

Comments of the Center for Democracy & Technology

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Docket No. ED-2021-OCR-0166

I. Introduction

The Center for Democracy & Technology (CDT) is a non-profit, public interest organization dedicated to developing and implementing public policies that preserve civil liberties and democratic values on the Internet. With regards to education and technology, CDT is particularly concerned with schools' increasing use of tools to monitor students' online activities. Although some of these tools were first implemented during remote learning, they have stayed in place as students return to physical buildings. Schools have dramatically increased the number of devices they have provided to students and families, with 95 percent of teachers reporting that their school provided laptops and/or tablets to the students in the past academic year.¹ With the increase in providing devices, schools have also increased their abilities to track what students are doing online, with 89 percent of teachers reporting that their school uses student activity monitoring software.²

Unfortunately, this increased monitoring of students has led to harms that disproportionately affect protected classes of students. One area of particular concern is the targeted monitoring of LGBTQI+ students, which puts them at disproportionate risk of harm compared to their heterosexual, cisgender, and endosex peers. We submit the following comments in response to the Notice of Proposed Rulemaking issued by the U.S. Department of Education (Department), Nondiscrimination on the Basis of Sex in Education Programs or

¹ Elizabeth Laird et al., Center for Democracy & Technology, *Hidden Harms: The Misleading Promise of Monitoring Students Online* 7 (2022) [hereinafter *Hidden Harms*], available at <https://cdt.org/insights/report-hidden-harms-the-misleading-promise-of-monitoring-students-online/>.

² Although there is not one universal definition of student activity monitoring, two common types are "technology that collects data on individual students, such as a learning management system logging when students use the system or a webapp scanning students' email messages; and software on school-issued devices that allows for realtime features, such as viewing students' screens or switching which applications they have open." DeVan Hankerson Madrigal et al., Center for Democracy & Technology, *Online and Observed: Student Privacy Implications of School-Issued Devices and Student Activity Monitoring Software* 7 (2021) [hereinafter *Online & Observed*], available at <https://cdt.org/insights/report-online-and-observed-student-privacy-implications-of-school-issued-devices-and-student-activity-monitoring-software/>.

Activities Receiving Federal Financial Assistance (NPRM),³ to ensure that the use of data and technology does not harm the students that schools intend to help. Specifically, we urge the Department to:

- Adopt the formal position that sex-based discrimination includes discrimination on the basis of sexual orientation and gender identity.
- Explain that schools⁴ are liable for discriminatory uses of technology.
- Clarify that Title IX applies to digital spaces, but schools do not have an active obligation to monitor or surveil students online.
- Underscore that Title IX provides critical privacy protections notwithstanding contrary state and federal laws, preempting discriminatory state laws and overriding FERPA when disclosures would create a hostile environment for LGBTQI+ students.

II. Sex-Based Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity.

The Department has not previously addressed the inclusion of discrimination on the basis of sexual orientation and gender identity in rulemaking; however, as far back as 2001, it issued guidance around sex-based discrimination that included SOGI status.⁵ In 2021, OCR published a Notice of Interpretation in the *Federal Register* that explicitly stated that Title IX includes protections from discrimination on the basis of SOGI status.⁶ Unfortunately, this Notice of Interpretation was subsequently enjoined on July 15, 2022 by a district court in Tennessee, which barred the enforcement of the notice for failure to adhere to the rulemaking process required by the Administrative Procedure Act — the very process the Department is employing now.⁷ Thus, it is imperative that the Department enshrine protections for SOGI status within Title IX through formal rulemaking procedures.

³ *Notice of Proposed Rulemaking*, 87 Fed. Reg. 41390-41579 (July 12, 2022) [hereinafter *NPRM*].

⁴ In these comments, we use the term “school” to refer to all education programs or activities operated by recipients of federal financial assistance subject to Title IX. See 34 C.F.R. §§ 106.2, .11, .31; *NPRM* at 41568.

⁵ *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039 (1997, revised in 2001) [hereinafter *1997 Sexual Harassment Guidance*], available at <https://www.govinfo.gov/content/pkg/FR-1997-03-13/pdf/97-6373.pdf>; U.S. Dep’t of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* at 5 (Apr. 29, 2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [rescinded in 2017].

⁶ *Notice of Interpretation—Enforcement of Title IX with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021).

⁷ *Tennessee v. U.S. Dept. of Educ.*, 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022).

Courts, like the Department, have found that Title IX covers sexual orientation and transgender status. Courts have regularly held that Title IX protections extend to SOGI status.⁸ The “clear language of Title IX” prohibits discrimination based on gender identity.⁹ Following the Supreme Court’s holding in *Bostock v. Clayton County* that Title VII protections include sexual orientation and transgender status, circuit courts began immediately applying *Bostock* to Title IX, reinforcing the prior line of cases interpreting Title IX’s plain text.¹⁰ Looking towards Supreme Court precedent on Title VII for guidance on interpretation of Title IX is not novel.¹¹ Given the immense amount of case law supporting the Department in its proposed implementation of Title IX, the Department is well within its purview to read Title IX as covering sex-based discrimination that includes SOGI status.

CDT welcomes the Department’s clarification, included in the NPRM, that Title IX’s protections against sex-based discrimination include discrimination on the basis of sexual orientation and gender identity (SOGI status). We applaud the efforts to ensure that *all* students, especially LGBTQI+ students, are protected under federal law and that no student is discriminated against by schools. We strongly urge the Department to keep these definitions within the final rule when it is issued.

⁸ *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) *cert petition denied*, 138 S. Ct. 1260 (“A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.”); *Grimm v. Gloucester County Sch. Bd.*, 302 F. Supp. 3d 730, 746-47 (E.D. Va. 2018) (“[C]laims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory under Title IX.”) (quoting *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018)); *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 530 (3d Cir. 2018); *Adams v. Sch. Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1106 (D. Or. 2018).

⁹ *A.M. by E.M. v. Indianapolis Pub. Sch.*, No. 122-cv-1075, 2022 WL 2951430, at *11 (S.D. Ind. July 26, 2022); *see also B. P. J. v. W. Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 356 (S.D.W. Va. 2021) (granting a preliminary injunction as it was “clear” that transgender athlete was being discriminated against on the basis of her sex).

¹⁰ *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *Adams v. Sch. Bd. of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020), *opinion vacated and superseded sub nom. Adams v. Sch. Bd. of St. Johns County, Fla.*, 3 F.4th 1299 (11th Cir. 2021), *reh’g en banc granted, opinion vacated*, 9 F.4th 1369 (11th Cir. 2021).

¹¹ *Miles v. New York Univ.*, 979 F. Supp. 248, 250 n.4 (S.D.N.Y. 1997) (establishing that the Title IX term “on the basis of sex” is interpreted in the same manner as similar language in Title VII); *see, e.g., Murray v. New York University College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (“[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII”).

III. Schools Are Liable for Discriminatory Technology and Uses of Data.

In its NPRM, the Department has the opportunity to build on its previous statements about the scope of Title IX to clarify that schools are liable for discriminatory technologies that they choose to employ, including if that discrimination is due to a third-party contractor's conduct. The Department should provide this guidance at a general level, but should also specifically address the widespread use of student activity monitoring, through which students are being discriminated against on the basis of sex.

A. Student Activity Monitoring Can Create Disparate Treatment and Disparate Impact Under Title IX.

Title IX generally prohibits the disparate treatment and/or impact of protected classes of individuals. Schools' use of student activity monitoring software can cause both disparate treatment and disparate impact. In the context of Title IX, disparate treatment on the basis of sex occurs when "similarly situated individuals [are] treated differently because of, or on the basis of their sex" and requires that the treatment be intentional.¹² In contrast, disparate impact on the basis of sex "focuses on the consequences of a facially sex-neutral policy or practice," regardless of whether the disparate outcomes were intentional.¹³

The evidence suggests that both of these forms of discrimination are occurring through student activity monitoring. In 2020, as a result of the pandemic, schools rapidly shifted to remote classes. Schools significantly increased monitoring of student use of their school-issued devices and school-linked accounts on personal devices, including off-campus. Schools stated that their intentions were to comply with monitoring provisions in the Children's Internet Protection Act and to promote student safety and mitigate harms; however, the risks of constant monitoring of students' online activities are now coming into focus.¹⁴

Round-the-clock online tracking has substantial effects on the mental health and wellbeing of students.¹⁵ In order to better understand these effects, CDT has studied how

¹² Department of Justice, *Title IX Legal Manual*, sec. IV(A)(1) (2021), available at <https://www.justice.gov/crt/title-ix>.

¹³ Department of Justice, *Title IX Legal Manual*, sec. IV(A)(2) (2021), available at <https://www.justice.gov/crt/title-ix>.

¹⁴ *Online and Observed*, *supra* note 2.

¹⁵ Barbara Fedders, *The Constant and Expanding Classroom: Surveillance in K-12 Public Schools*, 97 N.C. L. Rev. 1673, 1706 (2018), available at <https://heinonline.org/HOL/P?h=hein.journals/nclr97&i=1722>.

online monitoring tools are used by schools and how students experience them. On August 3, 2022, CDT released “Hidden Harms: The Misleading Promise of Monitoring Students Online,” a report based on surveys conducted with students, parents, and teachers regarding the role of student activity monitoring and its impact.¹⁶ The survey data reveals a clear disparity between the justifications for schools to implement this technology and its actual use. For example, CDT found that, while 54 percent of teachers report that monitoring software was used to refer students to mental health resources, a much larger percentage of teachers — 78 percent — report that student activity monitoring in their school has flagged a student or students for violations of disciplinary policy.¹⁷

Additionally, the report raises serious concerns around how LGBTQI+ students are being disproportionately targeted for action as a result of student activity monitoring software, which often includes being outed (i.e., the nonconsensual disclosure of gender identity or sexual orientation) to school staff, other students, and their families. In fact, 29 percent of LGBTQI+ students reported that they or someone they know has been outed as a result of this technology.¹⁸ Given that sexuality and gender identity can be intensely private matters, outing presents both psychological as well as physical risks for LGBTQI+ students. Many LGBTQI+ students hide their identities, including because of fear of discrimination and bullying from their peers. A 2018 study of LGBTQ youth found that 70% have been bullied at school because of their sexual orientation, and most transgender youth do not express themselves in a way that completely reflects their gender identity at school.¹⁹ Worse, outing can lead to disastrous consequences at home, including parental rejection and violence. LGBTQI+ youth are disproportionately likely to experience homelessness, in part due to being kicked out or profoundly mistreated by their parents.²⁰ It is no wonder that more than three-quarters of the

¹⁶ *Hidden Harms*, *supra* note 1. A copy of the full report will be attached to this comment.

¹⁷ *Hidden Harms*, *supra* note 1, at 12.

¹⁸ *Hidden Harms*, *supra* note 1, at 21.

¹⁹ Human Rights Campaign, *LGBTQ Youth Report* at 10, 13 (2018) [hereinafter *HRC Report*], available at <https://assets2.hrc.org/files/assets/resources/2018-YouthReport-0514-Final.pdf>.

²⁰ Matthew H. Morton et al., *Prevalence and Correlates of Youth Homelessness in the United States*, 62 *Journal of Adolescent Health* 14 (2018), available at <https://linkinghub.elsevier.com/retrieve/pii/S1054139X17305037>; The Trevor Project, *Homelessness and Housing Instability Among LGBTQ Youth* (2022), available at <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf>.

12,000 youth surveyed as part of the 2018 LGBTQ Youth Report rated coming out to their parents as extremely stressful.²¹

These fears are not hypothetical. One LGBTQ+ student in Minnesota was outed to his family because of student activity monitoring.²² In fact, one student activity monitoring company specifically flags terms like “gay,” “lesbian,” “transgender,” and “queer” for content monitoring.²³ The company perversely cited Trevor Project statistics around LGBTQ+ youth suicide rates as a justification to disparately treat those same students and subject them to disproportionate scrutiny and monitoring as compared to their non-LGBTQ+ peers. The Department should make clear in the final rule that such monitoring based on SOGI status constitutes disparate treatment and disparate impact based on sex and is prohibited by Title IX.

For disparate treatment, technologies that single out protected characteristics such as SOGI status for targeted reporting can result in discrimination against students despite the positive intentions that are often cited as a basis for disparate monitoring frameworks. For instance, flagging student activity if students use the words “gay,” “lesbian,” “transgender,” and “queer” on school accounts or devices would subject LGBTQ+ students to heightened monitoring, compared to their heterosexual and cisgender peers who would not have terms associated with their identities flagged by software. Even beyond particular text-based flags, the sexualization of LGBTQ+ identities means that technological tools inevitably conflate LGBTQ+ identities with pornography and sexual content, and are thus more likely to flag queer content as pornographic than similar materials for straight people.²⁴ As a result, although schools and vendors may cite eliminating sexual content as a reason for subjecting terms

²¹ *HRC Report*, *supra* note 19, at 4.

²² Khayaal Desai-Hunt, *Gaggle: MPS’s New Student Surveillance Software Brings Possible Protection and Danger*, *The Southerner* (Mar. 14, 2021), <https://www.shsoutherner.net/features/2021/03/14/gaggle-mpss-new-student-surveillance-software-brings-possible-protection-and-danger>.

²³ *Id.*; see also Avery Kleinman, *Remote Learning Ushered In A New Era Of Online Academic Surveillance. What’s Next?*, 1A (Jan. 12, 2022), <https://the1a.org/segments/remote-learning-ushered-in-a-new-era-of-online-academic-surveillance-whats-next>.

²⁴ See Whitney Strub, *The Clearly Obscene and the Queerly Obscene: Heteronormativity and Obscenity in Cold War Los Angeles*, 60 *American Quarterly* 373 (2008), available at <https://www.jstor.org/stable/40068543>; Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 *Nw. U. L. Rev.* 1379 (2008), available at https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1163&context=faculty_scholarship; Ari Ezra Waldman, *Disorderly Conduct* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906001.

associated with SOGI status to increased monitoring, these policies treat the same content differently depending on sexual orientation. In practical terms, resources specifically geared toward supporting LGBTQI+ youth such as the Trevor Project can end up blocked or flagged in a search, where similar hotlines or materials that never use the words “lesbian,” “gay,” “queer,” or “transgender” can be accessed without triggering school scrutiny.²⁵ Implementing monitoring software on school-issued devices and accounts that specifically select terms associated with protected SOGI status for targeted reporting can thus create disparate treatment for LGBTQI+ students.

Student activity monitoring can also cause disparate impact on LGBTQI+ students, a form of discrimination that is harder to detect but just as insidious as disparate treatment. Even if student activity monitoring does not include search terms that are directly related to a student’s SOGI status, the tools can nonetheless inflict disparate impact based on sex. Not only does student activity monitoring lead to LGBTQ+ students being outed, but LGBTQ+ students also report

getting in trouble for online activity significantly more often than their non-LGBTQ+ peers, as well as being reported to law enforcement for concerns of committing a

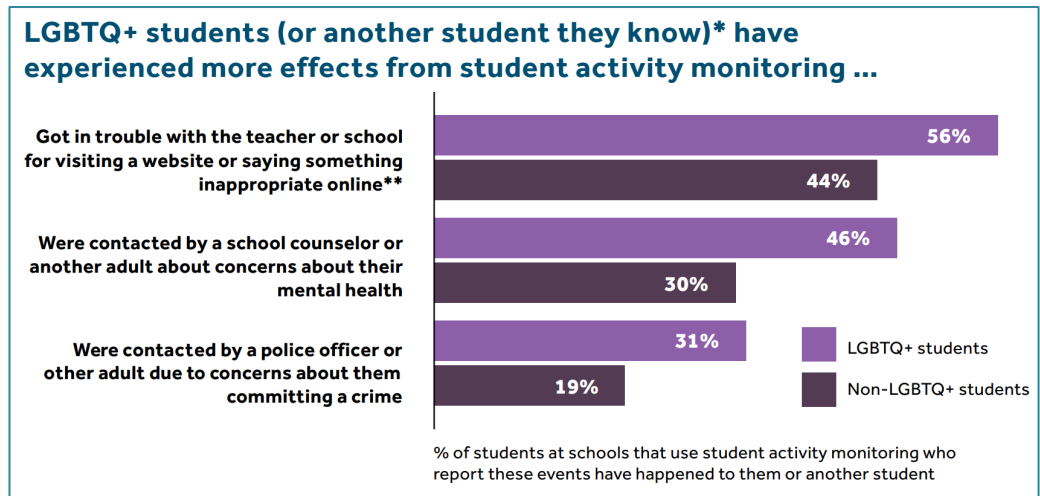


Figure 1

crime at a higher rate (see **Figure 1**).²⁶ These disparities represent institutional and systemic

²⁵ Such problems long predate modern activity monitoring. See American Civil Liberties Union, *Don't Filter Me* (2012), available at <https://www.aclu.org/other/dont-filter-me-final-report>.

²⁶ *Hidden Harms*, supra note 1, at 21. 56% of LGBTQI+ students report getting in trouble versus 44% for their non-LGBTQI+ peers. The difference persists for reports of being contacted by a school counselor or law enforcement. See also Mark Keierleber, *Gaggle Surveils Millions of Kids in the Name of Safety. Targeted Families Argue it's 'Not That Smart,'* The 74 Million (Oct. 12, 2021), <https://www.the74million.org/article/gaggle-surveillance->

bias against LGBTQI+ students. Because private rights of action for disparate impact in Title IX are limited, the Department should take concrete steps to protect students from the disparate outcomes associated with their SOGI status. Schools, and the companies that they employ, should implement proactive means of identifying disparate impacts of monitoring systems to help remedy their effects, through guidance and related enforcement from the Department.

The concerns around school monitoring technologies are widespread. Senators Elizabeth Warren and Ed Markey commissioned a report on the implications of around-the-clock online student monitoring.²⁷ CDT has issued multiple reports in the past two years raising concerns around the impact of this technology on the wellbeing of students.²⁸ The evidence increasingly shows student activity monitoring technologies can subject protected classes such as LGBTQI+ students to disproportionate and disparate treatment — the very conduct that Title IX aims to address.

For Title IX to adequately address the forms of discrimination that students are experiencing today, the Department should consider discriminatory technology use. Given these pressing concerns and the immediate implications of disparately applied technology for LGBTQI+ students, the Department should specifically clarify that the use of technologies that discriminate on the basis of sex is prohibited under Title IX.

B. Schools Are Responsible for Discriminatory Conduct of Their Contractors

The increasing use of technology vendors by schools to manage and run educational programs risks students having no recourse for discrimination by third-party technology companies. Given the importance of a nondiscriminatory educational environment, the Department should reiterate and formalize its long-standing position that schools must ensure

[minneapolis- families-not-smart-ai-monitoring](https://www.shsoutherner.net/features/2021/03/14/gaggle-mpss-new-student-surveillance-software-brings-possible-protection-and-danger); Khayaal Desai-Hunt, *Gaggle: MPS's New Student Surveillance Software Brings Possible Protection and Danger*, *The Southerner* (Mar. 14, 2021), <https://www.shsoutherner.net/features/2021/03/14/gaggle-mpss-new-student-surveillance-software-brings-possible-protection-and-danger>.

²⁷ Sens. Elizabeth Warren & Ed Markey, United States Senate, *Constant Surveillance: Implications of Around-the-Clock Online Student Activity Monitoring* (2022), available at perma.cc/97AC-FHCB.

²⁸ Elizabeth Laird & Hugh Grant-Chapman, Center for Democracy & Technology, *Sharing Student Data Across Public Sectors* (2021), available at perma.cc/HE8H-9WW8; Hugh Grant-Chapman & Elizabeth Laird, Center for Democracy & Technology, *Key Views toward EdTech, School Data, and Student Privacy* (2021), available at perma.cc/JBW7-G9X2; *Online and Observed*, *supra* note 2.

that their vendors adhere to Title IX’s requirements or otherwise be held responsible for their vendors’ discriminatory conduct.

The current regulations explicitly require schools to provide assurances that their contractors will adhere to Title IX²⁹ and prohibit schools from entering into a contract that would subject employees or students to discrimination with regards to employment.³⁰ This approach should be strengthened. The Department of Justice’s guidance on enforcement has interpreted Title IX to broadly cover contractors, stating, “[a] recipient may not absolve itself of its Title IX and other nondiscrimination obligations by hiring a contractor or agent to perform or deliver assistance to beneficiaries.”³¹ That interpretation, however, is supported by a citation only to Title VI’s implementing regulations — not Title IX. Nothing in Title IX’s current regulations make it clear that schools are ultimately responsible for their vendors’ discriminatory conduct — in contrast, Title VI’s regulations expressly prohibit a recipient from discrimination on the “ground of race” “through contractual or other arrangements.”³²

Given the demonstrated issues around student activity monitoring and its impact on LGBTQI+ students, the Department should make it clear that schools are liable for any sex-based discriminatory conduct by third-party vendors that supply software and digital services for education programs. Greater clarity in the Title IX regulations would help protect marginalized students from discriminatory tools that inflict harm based on SOGI status.

IV. Title IX Should Apply to Digital Spaces, But Schools Do Not Have an Active Obligation to Monitor or Surveil Students Online.

In its NPRM, the Department proposes to provide further clarity on how Title IX would apply to discrimination that occurs off-campus, including in online spaces, by refining the scope of “education program or activity” under the rules.³³ As discussed above, the Department should clarify that discrimination caused by digital technologies themselves are covered by Title

²⁹ 34 C.F.R. § 106.4(c).

³⁰ 34 C.F.R. § 106.51(a)(3) (“A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart [regarding employment], including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.”).

³¹ Department of Justice, *Title IX Legal Manual*, sec. III(B)(6) (2021), available at <https://www.justice.gov/crt/title-ix>.

³² 28 C.F.R. § 42.104(b)(1).

³³ See *NPRM* at 41400-04.

IX when they affect a person’s ability to equally access education program and activities. Given schools’ widespread implementation of student activity monitoring, the Department must couple its clarification about the scope of “education programs” under Title IX with a clear statement that schools do not have a duty to constantly monitor students’ online activities or their public social media posts, lest it further incentivize discriminatory surveillance.

a. Title IX Applies to Digital Spaces for which the School Has Responsibility.

Online digital discrimination on the basis of sex can take many forms and the Department has attempted to clarify its existing rules to encompass this increasing risk to students. Under Title IX, schools are required to respond to any sex-based discrimination that occurs within their programs or activities or that “causes sex discrimination within the recipient's education program or activity.”³⁴ “Programs or activities” encompass all the operations of recipients where recipients exercise substantial control over a person engaged in sex-based discrimination and the context in which harassment occurred; it is a fact specific inquiry.³⁵ In a Dear Colleague Letter published in October 2010, the Office of Civil Rights acknowledged that “[h]arassing conduct may take many forms, including . . . graphic and written statements, which may include use of cell phones or the Internet . . .”³⁶ In other words, the Department acknowledged that electronic communications may constitute actionable harassment under Title IX.

Since then, the Department, especially in response to commentators’ concerns that Title IX does not cover digital or online conduct, has emphasized that sexual harassment is not dependent on the method through which it is carried out.³⁷ It has acknowledged that technology has changed traditional understandings of harassment; “the means for perpetrating sexual harassment in modern society,” the Department wrote in 2020, “may include use of electronic, digital, and similar methods . . . [The] use of email, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail,

³⁴ *NPRM* at 41403.

³⁵ *NPRM* at 41400-04.

³⁶ U.S. Dep’t of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* at 2 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

³⁷ *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30146 (May 19, 2020).

handwritten, or other communications.”³⁸ As such, the Department has acknowledged that an “education program or activity” may include “computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.”³⁹

In the NPRM, the Department re-emphasizes that sex discrimination can cause a hostile environment within a recipient’s education program or activity even if the initial discrimination occurs off campus, provided that the conduct is subject to the recipient’s disciplinary authority and the recipient is aware of the discrimination.⁴⁰ This includes online platforms. The Department repeats: “A recipient’s education program or activity would also include . . . computer and internet networks, on digital platforms, with computer hardware or software owned, operated by, or used in the operations of the recipient . . .”⁴¹ And “when an employee has information about sex-based harassment among its student that took place on social media or other platforms and created a hostile environment in the recipient’s education program,” the recipient is required to address it so long as it is aware of the discrimination.⁴²

We applaud the Department’s clarification of the scope of Title IX with regards to online platforms, in particular its reiteration that online learning platforms and other forms of digital platforms are covered under a recipient’s education programs and activities, **provided that** the recipient has information regarding the discrimination on those platforms. While the Department’s clarifications are a good first step, particularly with regard to social media, it should specify that a school’s responsibility to address online harassment of which it is aware does not create a requirement to proactively monitor students’ online activity.

³⁸ *Id.* at 30202.

³⁹ *Id.*

⁴⁰ *NPRM* at 41397; *id.* at 41403 (hypotheticals premising recipients’ responsibility to address sex-based discrimination that occurred outside the education program on reports by students); *id.* at 41434-35 (“This approach is consistent with Federal courts’ interpretation of *Gebser* and *Davis* and what is required of a recipient under the deliberate indifference standard for monetary damages, when a recipient’s response to discrimination must be designed to effectively end the discrimination and prevent its recurrence and when courts have required a recipient to reevaluate its response if it proves ineffective.”); *NPRM* at 41571 (proposed § 106.11); *id.* at 41572 (proposed § 106.44).

⁴¹ *Id.* at 41401.

⁴² *Id.* at 41440.

b. Title IX Does Not Impose a Requirement to Monitor Students' Online Activity.

The current NPRM clarifies that it does not expect a recipient to “follow the online activity of its students that is not part of the recipient’s education program or activity.”⁴³ However, the final rule should make it even more explicit than the NPRM that Title IX’s coverage of off-campus conduct does not create a duty to constantly monitor students’ activities online including on school-owned devices or platforms.

Online student activity monitoring, which schools may undertake out of a good faith effort to comply with their Title IX obligations, can invade student privacy rights and chill free expression, especially for LGBTQI+ students.⁴⁴ Just as Title IX compliance would not require, and could even counsel against, installing cameras outside the homes of students to ensure that sex-based bullying does not take place on their front stoops, the Department should make clear that Title IX does not require *any* proactive monitoring of students’ online activities and social media content and that such monitoring in the name of complying with Title IX obligations can, in itself, create some of the harms that the statute is meant to prevent.

V. Title IX Provides Critical Privacy Protections that Override Contrary State and Federal Law.

In this rulemaking, the Department has an important opportunity to ensure equitable treatment based on sex by protecting student privacy through Title IX preemption of discriminatory state laws requiring forced disclosure of students’ gender identity or sexual orientation, and potentially overriding certain disclosures of student information under FERPA.

a. Title IX Preempts State Laws that Force Outing of Students.

Under § 106.6, obligations to comply with Title IX by avoiding sex discrimination are not obviated or alleviated by any state or local law.⁴⁵ Although it may seem like laws that specifically sanction sex discrimination should be few and far between, the recent onslaught of discriminatory legislation and policy efforts that forces educators to out LGBTQI+ students to their parents or other government agencies are a specific example of discriminatory laws that

⁴³ *Id.*

⁴⁴ *Hidden Harms*, *supra* note 1, at 22.

⁴⁵ 34 CFR § 106.6; *NPRM* at 41569.

Title IX should preempt to prevent sex discrimination and preserve student privacy, as proposed in the NPRM.⁴⁶

Given the explicit targeting of LGBTQI+ students by state policies, we support the Department's proposal to "make clear that all of the Title IX regulations would preempt State or local law" that conflict with Title IX.⁴⁷ Some states have passed laws that contextually target LGBTQI+ students.⁴⁸ As a result, schools have implemented policies that specifically out LGBTQI+ students to their parents, to other students and their parents, and to state agencies.⁴⁹ For example, a Florida county school district's manual states that parents of other students will be alerted if a transgender student in their child's physical education class is "open about their gender identity" and requests to use a locker room matching their gender identity.⁵⁰ These laws and accompanying policies result in disparate treatment of and disparate impact against LGBTQI+ students, violating a number of Title IX's provisions, including the most fundamental prohibitions against "[t]reat[ing] one person different from another" in providing educational services and "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment."⁵¹

Interpreting Title IX to preserve student privacy and prohibit forced outing of students is in line with previous policies from the Department. The Department has interpreted Title IX to require non-discriminatory policies for amending educational records.⁵² And as discussed above, transgender status and sexual orientation discrimination are included in sex discrimination by the majority of courts that have ruled on the issue, as well as the NPRM. The

⁴⁶ NPRM at 41405.

⁴⁷ *Id.* at 41404.

⁴⁸ Ala. Act No. 2022-289, sec. 5 (SB 184), available at <http://alisondb.legislature.state.al.us/ALISON/>; Fl. Law Ch. No. 2022-22, sec. 1 (SB 1557), available at <https://www.flsenate.gov/Session/Bill/2022/1557/?Tab=BillHistory>; see Andrew Krietz, *Amendment to Florida 'Parental Rights' Bill Could Lead to Outing of LGBTQ Students, Critics Say*, WTSP.com (Feb. 21, 2022), <https://www.wtsp.com/article/news/politics/florida-dont-say-gay-bill-amendment-parental-rights/67-b8d5a4cb-133a-4b97-a2ba-148b37470608>.

⁴⁹ James Finn, *Florida School District to Force Teachers to out LGBTQ+ Students*, Los Angeles Blade (June 29, 2022), <https://www.losangelesblade.com/2022/06/29/florida-school-district-to-force-teachers-to-out-lgbtq-students>.

⁵⁰ Leon County Schools (Florida), *LGBTQ+ Amendments 8* (June 28, 2022), available at <http://go.boarddocs.com/fla/leon/Board.nsf/goto?open&id=CFFP6Y6329EF>.

⁵¹ 34 C.F.R. § 106.31(b)(1), (4).

⁵² U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter on Transgender Students* (2016), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [rescinded].

Department should make clear that forced outing of students to other students, their parents, or other entities violates Title IX, and schools' obligations to follow federal law supersede state statutes that might require such outing.

Title IX's preemption of discriminatory state laws is further supported by case law finding that students have a privacy interest in their sexual orientation and gender identity. Transgender status and sexual orientation can be intensely private matters.⁵³ Students who might disclose their sexual orientation or gender identity under some circumstances still retain a privacy interest against further disclosure.⁵⁴

The Department should also take a similar stance against state laws that require outing students to their parents. Although it may seem as though notifying parents is a non-discriminatory act, such information may effectively subject LGBTQI+ students to abuse, both at home and at school. After all, courts have recognized that “[n]ot every [] adolescent has parents out of the comforting and idyllic world of a Norman Rockwell painting.”⁵⁵ Title IX should preempt forced disclosures, especially discriminatory disclosures that aim specifically at closeting LGBTQI+ students and preventing them from getting support at school, even when such disclosures may only be to their parents. Such disclosures subject LGBTQI+ students to “separate or different rules of behavior, sanctions, or other treatment,”⁵⁶ in violation of Title IX.

b. Title IX Also “Overrides” FERPA Where Disclosures Would Create a Hostile Environment for LGBTQI+ Students by Placing Their Health or Safety in Danger.

The Department should also make clear through this rulemaking that Title IX overrides both permitted⁵⁷ and mandatory disclosures⁵⁸ under FERPA, such as the right to review and inspect education records, when the release of that information would endanger students' health or safety due to their sex, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity.

⁵³ See, e.g., *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (“It is difficult to imagine a more private matter than one's sexuality.”); *Powell v. Scrivener*, 175 F.3d 107, 111 (2d Cir. 1999) (“[T]he excruciatingly private and intimate nature of transsexualism [*sic*], for persons who wish to preserve privacy in the matter, is really beyond debate.”).

⁵⁴ *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1195 (C.D. Cal. 2007).

⁵⁵ *American Academy of Pediatrics v. Lundgren*, 912 P.2d 1148, 1171 (Cal. 1996) (Kennard, J., dissenting)).

⁵⁶ 34 C.F.R. § 106.31(b)(1), (4).

⁵⁷ See 34 C.F.R. § 99.31(a).

⁵⁸ See 34 C.F.R. § 99.31(d).

As the Department makes clear in the NPRM, Title IX explicitly “overrides” FERPA when the statutes directly conflict.⁵⁹ Although the conflict usually arises when Title IX mandates certain disclosure prohibited by FERPA, Title IX’s language overriding FERPA is not limited to those cases.⁶⁰ Instead, the current regulations — which the Department proposes to maintain — broadly provide, “The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.”⁶¹ The General Education Provisions Act (GEPA), of which FERPA is a part, similarly states that “nothing” in GEPA “shall be constructed to affect the applicability of . . . title IX of the Education Amendments of 1972.”⁶² Thus, where FERPA would either permit or require disclosures that violate Title IX, Title IX would prohibit those disclosures.

In limited circumstances, disclosures under FERPA, such as the right to inspect and review education records, can violate Title IX. Under the proposed regulations, “a recipient has an obligation to address a sex-based hostile environment under its education program or activity.”⁶³ Although that obligation normally arises due to harassment of a student by teachers or other students, Title IX does not permit a school to directly create a hostile environment that would deny the student the benefits of the educational program.⁶⁴ Disclosing a student’s sex, pregnancy status, gender identity, sexual orientation, or other sex-based characteristics⁶⁵ in a manner that would place the student’s health or safety in danger creates a hostile environment. This could result in denying the student the benefit of the education program — even if the individual receiving the information is entitled to it under FERPA. Thus, the Department should directly state that, where the school reasonably believes that the disclosure of a student’s sex, pregnancy status, gender identity, sexual orientation, or other sex-based

⁵⁹ 20 U.S.C. § 1221(d); *NPRM* at 41404.

⁶⁰ *NPRM* at 41404.

⁶¹ 34 C.F.R. § 106.6(e).

⁶² 20 U.S.C. § 1221(d).

⁶³ *NPRM* at 41401.

⁶⁴ See 34 C.F.R. § 106.31; *NPRM* at 41571 (proposed § 106.10) (“Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”).

⁶⁵ See *NPRM* at 41571 (proposed rule 34 C.F.R. § 106.10).

characteristic would place a student’s health or safety in danger, those disclosures are prohibited by Title IX.

VI. Conclusion

With this rulemaking, the Department has the opportunity to clarify the scope of sex-based discrimination, as well as to make clear that it will vigorously oppose violations of Title IX even when they occur because of novel technologies or at the hands of third-party contractors, such as through student activity monitoring. CDT applauds the steps that the Department proposes to take in its NPRM to protect all students, and we encourage the Department to provide clear and direct guidance that Title IX is violated if LGBTQI+ students experience discriminatory harms, whether because of monitoring, state laws that forcibly “out” students, or the exercise of some rights under FERPA that subject students to harm. However, we caution the Department to make clear through this process that Title IX does not require monitoring of students, which may end up causing the very harms that it seeks to prevent.

Respectfully submitted,

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