumstances that LGBTQ+ students may be in throughout the process. This should include requiring employees to be sensitive to whether an LGBTQ+ student is “out” and maintain the confidentiality of that information. It should also include a special understanding of the housing challenges and home-life situations that LGBTQ+ students particularly face. Finally, they should be required to be trained in the special forms of

³⁰ *Id.*

³¹ President Joseph R. Biden, Jr., *Executive Order 14021 of March 8, 2021: Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, § 2(b) 86 Fed. Reg. §46 (March 11, 2021), (Accessed June 7, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>.

discrimination and harassment that LGBTQ+ students face, so as to be properly sensitive to when these students have been harassed and assaulted and are able to properly render a mandatory report.

Second, the new mandated procedures for hearings must be changed to protect survivors, particularly LGBTQ+ survivors. This should include a number of changes, including: (1) ending the mandated participation and cross-examination of survivors in the hearings; (2) prohibiting questions about sexual orientation or gender identity in any hearing that takes place, unless such questions are absolutely essential to the disposition of the complaint (which they should rarely be); (3) replacing the presumption of credibility *against* survivors with a balanced standard that, in part, assumes the truth of the survivor's complaint; and (4) reinstating the preponderance-of-the-evidence standard. Those reforms should be coupled with cultural competency requirements for personnel who preside over adjudications of these complaints, and these requirements should include trainings regarding historical and societal bias against LGBTQ+ people and other marginalized individuals.

Finally, the Final Rule's changes to remedial measures should not only be rescinded and the prior rules reinstated, but institutions should be instructed to be particularly sensitive to the needs of minority communities, including the LGBTQ+ community. This should include a rescission of the prohibition on placing burdens on the perpetrators. Institutions should be required to take additional steps for survivors who may face special forms of harassment due to their sexual orientation or gender identity. Institutions must be held responsible for providing additional housing and counseling for LGBTQ+ survivors - and should take into account the special traumas or housing problems they may face because of their sexual orientation or gender identity.

To be clear, the above is not a comprehensive list of all the special considerations that institutions should be made to take into account. Rather, it represents a starting point. The Department of Education should promulgate a general rule that requires institutions to be sensitive to the needs of LGBTQ+ survivors in every level and step of their sexual harassment and assault response and complaint adjudication.

Expanding the definition of “on the basis of sex.” On top of these changes, the Department of Education should promulgate rules that make clear that discrimination/harassment on the basis of sexual orientation, gender identity, transgender status and intersex traits are cognizable as sex discrimination and sexual harassment under Title IX. In March 2021, the Justice Department concluded that *Bostock v. Clayton County, Georgia*,³² applied with equal force to Title IX given the similarities in their language and the historic reliance of court on Title VII when interpreting Title IX. The Department of Education should follow suit. It should also make clear that the Supreme Court's understanding of gender expression as a form of sex discrimination³³ is also cognizable under Title IX. This change should be simple. The Department should include a simple clarifying rule that defines “on the basis of sex” to include “on the basis of sexual orientation, gender identity, gender expression, transgender status, or sex characteristics.”

³² Pamela S. Karlan, *Memorandum of Principal Deputy Assistant Attorney General Pamela S. Karlan, Civil Rights Division, “Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972”*, Department of Justice (March 26, 2021), (Accessed June 7, 2021) <https://www.justice.gov/crt/page/file/1383026/download>

³³ As laid down in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In addition, the Department should clarify that this encompasses intersex traits. The logical extension of any rule that protects gender identity and gender expression includes any expression of intersex traits. Plain readings of *Bostock* and *Price Waterhouse* support this conclusion. As a result, the above mentioned language should contain an interpreting statement by the Department that “gender identity, gender expression, transgender status, or sex characteristics” encompasses intersex traits.

Clarify that Title IX provides no safe harbor for anti-LGBTQ+ discrimination. The above changes will make meaningful and important changes to Title IX, but the Department must also clarify that beyond just providing protections against discrimination and harassment by others, Title IX does not itself authorize discrimination by institutions in the name of complying with its single-sex requirements. Besides its prohibitions on discrimination and harassment, Title IX was also intended to undo years of sex discrimination by requiring certain single-sex or sex-segregated activities and programs. While we agree that these activities and programs are still crucial to maintaining an equitable educational environment, it is also true that these activities/programs have become vehicles for discrimination. Various entities, and at times the Department itself, have improperly invoked these single-sex requirements to deny transgender and gender non-conforming individuals access to programs, facilities, sports, and activities. At a time when trans* students access to sports, facilities, and school programs are under attack at the state level, the federal government must take special steps to combat this discrimination.

As such, the Department should issue guidance making it clear that no part of Title IX or the rules that accompany it can be used as a safe harbor for anti-LGBTQ+ discrimination. This can be done by adding a provision that makes clear that any rule or provision that requires different treatment on the basis of sex, or requires certain single-sex or sex-segregated activities, by a recipient shall not be construed to authorize or require treatment of individuals that is inconsistent with their stated gender identity.

In conclusion, Equality California strongly urges repeal of Secretary DeVos’ Final Rule. The Department of Education should return Title IX to a regime that protects and supports survivors, consistent with the above recommendations, and take this opportunity to protect LGBTQ+ students who are at far higher risks for sexual assault and harassment. We further urge the Department of Education to expand understandings of sex discrimination and sexual harassment to include discrimination and harassment on the basis of sexual orientation, gender identity, gender expression, transgender status, and/or intersex traits. It should also clarify that Title IX cannot itself be a vehicle for LGBTQ+ discrimination. Only by taking these steps can the Department of Education ensure that Title IX does the job it was meant to do - provide equal and equitable educational opportunities for all.

Respectfully submitted,

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