

Acting Assistant Secretary Suzanne Goldberg  
Office for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20002

June 11, 2021

Re: Written Comment Title IX Public Hearing (Sexual Harassment in K-12 Schools & Discrimination Based on Sexual Orientation and Gender Identity)

Dear Assistant Secretary Goldberg:

On behalf of the nation's district leaders and middle level and high school principals, AASA: The School Superintendents Association and the National Association of Secondary School Principals (NASSP) submit the following comments for the virtual public hearing on strengthening enforcement of Title IX of the Education Amendments Act of 1972.

AASA is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from CEOs, superintendents, and senior level school administrators to cabinet members, professors, and aspiring school system leaders. AASA's mission is to advocate for equitable access for all students to the highest quality public education and develop and support school system leaders.

NASSP is the leading organization of and voice for middle level principals, high school principals, and other school leaders across the United States. NASSP seeks to transform education through school leadership, recognizing that the fulfillment of each student's potential relies on great leaders in every school committed to the success of each student. Principals have the ultimate responsibility in creating an effective school culture that nurtures each individual to live the shared norms, values, and beliefs to grow in a safe, caring, and high-performing school community.

### **Title IX Regulations Related to Sexual Harassment**

In 2019, our organizations both submitted comments to the Department of Education in response to the Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. We also attended a meeting with officials at the Office of Management and Budget at the White House and urged them not to finalize the Title IX amendments on sexual harassment and assault.

AASA and NASSP were especially dismayed that the department chose to implement the final rule in the middle of the COVID-19 pandemic, which had an enormous impact on K–12 schools and demanded all of our members' attention to ensure students could continue their learning and receive food and other vital services to meet their needs—and that schools could safely reopen with new infection mitigation measures in place. Staffing needs of school districts were at an all-

time high and the capacity to do training and assign personnel new staffing responsibilities was at an all-time low, which has greatly impacted the implementation of the regulation at the K–12 level. Many middle level and high school principals reported receiving no training during the 2020–21 school year or even having knowledge about the new requirements for investigating reports of sexual harassment or assault. Districts that were able to invest in the substantial and necessary training required of the regulation have found the new process daunting, difficult, and very time-consuming.

AASA and NASSP urge to the department to immediately rescind the 2020 amendments to the Title IX regulations and replace them with nonbinding guidance for K–12 schools, technical assistance, and best practices to ensure the fair, prompt, and equitable resolution of reports of sexual harassment and other sex discrimination. Our comments focus on three major issues with the 2020 amendments:

- The length of the process and the ability of administrators to adequately mitigate potential and actual sexual harassment and assault of students in a timely manner, especially when compared to other similar disciplinary infractions
- Staffing burden
- Confidentiality requirements

Our most significant concern stems from the inability of district and school administrators to swiftly remove students from harmful educational environments because of paperwork, evidence, and notice requirements in the regulation. In the past, school and system leaders relied on previous federal Title IX guidance to develop and solidify procedures to ensure that all Title IX complaints are addressed in an efficient fashion that offered fair protections for both the accuser and the accused. Principals and superintendents already recognized the need to protect the accused and worked to ensure that the burden of a necessary separation is not borne entirely by the accused in these types of instances.

The new regulations take the duty to protect the accused to such an extreme that administrators are required to undergo such a time-consuming, onerous, and frequently unhelpful process that victims are consequently exposed to further trauma and denied immediate supportive measures from being implemented quickly and appropriately. There are several reasons this is happening.

First, new standards and definitions for sexual harassment are not appropriate to apply in a K–12 school setting. Under the prior guidance, a single incident, if severe enough, might meet the definition of sexual harassment. The new rules state that sexual harassment must be unwelcome conduct that is so “severe, pervasive, and objectively offensive” that it effectively denies a person access to the school’s education programs or activities. An isolated incident of unwelcome remarks of a sexual nature, for example, may not meet the revised definition. We urge the department to reiterate that if an incident does not meet the Title IX rule’s new definition of “sexual harassment,” schools can and should address the incident under a separate “non-Title IX” policy that defines sexual harassment as “unwelcome conduct of a sexual nature,” including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”

Second, the new multilayered adjudicative process is overwhelming for district and school staff to undertake and frequently requires 80–90 days to complete. While providing accused students with a full and fair opportunity to review and rebut evidence gathered against them is appropriate (particularly as increasingly those students found to have violated a sexual harassment policy will potentially have that fact reported by school counselors in response to direct inquiries for that information by colleges and universities to which they are applying), the multiple levels of review mandated (even in the K–12 context where a full evidentiary “hearing” is not required) is excessive and creates delays in resolution that are hard for students in this age group to bear. Such delays are emotionally difficult and educationally distracting for both parties. An obvious candidate for excision from the current process is the provision for “party questions.” After having provided both parties with the opportunity to offer questions that should be posed to the other party and/or witnesses, fully reviewed, and provided written comments on the Investigator’s Draft or Initial Investigative Report, it seems wholly redundant and unnecessary to then ask that they submit “questions” that then can be posed to either side to a witness.

Third, the striking difference in how administrators can discipline sexual harassment versus other physical assault and similar school infractions has infuriated parents, led to further traumatization of students, and greatly frustrated educators who want to effectively address potential Title IX violations quickly. School leaders are also concerned that it could cause a chilling effect that will make victims unwilling to report violations in the future. One assistant principal at a middle level school in Utah shared the story of an incident that took place in a classroom in front of other students. Although he deemed the incident severe, pervasive, objectively offensive, and met the criteria for a Title IX violation, the parents of the victim chose not to file an official complaint. The assistant principal felt that he was unable to discipline the other student or force a separation in the school, and his only option was to offer both students counseling support.

Another issue that we bring to the department’s attention is the staffing difficulties caused by the 2020 Title IX regulation. In addition to having a Title IX coordinator in each school district, there are various roles that must be assigned to other trained personnel on a case-by-case basis (investigators, initial decision makers, appellate decision makers) who are all free of “bias” toward or against victims and accused students. While the provision requiring neutrality with respect to the process generally is quite appropriate, mandating that every individual tasked with responsibility in a Title IX case be unbiased and therefore viewed by *parents as neutral* with respect to the individual complainant and respondent in every case, may not be practical in many smaller or more rural K–12 schools. Any individual likely tasked with the responsibility of conducting an investigation or rendering a decision at either the initial stage or appellate stage will be someone who has experience and/or prior responsibility in a building where they connect with the students involved and may potentially create a bias against the victim or accused student. Schools may attempt to ask individuals from other schools in the district to conduct or render a decision, but that assumes an availability of personnel resources that is frequently at odds with the reality. In addition, there are good investigatory reasons to assign individuals with prior knowledge and relationships with the students to a given case. Effective communication in interviews with students often requires prior rapport. Having an appreciation and understanding

of histories and backgrounds of students and the dynamics between students can prove invaluable in reaching decisions that will reflect the full fact and circumstances of any given set of behaviors. Without this context any remedial action taken may prove one-dimensional and/or ineffective.

A further problematic aspect of the regulation is around the disclosure of confidential information. Students are not aware that by reporting any incident of sexual harassment to a school counselor, psychologist, or social worker that they may be automatically triggering a Title IX complaint and subsequent investigation. School leaders also feel that the new requirements do not allow them to protect witnesses. In other discipline incidents, they can issue a gag order and consequences for students who do not comply. Now they are only able to suggest that students not share information, but with no enforcement mechanism in place, they have concerns about how this will impact the investigation. School districts should be allowed to have a mechanism for confidential reporting of sexual harassment to an adult who is not a mandatory reporter, so that students can receive supportive measures, including mental health counseling, without disclosing their identity to their harasser, initiating a Title IX investigation against their harasser, or initiating a mandatory report by the school to local police.

### **Discrimination Based on Sexual Orientation and Gender Identity in Educational Environments**

LGBTQ+ students are bullied and harassed at a rate far greater than any other group. According to the [Human Rights Campaign's analysis of the 2019 Youth Risk Behavior Surveillance from the Centers for Disease Control and Prevention](#), 31% of LGBTQ+ youth, 43% of transgender youth, and 40% of questioning youth have been bullied at school, compared to 16% of their non-LGBTQ+ peers. Fifty-four percent of LGBTQ+ youth, 61% of transgender youth, and 61% of questioning youth have seriously considered attempting suicide, compared to 13% of non-LGBTQ+ youth. Negative and unsafe school environments lead to adverse academic and social-emotional outcomes, including school dropout, self-harm, and even suicide.

LGBTQ+ student safety is inherently tied to a school's culture, the area where school leaders exercise the greatest influence and can have the greatest impact. The best school cultures, where students are most successful, recognize each person in the school as an important and valued member of the community possessing inherent dignity. Sadly, school leaders often build a culture in the face of powerful opposition.

NASSP and AASA were disappointed when the previous administration rescinded the 2016 joint guidance from the U.S. Departments of Education and Justice, which asserted that Title IX's prohibition against sex discrimination encompasses discrimination based on student's gender identity, including discrimination based on a student's transgender status. The guidance addressed a school's responsibility to provide a safe and nondiscriminatory environment for all students and outlined a school's obligations regarding identification documents and pronouns, sex-segregated activities and facilities, and privacy and education records. In conjunction with

the guidance, the Office of Elementary and Secondary Education released a helpful document providing examples of policies and emerging practices for supporting transgender students.

Our organizations encourage the department to amend the Title IX regulations to define “on the basis of sex” to encompass discrimination based on sexual orientation, gender identity, or transgender status. The department should also develop guidance that strongly affirms the protections LGBTQ+ students are afforded under Title IX and ensure that schools are not discriminating against LGBTQ+ youth, their families or guardians, and school employees. Schools would also welcome guidance and best practices on providing the appropriate support for LGBTQ+ individuals who have experienced sex discrimination and making their school procedures fair and equitable for all.

Congress, through the Title IX statute, and the department, by regulation, have set forth exceptions that permit single-sex or sex-segregated programs or activities in certain narrow contexts. The department should make clear beyond all doubt that these exceptions do not create any safe harbor for excluding LGBTQ+ students. The department should clarify that any program or activity that segregates students on the basis of sex, or is provided for members of one sex, must treat an individual in a manner consistent with their gender identity.

Thank you for this opportunity to provide written comments on the Title IX regulations and 2020 amendments. AASA and NASSP stand ready to partner with the department as it works to fulfill the Biden-Harris administration’s commitment to an educational environment free from discrimination on the basis of sex, including harassment, sexual violence, and discrimination based on sexual orientation or gender identity. Should you have any questions about our recommendations, please contact AASA Advocacy Director Sasha Pudelski ([spudelski@aasa.org](mailto:spudelski@aasa.org)) or NASSP Policy & Advocacy Director Amanda Karhuse ([karhusea@nassp.org](mailto:karhusea@nassp.org)).

Sincerely,



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Advocacy Director  
AASA, The School Superintendents Association



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