

From: Sylvan Fraser
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To Whom It May Concern:

Please find attached a written comment from interACT: Advocates for Intersex Youth regarding the importance of explicit intersex inclusion in Title IX protections.

Thank you very much.



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Written Comment: Title IX Public Hearing
Submitted by interACT: Advocates for Intersex Youth

June 11, 2021

interACT: Advocates for Intersex Youth is the oldest and largest organization in the United States dedicated to advocacy on behalf of young people born with variations in their sex characteristics—sometimes known as intersex traits. As an intersex person and Executive Director, I wish to thank the Department of Education (ED) for working to strengthen Title IX regulations and enforcement to protect all students from all forms of sex-based discrimination. We hope ED will expressly include intersex students in this work, just as it recently recognized intersex students as an underserved population in its proposed Education Innovation and Research (EIR) program priorities. Intersex youth face the same kinds of stigma, discrimination, and abuse faced by other LGBTQI+ students. In addition, many also suffer medical trauma from non-consensual early genital or sterilizing surgeries. Like all LGBTQI+ youth, intersex youth can thrive if they are affirmed and supported. ED must act to protect and support all LGBTQI+ students, including intersex students.

Background

“Intersex” refers to people born with variations in physical sex characteristics—including genitals, gonads, chromosomes, and hormonal factors—that do not fit typical definitions of male or female bodies. **About 1.7 percent of the population is born with intersex traits, meaning millions of Americans are intersex, and there could be over 60,000 intersex births in the US every year.**¹ Despite being relatively common, “intersex” is still an unfamiliar term to many. This lack of awareness can cause feelings of stigma and loneliness for intersex people—and in fact, many intersex people may not even be aware of their own intersex traits until much later in childhood, adolescence, or even adulthood. One reason for this is that many variations may only become apparent during puberty or later in life, but another reason is that intersex youth have often had their variations and medical histories kept secret from them by their families and doctors. While this level of deception may not be as common today as it was in the past, the misguided desire to “protect” intersex youth from the supposed harm of growing up with a noticeable difference persists. This may lead to overt harm in the form of non-consensual “normalizing” surgeries to erase their intersex variations, or to adults punishing or discriminating against intersex youth for any perceived gender-nonconformity in appearance or behavior. These latter experiences, which are shared by many other youth in sexual and gender minority communities, can be especially severe for intersex youth who are also transgender, non-binary, or gender-nonconforming. (While many intersex people do identify with the sex with which they were raised, many others do not—*i.e.*, are transgender—and while most intersex people identify as either male or female, some are non-binary.) The range of unique challenges faced by intersex students can only be fully understood in the context of a history of silence, stigma, and medical trauma.

Many Intersex Students Live with a History of Silence, Stigma, and Medical Trauma

The vast majority of intersex children will not have immediate health concerns related to their differences, yet they are still frequently subjected to surgical interventions to make their bodies appear more “typical” absent any medical need. Most commonly occurring before the age of two, these operations include clitoral reductions, vaginoplasties, repeated penile surgeries, and even gonadectomies that can be sterilizing. Other consequences include chronic pain, urinary incontinence,

¹Melanie Blackless et al, How Sexually Dimorphic Are We? Review and Synthesis, 12 AM J HUM BIOL 151-166 (2000).

sexual dysfunction, psychological trauma, and the chance that surgery will enforce a sex assignment that the child will not identify with later.²

There are no proven medical benefits associated with performing these procedures before the intersex individual can participate in these weighty decisions about their own bodies and lives, but parents frequently report feeling pressure to consent to these surgeries on their child's behalf. When parents do approve these surgeries, they often do so in a state of overwhelm and with incomplete information about the risks and alternatives, and what their child's medical needs might be as they grow up. interACT has heard from parents who pushed back, asked questions, and successfully advocated for their children to have the chance to make these choices for themselves, but we have also heard from other parents who are wracked with regret over consenting to irreversible and damaging procedures that could have been avoided if they had known more at the time.

When intersex children are born, decisions to conduct unnecessary surgeries are often made based on social fears instead of evidence of medical need. When other people's fears drive decision-making, the standards for what makes someone's body "healthy" or "normal" can become deeply flawed. Oftentimes intersex youth's bodies are compared to people who are non-intersex, cisgender, white, able-bodied, and thin. The truth is, intersex children are already healthy. **It's the ideas surrounding our bodies that need to be changed, not our bodies themselves.**

Despite condemnation from numerous United Nations bodies,³ human rights groups,⁴ and medical associations,⁵ the practice of non-consensual surgery on intersex infants continues to this day in hospitals around the country. The most in-depth report on the practice was released by Human Rights

² Human Rights Watch, *"I Want to be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the US* (2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

³ UN Office of the High Commissioner for Human Rights, *Background note on human rights violations against intersex people* (2019), <https://www.ohchr.org/EN/Issues/Discrimination/Pages/BackgroundViolationsIntersexPeople.aspx>; United Nations, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO, *Eliminating forced, coercive or otherwise involuntary sterilization: An interagency statement* (2014), http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf?ua=1; United Nations, Report of the Special Rapporteur on Torture, Juan E. Mendez, UN Doc. A/HRC/22/53 (2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf.

⁴ Amnesty International, *First, Do No Harm: Ensuring the Rights of Children Born Intersex* (2017), <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/>; Human Rights Watch, *"I Want to be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the US* (2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>; Physicians for Human Rights, *Unnecessary Surgery on Intersex Children Must Stop* (Oct. 20, 2017), <https://phr.org/news/unnecessary-surgery-on-intersex-children-must-stop/>.

⁵ American Academy of Family Physicians, *Genital Surgeries in Intersex Children* (July 2018), <https://www.aafp.org/about/policies/all/genital-surgeries-intersexchildren.html>; GLMA: Health Professionals Advancing LGBTQ Equality, *Medical and Surgical Intervention of Patients with Differences in Sex Development* (Oct. 3, 2016), <http://glma.org/index.cfm?fuseaction=Feature.showFeature&CategoryID=1&FeatureID=796>; Massachusetts Medical Society, *Evidence-Based Care of Individuals Born with Differences in Sex Development (DSD)/Intersex* (Dec. 7, 2019), <http://www.massmed.org/News/Press-Releases/Massachusetts-Medical-Society-announces-policies-on-opioid-use-disorder-intersex-children-and-e-cigarettes/#.Xz7jNS2z0nU>; Michigan State Medical Society, *Opposing Surgical Sex Assignment for Infants with Differences of Sex Development, Resolution 12-18* (2018), <https://www.msms.org/hodresolutions/2018/12.pdf>.

Watch in 2017 and identified New York City as a major center of non-consensual intersex surgeries.⁶ A provider in New York who has been identified in the press previously as a perpetrator of childhood sexual abuse, Dix P. Poppas, Chief of Pediatric Urology at Weill-Cornell/New York Presbyterian, has come under fire in the past not only for his performance of clitoral reduction surgeries on intersex children, but also for his follow-up “sensitivity testing” that involved applying a medical vibratory device to the surgically reduced clitorises of children as young as 6.⁷ Despite this shocking practice, he continues to operate on his own patients.

Non-consensual early genital or sterilizing surgeries also implicate civil and constitutional rights.

The Constitution protects the right of everyone—including children—to be free from unnecessary and unwanted medical procedures.⁸ Early intersex surgeries frequently violate this right. The Constitution also subjects discrimination based on sex characteristics to heightened scrutiny.⁹ This scrutiny is triggered when the reason for an early sterilizing or genital surgery is not a medical emergency (or the patient’s request) but solely the goal of “normalizing” intersex traits.¹⁰ Federal statutes applicable to ACF-assisted programs, including the Affordable Care Act, Title IX, and the Family Violence Prevention Services Act, also prohibit discrimination based on intersex traits.¹¹

These irreversible and often high-risk early surgeries are performed to conform intersex bodies to gender expectations, often with patients having little or no say in this personal decision to determine what, if any, surgery or other treatment is appropriate for them. These surgeries may often be well-intentioned and carried out with the assumption that this is what children would want as adults, but we know from the many heart-wrenching stories of intersex adults who grew up to wish they had not had these surgeries that this assumption simply cannot be safely relied upon. Good intentions aren’t enough. Doctors and parents need to know that delaying non-emergency genital and gonadal surgeries so an intersex person can make their own decision is the safe and ethical choice. There are many intersex people living healthy and fulfilling lives without surgery. We need more of our doctors and our parents to know that our bodies are not broken and don’t need to be “fixed.”

Fortunately, medical practice is beginning to change. The largest children’s hospitals in Boston and Chicago—Boston Children’s Hospital and Lurie Children’s Hospital— have committed to ending certain harmful surgeries on intersex children too young to participate in these life-altering decisions about their own bodies.¹² And in a step that deserves to be replicated nationwide, New York City recently passed legislation to create a public education campaign to better educate both families and medical providers on intersex variations and the potential harms of unnecessary early surgeries.¹³

⁶ Human Rights Watch, “I Want to be Like Nature Made Me”: Medically Unnecessary Surgeries on Intersex Children in the US (2017).

⁷*Id.*; see also Yang, J., D. Felsen, and D.P. Poppas, Nerve sparing ventral clitoroplasty: analysis of clitoral sensitivity and viability, 178 J UROL 1598-601 (2007).

⁸See *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (“It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.”).

⁹See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, (2017).

¹⁰ Nondiscrimination in Health Programs and Activities; Final rule, 81 FR 31375, 31389 (May 18, 2016) (“[T]he prohibition on sex discrimination extends to discrimination on the basis of intersex traits or atypical sex characteristics. OCR intends to apply its definition of ‘on the basis of sex’ to discrimination on these bases.”).

¹¹ 20 U.S.C. § 1681; 42 U.S.C. §§ 10406, 18116.

¹² Lurie Children’s Blog, Intersex Care at Lurie Children’s and our Sex Development Clinic (July 28, 2020), <https://www.luriechildrens.org/en/blog/intersex-care-at-lurie-childrens-and-our-sex-development-clinic/>; Kimberly Zieselman, Boston Children’s Hospital’s Change on Intersex Surgeries was Years in the Making (October 23, 2020), <https://interactadvocates.org/boston-childrens-hospital-intersex-surgery/>.

¹³ N.Y.C. Int. No. 1748-A (2021).

Like other marginalized youth, intersex youth can thrive when they are affirmed and supported— **but despite current encouraging shifts in medical practice, many intersex students today live with this legacy of silence, stigma, and trauma.** Like their peers, many strive for excellence in school, sports, community involvement, and helping others—but struggle in the face of medical trauma, discrimination, and the need to rely on adults who often have little knowledge or understanding of their experiences. Some may have discovered information about their intersex traits or medical history only recently. Others were told for years by ill-informed providers or parents that their intersex traits must be hidden. (Indeed, the specter of being harassed in school locker rooms has historically been invoked as a justification for early surgeries.) Like many transgender children, they may be very open or very private about their intersex traits. Regardless of whether they are out as intersex or whether they appear visibly gender-conforming or not, many have learned to fear having their gender questioned and becoming targets of harassment and abuse.

Intersex Students Face Harassment and Discrimination in K-12 and Post-Secondary Education

Intersex youth face educational barriers based on both in- and out-of-school experiences of stigma, discrimination, and trauma. Unfortunately, there has been little rigorous research on the experiences of intersex students in the United States to date, but existing research paints a troubling picture. For example, a study of 272 Australian intersex adults about their schooling experiences found that two-thirds reported some form of victimization, most reported suicidal ideation, only a quarter reported positive educational experiences, and they were far more likely than their peers not to complete secondary school.¹⁴ Australian intersex adults also report more social isolation in both elementary and secondary schooling than their non-intersex (or endosex) peers.¹⁵ Research from East African nations similarly found frequent reports of abuse in school and disparities in graduation rates.¹⁶

Intersex students' stories confirm the importance of clear, robust, and inclusive Title IX protections. interACT's Director of Engagement, Bria Brown-King, has spoken about their own experiences in school, which included being singled out by peers because of their visible sex characteristics: "I started growing facial and body hair when I was about 6 or 7, but didn't pay it any mind until other kids started pointing out the differences and bullying me because of it."¹⁷ The bullying began on their first day of third grade. At this young age, they learned that if they were going to survive school, they had to become invisible to avoid drawing too much attention to themselves. They did not know at the time that their entire educational career would be a testament to their survival skills, all because they had sex characteristics that looked different from those of their peers.

Another youth advocate with the same intersex variation shares:

I knew other girls didn't grow facial or body hair like me, but I didn't understand why. Classmates called me "man voice" and made fun of my flat chest and muscular arms. I woke up two hours early every morning to make sure I had time to remove every visible hair from my

¹⁴ Tiffany Jones, *The needs of students with intersex variations*, 16 *SEX EDUC.* 602 (2016).

¹⁵ Mandy Henningham & Tiffany Jones, *Intersex students, sex-based relational learning & isolation*, *SEX EDUC.* (2021). DOI: 10.1080/14681811.2021.1873123.

¹⁶ Kenya National Commission on Human Rights, *Equal in Dignity and Rights: Promoting The Rights of Intersex Persons In Kenya* (2018), <https://www.knchr.org/Publications/Thematic-Reports/Group-Rights/Rights-of-Sexual-Minorities>; Support Initiative for Persons with Congenital Disorders, "Baseline Survey on Intersex Realities in East Africa—Specific Focus on Uganda, Kenya and Rwanda" (2016), <https://sipdug.org/baseline-survey-on-intersex-realities-in-east-africa/>.

¹⁷ Bria Brown-King, *5 Intersex People on Growing Up with Congenital Adrenal Hyperplasia* (June 12, 2020), <https://interactadvocates.org/intersex-congenital-adrenal-hyperplasia/>.

face, all for fear of someone catching a glimpse of my stubble. I didn't actually notice the things that made my body different until other people pointed them out, and then it just stuck with me.¹⁸

Today, after finding support through intersex communities and having stepped into a leadership role in intersex advocacy herself, Bria reflects: "I've overcome doubts and fears that I've held onto for most of my life. I always let my intersex traits hold me back from opportunities because of severe bullying. I learned to hide in the background so that people wouldn't notice me. In the process, I lost my voice and my confidence. I forgot who I was and what I was capable of becoming."¹⁹

For other intersex students, different treatment can start when they choose to confide in a friend or teacher about their intersex traits. One interACT Youth member reports: "A friend told me not to go into the girl's locker room anymore after I told them I'm intersex."²⁰ Classroom discussions of gender, sexuality, and human development that leave out intersex realities can be painful for students in themselves, and can also lead to bullying and harassment. "I walked out of health class crying last year," reports another interACT Youth member.²¹

Like transgender youth, intersex youth can face harassment and discrimination in access to school facilities like restrooms and locker rooms. Many intersex students find themselves trying to avoid using the restroom during school hours altogether to avoid unfair scrutiny and the stigma—and even threat of violence—that comes with it. Bria, whose experiences being targeted for bullying are described above, recalls times when they had to hide in a bathroom stall after using the school restroom until it was safe to come out. In a brief submitted to the Supreme Court, another former student relates their apprehension when their body began to masculinize at puberty. This led to school staff setting increasingly restrictive rules for their restroom access, ultimately barring the student from using any restroom in the school:

[I] was in a boys' restroom, and someone saw that I went in there, and then complained to my counselor, who then said "Well, you can't use the boys' restroom, so you have to use the girls' restroom." And I was like "ok, fine, whatever." But ... there [were] then complaints that I was using the girls' restroom. And I was told, "Well, you can use the nurse's restroom."

Now, ... the nurse was on the complete opposite side of the entire building So if I was in the middle of class, I would have to leave, and I would be gone for 10-15 minutes, so of course my teachers didn't like that. So I was told "You can't use the nurse's restroom There is a single-stall restroom in the special education area, which is near where your classroom[s] are, so you can use that one." And I was like "fine, ok." And I used that one for a bit and was then told that I couldn't use that one....

At that [point] ... I was told "Well, you don't have a full school schedule, so you can just hold it." So yeah, for the last semester, at least, I just wasn't allowed to use the restroom at the high school at all.²²

As illustrated by this experience, intersex students have many of the same needs as transgender students, such as support from adults and peers, inclusive policies and rules, equal access to school facilities, and the ability to easily update school records if needed, as noted in national guidance for schools in Malta.²³

¹⁸ Bria Brown-King, 5 Intersex People on Growing Up with Congenital Adrenal Hyperplasia (June 12, 2020), <https://interactadvocates.org/intersex-congenital-adrenal-hyperplasia/>.

¹⁹ InterACT, Bria Recaps Their interACT Internship (Feb. 4, 2020) https://interactadvocates.org/internship_recap/.

²⁰ interACT, What We Wish Our Teachers Knew (2018), <https://interactadvocates.org/wp-content/uploads/2018/07/BROCHURE-interACT-Teachers-final.pdf>.

²¹ *Id.*

²² Brief of interACT: Advocates for Intersex Youth, et al., as *Amicus Curiae* in Support of Respondent, Gloucester County School Board v. G.G. ex rel. Grimm, No. 16-273 (U.S. Mar. 2, 2017).

²³ Malta Ministry for Education and Employment, Trans, Gender Variant and Intersex Students in Schools Policy, 14 (2015),

The Malta guidelines further state that in addition to the above, intersex students need:

- clear messages that a service welcomes intersex people, and awareness of sex characteristics related to bodily variations, not gender identity or sexual orientation;
- to know that confidentiality will be respected;
- services that understand intersex health and well-being concerns.²⁴

Singling-out and harassment have lasting effects on intersex youth, often compounding medical and other traumas. One youth reported that after being bullied at school, including having a milkshake thrown on him, “Even today I don’t like to be touched, so don’t touch me.”²⁵

Bullying and mistreatment are driven by the same stigma and biases that motivate “normalizing” surgeries. The specter of one day being harassed in the locker room has historically been invoked as a justification for medically unnecessary early surgeries. In effect, doctors have viewed the harmless presence of intersex traits as a “social emergency,” and believed surgeries would prevent children from experiencing stigma, isolation, and trauma as they grew up. However, early surgery often produces the opposite effect, teaching intersex youth from the beginning of their lives that there is something wrong with them about which they should feel ashamed. (Bullying against intersex youth should be addressed in the same way as other types of bullying—with social interventions aimed at stopping the abusive behavior and encouraging acceptance—rather than through unnecessary and non-consensual surgery.)

Clear interpretation and enforcement of Title IX’s protections for intersex youth are needed now more than ever, as more and more intersex students are coming out—or threaten to be outed by growing scrutiny on youth who don’t conform to gender stereotypes. State legislation to adopt sex-verification regimes for school sports,²⁶ and other proposals such as mandated reporting of “gender non-conformity,”²⁷ are exacerbating the potential for anti-intersex discrimination in schools. In addition to harming transgender students, **sex testing requirements single out and gravely harm intersex students.** Sex-verification procedures in athletics have a documented history of singling out intersex athletes, invading their medical privacy, and inflicting severe social stigma and emotional trauma.²⁸ These harms are far more than rhetorical: one study found intersex people subjected to medical procedures to “verify” a person’s sex suffered symptoms comparable to survivors of sexual abuse.²⁹ More than one young intersex woman publicly outed by sports authorities has died by suicide after “failing” such tests.³⁰ Such requirements have also led to intense pressure for young intersex athletes to undergo unwanted medical

<https://education.gov.mt/en/resources/Documents/Policy%20Documents/Trans,%20Gender%20Variant%20and%20Intersex%20Students%20in%20Schools%20Policy.pdf>.

²⁴ *Id.*

²⁵ Jack D. Simons, Jose-Michael Gonzalez & Melissa Ramdas, Supporting Intersex People: Effective Academic and Career Counseling, 14 J LGBTQ Issues Couns. 91-209 (2020).

²⁶ *See, e.g.*, Ala. Acts 285 (2021); Ark. Acts 461 & 953 (2021); Miss. SB 2536 (2021); Tenn. Pub. Ch. 40 (2021); W.V. Code §18-2-25d (2021).

²⁷ *See, e.g.*, North Carolina SB 514 (2021); Iowa IA HF2272 (2020); Ohio HB 658 (2018).

²⁸ *See* Claudia Wiesemann, Is There A Right Not to Know One’s Sex? The Ethics of ‘Gender Verification’ in Women’s Sports Competition, 1–3 J. Med. Ethics (2010); Erin E. Buzuvis, Transsexual and Intersex Athletes, in SEXUAL MINORITIES IN SPORTS: PREJUDICE AT PLAY 59–67 (Melanie L. Sartore-Baldwin, ed. 2013); Robert Ritchie et al., Intersex and the Olympic Games, J. Royal Soc. Med. 2008 Aug 1; 101(8): 395-399.

²⁹ Karsten Schützmann et al., Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development, Arch. Sex. Behav. (2009):16-33.

³⁰ Isheeta Sharma, Santhi Soundarajan & The Misogyny Of Sex Verification Tests In Sports, Feminism in India (Nov. 25, 2020), <https://feminisminindia.com/2020/11/25/santhi-soundarajan-gender-determination-test/>; Nihal Koshie, The rising star who ended her life much before Dutee Chand challenged the rules, Indian Express, Sept. 9, 2018, <https://indianexpress.com/article/sports/sport-others/the-girl-before-dutee-chandpratima-gaonkar-5346699/>.

interventions solely to able to compete.³¹ Indeed, it is largely based on the harms inflicted on numerous intersex women that the United Nations Human Rights Council has noted “the absence of legitimate and justifiable evidence” supporting sex-testing regimes.³²

Title IX prohibits discrimination based on sex characteristics, including intersex traits.

Title IX clearly prohibits discrimination based on sex characteristics, including discrimination that targets intersex students. Like anti-transgender discrimination, anti-intersex discrimination is necessarily motivated by a contrast between one presumed indicator of sex and another. In *Bostock*, the Court recognized that an employer may not discriminate against “persons with one sex identified at birth and another today.”³³ Anti-intersex bias is typically motivated by a perceived contrast between an individual’s specific sex characteristics and their sex category (either as identified at birth or today). Additionally, discrimination based on anatomical or physiological sex characteristics (such as genitals, gonads, chromosomes, and hormone function) is itself inherently sex-based. Just as gender identity and sexuality are “inextricably bound up with” sex, intersex traits are as well.³⁴ The Fourth Circuit recently observed: “how does [a decisionmaker] determine transgender status, if not by looking to what it calls ‘biological gender’?”³⁵ The same insight applies to intersex students. Finally, discrimination based on intersex traits invariably involves sex stereotypes. Just as, “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that [they were] assigned at birth,” intersex people by definition have traits that do not conform to stereotypes about male or female bodies.³⁶ While courts have not had occasion to squarely address anti-intersex discrimination in light of *Bostock*, some have already anticipated doing so.³⁷

When intersex youth or adults face discrimination in access to sex-segregated settings—such as school or workplace restrooms or locker rooms, school sports, or prisons—the same principles apply as in cases involving transgender people. Where such sex-segregation is otherwise lawful, all persons should have equal access, regardless of intersex *or* transgender status, to opportunities consistent with their self-identified gender. An intersex person should not have to disclose their intersex traits (which may include private medical information) when using sex-segregated settings, in the same way as a non-intersex person should not have to disclose their genital makeup or chromosomes in order to use the restroom. As with a transgender student, for example, it would violate Title IX and Equal Protection for an intersex student to be “treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender.”³⁸ (Of course, a school that discriminates

³¹ Geneva Abdul, This Intersex Runner Had Surgery to Compete. It Has Not Gone Well, N.Y. Times (Dec. 16, 2019) <https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-andfield.html>; U.N. GEN. ASSEMBLY, HUM. RTS. COUNCIL, 32 Sess. Report of The Special Rapporteur on The Right of Everyone to The Enjoyment of The Highest Attainable Standard Of Physical And Mental Health, 14 (2016).

³² United Nations Human Rights Council, Elimination of Discrimination Against Women and Girls in Sport (Resolution 40/5), May 5, 2019.

³³ *Cf. Bostock*, 140 S.Ct. at 1747 (“By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today”).

³⁴ *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731, 1742 (2020).

³⁵ *Grimm v. Gloucester County School Board*, 972 F.3d 586, 609 (4th Cir. 2020).

³⁶ *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017).

³⁷ *See, e.g., Frappied v. Affinity Gaming Black Hawk*, 966 F.3d 1038, 1057 n. 3 (10th Cir. 2020) (“This case does not raise, and we do not address, sex discrimination involving intersex or gender non-binary individuals”); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 623 (4th Cir. 2020) (Wynn, concurring) (noting that intersex students may “comprise a greater fraction of the population than transgender individuals”).

³⁸ *Grimm v. Gloucester County School Board*, 972 F.3d 586, 618 (4th Cir. 2020). *Accord*, *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1306 (11th Cir. 2020) (“The School Board allowed all non-transgender boys to use the boys’ restroom. It allowed all non-transgender students with male driver’s licenses and birth certificates to use the

against both intersex *and* transgender students in the same manner “doubles rather than eliminates [Title IX and Equal Protection] liability.”³⁹) When the Fourth Circuit affirmed the application of Title IX to transgender students, it expressly recognized that “there are... youth born intersex who do or do not identify with their sex-assigned-at-birth,” and that this is one reason why some youth “do not have genitalia that match the binary sex listed on their birth certificate—let alone that matches their gender identity,” and ultimately why policies restricting facility use on this basis are unlawfully discriminatory.⁴⁰ For intersex people who are non-binary, while these students would benefit from the rethinking of binary sex-based rules, many students seek the immediate remedy of accessing the “least worst fit” between the two available options. Some federal and state agency guidance recognizes that where only binary options exist in a school or workplace—such as for restrooms, locker rooms, or dormitories—non-binary individuals have the right to determine which facilities are most appropriate for them.⁴¹ Refusing to honor this choice could constitute disparate treatment where there is no truly equal option for intersex and non-binary people.⁴²

Title IX rules must expressly define discrimination “on the basis of sex” to include discrimination based on sex characteristics, including intersex traits.

ED must codify Title IX’s protections for intersex students into Part 106. Specifically, the regulations should define “on the basis of sex” to include “on the basis of sex characteristics, including intersex traits.” This language tracks proposed bills related to sex discrimination recently passed by the House of Representatives.⁴³ As one circuit judge recently noted, intersex students are an even larger population than transgender students,⁴⁴ and just as much in need of the clarity and visibility of protection that rulemaking would provide.

ED must also codify that the Title IX provisions permitting single-sex programs or activities are not a safe harbor for discrimination against transgender or intersex students. Some provisions of the Title IX statute permit single-sex activities in certain contexts,⁴⁵ while ED has sought to establish additional exceptions by regulation.⁴⁶ Some parties in litigation, as well as the prior Administration, have argued that these provisions necessarily permit—or even *require*—schools to apply standards that exclude

boys’ restroom. But because Mr. Adams is a transgender boy, the School Board singled him out for different treatment”); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (“A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX”).

³⁹ *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 17434-44 (2020).

⁴⁰ *Grimm v. Gloucester County School Board*, 972 F.3d 586, 596, 615 (4th Cir. 2020) (citing interACT brief).

⁴¹ See, e.g., U.S. Dep’t of Labor, *Job Corps Program Instr. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program* (2015) (“For transgender students who do not identify as male or female, again, the housing preference of the student should be discussed and respected, whenever possible”); N.Y.S. Div. Of Hum. Rts., *Guidance on Protections from Gender Identity Discrimination under the New York State Human Rights Law*, 9 (Jan. 29, 2020), <https://dhr.ny.gov/sites/default/files/pdf/nysdhr-GENDA-guidance-2020.pdf> (“Jordan is a high school student who is non-binary. Jordan would feel safest using the single sex bathroom assigned to girls. The school administration tells Jordan to use single-occupancy restrooms only. The school must allow Jordan to access the facilities consistent with Jordan’s gender identity or expression. No one can be limited to using single-occupancy restrooms”).

⁴² See generally Feldblum C.R., *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 Me. L. Rev. 159 (2002).

⁴³ Equality Act, H.R. 5, S. 393, 117th Cong., § 9 (2021); Paycheck Fairness Act, H.R. 7, S.205, 117th Cong., § 2(a) (2021).

⁴⁴ *Grimm v. Gloucester County School Board*, 972 F.3d 586, 623 (4th Cir. 2020) (Wynn, concurring) (noting that intersex students may “comprise a greater fraction of the population than transgender individuals”).

⁴⁵ 20 U.S.C. § 1681(a)(6)-(9).

⁴⁶ 34 C.F.R. §§ 106.15, 106.32-106.34, 106.41.

or otherwise discriminate against transgender and intersex students.⁴⁷ To date, courts have overwhelmingly rejected these arguments.⁴⁸ Nevertheless, this widespread and heavy reliance on ED's own regulations, as well as certain statutory provisions, remains the primary argument being asserted across the country to justify systematic discrimination against these populations. ED's rules must be clarified to definitively preclude such claims. The best way to do this is by stating that no provision of the statute or regulations related to single-sex or sex-segregated activities may be construed to permit an entity to exclude transgender or intersex students from an activity consistent with their gender identity.

ED Must Take Other Actions to Protect Intersex Students

Restoring and strengthening Title IX protections regarding sexual harassment and violence is critical for intersex youth. The President's Executive Order requires ED to account for disproportionate rates of sexual violence faced by LGBTQI+ youth, and to ensure schools are adequately supporting them.⁴⁹ To do this, ED must revise Title IX rules to eliminate provisions that tilt the scales against survivors of sexual harassment and violence, and ensure strong protections for survivors and a fair process for all. Specifically, ED should:

Ensure Title IX complaints are not dismissed simply because of where a student was victimized, which employee they asked for help, or whether they put it in writing, or because they have managed to stay in school despite the abuse, or because they or their abuser left school.

Restore fair standards of proof that don't give schools a pass for negligence or tilt the scales against survivors.

Require equal procedural rights and prohibit schools from dragging their feet, urging survivors to enter mediation with their abusers, or subjecting them to live cross-examination.

Guarantee survivors a wide range of supportive measures and remedies.

ED should correct and clarify the application of Title IX's religious exemption. ED should also revise § 106.12 to ensure that Title IX's religious exemption is correctly applied. The current rule exceeds the clear terms of the statute by suggesting that schools that are not controlled by any religious institution may nevertheless invoke the exemption. Moreover, it creates confusion and unfairness by encouraging schools to assert the exemption on a *post hoc* basis, notwithstanding the requirement to notify students of their Title IX rights.⁵⁰ Thus, schools are required to promise students and families that they will follow Title IX and not discriminate, yet permitted to break that promise without warning. ED should:

Revise § 106.8's notification requirements to include notifying students and families of a school's intention to rely on the religious exemption.

Revise § 106.12(b) to make clear that seeking advance assurance will be considered as evidence of the sincerity of an exemption claim.

Revise § 106.12(c) to accurately reflect the scope of the statutory exemption.

⁴⁷ Memorandum of Acting Assistant Attorney General John B. Daukas, Civil Rights Division, "Application of *Bostock v. Clayton County*" (January 17, 2021) (rescinded); Memorandum of Acting Assistant Secretary Kimberly M. Richey, Office for Civil Rights, "Re: *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020)" (January 8, 2021) (archived); Statement of Interest of the United States, *Soule v. Connecticut Association of Schools*, No. 3:20-cv-00201(D. Conn. March 24, 2020) (withdrawn).

⁴⁸ *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020); *Doe ex rel. Doe v. Boyertown Area School District*, 897 F.3d 518 (3d Cir. 2018); *Cruzan v. Special School District No. 1*, 294 F.3d 981 (8th Cir. 2002).

⁴⁹ 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).

⁵⁰ Compare 34 CFR § 106.8 (requiring schools to notify students, families, and staff of their Title IX rights and that they will not discriminate on the basis of sex), with § 106.12(b) (permitting *post hoc* exemption claims).

ED should work with DOJ and other agencies to codify SOGII protections in the Title IX common rule for 20 other federal agencies. Title IX’s protections with respect to SOGII discrimination are critical not only for ED-assisted programs but also for programs assisted by the twenty other agencies with responsibility for Title IX enforcement. ED should work with the Justice Department and other agencies to incorporate core definitions into the twenty-year-old Title IX common rule.⁵¹

ED—through both OCR and OESE—should provide guidance and assistance to ensure the needs of intersex students are addressed in state and local equity efforts, including with respect to violence, bullying, and suicide prevention; student health and support services; and creating inclusive classrooms, curriculum, and school climates. These efforts should include:

Clarifying Title IX’s application to common situations facing LGBTQI+ students, as well as the protections of the Equal Access Act and the Family Educational Rights and Privacy Act (FERPA).

Best practice resources for schools on supporting intersex and transgender students.

Consistently naming and addressing the needs of intersex students as an underserved population in guidance under the Every Student Succeeds Act and other ED funding programs.

Promoting curriculum and programming that addresses the normal and healthy diversity of sex characteristics, as well as the traumas and challenges youth may face from unnecessary early “normalizing” surgeries.

Engaging intersex youth and promoting intersex visibility and youth leadership, including through ED events and publications.

Collecting and reporting disaggregated OCR complaint data, including data on claims involving discrimination based on sex characteristics (including intersex traits).

Collecting data on the experiences of intersex students, including through the Civil Rights Data Collection and the Clery Act.

⁵¹ Nuclear Regulatory Commission; Small Business Administration; National Aeronautics and Space Administration; Department of Commerce; Tennessee Valley Authority; Department of State; Agency for International Development; Department of Housing and Urban Development; Department of Justice; Department of Labor; Department of the Treasury; Department of Defense; National Archives and Records Administration; Department of Veterans Affairs; Environmental Protection Agency; General Services Administration; Department of the Interior; Federal Emergency Management Agency; National Science Foundation; Corporation for National and Community Service; Department of Transportation, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Rule, 65 FR 52857 (Aug. 30, 2000). *See also* Department of Energy, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 66 FR 4627 (Jan. 18, 2001).