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Autistic Self Advocacy Network Comments Re: Docket ID ED-2021-OCR-0166, RIN 1870-AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

The Autistic Self Advocacy Network (ASAN)¹ appreciates the opportunity to provide recommendations for the U.S. Department of Education’s (Department) Notice of Proposed Rulemaking (NPRM)² on proposed amendments to regulations implementing Title IX of the Education Amendments of 1972 (Title IX).

ASAN strongly supports the administration’s commitment to enforcing Title IX. We particularly support the extension of Title IX’s protections to discrimination due to sexual orientation, sex stereotypes, intersex characteristics, pregnancy,³ and gender identity.⁴

The NPRM also does much to rectify the 2020 rule’s harmful treatment of sexual harassment.⁵ Specific provisions ensure people with disabilities’ access to appropriate auxiliary aids and services.⁶ The NPRM is consistent with President Biden’s executive

¹ For more information on ASAN, visit <https://autisticadvocacy.org/>.

² Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41390 (Jul. 12, 2022) (to be codified at 34 C.F.R. § 106).

³ Pregnancy has been protected by Title IX since 1975, but the Department’s regulations on pregnancy have not been updated nor clarified since that time. 87 Fed. Reg. at 41394.

⁴ 87 Fed. Reg. at 41571.

⁵ 87 Fed. Reg. at 41459-513.

⁶ 87 Fed. Reg. at 41466, 41497, 41500, 41509, 41570, 41574.

orders, which advance an ambitious agenda addressing both sex discrimination and racial equity.⁷

The Department's improvements to Title IX's treatment of sexual orientation and gender identity are important to ASAN. Autistic people are much more likely to be LGBTQ than non-autistic people.⁸ We are more likely to have our trans identity dismissed or disbelieved.⁹ We may be denied appropriate access to sex education.¹⁰ We are bullied and harassed for our LGBTQ status more often, and experience a more hostile school climate.¹¹ Autistic people are also *three times* more likely than the general population to experience sexual violence.¹²

While the new NPRM represents a strong step in the right direction, it is not perfect. For example, while the proposed rule does add a definition for "student with a disability," it does not go far enough to address the disproportionate sex-based discrimination and harassment faced by students with disabilities. The disproportionate sexual abuse, violence, harassment and discrimination experienced by children, youth, and young adults with disabilities across all educational settings has been well documented.¹³

ASAN's comments make recommendations to improve the rule's treatment of students with disabilities, students who are LGBTQ, and students who are both.

⁷ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021); Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan 25, 2021) Exec. Order No. 14021 86 Fed. Reg. 13803 (Mar 11, 2021).

⁸ R. George and M.A. Stokual, *Orientation in Autism Spectrum Disorder*, 11 *Autism Research* 1, 133-141 (2018), <https://pubmed.ncbi.nlm.nih.gov/29159906/>; Emily Stembridge, *Children with autism report greater gender diversity: study*, Assoc. Univ. Ctrs. on Disabilities (Aug. 29, 2022), https://www.aucd.org/template/news.cfm?news_id=16118

⁹ This is more likely to happen in a psychiatric context. There is little reason to believe that school counselors and psychologists are different. See Bryony White, *The Link Between Autism and Trans Identity*, *The Atlantic* (Nov. 15, 2016) ("Clarke's therapist, for example, the statement says, 'would not approve his starting on hormones until after his autism spectrum disorder—which she referred to as a 'disease'—was 'cured'").

¹⁰ Autistic Self Advocacy Network & Nat'l Partnership for Women & Families, *Access, Autonomy, and Dignity: Comprehensive Sexuality Education for People with Disabilities 4-11* (Sept. 2021), available at <https://www.nationalpartnership.org/our-work/resources/health-care/repro/repro-disability-sexed.pdf>.

¹¹ Joseph G. Kosciw, Emily A. Greytak, Adrian D. Zongrone, Caitlin M. Clark, Nhan L. Truong & GLSEN, *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools at 90, 91* (2018), available at <https://www.glsen.org/sites/default/files/2019-10/GLSEN-2017-National-School-Climate-Survey-NSCS-Full-Report.pdf>.

¹² 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* 13-14(2022), <https://www.frontiersin.org/articles/10.3389/fnbeh.2022.852203/full>

¹³ There are also challenges for some students with disabilities whose behaviors related to their disability may be misunderstood and misconstrued as sexually threatening. Consortium for Constituents with Disabilities, *CCD Comments at the Title IX Public Hearing* (June, 2021), available at https://www.c-c-d.org/fichiers/CCD-Comments-on-Title-IX-hearing-6_11_2021_FINAL.pdf

Recommendations for Complaint Procedures

Accommodations for complaint procedures may be necessary whether a student with a disability is reporting sexual harassment or responding to allegations of sexual harassment against them. ASAN supports the proposed rule's requirement that the Title IX Coordinator(s) work with a student's Individualized Education Plan (IEP) team when a student with a disability is involved in a sex-based discrimination or harassment investigation.¹⁴

We urge the Department to *require* that Title IX Coordinators in colleges consult with its disability services office or office in charge of implementing Section 504 of the Rehabilitation Act of 1973 whenever an involved student has a disability, rather than recommending it. We understand that sometimes a student with a disability has not established a formal relationship with this office.¹⁵ Nonetheless, if the Title IX Coordinator has a reasonable belief that an involved student has a disability, there is little justification for treating postsecondary students differently.

We additionally urge the Department to include, in its provisions at §106.8(e) concerning consultation with the IEP team, a specific requirement that reasonable accommodations be provided.¹⁶ Reasonable accommodations must be a component of any investigation or proceeding involving a person with a disability. These can include general universal design and accessibility principles such as the use of plain language, physically accessible settings, clearly defined informed consent, and trauma-informed practices. There may also be specific access needs and accommodations based on an individual's specific disability. These can include for autistic people but are not limited to: access to ASL translators, captions for virtual hearings, use of Augmentative and Alternative Communication (AAC) devices, the availability of visual aids and Easy Read materials, and/or a Direct Support Professional (DSP).

Live Hearings

ASAN appreciates that the Department has made live hearings with direct cross-examination optional rather than mandatory.¹⁷ Formal hearings may present issues for people with disabilities, sexual harassment and assault survivors, and survivors with disabilities. People with IDD- including autistic people- often have difficulty testifying,¹⁸ and these difficulties are likely to be more prevalent during a sexual harassment investigation. Mandatory live hearings with cross-examination may also cause needless retraumatization.

¹⁴ 87 Fed. Reg. at 41570.

¹⁵ 87 Fed. Reg. at 41430.

¹⁶ 87 Fed. Reg. at 41466, 41497.

¹⁷ 87 Fed. Reg. at 41503.

¹⁸ Joanne Morrison, Jill Bradshaw & Glynis Murphy, *Reported communication challenges for adult witnesses with intellectual disabilities giving evidence in court*, 25 *The International J. Evidence & Proof* 244, 244-45, 256-58 (2021) (describing the typical communication challenges faced by adults with ID in

Sexual Harassment Investigations

ASAN opposes the Department's proposed rule stating that if any party "does not respond to questions related to their credibility," *all* of that party's statements supporting their position must be discounted.¹⁹ The Department did not explain which questions relate "to credibility," meaning that the rule could be applied to any question.²⁰ A school could, therefore, exclude all the statements of a sexual assault victim because they refused to answer a single question.

ASAN recommends that the Department remove this exclusionary rule from the NPRM. We are particularly concerned in light of the difficulties people with IDD, including autistic people, have giving testimony.²¹ These difficulties are likely to be more frequent during the high-stress context of a sexual harassment investigation - even during an informal investigation. ASAN emphasizes its recommendation that the Department require schools to provide any reasonable accommodations necessary for people with IDD to participate fully, including extra time to answer questions or a particular way of answering questions if necessary.

Supportive Measures

We appreciate the proposed rule's requirement that supportive measures be provided to all people who report that they have experienced sexual harassment, even if their complaint is ultimately dismissed.²² We strongly support the requirement that the Title IX Coordinator, when providing supportive services, is required to consult with a student with a disability's IEP team in public school.²³

Sex-Segregated Programs or Activities

ASAN supports the proposed rule's clarification that preventing a student from participating in an education program or activity consistent with their gender identity violates Title IX.²⁴ Specifically, any sex-based exclusion that causes the specific person

the United Kingdom, but applicable elsewhere); Katie Maras, Dermot M. Bowler, *Eyewitness Testimony in Autism Spectrum Disorder: A Review*, 44 J. Autism & Developmental Disorders 2682, 2682-697 (2014) (describing both the memory difficulties that characterize autistic people and how this impacts our testimony in a literature review).

¹⁹ 87 Fed. Reg. at 41578.

²⁰ 87 Fed. Reg. at 41503, 509 (describing the Department's reasoning for including this provision).

²¹ *Supra* note 17.

²² 87 Fed. Reg. at 41422.

²³ 87 Fed. Reg. at 41574.

²⁴ 87 Fed. Reg. at 41534-537.

more than *de minimis* harm violates Title IX.²⁵ However, the Department should clarify that the *de minimis* harm standard applies to all sex-separated programs and activities such as bathrooms, locker rooms, housing, and other programs and activities.

In most situations, Title IX requires treatment in sex-specific facilities consistent with the person's gender identity. The Department's definition of "sex" is not dependent on biological sex, meaning that these standards allow for the participation of transgender students.²⁶ However, in certain situations, it is not clear from the rule what would happen when a transgender student wishes to participate. The rule states both that any treatment inconsistent with gender identity causes more than *de minimis* harm, and that there are specific situations - such as sex-segregated housing - where a school may cause more than *de minimis* harm regardless.²⁷

This lack of clarity may disproportionately impact students with intellectual and developmental disabilities, particularly autistic students, who are more likely to be transgender²⁸ and may have support needs relating to stability in housing, accessibility, and proximity to the school. ASAN therefore urges the Department to clarify its position when it comes to how the *de minimis* harm standard impacts transgender individuals in sex-specific facilities.

Athletics

The Department proposes to issue a separate rule concerning sex-specific athletics, including on whether or not an individual student (including a transgender student) may participate in a particular sex-segregated athletics team.²⁹

ASAN opposes the proposed rule's treatment of athletics separately. State legislatures have specifically targeted LGBTQI+ students over the past few years, with most laws focused on excluding transgender student athletes from participating in athletic activities that match their gender identity.³⁰

The lack of clarity may disproportionately impact students with intellectual and developmental disabilities, particularly autistic students, who are more likely to be transgender. Students with IDD may also have disability specific support needs relating to their athletics participation, such as the need for consistency in the team they participate in. If the Department fails to preempt state or local laws with clarity on athletics in its final rule, an Autistic student may be forced to change teams, or may be

²⁵ *Id.*

²⁶ 87 Fed. Reg. at 41537.

²⁷ 87 Fed. Reg. at 41534-536.

²⁸ Emily Stenbridge, *supra* note 8.

²⁹ 87 Fed. Reg. at 41537-538.

³⁰ Am. Civ. Liberties Union, *Legislation Affecting LBGTQ Rights Across The Country*, ACLU.org (July 1, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

banned from joining a sex-specific team in college that they were involved in in high school, causing needless trauma and disruption.

ASAN therefore urges the Department to clarify that transgender, nonbinary, and intersex students have the right to participate in sports consistent with their gender identity and that bans against transgender and intersex students participating in sex-specific sports teams by state or local laws are forms of impermissible sex-based discrimination.

ASAN recognizes the Department's intent to provide a separate NPRM focused on athletics. We therefore urge the Department not to engage in a completely separate rulemaking and to undergo a simultaneous rulemaking that includes athletics in the final Title IX rule.

Religious Exemption

The previous administration made two changes to the Title IX regulations that allow some schools to use a "religious exemption" as pretext for sex-based discrimination. These so-called "religious exemptions" disproportionately harm women, girls and nonmasculine presenting students; pregnant and parenting students or students who may become pregnant; students seek or need access to abortion or birth control or who require other forms of reproductive health care, LGBTQI+ students, and students with disabilities.

The 2020 regulations allow schools that are not actually "controlled by a religious organization" to claim a religious exemption from Title IX. The 2020 regulations also allow schools to assert a religious exemption *after* they are already under investigation for a Title IX violation by the Department. This can prevent students and employees from receiving prior notice of sex-based discrimination even though Title IX's regulations require a school to notify students, their families, employees, and applicants of the school's anti-sex discrimination policies.

This lack of proper notice may disproportionately impact students with intellectual and developmental disabilities, particularly Autistic students, who are more likely to be transgender, or have other kinds of gender diversity. Additionally, Autistic students may be more likely, due to cognitive aspects of the disability, to be unaware that a school has such a religious exemption.

The proposed rules do not address this problem. ASAN urges the Department to address this issue through proposed Title IX regulations by rescinding the expansion of eligibility for religious exemptions to institutions that are not controlled by a religious organization. Additionally, the Department should require schools to provide notice of any religious exemption claims to the Department while also requiring schools to make any religious exemptions clear in the required nondiscrimination notices provided to students, families, employees, and applicants.

ASAN thanks the Department for the opportunity to provide comments, which will further its development of robust, effective regulations on Title IX. For more information on ASAN's positions on Title IX, please contact Larkin Taylor-Parker at ltaylorparker@autisticadvocacy.org.