
FULFILLING TITLE IX'S PROMISE THROUGH THE SAFER ACT

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There have been, and continue to be, many challenges this past year. We are about to complete a third year in a global pandemic, and 2022 was a challenging year for the law. Last June, the Supreme Court overturned *Roe v. Wade*,¹ dismantled environmental regulations,² and weakened constitutional guarantees of religious and civil liberties.³ But 2022 was also the fiftieth anniversary of Title IX of the Education Amendments of 1972, marking the continued success of at least one of civil rights laws' greatest victories.

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."⁴

Though only thirty-seven words long, this crucial civil rights statute is very broad. The Supreme Court has repeatedly recognized Title IX's wide scope, saying that Title IX must be "accord[ed] . . . a sweep as broad as its language."⁵ And, in many instances, Title IX has been successful. Because of Title IX, for example, there are more women and girls in college and more women and girls playing school sports.⁶

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¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

² *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (holding EPA exceeded statutory authority when implementing certain emissions regulations of coal-fired power plants).

³ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2434 (2022) (Sotomayor, J., dissenting) (arguing decision allowing public school football coach to lead team prayers "strikes at the core of our constitutional protections for the religious liberty of students"); *Vega v. Tekoh*, 142 S. Ct. 2095, 2106 (2022) (holding violation of Miranda rights does not support federal civil suit under 42 U.S.C. § 1983).

⁴ 20 U.S.C. § 1681(a).

⁵ *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (citation omitted); *see also* *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("[B]y using such a broad term [as 'discrimination'], Congress gave the statute a broad reach.").

⁶ *50 Years of Title IX*, WOMEN'S SPORTS FOUND. (last visited Feb. 23, 2023), https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf [<https://perma.cc/H7JW-K9CG>] (high school sports slots for women increased from 294,015 in 1971-1972 to 3,402,733 in 2018-2019).

Yet sex-discrimination in schools persist. The majority of college presidents are still men,⁷ pregnant and parenting students continue to be pushed out of school at high rates,⁸ LGBTQI+ students are facing an onslaught of attacks from discriminatory state laws,⁹ and sexual harassment in colleges and K-12 schools continues to be pervasive.¹⁰

I. PREVALENCE AND IMPACT OF SEXUAL HARASSMENT

For years, research has shown that campus sexual assault victimizes at least one in five to one in four undergraduate women. This was revealed decades ago in a 1985 “sexual experiences survey” led by Mary Koss of thousands of college students on 32 college campuses;¹¹ later in 2000 by research funded by the Department of Justice;¹² in a 2015 poll conducted by the Washington Post-Kaiser Family Foundation;¹³ and more recently, in a 2019 climate survey conducted by the Association of American Universities.¹⁴ These are just a

⁷ *Fast Facts: Women Working in Academia*, AM. ASSOC. UNIV. WOMEN, <https://www.aauw.org/resources/article/fast-facts-academia/> [<https://perma.cc/MK63-A7EZ>] (“Only around 30% of college presidents are women.”).

⁸ *Stopping School Pushout for: Girls Who Are Pregnant or Parenting*, NAT’L WOMEN’S L. CTR. (Apr. 18, 2017), <https://nwlc.org/resource/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/> [<https://perma.cc/7GDY-QZ4C>] (“According to a survey conducted by the Bill and Melinda Gates Foundation, a third of young women who did not finish high school stated that becoming a parent played a major role in their decision to leave.”).

⁹ Jo Yurcaba, *With Over 100 Anti-LGBTQ Bills before State Legislatures in 2023 So Far, Activists Say They’re ‘Fired Up’*, NBC NEWS (Jan. 14, 2023), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/100-anti-lgbtq-bills-state-legislatures-2023-far-activists-say-fired-rcna65349> [<https://perma.cc/BLV5-DYQD>]; Anne Branigin, *10 Anti-LGBTQ Laws Just Went into Effect. They All Target Schools*, WASH. POST (June 8, 2022), <https://www.washingtonpost.com/nation/2022/07/08/anti-lgbtq-education-laws-in-effect/> [<https://perma.cc/W3UL-RJKC>].

¹⁰ Melissa Withers, *Sexual Assault on College Campuses Is a Pervasive Problem*, PSYCH. TODAY (Apr. 15, 2019), <https://www.psychologytoday.com/us/blog/modern-day-slavery/201904/sexual-assault-college-campuses-is-pervasive-problem> [<https://perma.cc/J573-C8QY>] (“16.9 percent of females reported sexual assault during their first year of college.”); Erin McIntyre, *Sexual Harassment in K-12 Schools a Pervasive Problem*, K-12 DIVE (Mar. 18, 2016), <https://www.k12dive.com/news/sexual-harassment-in-k-12-schools-a-pervasive-problem/415861/> [<https://perma.cc/79YB-VMR9>].

¹¹ Mary P. Koss & Christine A. Gidycz, *Sexual Experiences Survey: Reliability and Validity*, 53 J. CONSULTING & CLINICAL PSYCH. 422, 422 (1985).

¹² BONNIE S. FISCHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 11* (2000) (estimating that college with 10,000 women could experience 350 rapes per year).

¹³ Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (June 12, 2015), <https://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/> [<https://perma.cc/HK9S-H4VZ>].

¹⁴ DAVID CANTOR ET AL., *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT vii* (2019) (“The overall rate of nonconsensual sexual contact by physical force or inability to consent since the student enrolled at the school was 13.0

handful of the surveys that have shown the continued high prevalence of sexual violence against undergraduate women, with similar findings for K-12 students.¹⁵

While underreported, sexual violence, and the negative responses towards survivors by schools, including minimization of harm, blame, and retaliation, have a greater impact on women and girls of color,¹⁶ disabled women and girls,¹⁷ and LGBTQI+ students¹⁸ (with one study finding that the majority experienced sexual harassment in the past year)¹⁹ due to bias and stereotypes that label them as blameworthy, less credible, and less deserving of protection.

As a civil rights matter, Title IX requires schools to address sexual harassment because its impact on survivors' access to the benefits of, and ability to participate in, educational programs or activities is grave.²⁰ And yet too often, schools fail to respond appropriately and even often cause additional trauma and

percent.”).

¹⁵ In grades seven to twelve, fifty-six percent of girls and forty percent of boys are sexually harassed in a given school year. CATHERINE HILL & HOLLY KEARL, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2* (2011). One in five girls ages fourteen to eighteen have been kissed or touched without their consent. KAYLA PATRICK & NEENA CHAUDHRY, *LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 3* (2017).

¹⁶ Schools are also more likely to ignore, blame, and punish women and girls of color who report sex-based harassment due to harmful race and sex stereotypes that label them as “promiscuous,” less deserving of protection and care than white women, or simply unable to be a victim of sexual harassment. *See, e.g.,* Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 16, 17, 24-29 (2018); REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1* (2018); Katherine Giscombe, *Sexual Harassment and Women of Color*, CATALYST (Feb. 3, 2018), <http://www.catalyst.org/2018/02/13/sexual-harassment-and-women-of-color> [<https://perma.cc/D4M4-ULWN>].

¹⁷ *Survivor Justice Is Disability Justice: Schools Must Protect Students with Disabilities from Sexual Harassment*, NAT'L WOMEN'S L. CTR. (June 24, 2019), <https://nwlc.org/resource/survivor-justice-is-disability-justice/#> [<https://perma.cc/6HNZ-E677>].

¹⁸ Jireu Chen et al., *Sexual Violence, Stalking, and Intimate Partner Violence by Sexual Orientation, United States*, 10 PSYCH. VIOLENCE 110, 116 (finding that bisexual women had a much higher lifetime prevalence of forms of sexual violence); Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, at 68 MORBIDITY & MORTALITY WKLY. REP. 67, 68 (2019); Sarah Nightingale, *“It Probably Hurt More Than It Helped”: LGBTQ Survivors of Sexual Assault and their Experience with the College Title IX Reporting Process*, 21 ADVANCES IN SOC. WORK 1280, 1281 (2022).

¹⁹ JOSEPH G. KOSCIW ET AL., *THE 2019 NATIONAL SCHOOL CLIMATE SURVEY 30* (2020) (58.3% of LGBTQ+ students reported being sexually harassed).

²⁰ KATHARINE K. BAKER, DEBORAH L. BRAKE, & NANCY C. CANTALUPO, *TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 1-2* (2016).

harm to survivors, which is also known as “institutional betrayal.”²¹ At the National Women’s Law Center, we’ve represented student survivors whose complaints were ignored by their schools, who were disbelieved and disciplined with their assailants, and whose education suffered as a result.²² In fact, there have been many reports in the news about student survivors being punished and pushed out of school, and about the harmful impact of sexual assault on the survivor’s education and future,²³ and yet it is very likely that what the media captures represents a small fraction of the reality faced by student survivors.²⁴

In 2021, a student survivor advocacy group, Know Your IX, published results from a survey they conducted asking students about their experiences after reporting sexual assault to their schools. They found that 39% of students who reported sexual violence experienced a “substantial disruption in their education.”²⁵ This includes survivors taking a leave of absence, transferring, or dropping out of school. Of the survivors who stayed in school, the majority suffered academically, which also had financial and career impacts.²⁶ And unsurprisingly, survivors also reported considerable mental and physical health

²¹ *Institutional Betrayal as a Motivator for Campus Sexual Assault Activism*, NAT’L ASS’N STUDENT PERS. ADM’RS (July 16, 2018), <https://www.naspa.org/blog/institutional-betrayal-as-a-motivator-for-campus-sexual-assault-activism> [<https://perma.cc/7GT9-BFU9>].

²² See, e.g., *Jane Doe Is Standing Up for Herself and Other Teen Dating Violence Survivors*, NAT’L WOMEN’S L. CTR. (Aug. 9, 2017), <https://nwlc.org/jane-doe-is-standing-up-for-herself-and-other-teen-dating-violence-survivors/> [<https://perma.cc/3R6Z-GBCX>]; *Miami School Board Pushed Survivor of Multiple Sexual Assaults Out of School*, NAT’L WOMEN’S L. CTR. (Jan. 15, 2019), <https://nwlc.org/press-release/miami-school-board-pushed-survivor-of-multiple-sexual-assaults-out-of-school-says-nwlc/> [<https://perma.cc/27CN-3W6M>]; *NWLC Sues Georgia High School for Expelling Student Who Reported She Was Sexually Assaulted After School*, NAT’L WOMEN’S L. CTR. (Aug. 23, 2019), <https://nwlc.org/press-release/nwlc-sues-georgia-high-school-for-expelling-student-who-reported-she-was-sexually-assaulted-after-school/> [<https://perma.cc/K6EX-FG6E>].

²³ Wagatwe Wanjuki, *What Happens to Victims of Campus Sexual Assault?*, WAGATWE (Dec. 2, 2019), <https://wagatwe.com/blog/campus-sexual-assault-victim-impact-data> [<https://perma.cc/2WFC-L7F5>].

²⁴ Tyler Kingkade, *Girl Suspended After Being Sexually Assaulted in School Stairwell*, BUZZFEED NEWS (Sept. 22, 2016, 3:27 PM), <https://www.buzzfeednews.com/article/tylerkingkade/girl-suspended-after-being-sexually-assaulted-in-school-stairwell> [<https://perma.cc/Q4NR-93FW>]; Tyler Kingkade, *Schools Keep Punishing Girls—Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, 74 MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/> [<https://perma.cc/CSU2-RKQC>]; Carter Sherman, *Inside the Sexual Assault Scandal Plaguing a High School District*, VICE (June 24, 2022, 7:00 AM), <https://www.vice.com/en/article/v7vg9y/inside-the-sexual-assault-scandal-plaguing-a-high-school-district> [<https://perma.cc/3RYB-2UQU>].

²⁵ SARAH NESBITT & SAGE CARSON, THE COST OF REPORTING: PERPETRATOR RETALIATION, INSTITUTIONAL BETRAYAL, AND STUDENT SURVIVOR PUSHOUT 1 (2021).

²⁶ *Id.* at 7-10.

effects.²⁷ An institution's response to sexual misconduct can have a significant impact on whether other students report sexual assault and thus get the remedies that only schools can offer—e.g., academic accommodations, changing dorm rooms, counseling, and more—which also impact a student's ability to stay and succeed in school.

II. LITIGATION STANDARDS AND ADMINISTRATIVE ENFORCEMENT OF TITLE IX

Strong Title IX enforcement and protections against harassment is crucial, but access to justice for student survivors under Title IX has been severely limited by court decisions and administrative actions. In a seminal case from 1998, *Gebser v. Lago Vista Independent School District*,²⁸ involving a teacher who sexually abused an eighth-grade student, the Supreme Court made it difficult to hold schools responsible when employees sexually harass students by requiring, in private lawsuits for damages, (1) notice of the harassment to a school official with authority to take corrective action, and (2) deliberate indifference—or a *clearly* unreasonable response—on the part of institutions.²⁹ As Justice Stevens noted in his dissenting opinion, this holding creates an incentive for schools to “insulate themselves from knowledge” of sexual abuse in order to escape damages liability.³⁰ A year later in *Davis v. Monroe County Board of Education*,³¹ a case that involved a fifth-grade student who was sexually harassed and assaulted repeatedly by a peer, the Court defined actionable sexual harassment narrowly as being “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”³²

Undermining the broad purpose of Title IX, these opinions incentivize schools to sweep sexual harassment under the rug. They also create standards for Title IX sexual harassment lawsuits that are more burdensome than standards applicable to workplace sexual harassment under Title VII of the Civil Rights Act of 1964. Under Title VII, a plaintiff who was harassed by a coworker or other non-supervisor need only show their employer reacted negligently in response to severe *or* pervasive harassment of which the employer knew *or should have known*.³³ If a supervisor fires someone because they refuse to submit to sexual advances, Title VII automatically holds the employer liable. Schools thus have to do less to address harassment against their students than employers

²⁷ *Id.* at 11.

²⁸ 524 U.S. 274 (1998).

²⁹ *Id.* at 290, 292-293.

³⁰ *Id.* at 300.

³¹ 526 U.S. 629 (1999).

³² *Id.* at 631.

³³ *Vance v. Ball State Univ.*, 570 U.S. 421, 427, 453-54 (2013).

addressing equivalent harassment of employees.³⁴ Tellingly, soon after the *Davis* decision came out, the attorney for the school board said he thought the Court set such a high bar that “[i]t’s going to be tough for any plaintiff to win any of these cases . . . unless she can show that the school did nothing.”³⁵

However, the Court and the Department of Education acknowledged that these Court-created standards are limited to private actions for money damages, and that federal agencies may “‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,’ even in circumstances that would not give rise to a claim for money damages.”³⁶ Thus, for decades, the Department adopted broader standards similar to Title VII’s regarding notice, reasonableness and actionable harassment for schools. Almost three years ago, though, the Trump administration changed course and weakened Title IX civil rights protections by promulgating harmful regulations, adopting many of the onerous standards from *Gebser* and *Davis*.³⁷ In fact, it should be no surprise that these changes were made with the help of men’s rights advocates and are designed to prevent students from reporting sexual harassment and schools from addressing it.³⁸

The new regulations require schools to dismiss many Title IX complaints of sexual harassment, including when harassment occurs in study abroad programs or outside of a school program or activity — even if the student must still take a

³⁴ However, as Justice Stevens noted in his dissenting opinion in *Gebser*, “the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII.” *Gebser*, 524 U.S. at 296 (Stevens, J., dissenting) (citing *Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (dissenting opinion)).

³⁵ Joan Biskupic, *Schools Liable for Harassment*, WASH. POST, May 25, 1999, at A1.

³⁶ U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE, HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at ii (2021).

³⁷ See generally Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) (codified at various places in 34 C.F.R. pt. 106).

³⁸ H el ene Barthel eme, *How Men’s Rights Groups Helped Rewrite Regulations on Campus Rape*, NATION (Aug. 14, 2020), <https://www.thenation.com/article/politics/betsy-devos-title-ix-mens-rights/> [<https://perma.cc/SCA6-PFMP>]. These changes rely in part on misinformation about earlier guidance issued under the Obama Administration, which actually required schools to have a fair process and protect due process rights. *The Disinformation You’re Falling for on Title IX*, NAT’L WOMEN’S L. CTR. (Aug. 2021), <https://nwlc.org/resource/the-disinformation-youre-falling-for-on-title-ix/> [<https://perma.cc/D8NR-G5SH>]; Jake New, *A Title IX Win for Accused Students*, INSIDE HIGHER ED (Oct. 13, 2016), <https://www.insidehighered.com/news/2016/10/13/us-says-wesley-college-violated-rights-students-punished-over-sexual-misconduct> [<https://perma.cc/6V9R-HGBU>] (describing how in 2016 OCR found a school in violation of Title IX for discriminating against male respondents for having unfair processes). These rule changes are so disfavored that a majority of the over 120,000 comments submitted to the Trump administration about the proposed changes opposed them. Nancy Chi Cantalupo et al., OVERWHELMING OPPOSITION: THE AMERICAN PUBLIC’S VIEWS ON THE TITLE IX RULEMAKING OF 2018-2020, at 2 (2022).

class taught by, or shared with, their assailant.³⁹ Students must endure repeated and escalating levels of harassment *before* their complaint can be investigated,⁴⁰ and schools are no longer allowed to investigate a Title IX complaint of sexual harassment if the survivor has already graduated, transferred, or even dropped out because of the harassment when they don't plan to re-enroll or be involved in alumni programs.⁴¹ In higher education, schools can ignore reports that are not made to high-ranking school employees.⁴² These changes impose a heavy cost on survivors.

And for complainants who overcome these hurdles and whose reports are investigated, the rule requires unfair and potentially traumatic procedures. Some schools now must use a more demanding standard of proof that's unfair to complainants.⁴³ In higher education, survivors and their witnesses will be required to submit to direct live and oral cross examination by the respondent's advisor of choice, who could be anyone from an angry parent to a fraternity brother.⁴⁴

In mandating a process that singles out sexual harassment complaints for uniquely burdensome and unfair procedures—procedures that are not required for school investigations of any other type of student or staff misconduct, even if it amounts to a crime—the Trump Title IX rule relies on and perpetuates false and toxic stereotypes that individuals tend to lie about sexual harassment, and therefore need to be subjected to more scrutiny. Of course, these stereotypes fall heavily on women and girls of color.⁴⁵ Survivor advocates strongly believe in protecting due process rights while ensuring that school grievance procedures are trauma-informed and fair to all parties. It's possible to advocate for all of these, without weakening meaningful protections against sexual harassment that rely on outdated and offensive rape myths.

III. TITLE IX HAS YET TO FULFILL ITS PURPOSE AS A BROAD CIVIL RIGHTS LAW AND PROTECT STUDENTS FROM HARASSMENT

On June 23, 2022, which also was the fiftieth anniversary of Title IX, the Biden administration's Department of Education proposed changes to the Title IX rule⁴⁶ that would undo many of the harmful provisions in the Trump Title IX

³⁹ 34 C.F.R. §§ 106.44(a), 106.45(b)(3)(i) (2022).

⁴⁰ *Id.* § 106.45(b)(3)(i).

⁴¹ *Id.* § 106.30(a) (defining “formal complaint”).

⁴² *Id.* § 106.44(a).

⁴³ *Id.* § 106.45(b)(1)(vii).

⁴⁴ *Id.* § 106.45(b)(6)(i).

⁴⁵ Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391, 412-17 (2021).

⁴⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41571 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter *The Proposed Rule*], available at <https://federalregister.gov/d/2022-13734> (proposed 34 C.F.R. § 106.10).

rule, but also make clear that discrimination against lesbian, gay, bisexual, transgender, queer, and intersex students constitute sex discrimination and ensure that pregnant and parenting students receive greater support to complete their education.⁴⁷ These other changes are especially critical now given that 2022 has seen a record number of states enact or propose discriminatory laws targeting LGBTQI+ youth, particularly transgender youth.⁴⁸ They are also critical in light of the *Dobbs* decision, which inevitably has an impact on pregnant students in states where access to abortion is extremely restricted or criminalized.⁴⁹

Biden's changes would restore a faithful understanding of Title IX's broad protections in many ways.⁵⁰ For example, the rules would no longer require schools to dismiss Title IX complaints without investigation or other action just because the reported harassment is not yet severe or widespread enough,⁵¹ or because it occurred at a private off-campus party.⁵² They would also ensure that more students have access to the resources they need to feel safe and supported at school,⁵³ and no longer require that students be placed into potentially traumatic and unfair grievance procedures in their schools' investigations.⁵⁴

The rule would also have stronger protections against retaliation⁵⁵ for any reported sex discrimination, and for the first time require all employees to be trained on school's duties under Title IX to address sex discrimination,⁵⁶ including harassment, and schools to proactively address barriers to reporting and take other measures to ensure that sex discrimination does not persist or reoccur in the school's program or activity.⁵⁷

⁴⁷ *The Biden Administration's Proposed Department of Education Title IX Rules, Explained*, NAT'L WOMEN'S L. CTR. (July 14, 2022), <https://nwlc.org/resource/the-biden-administrations-proposed-department-of-education-title-ix-rules-explained/> [<https://perma.cc/C8KN-VQ6M>].

⁴⁸ *LGBTQ Youth: Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT (Aug. 22, 2022), <https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf> [<https://perma.cc/DZ7D-KGJQ>].

⁴⁹ Kavitha Cardoza, *Schools Have Long Mistreated Pregnant Students. What Will Happen in a Post-Roe World?*, USA TODAY (July 24, 2022), <https://www.usatoday.com/story/news/nation/2022/07/24/pregnant-girls-can-have-hard-time-school-new-laws-help/10127324002/?gnt-cfr=1> [<https://perma.cc/4SCE-WEC4>].

⁵⁰ *Biden's Proposed Title IX Rules Would Restore Protections Lost Under Trump—but They Should Go Even Further*, NAT'L WOMEN'S L. CTR. (Sept. 13, 2022), <https://nwlc.org/bidens-proposed-title-ix-rules-would-restore-protections-lost-under-trump-but-they-should-go-even-further/> [<https://perma.cc/A3UL-KBJB>].

⁵¹ *The Proposed Rule*, *supra* note 46, at 41569 (to be codified at 34 C.F.R. § 106.2(2)).

⁵² *Id.* at 41571 (to be codified at 34 C.F.R. § 106.11).

⁵³ *Id.* at 41575-76 (to be codified at 34 C.F.R. §§ 106.45(d)(4)(i)).

⁵⁴ *Id.* at 41577-78 (to be codified at 34 C.F.R. §§ 106.46).

⁵⁵ *Id.* at 41579 (to be codified at 34 C.F.R. § 106.71).

⁵⁶ *Id.* at 41570 (to be codified at 34 C.F.R. § 106.8(d)(1)); *see also id.* at 41575 (to be codified at 34 C.F.R. § 106.45(b)(1)(iii)).

⁵⁷ *Id.* at 41572 (to be codified at 34 C.F.R. § 106.44(a)-(b)).

While the proposed regulations are an important step forward, unfortunately, without a statutory fix—that is, a change to the Title IX statute itself—there is no guarantee that Title IX regulations will not change every four to eight years with a change in administration. Congress should thus amend Title IX to fix the unjustifiably high burdens for student survivors established by courts and, in doing so, prevent a future administration from weakening Title IX regulations. This can be achieved by Congress passing the recently introduced Students' Access to Freedom and Educational Rights (SAFER Act).⁵⁸

In amending Title IX, SAFER Act would require institutional responses to harassment be reasonable and remove the deliberate indifference standard that has allowed many schools to escape liability for insufficient and harmful responses to harassment.⁵⁹ Moreover, SAFER Act would require an institutional response to harassment when it unreasonably alters a person's ability to participate in or receive any benefit, service, or opportunity from an education program or activity, including by creating an intimidating, hostile, or offensive environment, thereby changing the current unduly burdensome standard that only requires schools to respond to harassment when it is "severe, pervasive, and objectively offensive" such that it deprives access to educational programs and opportunities.⁶⁰ Finally, this crucial legislation would broaden the notice standards so that instead of only requiring schools to respond when a narrow set of employees—officials with authority to institute corrective measures—have actual knowledge of the harassment, schools would be required to respond when a broader swath of school employees knew about or should have known about the harassment in the exercise of reasonable care.⁶¹ Consistent with agency law principles,⁶² institutions would also be responsible for harassment that is enabled or assisted by the authority exercised as an employee or agent of the school.⁶³

As students often experience harassment targeted at multiple aspects of their identity, sexual harassment cannot be treated as completely unique and unrelated to harassment on the basis of race, color, national origin, disability, or other forms of sex-based harassment (e.g., harassment based on gender identity, sexual orientation, sex characteristics, parental status, pregnancy or related medical conditions). Thus, the SAFER Act would also similarly amend

⁵⁸ S. 5158, 117th Cong. (2022). *See also The SAFER Act*, NAT'L WOMEN'S L. CTR. (2022), https://nwlc.org/wp-content/uploads/2022/12/SAFERact-KYIX_NWLC.pdf [<https://perma.cc/G6YG-R6NQ>].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 298-99 (J. Stevens, dissenting) (noting that the Court's holding that a damages remedy was not available under Title IX because no official with authority to institute corrective measures had actual notice of the sexual abuse was "at odds with settled principles of agency law, under which the district is responsible for Waldrop's misconduct because 'he was aided in accomplishing the tort by the existence of the agency relation.'").

⁶³ S. 5158, 117th Cong. (2022).

analogous civil rights statutes that require schools to address harassment based on race, national origin, and disability, under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act.⁶⁴ Harassment based on these other identities also undermines students' equality, safety, and dignity, and a consistent liability standard would ensure that students experiencing intersectional forms of harassment are not subjected to different standards in litigation and in their schools' processes arising from the harassment.

When enforced meaningfully, Title IX's protections can make the difference between a victim staying in school or dropping out. Too many student survivors are pushed out of school because their schools ignored their reports, minimized the harassment and harm they experienced, or even punished them after being assaulted. Yet these students haven't been met with justice in the courts because of the extremely high standards to prevail in lawsuits.

At this historic moment celebrating Title IX's fiftieth anniversary and the progress that has come with it, there remains a lot of work to fulfill Title IX's broad purpose and promise so that all students can access the benefits and privileges of education despite their sex.

⁶⁴ *Id.*