September 1, 2022

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


Dear Mr. Reyes:

The Council of Parent Attorneys and Advocates (COPAA) is an independent, nonprofit organization of 3000+ parents, attorneys, advocates, and related professionals; over 90% of whom identify as having a disability or are parents or family members of individuals with disabilities. COPAA members nationwide work to protect the civil rights and secure excellence in education on behalf of the nearly 8 million students ages 0–21 with disabilities in America. COPAA serves as a national voice for these children and their families. Our actions are grounded in the belief that every child deserves the right to a quality education that prepares that child for meaningful employment, higher education, and lifelong learning, as well as full participation in their community. Thank you for the opportunity 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).

COPAA appreciates the U.S. Department of Education (ED) responding to the urgent need to update the Title IX regulations. We believe amendments to Title IX are needed so that final regulations can be implemented which fully consider the experiences, challenges, and needs of students with disabilities, including those who identify as Black, Indigenous or People of Color (BIPOC) and/or may also identify as LGBTQI+ as it is well documented that these students already face additional barriers to education. By way of background and context setting for our recommendations below, we wish to remind you that COPAA, along with civil rights and disability partners vehemently opposed changes made to Title IX by the previous Administration, and provided testimony and recommendations to the Biden Administration to support regulations which ensure that every educational environment is free from sex discrimination and sexual violence, including sexual harassment/bullying, homophobic or gender-focused name calling, gender-segregation or other forms of discrimination based on sex. The negative academic and mental health effects of sexual violence are well documented and people with disabilities are victimized by crime at higher rates than the rest of the population. We also know there are students with disabilities who are improperly accused and mistreated in K-16 settings, including college Title IX hearings. These students due process rights under key federal civil rights statutes are too often ignored, and they are also not treated equitably during the Title IX process. Given these facts, we offer the following recommendations:

§ 106.2 Definitions.  
**Recommendation-Respondent:** COPAA supports ED’s proposal to define ‘respondent’ as an individual who is alleged to have violated the recipient’s prohibition on sex discrimination.

**Rationale:** As noted by ED, the current definition of ‘respondent’ is limited to persons who may have engaged in conduct that could constitute sexual harassment. We agree that it is “more accurate to frame
the allegations against a respondent in the context of violating the recipient’s prohibition on sex discrimination because this prohibition on sex discrimination is directly tied to the recipient’s obligation under Title IX to operate its education program or activity free from sex discrimination. A determination that the respondent violated the recipient’s prohibition would amount to a determination that sex discrimination occurred, which in turn would obligate the recipient to take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.” For individuals with disabilities who may be placed in the position of ‘respondent’ COPAA believes this definition, along with additional clarifications ensuring that all other civil rights laws apply, the combination thereof increases the likelihood that a fair, consistent process is applied to the complaint process for any respondent who may also be subject to additional civil rights protections.

**Recommendation- Sex-Based Harassment:** COPAA supports ED’s reorganizing this section and including all definitions here. 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, 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 ED would return Title IX to the longstanding standard applied from 1997-2020 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. COPAA opposes 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 crimes like sexual assault or abuse. (See: COPAA Letter to Bull for examples).

**Recommendation- Student With a Disability:** COPAA supports the addition of the definition to Title IX 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:** COPAA supports the proposal to update simplify § 106.6(b) by eliminating § 106.6(h) entirely.

**Rationale:** COPAA agrees with ED 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 with 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:** COPAA 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 ED’s maintaining that the student is always the complainant.
Related provisions at: § 106.46(c)(2)(ii) and (e)(2). COPAA also supports important clarifications made by ED 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. Ed 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 with previous commenters that some children 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(e): **Recommendation:** COPAA 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 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; 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 may require these. Our edits would also clarify that a postsecondary level meeting between the Title IX coordinator and the CTP program staff **is permitted** and stems from reports from the National Coordinating Center Accreditation Workgroup which has heard from parents and staff 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.

§ 106.8(d)(1)): **Recommendation:** Add a new requirement that Title IX coordinators must conduct age-appropriate 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 intellectual disabilities and disabilities that limit their verbal and hearing abilities.
**Rationale:** COPAA has recommended in 2019 and 2021\textsuperscript{viii} that schools (via Title IX coordinators) must be required to conduct age-appropriate training on healthy relationships and all Title IX information, communicated in a way that can be understood and learned by all, including those with intellectual disabilities and disabilities that limit their 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.

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

**Recommendations:** COPAA 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.

§ 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): COPAA supports the additions proposed to § 106.44(g)(7)(i) and § 106.44(g)(7)(ii)) respectively which are essential to ensuring that the Title IX Coordinator is responsible to offer and coordinate supportive measures to students with disabilities.

**Rationale:** COPAA opposed the current regulation which harshly built in a standard of “deliberate indifference” which allows schools to ignore the needs of students and employees by promoting 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—recipients of supportive measures under Title IX—are essential to 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:** COPAA supports the grievance procedures as outlined in this section and in particular, supports the clarifications provided that ensure each grievance procedure treats complainants and respondents equitably; that no conflict of interest is present between either party and the Title IX coordinator; that a presumption the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred and is made at the conclusion of the recipient’s grievance procedures for complaints of sex discrimination; and that prompt timeframes must be established [for the process]. COPAA especially appreciates the clarity provided for dismissals as outlined in 106.45(d) which ensures equity for all parties.

**Rationale:** The current regulation did not adequately uphold equity and access to grievance procedures for both complainants and respondents. In particular, COPAA 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. Further, the proposed regulation upholds the Supreme Court in Davis v. Monroe County Board of Education\textsuperscript{x}, which found that “a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.” Most courts which have addressed the issue have concluded that even a single incident of rape is sufficient to establish that a child was subjected to severe, pervasive, and objectively offensive sexual harassment for purposes of Title IX.\textsuperscript{x}

§ 106.45(d).

Recommendation: COPAA 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: COPAA agrees with the decision to require schools to address complaints by individuals who are not current students or employees. However, we encourage ED 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 harassers.

§ 106.71: Retaliation.

Recommendation: COPAA 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 ED to 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 essential. We also ask that you add clarifications to the section which outline what retaliation includes. Combined, these additions will ensure the Title IX regulations provide both protections and clarity with regard to retaliation.

In conclusion, we appreciate the opportunity to comment on the Title IX NPRM and look forward to working with ED to assure final regulations build on the research and best practices that fully support the rights of students with disabilities.

Sincerely,

Selene Almazan, Esq.
Legal Director

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1 COPAA letter to Bull, (2019); and Know Your IX v. Devos, (2019)
2 COPAA Testimony, Title IX Public Hearing, June 2021
3 Sarah Rinehart, Namrata Doshi, & Dorothy Espelage, Sexual Harassment and Sexual Violence Experiences Among Middle School Youth, University of Illinois at Urbana-Champaign (April 6, 2014), at: http://www.aera.net/Newsroom/Recent-AERA-Research/Sexual-Harassment-and-Sexual-Violence-Experiences-Among-Middle-School-Youth
6 34 C.F.R. § 106.30(2). While we support a return to the broader standard, it still may create burdens for survivors by requiring an inquiry into how a student’s education is limited or impacted by harassment. For example, a school might interpret this to require a student to make a showing of lower grades, which would ultimately create a barrier to reporting, because without such a showing, the harassment might not rise to the level of “severe or pervasive” such that it “denies or limits” their ability to participate in or benefit from the education program or activity.
8 COPAA letter to Bull, (2019)