From: Tang, Elizabeth
Sent: Fri, 11 Jun 2021 20:25:47 +0000
To: T9PublicHearing
Cc: Martin, Emily;Patel, Shiwali;Sue Klein
Subject: Written Comment: Title IX Public Hearing (Sex Discrimination)
Attachments: NCWGE Title IX Comment 6.11.21 vF.pdf

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Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

Please find attached a comment from members of the National Coalition for Women and Girls in Education on the Title IX regulations addressing sexual harassment, anti-LGBTQ discrimination, and other forms of sex-based discrimination in education.

Thank you,
Elizabeth

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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 20202

Re: Written Comment for Title IX Public Hearing (Sex Discrimination)

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

As a diverse group of advocates and experts for gender equity in education who are members of the National Coalition for Women and Girls in Education (NCWGE), we are pleased to submit this comment regarding the Title IX regulations addressing sexual harassment and anti-LGBTQ discrimination (Part I) and other forms of sex-based discrimination in education (Part II) in response to the Department of Education's public hearing.

In preparing the changes in the Title IX regulation, we urge the Department to keep them as clear and easily understandable as possible and to ensure that grievance procedures are fair and equitable and work for all types of sex discrimination. We hope that the Department will rescind the changes to the Title IX regulations made by the previous administration, eliminate outdated provisions, incorporate accepted standards from existing guidance documents, and make suggested improvements as suggested in Part II of these comments before the end of their first four years.

The following are our recommendations for the Department regarding Title IX protections against sex discrimination:

I. Protections Against Sexual Harassment and Anti-LGBTQ Discrimination

A. Restore and strengthen Title IX protections against sexual harassment.

Sexual harassment is widely prevalent yet underreported in both PreK-12 and higher education. For example, one in five girls ages 14-18 have been kissed or touched without their consent,[1] and one in four women are sexually assaulted in college,[2] but only 2 percent of girls ages 14-18[3] and 12 percent of college women[4] who are

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[1] National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 3 (2017) [hereinafter NWLC Sexual Harassment Report], https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence.
[2] AAU, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ix (Oct. 15, 2019) [hereinafter AAU Campus Climate Survey], https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019.
[3] NWLC Sexual Harassment Report, *supra* note 1, at 2.
[4] AAU Campus Climate Survey, *supra* note 2, at A7-27.

sexually assaulted report the incident to their schools. Yet when students do report sexual harassment, they are often ignored, disbelieved, or even punished by their schools. Despite the need for better responses to sexual harassment in schools, the previous administration instead took numerous steps to weaken civil rights protections against this harassment, including by creating a new harmful Title IX rule that requires schools to ignore many incidents of sexual harassment and to adopt uniquely unfair and retraumatizing procedures in sexual harassment investigations.

The Department should suspend enforcement and implementation of this new Title IX harassment and religious exemption rule and issue a new rule that is responsive to the needs of students and survivors in both PreK-12 and higher education, with a particular focus on Black students, Indigenous students, and other students of color; undocumented students; LGBTQ students; students with disabilities; and students who are English learners. The new Title IX rule should include the following provisions:

- **Restore and strengthen protections against harassment:**
  - Define sexual harassment as unwelcome sexual conduct, including quid pro quo harassment;
  - Affirm that sex-based harassment includes sexual harassment, sexual assault, dating violence, domestic violence, and sex-based stalking, and harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions;
  - Require schools to respond to sex-based harassment regardless of where it occurs (including off campus or abroad), when the harassment interferes with or limits an individual's ability to participate in or benefit from an education program or activity;
  - Require schools to address sex-based harassment that they know or should know about, as well as all harassment by school employees that occurs in the context of their job duties, regardless of whether the complainant faces further actionable harassment post-notice;
  - Require schools to provide a prompt, effective, and reasonable response to sex-based harassment, including by providing supportive measures to complainants no later than five school days after receiving notice, and prohibit schools from conditioning a complainant's access to supportive measures on their agreement to a nondisclosure agreement or waiver of legal claims against the school;
  - Allow schools to use non-investigative processes (such as a restorative justice process) to resolve complaints of sex-based harassment as long as participation is truly voluntary, the parties are able to withdraw at any time before the process concludes, and the facilitators are adequately trained;
  - Clarify that Title IX protects all persons, including those who are neither students nor employees, who seek to access or benefit from an education program or activity; and
  - Allow states and schools to provide additional protections beyond those in the Title IX rule.

- **Develop robust protections against retaliation:**
  - Explicitly prohibit these and other common forms of retaliation:
    - Disciplining a complainant for collateral conduct that is disclosed in a complaint or investigation (e.g., alcohol or drug use, consensual sexual contact, reasonable self-defense, presence in restricted parts of campus) or that occurs as a result of the reported harassment (e.g., nonattendance);
    - Disciplining a complainant for a "false report" or for prohibited sexual conduct solely because the school has decided there is insufficient evidence for a finding of responsibility or because the respondent is found not responsible;
    - Disciplining a complainant for discussing the allegations that gave raise to their complaint; and

        - Disciplining a victim of sex-based harassment for misconduct charges the school knew or should have known were brought by a third party for the purpose of retaliation; and
    - Allow schools to dismiss, without a full investigation, a complaint of sex-based harassment that is patently retaliatory (e.g., a disciplined harasser a files countercomplaint against their victim).

- **Ensure fair disciplinary procedures:**
    - Require schools to resolve complaints using grievance procedures that are fair and afford both parties the same procedural rights, including by applying a preponderance of evidence standard;
    - Otherwise allow schools flexibility in implementing grievance procedures, particularly when addressing complaints that, if substantiated, would not result in serious sanctions;
    - Do not foreclose schools from forgoing live hearings attended jointly by the parties or from forgoing direct cross-examination, where not otherwise required by law; and
    - For schools that rely on direct cross-examination, do not foreclose recipients from considering past statements by parties or witnesses who are not available for direct cross-examination.

To ensure that no type of harassment is singled out for uniquely burdensome standards or labeled as uniquely suspect, we also ask the Department to apply uniform standards for other forms of sex-based harassment, including harassment based on sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, sex characteristics (including intersex traits), parental status, pregnancy, childbirth, termination of pregnancy, or related conditions; as well as harassment based on other protected traits, including race, color, national origin, and disability.

B. Fully enforce Title IX protections for LGBTQ students.

LGBTQ students face especially high rates of discrimination in school, including being denied equal access to school facilities and facing unsafe and hostile school environments. Students who face anti-LGBTQ discrimination or victimization are three times more likely to miss school in a given month, have lower grade point averages, have lower self-esteem, and are half as likely to plan to pursue higher education.[5] Yet one of the previous administration's first actions was to rescind the 2016 guidance addressing transgender students' rights. However, the Supreme Court's holding in *Bostock*—that sex discrimination under Title VII includes discrimination based on sexual orientation and gender identity—is based on a textual analysis that applies to protections against sex discrimination within all federal civil rights laws and thus makes clear that Title IX protects against this discrimination. President Biden's recent Executive Orders reiterate the core principles of the *Bostock* ruling.[6] To fully implement *Bostock* and the above executive orders, the Department should:

- Affirm that sex-based discrimination includes sexual orientation, gender identity, gender expression, transgender status, sex stereotypes, and sex characteristics (including intersex traits);
- Affirm that students must be allowed access to sex-separated activities and facilities consistent with their gender identity, including athletics teams, bathrooms, and locker rooms;
- Clarify that provisions permitting single-sex programs or activities are not a safe harbor for anti-LGBTQ discrimination; and
- Clarify immediately that OCR will accept complaints alleging that schools have discriminated on the basis of sexual orientation or gender identity, and reach out to students and families who filed such

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[5] GLSEN, *The 2019 National School Climate Survey* xx (2020), https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf.

[6] Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation). 86 Fed. Reg. §14 (January 25, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf; 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). 86 Fed. Reg. §46 (March 11, 2021), https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf.

complaints with OCR only to have those complaints rejected or narrowed because of erroneous interpretations of the law.

Religious exemptions from Title IX's protection pose particular risks to LGBTQ students, as well as to pregnant and parenting students and to all students who do not conform to traditional gender stereotypes. Therefore, it is also critical that the Department take steps to ensure that religion is not inappropriately used as a license to discriminate, including by rescinding the religious exemption regulations promulgated by the previous administration. Specifically, the Department should:

- Narrowly construe the Title IX statute's religious exemption in order to effectuate Title IX's remedial purpose;
- Require schools to provide advance notice to the Department—and thereby, to students, families, and the public—of their intention to rely on a religious exemption from Title IX;
- Require a school that claims religious exemptions to clearly disclose those exemptions whenever it disseminates its nondiscrimination policy pursuant to 34 U.S.C §106.9; and
- Remind all stakeholders that preventing and remedying discrimination is a compelling government interest, and so any exceptions, including religious exemptions, must be narrowly construed so that federal funding is not used to subsidize discrimination, including against LGBTQ individuals.

II. Protections Against Other Forms of Sex Discrimination

While we urge the Department to prioritize regulatory action restoring protections against sexual harassment and implementing *Bostock*'s protections, we also urge the Department to undertake additional steps to implement and enforce Title IX.

A. Ensure Title IX protects Black, Latinx, and Indigenous women, girls, and LGBTQ children from discriminatory discipline.

Women, girls, and LGBTQ children who are Black, Latina, or Indigenous are more likely to be disciplined and pushed out of school than their white peers, because of pernicious sex- and race-based stereotypes. For example, nationwide, Black girls are almost six times more likely to be suspended from school than white girls, Indigenous girls are almost three times as likely, and Latina girls are more than 1.5 times as likely—often for minor and subjective offenses.[7] Girls of color, especially Black girls, and LGBTQ students of color are also more likely to be targeted and disciplined for violating dress codes based on gender- and race-based stereotypes.[8] To restore and strengthen protections under Title IX (and Title VI) against discriminatory discipline, the Department should:

- Release new guidance outlining Title IX (and Title VI) protections against intersectional discrimination based on sex and other protected traits, like race; and
- Initiate rulemaking under Title IX (and Title VI) to prohibit discriminatory dress and grooming policies in schools, including reinstating the express prohibition on discriminatory codes of appearance contained in the original 1975 Title IX regulations.

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[7] National Women's Law Center, *Let Her Learn: A Toolkit to Stop School Pushout for Girls of Color* 1 (2016), https://nwlc.org/resources/let-her-learn-a-toolkit-to-stop-school-push-out-for-girls-of-color.
[8] National Women's Law Center, *Dress Coded: Black girls, Bodies, and Bias in DC Schools* (2018), https://nwlc.org/resources/dresscoded.

B. Strengthen protections for pregnant, expectant, and parenting students.

More than one in five (22 percent) students in college are parents,[9] and in 2015, 2.2 percent of teens aged 15-19 gave birth.[10] Due to hostile attitudes and policies concerning young parents, including Title IX violations, this population faces unique barriers in enrolling, attending, and succeeding in school. Only 51 percent of women who have children as teenagers obtain a high school diploma by age 22, compared to 89 percent of their peers.[11] In higher education, nearly half (44 percent) of student parents work full-time while enrolled, and nearly one quarter (23 percent) are both single parents and working full-time while enrolled.[12] Despite these responsibilities, parenting college students tend to have higher GPAs than their non-parenting peers.[13] And having a child can be a motivating factor for students who were previously disengaged from school.[14] Institutional barriers and lack of support, however, lead to student parents having lower levels of college enrollment and completion, higher levels of unmet financial need, and higher levels of debt upon graduation.[15] To ensure that Title IX protects pregnant, expectant, and parenting students' access to education, the Department should:

- Issue comprehensive Title IX regulations for lactation, pregnancy, parental, and reproductive health accommodations, including specifically requiring schools to provide an appropriate non-bathroom space and breaks for students to breastfeed or express breast milk; and
- Ensure that religious exemptions are narrowly construed, so federal funding is not used to subsidize discrimination based on sex, including pregnancy or parenting status.

C. Strengthen protections for gender equity in athletics.

While gender equity in athletics has improved greatly since Title IX's inception in 1972, much work remains. College women receive almost 60,000 fewer athletic participation opportunities than college men, and girls in high school receive over 1 million fewer opportunities than boys to participate.[16] Women's and girls' teams across the country are also given second-class treatment when it comes to facilities, equipment, travel, and other benefits and services, and they have been hit especially hard by the COVID-19 pandemic.[17] In addition, girls of color receive far fewer chances to play on school sports teams than their white and male peers.[18] Furthermore, transgender athletes continue to face discrimination on the basis of gender identity, which the Supreme Court has held is sex discrimination. In 2020 alone, nearly 20 states introduced bills seeking to ban transgender athletes from sports, with over half of these bills specifically targeting transgender women and

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[9] U.S. Government Accountability Office, *Higher Education: More Information Could Help Student Parents Access Additional Federal Student Aid* 9 (Aug. 2019), https://www.gao.gov/assets/710/701002.pdf.
[10] U.S. Department of Health and Human Services, Centers for Disease Control & Prevention, National Center for Health Statistics, *NCHS Data Brief, Continued Declines in Teen Births in the United States* (2015) 1, https://www.cdc.gov/nchs/data/databriefs/db259.pdf.
[11] Kate Perper *et al.*, *Child Trends Fact Sheet: Diploma Attainment Among Teen Mothers* (2010), http://www.childtrends.org/Files//Child_Trends-2010_01_22_FS_DiplomaAttainment.pdf.
[12] *Id.* at 9.
[13] Institute for Women's Policy Research, *Parents in College: By the Numbers* 1 (Apr. 2019) https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers.
[14] Wanda S. Pillow, Unfit Subjects: Educational Policy and the Teen Mother (New York: Rutledge Falmer, 2004), 117.
[15] *Id.* at 1; Perper *et al.*, *supra* note 11, at 11-13.
[16] Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (2020), https://www.womenssportsfoundation.org/articles_and_report/chasing-equity-the-triumphs-challenges-and-opportunities-in-sports-for-girls-and-women.
[17] United Nations Women, *COVID-19, Women, Girls and Sport: Build Back Better,* (2020), https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-covid-19-women-girls-and-sport-en.pdf.
[18] National Women's Law Center, *Finishing Last: Girls of Color and School Sports Opportunities* 1 (2015), https://nwlc.org/resources/finishing-last-girls-color-and-school-sports-opportunities.

girls.[19] In 2021 so far, at least 69 bills have been introduced prohibiting transgender students from participating in sports consistent with their gender identity.[20] To continue the fight for gender equity in athletics, the Department should:

- Work with Title IX Coordinators and other relevant officials in states and schools to ensure that they are complying with Title IX to provide equal athletic opportunities based on gender; and
- Protect the right of women and girls who are transgender to participate fully and equally on sex-segregated sports teams consistent with their gender identity, in accordance with the reasoning in the Supreme Court's *Bostock* decision.

D. Restore and strengthen Title IX protections for gender-conscious programs.

Although great strides have been made with respect to gender and racial equity in education, gender- and race-conscious programs remain critical to ensuring equal educational opportunities for all women and girls, including women and girls of color. For example, Latina women still hold only 4 percent of all bachelor's degrees, even though they are 9 percent of the U.S. population, and Black women still hold only 3 percent of all computer science degrees, even though they are more than 7 percent of the U.S. population.[21] Disparities like these persist in the workplace, where, despite reaching an all-time high in 2020, women still comprise only 7 percent of Fortune 500 CEOs, and women of color only 0.6 percent.[22] Despite these glaring gaps, the previous administration opened numerous investigations into affirmative action programs for women and girls.[23] To protect gender-conscious programs in education, the Department should:

- Issue Title IX guidance clarifying that gender-conscious affirmative action programs are permissible to address patterns of historical exclusion and discrimination and to promote educational diversity; and
- Dismiss frivolous OCR complaints challenging gender-conscious affirmative action programs, consistent with the regulations allowing affirmative action under Title IX.

E. Prohibit sex-segregated education programs and activities that are sex discriminatory and often based on harmful and inaccurate sex stereotypes about women and girls or men and boys.

Numerous studies by neuroscientists and child development experts have consistently found that cognitive abilities and learning needs differ more *within* groups of girls or boys than *between* them.[24] However, sex-segregated classes, activities, and schools based on harmful and inaccurate sex stereotypes about brain development and learning have proliferated widely in recent years, in large part due to the Bush administration's 2006 changes to the Title IX single-sex regulations.[25] Not only do these sex-segregated programs reinforce

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[19] American Civil Liberties Union, *Trans Rights Under Attack in 2020* (last visited Dec. 14, 2020), https://www.aclu.org/issues/lgbt-rights/transgender-rights/trans-rights-under-attack-2020.

[20] Human Rights Campaign, *2021 Officially Becomes Worst Year in Recent History for LGBTQ State Legislative Attacks as Unprecedented Number of States Enact Record-Shattering Number of Anti-LGBTQ Measures Into Law* (May 7, 2021), https://www.hrc.org/press-releases/2021-officially-becomes-worst-year-in-recent-history-for-lgbtq-state-legislative-attacks-as-unprecedented-number-of-states-enact-record-shattering-number-of-anti-lgbtq-measures-into-law.

[21] National Women's Law Center, *Making the Case: Gender-Conscious Programs in Higher Education* 4 (2020) [hereinafter NWLC Gender-Conscious Programs Report], https://nwlc.org/resources/making-the-case-gender-conscious-programs-in-higher-ed.

[22] Emma Hinchliffe, *The number of female CEOs in the Fortune 500 hits an all-time record*, FORTUNE (May 18, 2020), https://fortune.com/2020/05/18/women-ceos-fortune-500-2020.

[23] *E.g.,* Sam Ogozalek, *SU is under federal investigation for alleged sex discrimination against men*, DAILY ORANGE (Apr. 17, 2020), http://dailyorange.com/2020/04/su-federal-investigation-alleged-sex-discrimination-men.

[24] National Coalition for Women and Girls in Education, *Title IX At 45: Advancing Opportunity through Equity in Education* 64 (2017) [hereinafter NCWGE Report], https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf.

[25] American Civil Liberties Union, *Preliminary Findings of ACLU "Teach Kids, Not Stereotypes" Campaign* 6 (Aug. 20, 2012), https://www.aclu.org/files/assets/doe_ocr_report2_0.pdf.

harmful gender stereotypes, but they also often fail to offer comparable subjects or teaching methods for boys and girls, provide no comparable option for students who prefer coeducation, allocate fewer resources for girls' programs,[26] and are correlated with high race-based segregation.[27] To restrict the proliferation of harmful sex-segregated education programs, the Department should:

- Rescind the 2006 Title IX single-sex regulations and initiate enforcement efforts against sex-segregated classes, activities, and schools that rest upon and perpetuate gender stereotypes, and update relevant guidance documents to reflect this change;
- Ensure that religious exemptions are narrowly construed, so that federal funding is not used to subsidize discrimination based on sex, including single-sex education based on sex stereotypes; and
- Continue to collect data on sex-segregated classes and schools among PreK-12 students in the CRDC.

F. Assist Title IX Coordinators in fully implementing Title IX.

As the primary individuals responsible for implementing Title IX at each school, school district, institution of higher education, or state, Title IX Coordinators play a critical role in ensuring that students and staff do not face any form of sex discrimination in schools. Unfortunately, the previous administration rescinded key guidance addressing the roles and responsibilities of Title IX Coordinators. To assist Title IX Coordinators with their work, the Department should:

- Restore and strengthen the rescinded 2015 guidance on the appointment and responsibilities of Title IX Coordinators at all levels, including encouraging or requiring school districts to have a Title IX Coordinator at each school (rather that only at the school district level), requiring school district Title IX Coordinators to train and assist any local school-based Title IX Coordinators, and providing instructions to Title IX Coordinators on how they can work more collaboratively with other equity coordinators, gender equity experts, and stakeholders using advisory groups or other structures.

G. Bolster support for women and girls in STEM and CTE education.

Title IX is critical to ensuring that girls and women have access to high-quality instruction in science, technology, engineering, and mathematics (STEM) and career and technical education (CTE) in both PreK-12 and higher education; that aspiring female researchers and faculty are able to attain their professional goals in STEM and CTE; and that the U.S. cultivates a diverse and equitable STEM and CTE workforce. Although women and girls have gained ground in many STEM and CTE fields over the recent years, a significant gender gap still persists, in part due to the misogynistic and false stereotype that men and boys are innately better than women and girls in male-dominated fields like math, science, finance, and manufacturing.[28] For example, as noted earlier, only 8 percent of computer science degrees are held by white women, 3 percent by Black women, and 2 percent by Latina women, compared with 47 percent by white men.[29] In an increasingly tech-focused economy, women and girls cannot be left out of these fields. The Department should promote gender equity in STEM and CTE by restoring and strengthening Title IX protections that keep women and girls safe and supported in their educational pathways. This includes:

- Coordinate all federal agencies that enforce Title IX (*e.g.*, Department of Education, Department of Labor, Department of Energy, National Science Foundation, Health and Human Services) to ensure women and girls do not face harassment or discrimination as students, researchers, or instructors in STEM, and that their discrimination complaints are adequately addressed; and

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[26] NCWGE Report, *supra* note 24, at 68.
[27] *The Discredited Science Behind the Rise of Single-Sex Public Schools*, MOTHER JONES (May 2020), https://www.motherjones.com/politics/2020/05/single-sex-public-schools-brain-science-gender.
[28] NCWGE Report, *supra* note 24, at 9-10, 24.
[29] *See* NWLC Gender-Conscious Programs Report, *supra* note 21, at 4.

- Restore the 2016 CTE guidance clarifying that under Title IX, schools can provide targeted programing to women in fields where they're underrepresented, including STEM, even if those disparities cannot be traced to specific instances of unlawful discrimination.

* * *

If you have any questions, please contact Emily Martin (emartin@nwlc.org), Shiwali Patel (spatel@nwlc.org), Elizabeth Tang (etang@nwlc.org), and Sue Klein (sklein@feminist.org).

Sincerely,

The undersigned members of the National Coalition for Women and Girls in Education:

American Association of University Women (AAUW)
Athlete Ally
Feminist Majority Foundation
Girls Inc.
GLSEN
Healthy Teen Network
Human Rights Campaign
Legal Aid at Work
Legal Momentum, the Women's Legal Defense and Education Fund
National Alliance for Partnerships in Equity (NAPE)
National Center for Lesbian Rights
National Center for Transgender Equality
National Organization for Women
National Women's Law Center
National Women's Political Caucus
Stop Sexual Assault in Schools (SSAIS.org)
VA NOW, Inc.
Women's Law Project
YWCA USA