

A CALL FOR LEGISLATIVE ACTION TO SUPPORT STUDENT SURVIVORS OF SEXUAL HARASSMENT

APRIL 2021

On behalf of over 70 organizations, we urge lawmakers to take legislative action to prioritize, address, and eliminate sexual harassment in education.

Over the last decade, advocacy led by student survivors, academics, policymakers, the #MeToo movement, and other activists has forced an unprecedented reckoning with the threat sexual harassment¹ poses to students' educations and wellbeing. Yet despite recent progress and long-standing legal protections, harassment persists at extraordinary rates. Too often, schools fail to provide survivors—especially students of color, students with disabilities, and LGBTQ students—the support and services they need, denying them equal educational opportunities.

Title IX of the Education Amendments of 1972 (Title IX) is a critical civil rights law that prohibits discrimination based on sex, including sexual harassment, in federally funded educational programs. When enforced meaningfully, Title IX's protections can make the difference between a victim staying in school or dropping out. However, as civil rights advocates and advocates for student survivors, we know too well the damage that has been done to Title IX and similar civil rights laws by imposing barriers that limit access to justice in the courts and through federal agencies. Most recently, the Trump administration took steps to weaken civil rights protections for student survivors by promulgating harmful regulations that allow schools to ignore sexual harassment and adopt uniquely unfair procedures to address it.

Now is the time for Congress to take swift action to strengthen protections against sexual harassment in education. Schools need to provide support and services to student survivors so they can keep learning in the wake of violence or other forms of harassment; invest in prevention measures like comprehensive sex education; and ensure transparency about the prevalence of harassment within a school community. And the courts and Department of Education must be partners in ensuring survivors' rights are protected.

While the principles and priorities below focus primarily on the need for Congressional action addressing sexual harassment in schools, students often experience harassment targeted at multiple aspects of their identity. For this reason, among others, 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, parental status, pregnancy or related medical conditions). Existing civil rights laws protecting students who experience harassment because of their race, color, national origin, and disability in schools should also be strengthened, and lawmakers should work towards policy changes to address and remedy all forms of discriminatory harassment.

We look forward to working with Congress to continue to develop legislative solutions for students and school employees that are consistent with these principles. And we call on Congress to take these bold and necessary actions in time for the 50th anniversary of the historic passage of Title IX in June 2022. Anything less is an unacceptable step backwards.

¹ Consistent with anti-sex discrimination laws, such as Title IX and Title VII, this document uses the term "sexual harassment" to describe a range of sexual harms that include verbal harassment and harassment via images as well as sexual violence and sexual assault.

1. Reforms must remove barriers to justice.

In Title IX's language is broad and sweeping, making clear Congress's intent to open the courthouse doors to victims of a wide range of sex discrimination in schools. However, since Title IX's passage, courts have created barriers that make it extraordinarily difficult for survivors to obtain redress from schools through private litigation. Most notably, the Supreme Court's opinions in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999), created prohibitively high standards for Title IX sexual harassment lawsuits that are more onerous than those applicable to workplace sexual harassment lawsuits under Title VII of the Civil Rights Act of 1964. Title IX plaintiffs must now establish that they were subject to severe and pervasive harassment; that the school had actual knowledge of the harassment; and that the school was deliberately indifferent. In contrast, a Title VII plaintiff experiencing harassment by a coworker or other nonsupervisor need only show their employer reacted negligently in response to severe or pervasive harassment of which the employer knew or should have known, and in certain instances—such as when a supervisor fires someone because they refuse to submit to sexual advances—Title VII automatically holds an employer liable. As a result, schools are required to do less to address harassment against their students than it does to address the same harassment of its employees, meaning that young students must suffer worse harassment than adult employees before they are entitled to a remedy in court.

Some lower courts have added additional onerous barriers, including a “one free rape rule,” under which a school is only liable for its failure to address sexual harassment if the same student later experiences further actionable sexual harassment. And many survivors are not able to hold their schools accountable for violating Title IX because their claims are time-barred before they even realize they were harassed or that their school played a role in the harassment they suffered.

Crucially, a legislative fix to this case law must address not only Title IX but also analogous civil rights statutes that require schools to address harassment based on race, national origin, and disability as a condition of receipt of federal funds, since courts regularly apply Title IX precedents (including *Gebser* and *Davis*) to suits brought under those laws. Harassment based on these other identities also undermines students' and educators' equality, safety, and dignity, and are no less harmful to educational success. This would also ensure that students experiencing intersectional forms of harassment are not subjected to different standards in litigation arising from the harassment.

Finally, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) should offer survivors in postsecondary institutions additional protections. Since the reauthorization of the Violence Against Women Act (VAWA) in 2013, campuses have been required to implement prevention and

Congress Should:

- Amend Title IX and analogous civil rights laws prohibiting discriminatory harassment by rejecting the standards that apply in private action claims for damages, including the deliberate indifference standard, actual knowledge requirement, and narrow definition of sexual harassment imposed by *Gebser* and *Davis*;
- Reject the “one free rape rule” by clarifying that a plaintiff may make out a claim under Title IX for educational deprivations due to a school's failure to address sexual harassment regardless of whether they experience further sexual harassment after notifying their school;
- Create a fair, uniform statute of limitations for Title IX lawsuits that provides at least five years after the date on which the survivor reasonably discovers both the existence of the injury and the causal connection between the injury and the educational institution's conduct; and
- Create a private right of action under Clery.

2. Reforms must ensure that schools provide effective supportive measures to survivors to help them succeed in school.

When students feel safe and welcome in school, they are more successful. But sexual harassment can make it harder for students to study and maintain their grades, participate in school activities, or even attend school. This inability to feel safe and welcome and be able to fully participate in their education increases the likelihood of these students to drop out of school altogether. Schools providing supportive services to survivors, such as mental health services, medical services, housing assistance, disability services, and academic support services can mean the difference between a student succeeding or dropping out. As numbers of studies show, harassment has a negative impact on students' mental health and learning. Also, many survivors must withdraw from or retake courses after incurring significant financial burdens because of their assaults, which has led to some survivors being unable to complete their college education. Schools must do more in support of survivors so that they are able to successfully continue with their education. To make sure survivors are connected with support, staff must also be trained to recognize sexual harassment and respond appropriately, which includes learning about discriminatory stereotypes and rape myths that are often used to discredit survivors.

Congress Should:

- Require that schools provide no-cost supportive measures and accommodations that minimize the burden on survivors (including prohibiting mutual no contact orders, which are often used by respondents to retaliate against victims); require schools to reimburse survivors for lost tuition and student loan interest accrued in relation to the student's experience with sexual harassment; and ensure that school employees are adequately trained in responding to harassment. Examples of legislative language addressing supportive measures and employee trainings in K-12 schools can be found in the Supporting Survivors of Sexual Abuse in School Act and the Stop Sexual Harassment in K-12 Act. Examples of legislative language addressing trainings and other resources so that postsecondary institutions can foster inclusive approaches to sexual harassment can be found in the HALT Act and the Safe Equitable Campus Resources and Education Act (SECuRE Act), which focuses on students with disabilities;
- Embrace programs that enhance social service resources instead of police presence in schools. An example of legislative language is found in the Counseling Not Criminalization in Schools Act, which requires schools to divest from police in order to receive grant funds, which can be used to hire more counselors and similar employees and implement trauma-informed and evidence-based student support programs;
- Fund trauma care and mental health programs and personnel at schools. Example of legislation providing such resources is in the Ending Punitive, Unfair, School-Based Harm that is Overt and Unresponsive to Trauma Act (PUSHOUT Act); and
- Require (or encourage) schools to develop MOUs with community-based and culturally-specific organizations to ensure students have access to counseling and support services.

3. Reforms must protect against the retaliation and the silencing of students who are sexually harassed.

Federal law prohibits retaliation against students who report sexual harassment and other forms of discrimination. Yet far too many schools continue to subject students (especially students of color, LGBTQ students, and disabled students) to adverse action when they report sexual harassment. For example, many students who report sexual harassment are disciplined by their schools for violating a school rule during the incident, such as a rule against drug or alcohol use, a COVID-19 social distancing rule, a rule against engaging in sexual activity or premarital sexual activity, or a rule against physical fighting. Other student victims are disciplined for acting out in age-appropriate ways due to trauma, for missing school in the aftermath of harassment, for making an allegedly "false" report, or for merely talking about an assault with other students in violation of a "gag order" or nondisclosure agreement imposed by their school. Schools have also pressured or forced student survivors to leave school, transfer to other schools, or enroll in inferior or "alternative" education programs that isolate them from their teachers and friends. And in recent years, schools have opened retaliatory cross-complaints of sexual harassment by harassers and abusers against their victims. In doing so, schools have been complicit in harassment as survivors have been forced to participate in clearly retaliatory and harassing investigations and hearings. This retaliatory harassment by schools and harassers has not just harmed and silenced victims who have already spoken out but has chilled further reporting as survivors are shown the cost of reporting is too high to bear.

Moreover, mandatory referrals of harassment complaints to law enforcement often deter students from reporting to their school and accessing the support and accommodations they need to continue their education. Fear of interacting with police can be especially pronounced for students who are Black, Latinx, Muslim, immigrants, LGBTQ, and/or disabled. These actions, and the threat of such actions, have a chilling effect that keeps victims from coming forward to ask for help.

Congress Should:

- Prohibit schools from punishing students who report sexual harassment for any collateral conduct related to the reported incident, including, but not limited to, drug or alcohol use, consensual sexual activity, a COVID-19 policy violation, and reasonable self-defense. Examples of legislative language related to amnesty policies for K-12 schools can be found in the Supporting Survivors of Sexual Abuse in School Act;
- Require schools to respond to students who report sexual harassment in a trauma-informed way for subsequent conduct in relation and reaction to the harassment, including, but not limited, to “acting out”, nonattendance, and other responses that otherwise trigger disciplinary action;
- Prohibit schools from restricting the right of student survivors to discuss an experience of sexual harassment;
- Prohibit schools from having policies that require all reports of sexual harassment be referred to law enforcement, unless required by state mandatory referral laws;
- Prohibit schools from requiring or coercing students who report sexual harassment to take a leave of absence, transfer to another school or department, or enroll in an alternative education program; and
- Specifically prohibit schools from pursuing retaliatory disciplinary proceedings against students who report sexual harassment, including, but not limited to, disciplinary proceedings based on retaliatory complaints of defamation and retaliatory cross-complaints of sexual harassment. Additionally, where appropriate, schools should investigate retaliatory cross-complaints as a student conduct violation.

4. Reforms must ensure that schools treat all complaints of sexual harassment seriously and fairly.

Schools should take immediate and appropriate action designed to stop harassment, correct its effects, and ensure that the harassment does not recur. To that end, school must have effective adjudication procedures to resolve sexual harassment complaints. However, while Title IX regulations have long required schools to follow prompt and equitable procedures in response to complaints of sexual harassment, many schools do not take reports of sexual harassment seriously or treat survivors fairly. The recent Title IX rule changes by the Trump administration only exacerbate these problems by requiring schools to follow procedures for sexual harassment that are uniquely unfair and retraumatizing, that do not apply to investigations of other types of harassment, and that deter many survivors from coming forward at all.

Congress Should:

- Require schools to respond to all complaints of sexual harassment that could threaten students’ equal access to education, regardless of where it occurs;
- Require schools to have grievance procedures for responding to complaints of sexual harassment that are trauma-informed, reliable, timely, and equitable, that do not pose unnecessary barriers to reporting, that consider the safety of parties and witnesses, that provide meaningful opportunity to participate, that are transparent, and that do not require more burdensome processes than applicable in responding to other complaints of student or employee misconduct; and
- Require schools when investigating harassment to inform complainants of all remedies available to the complainant and all sanctions issued on a respondent, to prohibit schools from informing respondents of any remedies for a complainant, and to provide complainants and respondents with any written determination of the facts on which the outcome is based.

5. Reforms must promote prevention and transparency.

Comprehensive sex education is a proven way to prevent sexual harassment. While schools are required to have anti-harassment and anti-discrimination policies, schools can shield themselves from liability by having policies or training programs in place, regardless of quality or efficacy. These efforts have frequently been ineffective in preventing harassment and discrimination in the first instance, in part because they permit symbolic compliance with the law instead of addressing behaviors that are unacceptable as well as unlawful.

However, youth who receive comprehensive sex education with a focus on healthy relationships are less likely to perpetrate intimate partner violence and sexual harassment. When raising the subject of sex is taboo, or abstinence is presented as the only way to avoid teen pregnancy or STIs, survivors tend to feel shame in coming forward to report sexual assault when it happens to them, so they suffer in silence. We must give youth the tools to spot the signs of unhealthy relationships and the language to report abuse when it happens. While prevention should be a primary goal for schools in addressing sexual harassment, unfortunately, there is no federal funding stream to support comprehensive sex education.

Additionally, because sexual harassment is underreported, it can be difficult for schools to know how pervasive the problems are and whether their prevention efforts are having an impact. By administering annual, anonymous school climate surveys, schools can get more accurate data and honest feedback from students and educators on their policies, practices, and trainings. Climate surveys provide school-specific data that measure the prevalence of harassment within a school's own community, ensuring schools are better equipped to determine the effectiveness of existing practices and to develop new strategies as appropriate.

Congress Should:

- Require schools to provide comprehensive, medically-accurate and complete, age-appropriate, culturally sensitive, non-shaming, and LGBTQ+-inclusive healthy sexuality education programs that include a focus on consent and healthy relationships, and stop providing funding to abstinence-only programs, including through the federal title IV State Abstinence Education Grant Program. An example of legislative language to create a dedicated federal funding stream for K-12 comprehensive sexuality education can be found in the Real Education for Healthy Youth Act (REHYA);
- Fund programs that track and fund research on best practices for preventing and responding to sexual assault and harassment. This includes increasing funding for the Rape Prevention & Education Program at the Center for Disease Control's Injury Center. Additionally, examples of legislative language for other funding is in the Campus Accountability and Safety Act, which would create a new grant program to fund best practices for preventing and responding to sexual and interpersonal violence on college campuses, the Combating Sexual Harassment in Science Act of 2019, which funds research into sexual harassment and violence in STEM, and the Gender Equity in Education Act (GEEA), which funds trainings, prevention education and awareness programs, efforts for better data collection, research, development, and evaluation;
- Ensure K-12 schools and institutions of higher education have resources to conduct comprehensive climate surveys to understand the prevalence of sexual harassment in their schools, the impact on students, and where schools' responses need to improve. Examples of legislative language requiring climate surveys for institutions of higher education as well as K-12 schools can be found in the HALT Act, Stop Sexual Harassment in K-12 Act, and Supporting Survivors of Sexual Harassment in School Act of 2020; and
- Promote transparency on institutional compliance with Title IX. An example of legislative language is in the HALT Act, which would make publicly available on the Department of Education's website a list of institutions under investigation, the sanctions (if any) or findings issued pursuant to such investigations, and a copy of program reviews and resolution agreements, including voluntary resolution agreements with the Secretary of Education or Attorney General.

6. Reforms must be accompanied by larger investments in the Department of Education and Title IX coordinators, and by enhanced administrative enforcement.

Ensuring the right to an equal educational opportunity through robust enforcement of federal civil rights laws increases the likelihood that students will succeed in school. Without federal oversight and sufficient funding for the Department of Education's Office for Civil Rights (OCR) to fully investigate complaints in a timely fashion, institutions would be able to deny students their civil rights without recourse. Thus, effective legal reform must be accompanied by substantial additional funding for OCR to increase their capacity to conduct trainings, investigations and other enforcement actions, data collection, and to develop new resources or policy to clarify civil rights protections. Additionally, in order to provide more training and technical assistance to proactively support institutions' campus violence prevention instead of focusing just on punitive reactive measures like program reviews, the Department of Education needs additional funding to support a robust enforcement of and education on Clery Act requirements.

Likewise, Title IX coordinators are critical for ensuring that schools uphold students' civil rights, including students who experience sexual harassment. Unfortunately, too many school districts do not have well-trained and qualified Title IX coordinators, do not have enough Title IX coordinators, or have Title IX coordinators holding multiple, often conflicting, positions that hinder their ability to fully implement Title IX and serve the many students in their district. Relatedly, the Department of Education needs additional funding to support providing technical assistance to Title IX coordinators and other administrators and allies who promote equity in education.

And in addition to current enforcement mechanisms under Title IX and other analogous civil rights laws, the Secretary of Education should have the power to levy fines against institutions when they violate federal civil rights law as another tool for holding institutions accountable for ensuring that students' rights are secured. This is particularly important given that OCR has virtually never revoked federal funding from educational institutions for violating civil rights laws.

Congress Should:

- Double the budget for the Department of Education's Office for Civil Rights;
- Increase the budget for the Department of Education's enforcement of the Clery Act. Example of legislative text is in the HALT Act;
- Amend the Department of Education Organization Act to allow the Secretary of Education to levy fines against institutions for violating federal civil rights law. Example of legislative text is in the HALT Act; and
- Create a grant program for school districts to hire trained and full time Title IX coordinators, thus supporting the creation of a gender equity infrastructure with an emphasis on addressing sexual harassment and violence. Examples of legislation language that address greater resource allocation for Title IX coordinators in K-12 school districts are in the Stop Sexual Harassment in K-12 Act, Supporting Survivors of Sexual Harassment in School Act of 2020, and GEEA.

If you have any questions or need additional information, please contact Shiwali Patel (National Women's Law Center) at spatel@nwlrc.org, Alexandra Brodsky (Public Justice) at abrodsky@publicjustice.net, and Kenyora Parham (End Rape On Campus) at kenyora@civcnation.org.

SUPPORTING ORGANIZATIONS

American Association of University Women (AAUW)

American Atheists

American Psychological Association

Arkansas Coalition Against Sexual Assault

Athlete Ally

Atlanta Women for Equality

Autistic Self Advocacy Network

Bazon Center for Mental Health Law

BHS Stop Harassing

California Women's Law Center

Center for Public Representation

Chicago Alliance Against Sexual Exploitation

Clearinghouse on Women's Issues

Colorado Coalition Against Sexual Assault

Council of Parent Attorneys and Advocates

Day One

Disability Rights Education & Defense Fund

End Rape On Campus

Enough is Enough Voter Project

Equal Rights Advocates

Every Voice Coalition

Faculty Against Rape

Family Equality

Feminist Majority Foundation

Futures Without Violence

Enough is Enough Voter Project

Equal Rights Advocates

Every Voice Coalition

Family Equality

Feminist Majority Foundation

Futures Without Violence

Girls Inc

GLSEN.

Harvard Law School Gender Violence Program

Hindu American Foundation

Human Rights Campaign

Idaho Coalition Against Sexual & Domestic Violence

Illinois Coalition Against Sexual Assault

It's on Us

Jane Doe Inc. (JDI), the Massachusetts Coalition Against Sexual Assault and Domestic Violence

Jewish Women International

Know Your IX

Legal Aid at Work

Legal Momentum, the Women's Legal Defense and Education Fund

Maryland Coalition Against Sexual Assault

Michigan Coalition to End Domestic and Sexual Violence

Missouri Coalition Against Domestic and Sexual Violence (MCADSV)

National Alliance for Partnerships in Equity (NAPE)

National Alliance to End Sexual Violence

National Association of Councils on Developmental Disabilities

National Black Justice Coalition

National Center for Lesbian Rights

National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)

National Center for Youth Law

National Council of Jewish Women

National Education Association

National Indian Education Association (NIEA)

National Network to End Domestic Violence
National Organization for Women
National Resource Center on Domestic Violence
National Women’s Law Center
National Women’s Political Caucus
Network for Victim Recovery of DC
New York State Coalition Against Sexual Assault
Nevada Coalition to End Domestic and Sexual Violence
North Carolina Coalition Against Sexual Assault
Ohio Alliance to End Sexual Violence
PFLAG National
Pennsylvania Coalition Against Rape
Public Justice
Rocky Mountain Victim Law Center
SafeBAE
Stop Sexual Assault in Schools
Texas Association Against Sexual Assault
The Center for Learner Equity
University Survivors Movement (USM)
Victim Rights Law Center
West Virginia Foundation for Rape Information and Services
Wisconsin Coalition Against Sexual Assault
Women’s Law Project Children of NJ