



September 12, 2022

Alejandro Reyes
U.S. Department of Education
400 Maryland Ave. SW, PCP-6125
Washington, DC 20202

Re: Docket No. ED-2021-OCR-0166: RIN 1870-AA16

Dear Mr. Reyes:

The Consortium for Constituents with Disabilities (CCD) Education Task Force is writing to the U.S. Department of Education (Department) to provide comments to the Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance and proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 (Title IX). Our goal in providing input is to help assure our federal laws and related policies support CCD's vision of an American society in which all individuals – including those who are Black, Indigenous, people of color (BIPOC), and LGBTQI+ – have the freedom and opportunity to exercise individual decisions concerning their own lives, welfare and personal dignity; where communities are fully accessible to all individuals with disabilities and their families; where they are included and fully participate in all aspects of community life; and, where individuals with disabilities exercise their full rights and responsibilities free from racism, ableism, sexism, and xenophobia, as well as LGBTQI+ based discrimination and religious intolerance. CCD is pleased the Department has promulgated regulations to update Title IX as we want to assure this law supports every student with a disability attending a K-12 school or enrolled in a postsecondary institution.

To inform this important endeavor and to promote regulations consistent with our values and the needs of students with disabilities, CCD has communicated extensively with the Department over the past several years, including requesting the previous Administration to withdraw proposed changes¹ which have since become law, and submitting public comments to the Title IX Public Hearing conducted by the Department on June 11, 2021.² We have and remain concerned that Title IX law *does not adequately acknowledge and address the great risk and disproportionate harm students with disabilities experience* - both as victims (complainant) as well as reported harassers (respondent). Our previous communications document the extensive and well-known harms and negative impact of sexual abuse, violence, harassment and discrimination disproportionately experienced by children, youth, and young adults with disabilities across all educational settings and the challenges to certain students with disabilities whose behaviors related to their disability may be misunderstood and misconstrued as sexually threatening.³ The most recent data continue to reinforce these findings and also show that individuals with Autism (who identify as non-heterosexual at twice the rate of their typical peers⁴) are also three times more likely than the general population to experience sexual violence.⁵

¹ CCD letter to U.S. Department of Education, (2019): <https://www.c-c-d.org/fichiers/CCD-Title-IX-comments-1.30.19.pdf>

² CCD Comments: Title IX Public Hearing (2021): https://www.c-c-d.org/fichiers/CCD-Comments-on-Title-IX-hearing-6_11_2021_FINAL.pdf

³ *Id.*

⁴ R. George, M.A. Stokual, *Orientation in Autism Spectrum Disorder*, *Autism Res* 1, 133-141 (2018): <https://pubmed.ncbi.nlm.nih.gov/29159906/>

⁵ Cazalis Fabienne, Reyes Elisabeth, Leduc Séverine, Gourion David, *Evidence That Nine Autistic Women Out of Ten Have Been Victims of Sexual Violence*, 16 *Frontiers in Behavioral Neuroscience*, (2022), at: <https://www.frontiersin.org/articles/10.3389/fnbeh.2022.852203/full>

Based on these facts, and our goal to inform regulations we deem essential to ensuring equity and to supporting a safe and healthy educational environment for all students with disabilities, including those from BIPOC communities and who identify as LGBTQI+, we offer the following recommendations:

Recommendations

§ 106.2 Definitions

Sex-Based Harassment: CCD supports the proposal to reorganize the Definition section and including all definitions in § 106.2. Specifically, we support the proposal to define *sex-based harassment* to include sexual harassment and other harassment on the basis of sex (including sex stereotypes, sex characteristics, gender identity, pregnancy or related conditions, sexual orientation, and gender identity) when this harassment takes the form of “quid pro quo harassment,” “hostile environment harassment,” sexual assault, dating violence, domestic violence, or stalking. We also support the proposed rules more broadly—and appropriately—defining “hostile environment harassment” as sufficiently “severe or pervasive” sex-based harassment that “denies or limits” a person’s ability to participate in or benefit from an education program or activity.

Rationale: By updating the definition this would return Title IX to the longstanding standard applied from 1997-2020⁶ and ensure a marked improvement over the current standard, which requires schools to ignore sexual harassment unless it is “severe and pervasive” harassment that “effectively denies” equal access to education. CCD continues to oppose the current standard as it minimizes the impact of sexual harassment and victimization of students, including students with disabilities whose disability(s) may put them at higher risk for harms like sexual assault or abuse.

Student with a Disability: CCD supports the addition of the definition for a student with a disability as defined in the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act.

§ 106.6: Effect of other requirements and preservation of rights.

§ 106.6 (b): Recommendation: CCD supports the proposal to update and simplify § 106.6(b) by eliminating § 106.6(h) entirely .

Rationale: CCD agrees that as proposed § 106.6(b) makes two important distinctions: 1) that a school’s/recipients’ obligation to comply with part 106 is not obviated or alleviated by any State or local law or other requirement, and 2) that nothing in the Department’s regulations would preempt a State or local law that does not conflict with these regulations and that provides greater protections against sex discrimination. We also agree that “this clarification would ensure that the proposed regulations appropriately cover the full scope of Title IX while not extending further than the Department’s authority to promulgate regulations to effectuate Title IX.”

§ 106.6(g): Recommendations: CCD supports the proposal that in addition to “a parent” or “guardian” that an “other authorized legal representative” may [also] have a legal right to act on a student’s behalf, including by making a complaint on behalf of a complainant. We also support maintaining that the student is always the complainant.

⁶ See, e.g., Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/ga-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 66 Fed. Reg. 5,512 (Jan. 19, 2001; rescinded Aug. 14, 2020) [hereinafter 2001 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Sexual Harassment Guidance*, 62 Fed. Reg. 12,034 (Mar. 13, 1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

Related provisions at: § 106.46(c)(2)(ii) and (e)(2). CCD supports clarifications made regarding students attending postsecondary institutions who are required to self-advocate in grievance procedures related to alleged sex-based harassment that involves their own conduct or experiences but also may have more need for assistance from someone in an advisory role throughout the process. As the Department notes, these updates are made to ensure postsecondary students who are “newly independent”, [or may qualify] for additional procedural protections have a right to someone to assist them in an advisory capacity.

Rationale: We concur that some students may require the assistance of someone other than a parent or guardian to support them through the filing and complaint process. Additionally, making the distinction(s) in § 106.46(c)(2)(ii) and (e)(2) helps ensure students with disabilities in postsecondary education may request and have the support of an advisor in the process.

§ 106.8 Designation of coordinator, adoption and publication of nondiscrimination policy and grievance procedures, notice of nondiscrimination, training, and recordkeeping.

§ 106.8(e): Recommendation: CCD supports the new proposed provisions related specifically to students with disabilities and requests the **edits in bold**:

(e) Students with disabilities. If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator must consult with the student’s Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or the group of persons responsible for the student’s placement decision under 34 CFR 104.35(c) (Section 504 team), if any, to help ensure that the recipient complies with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, throughout the recipient’s implementation of grievance procedures under § 106.45, and if applicable § 106.46, **including to ensure receipt of accommodations as necessary.** If a complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator **is permitted to and** may consult, as appropriate, with the individual or office that the recipient has designated to provide support to students with disabilities to help comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, **including to provide any auxiliary aids or any other reasonable accommodation as necessary. The Title IX Coordinator is also permitted to and may consult, as appropriate, with Comprehensive Transition and Postsecondary Program (CTP) staff regarding students with intellectual disability enrolled in such programs.**

Rationale: We appreciate the proposed additions which help to clarify that every Title IX process, whether it be for a complainant or respondent, must protect the civil rights of students with disabilities. Furthermore, it ensures that those most knowledgeable about the student and the impact of their disability are consulted. However, we urge ED to follow its own lead in mentioning access to accommodation(s) and auxiliary aids for students with disabilities [in the preamble of the NPRM] and specify *inside* the regulation that a student with a disability may require these. Our specific edits would also clarify that the meeting [at the postsecondary level] between the Title IX coordinator and the CTP program staff is ‘permitted’ and the need stems from reports from the National Coordinating Center Accreditation Workgroup which has heard that students with intellectual disabilities [participating in postsecondary education programs] often need help understanding and communicating when a Title IX complaint is filed against them or when they need to file a complaint.⁷

⁷ Think College National Coordinating Center Accreditation Workgroup (2021). *Model Accreditation Standards for Higher Education Programs for Students with Intellectual Disability*. Boston, MA: University of Massachusetts Boston, Institute for Community Inclusion at: <https://thinkcollege.net/resource/program-accreditation/program-accreditation-standards-guidance-and-evidence-requirements>

§ 106.8(d)(1): Recommendation: *Add a new requirement* that Title IX coordinators must conduct research-based, trauma-informed training on healthy relationships and all Title IX information (e.g., what constitutes sexual harassment, how to report a claim, etc.) communicated in a way that can be understood and learned by all, including those with developmental disabilities, cognitive disabilities, intellectual disabilities, processing disabilities, and disabilities that affect verbal, visual and hearing abilities.

Rationale: CCD continues to recommend to the Department that schools (via Title IX coordinators) must be required to conduct age appropriate training on healthy relationships and all Title IX information⁸, communicated in a way that can be understood and learned by all, including those with developmental disabilities, cognitive disabilities, intellectual disabilities, processing disabilities and disabilities that limit verbal and hearing abilities. Without such training, schools may continue to rely on negative stereotypes and implicit bias that will put students with disabilities at risk.

§106.10 Scope.

Recommendation. CCD supports the proposed rule’s explicit listing of anti-LGBTQI+ discrimination as a form of sex discrimination, including discrimination on the basis of sexual orientation, gender identity, sex characteristics (including intersex traits), status as transgender or nonbinary, and sex stereotypes.

Additionally, we support provisions at §§ 106.10, 106.31(a)(2)) respectively which clarify that preventing a student from participating in an education program or activity consistent with their gender identity is *per se* a form of sex-based harm and generally violates Title IX because it causes more than “de minimis” harm. We also urge the Department to clarify the de minimis harm standard applies to all sex-separated programs and activities, unless Congress or the Department has expressly stated otherwise.

Rationale: As noted, CCD’s mission and vision is to advocate for federal public policy that ensures the self-determination, independence, empowerment, *integration and inclusion* of children and adults with disabilities *in all aspects of society*. We urge the Department to codify these protections so that no questions remain with regard to Title IX protections for those who identify as LGBTQI+.

§106.11 Application.

Recommendation. CCD supports the proposed rule’s requiring schools to respond to all sex-based harassment (or other sex discrimination) “occurring under [their] education program or activity,” which includes conduct that a school has disciplinary control over or that occurs in a building owned or controlled by an officially recognized student organization at a college or university. The preamble states that this means schools would be responsible for addressing incidents that occur off-campus or in a study abroad program, so long as it contributes to a hostile environment in school (e.g., due to the harasser’s continued presence on campus or their additional harassment of the complainant). We also urge the Department to expressly state in the regulations that Title IX covers “off-campus school-sponsored activities,” as this is a common point of confusion among schools and students.

§ 106.44: Action by a recipient to operate its education program or activity free from sex discrimination.

Recommendations: CCD supports the proposed rule requiring schools to take “prompt and effective action” to end sex-based harassment (or other sex discrimination), prevent it from recurring, and remedy its effects on all people harmed. We also support the proposed requirement for schools to offer supportive measures at no cost to individuals who report sex-based harassment (or other sex discrimination), regardless of whether they request an investigation or an informal resolution and even if their complaint is later dismissed.

⁸ CCD letter to U.S. Department of Education, (January, 2019) at: <https://www.c-c-d.org/fichiers/CCD-Title-IX-comments-1.30.19.pdf> and CCD Comments at the Title IX Public Hearing (June, 2021), at: <https://www.c-c-d.org/fichiers/CCD-Comments-on-Title-IX-hearing-6-11-2021-FINAL.pdf>

§ 106.44(c): We support that “removals” now include “any threat to physical or nonphysical health or safety.” We especially support the proposal clarifying that emergency removal “does not modify any rights under the IDEA, Section 504, or the Americans with Disabilities Act of 1990 (ADA).”

§ 106.44(g)(7)(i) and § 106.44(g)(7)(ii): CCD supports the additions proposed to § 106.44(g)(7)(i) and § 106.44(g)(7)(ii) respectively. These additions help clarify and ensure the Title IX Coordinator is responsible to offer and coordinate “supportive measures” to students with disabilities.

Rationale: CCD opposed the current regulation, which harshly builds into Title IX a standard of “deliberate indifference” that allows schools to ignore the needs of students and employees and promotes a climate and system that allows schools to operate with too little focus on prevention, safety, and timely responsiveness to sex-based harassment. Furthermore, the additions related to students with disabilities, as recipients of supportive measures under Title IX, are essential to ensuring equity for these students. The proposal clarifies that coordination for such measures in K-12 schools must include the IEP or 504 team, and for postsecondary settings should include consultation with the individual or office that the recipient has designated to provide support to students with disabilities.

§ 106.45: Grievance procedures for the prompt and equitable resolution of complaints of sex discrimination.

Recommendation: CCD supports the grievance procedures as outlined in this section and in particular that these protections would now apply to all complaints of sex discrimination, not just those that allege sex-based harassment. We support important clarifications and requirements including that no conflict of interest is present between either party and the Title IX coordinator; and, that prompt timeframes must be established [for the process]. CCD especially appreciates the clarity provided for dismissals in 106.45(d), including the right to appeal a complaint dismissal.

Rationale: The current regulation does not adequately uphold equity and access to grievance procedures for both complainants and respondents. In particular, CCD opposed current §106.45(b)(3) which requires a school to dismiss a complaint of sexual harassment if the alleged conduct did not meet the stringent definition, even if the conduct is proven to have occurred. This rule encouraged and allowed dismissals to occur for technical reasons, including when it involved harassment of a minor student by a teacher or other school employee and did not provide the right to appeal a complaint dismissal.

§ 106.45(d).

Recommendation: CCD supports the proposal to require schools to address Title IX complaints of sex-based harassment by all individuals, as long as the complainant was participating or attempting to participate in a school program or activity at the time they experienced the discrimination (whereas the current regulations require this at the time they filed their complaint). However, when a school chooses to dismiss a complaint because the respondent has left the school, we recommend that the regulation clarify that the “prompt and effective steps” that the school must take may include but are not limited to: providing training, investigating to determine whether there have been other victims, and whether other school staff knew about the incident(s) but ignored it, or took steps to cover it up.

Rationale: CCD agrees with the decision to require schools to address complaints by individuals who are not current students or employees. However, we encourage the Department to go further and make clear the steps schools must take when a complaint is dismissed because the respondent has left the school in order to support and promote a positive and safe environment for students and employees. Schools must not ignore the complaint because the respondent is no longer on the campus, as there could still be many other victims and staff could be protecting other serial harassers.

§ 106.71: Retaliation.

Recommendation: CCD supports the proposed rules prohibiting any school or person from retaliating against anyone because they reported sex discrimination or participated or refused to participate in an investigation or informal resolution of such incidents. We also support the clarifications that schools may not discipline someone for: non-harassing conduct that “arises out of the same facts and circumstances” as the reported incident (e.g., alcohol or drug use, self-defense); or for making a false statement or engaging in consensual sexual conduct based solely on the school’s decision of whether sex discrimination occurred. Furthermore, we support the proposed rules requiring schools to offer supportive measures to individuals who report retaliation and to investigate complaints of retaliation, including peer retaliation.

Finally, we ask that the Department clarify in the regulations that retaliation includes:

- Disciplining a complainant for conduct that the school knows or should know “results from” the harassment or other discrimination (e.g., missing school, expressing trauma, telling others about being harassed);
- Disciplining a complainant for charges the school knew or should have known were filed for the purpose of retaliation (e.g., a respondent who has been found responsible and disciplined for sexual assault or dating violence files a counter-complaint against their victim alleging the victim was the actual harasser);
- Requiring a complainant to leave an education program (e.g., to take leave, transfer, enroll in “alternative school”); and
- Requiring a complainant to enter a confidentiality agreement as a prerequisite to obtaining supportive measures, an investigation, an informal resolution, or any other Title IX rights, unless otherwise permitted by the Title IX regulations.

Rationale: Given the high prevalence of schools punishing student survivors, including survivors with disabilities, the proposed provisions at § 106.71 are absolutely necessary. We also ask that you add clarifications to the section which outline what retaliation includes.

CCD appreciates the opportunity to provide comments to the proposed Title IX regulations. Again, we encourage you to promulgate new regulations that reflect the priorities outlined here. We look forward to working with you to ensure Title IX supports every student with a disability attending a K-12 school or enrolled in a postsecondary institution. Please contact the cochairs listed below with any questions.

Sincerely,

American Music Therapy Association
American Physical Therapy Association
Autism Society of America
Autistic Self Advocacy Network
Bazelon Center for Mental Health Law
Center for Learner Equity
Council of Parent Attorneys and Advocates
Epilepsy Foundation
Muscular Dystrophy Association
National Association of Councils on Developmental Disabilities
National Association of School Psychologists
National Center for Learning Disabilities
National Center for Parent Leadership; Advocacy, and Community Empowerment (National PLACE)
National Disability Rights Network (NDRN)

National Down Syndrome Congress
National Down Syndrome Society
National Women’s Law Center
RespectAbility
The Advocacy Institute
The Arc of the United States

CCD Education Task Force Co-Chairs:

Bart Devon, NDSS	bdevon@ndss.org
Laura Kaloi, COPAA, CLE	lkaloi@stridepolicy.com
Lindsay Kubatzky, NCLD	lkubatzky@nclد.org
Kim Musheno, Autism Society	kmusheno@autismsociety.org

The Consortium for Constituents with Disabilities (CCD) Education Task Force monitors federal legislation and regulations that address the educational needs of children and youth with disabilities and their families, including regulatory efforts under federal law such as the Individuals with Disabilities Education Act (IDEA), the Every Student Succeeds Act (ESSA), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA). We advocate for high expectations for children with disabilities under these and other laws.