

117TH CONGRESS
1ST SESSION

H. R. 5396

To amend title IX of the Education Amendments of 1972 to establish standards of liability for harassment on the basis of sex, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 28, 2021

Mrs. DINGELL (for herself and Mrs. HAYES) introduced the following bill;
which was referred to the Committee on Education and Labor

A BILL

To amend title IX of the Education Amendments of 1972 to establish standards of liability for harassment on the basis of sex, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Title IX Take Respon-
5 sibility Act of 2021”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) As the Supreme Court has held in *Franklin*
9 *v. Gwinnett County Public Schools*, 503 U.S. 60, 75

1 (1992), and *Davis v. Monroe County Board of Edu-*
2 *cation*, 526 U.S. 629, 633 (1999), covered entities
3 are liable for harassment on the basis of sex under
4 their education programs and activities under title
5 IX of the Education Amendments of 1972 (20
6 U.S.C. 12681 et seq.) (referred to in this Act as
7 “title IX”).

8 (2) As courts have properly recognized, experi-
9 encing the effects of sexual harassment under an
10 education program or activity, whether perpetrated
11 by employees or agents of the program or activity,
12 by peers of the victim, or by others, can be a form
13 of unlawful and intentional discrimination that in-
14 flicts substantial harm on beneficiaries of the pro-
15 gram or activity and violates the obligation of a cov-
16 ered entity to maintain a nondiscriminatory environ-
17 ment.

18 (3) Title IX protects persons, of any gender,
19 from discrimination on the basis of sex in education
20 programs and activities that receive Federal funding.
21 Supreme Court opinions have established that under
22 title IX, schools are responsible for addressing sex-
23 ual harassment, regardless of the location of the
24 harassment, when it impacts a person’s access to an
25 educational program or activity.

1 (4) Perpetrators of sexual harassment and vio-
2 lence at school are not limited to students. Incidents
3 have also involved faculty, administrators, coaches,
4 and other staff members.

5 (5) A school culture that tolerates inappropriate
6 verbal and physical contact and that intentionally or
7 unintentionally discourages reporting these behaviors
8 undermines the emotional, intellectual, and profes-
9 sional growth of millions of young people.

10 (6) Sexual harassment of students, especially
11 among women and girls, students of color, disabled
12 students, and LGBTQ students, is widely prevalent
13 in K–12 and higher education, for example:

14 (A) One in 5 girls ages 14 through 18
15 have been kissed or touched without their con-
16 sent, 58 percent of LGBTQ youth ages 13
17 through 21 are sexually harassed, and children
18 with disabilities are 2.9 times more likely than
19 their peers to be sexually assaulted.

20 (B) Historically marginalized and under-
21 represented groups are more likely to experi-
22 ence sexual harassment than their peers, with
23 Native American, Black, and Latina girls being
24 more likely than White girls to be forced to
25 have sex when they do not want to do so.

1 (C) In college, 1 in 4 women, 1 in 15 men,
2 and 1 in 4 transgender, nonbinary, and gender-
3 nonconforming students are sexually assaulted
4 during their time as undergraduates.

5 (D) One in 3 college women and 1 in 6 col-
6 lege men are survivors of dating violence or do-
7 mestic violence.

8 (7) Few students report harassment to their
9 schools, often because of shame or self-blame, fear
10 of retaliation, fear of being ignored or disciplined,
11 fear of police or immigration officials, or lack of
12 knowledge of services schools can offer to help.

13 (8) Failure to meaningfully enforce title IX
14 leads to discrimination by creating a hostile learning
15 environment that impedes educational attainment,
16 damages rights to equal access to education, and un-
17 dermines learning for all.

18 (9) When schools fail to protect survivors, in-
19 cluding by offering supportive measures that are de-
20 signed to preserve and to restore their equal access
21 to education, survivors often suffer in the form of
22 lower academic achievement, lost scholarships, and
23 lost degrees.

24 (10) Current title IX regulations issued by the
25 Secretary of Education entitled “Nondiscrimination

1 on the Basis of Sex in Education Programs or Ac-
2 tivities Receiving Federal Financial Assistance” (85
3 Fed. Reg. 30026, May 19, 2020) have made it more
4 difficult for student survivors to report harassment
5 and receive help and pose uniquely burdensome pro-
6 cedures for cases of sexual harassment that are not
7 required for any other type of student or staff mis-
8 conduct, only further sweeping sexual violence under
9 the rug.

10 (11) Title IX’s language is broad and sweeping,
11 making clear Congress’ intent to open the court-
12 house doors to victims of a wide range of sex dis-
13 crimination in schools. However, since title IX’s pas-
14 sage, courts have created barriers that make it ex-
15 traordinarily difficult for survivors to obtain redress
16 from schools through private litigation.

17 (12) In a 5 to 4 opinion in *Gebser v. Lago*
18 *Vista Independent School District*, 524 U.S. 274
19 (1998), the Supreme Court held that students sub-
20 jected to sexual harassment may receive a damages
21 remedy under title IX only when school officials have
22 “actual notice” of the harassment and are “delib-
23 erately indifferent”, or respond in a clearly unrea-
24 sonable manner, to it.

1 (13) Although they do not affect the relevant
2 standards for individuals to obtain injunctive and
3 equitable relief for harassment on the basis of race,
4 color, sex, national origin, age, or disability under
5 covered programs and activities, Gebser and similar
6 opinions severely limit the availability of remedies
7 for such individuals by imposing new, more stringent
8 standards for recovery of damages under title IX.
9 Yet in many cases, damages are the only remedy
10 that would effectively rectify past harassment.

11 (14) These limitations on effective relief thwart
12 Congress' underlying purpose to protect students
13 from harassment, and they create prohibitively high
14 standards for title IX sexual harassment lawsuits
15 that are more onerous than those applicable to work-
16 place sexual harassment lawsuits under title VII of
17 the Civil Rights Act of 1964 (42 U.S.C. 2000e et
18 seq.). As a result, schools are required to do less to
19 address harassment against their students than to
20 address the same harassment of their employees,
21 meaning that students, who are children and young
22 adults, must suffer worse harassment than adult em-
23 ployees before they are entitled to a remedy in court.

24 (15) Some lower courts have added additional
25 onerous barriers under which a school is only liable

1 for its failure to address known sexual harassment
2 if the victim later experiences further actionable sex-
3 ual harassment.

4 (16) A Federal court of appeals opinion in
5 Kollaritsch v. Michigan State University Board of
6 Trustees, 944 F.3d 613, 621–24 (6th Cir. 2019),
7 went so far as to foreclose money damages if a vic-
8 tim of sexual harassment does not experience further
9 actionable harassment as a result of the recipient’s
10 deficient response to a complaint, even if the recipi-
11 ent’s conduct causes educational injuries under title
12 IX.

13 (17) Gebser and subsequent opinions create an
14 incentive for covered entities to insulate themselves
15 from knowledge of harassment on the basis of sex
16 rather than adopting and enforcing practices that
17 will minimize the danger of such harassment. The
18 opinions thus undermine the purpose of prohibitions
19 on discrimination in the civil rights laws to induce
20 covered programs or activities to adopt and enforce
21 practices that will minimize the danger that vulner-
22 able students or other persons will be exposed to
23 such odious behavior.

24 (18) Legislative action is necessary and appro-
25 priate to reverse Gebser and other court opinions

1 and restore the availability of a full range of rem-
2 edies for harassment based on sex.

3 (19) Restoring the availability of a full range of
4 remedies for harassment will—

5 (A) ensure that students and other persons
6 of federally funded programs and activities have
7 protection from harassment on the basis of sex;

8 (B) encourage covered entities to adopt
9 and enforce meaningful policies and procedures
10 to prevent and remedy harassment;

11 (C) deter incidents of harassment; and

12 (D) provide appropriate remedies for dis-
13 crimination.

14 **SEC. 3. PROHIBITION OF HARASSMENT.**

15 (a) PROHIBITION OF HARASSMENT.—Section 901 of
16 the Education Amendments of 1972 (20 U.S.C. 1681) is
17 amended by adding at the end the following:

18 “(d) PROHIBITION OF HARASSMENT.—

19 “(1) If an agent or an employee of a covered
20 entity engages in harassment, regardless of where
21 the harassment occurs, on the basis of sex, which is
22 enabled or assisted by the authority exercised as an
23 employee or agent of the covered entity, against a
24 person who is participating in or receiving benefits,
25 services, or opportunities from an education program

1 or activity, or who is attempting to do so, and the
2 harassment alters the aggrieved person's ability to
3 do so, including by creating an intimidating, hostile,
4 or offensive environment, the covered entity is liable
5 for sex discrimination.

6 “(2)(A) If a person who is an agent or em-
7 ployee of a covered entity engages in harassment, re-
8 gardless of where the harassment occurs, on the
9 basis of sex against a person who is participating in
10 or receiving benefits, services, or opportunities from
11 an education program or activity or who is attempt-
12 ing to do so—

13 “(i) the harassment is not enabled or as-
14 sisted by the authority exercised as an employee
15 or agent of the covered entity;

16 “(ii) the harassment alters the aggrieved
17 person's ability to participate in or receive bene-
18 fits, services, or opportunities from an edu-
19 cation program or activity, including by cre-
20 ating an intimidating, hostile, or offensive envi-
21 ronment; and

22 “(iii) the covered entity knew, or in the ex-
23 ercise of reasonable care should have known, of
24 the harassment,

1 then the covered entity is liable for sex discrimina-
2 tion unless it can demonstrate that it exercised rea-
3 sonable care to promptly prevent and correct the ef-
4 fects of any harassment based on sex.

5 “(B) If a person who is not an agent or em-
6 ployee of a covered entity engages in harassment, re-
7 gardless of where the harassment occurs, on the
8 basis of sex against a person who is participating in
9 or receiving benefits, services, or opportunities from
10 an education program or activity or who is attempt-
11 ing to do so, and the harassment alters the ag-
12 grieved person’s ability to do so, including by cre-
13 ating an intimidating, hostile, or offensive environ-
14 ment, and the covered entity knew, or in the exercise
15 of reasonable care should have known, of the harass-
16 ment, then the covered entity is liable for sex dis-
17 crimination unless it can demonstrate that it exer-
18 cised reasonable care to promptly prevent and cor-
19 rect the effects of any harassment based on sex.

20 “(C) A covered entity shall exercise reasonable
21 care in response to harassment based on sex if any
22 of the following individuals knew, or in the exercise
23 of reasonable care should have known, about the
24 harassment:

1 “(i) An agent or employee who has the au-
2 thority to take action to redress the harass-
3 ment.

4 “(ii) An agent or employee who has the
5 duty to report to an administrator harassment
6 or any other misconduct by others.

7 “(iii) An individual who a harassment vic-
8 tim or reporting party could reasonably believe
9 has this authority or responsibility.

10 “(D) A showing that the covered entity has ex-
11 ercised reasonable care to promptly prevent and cor-
12 rect the effects of any harassment based on sex in-
13 cludes a demonstration by the covered entity that it
14 has—

15 “(i) established, adequately publicized, and
16 enforced an effective and comprehensive harass-
17 ment prevention policy and complaint procedure
18 that is likely to provide redress and avoid harm
19 without exposing the person subjected to the
20 harassment to undue risk, effort, or expense;

21 “(ii) if requested by the aggrieved person
22 or otherwise deemed necessary to protect the
23 aggrieved person or other persons within the
24 program or activity from a significant ongoing
25 threat, undertaken a prompt, thorough, and im-

1 partial investigation, unless the allegations are
2 patently frivolous;

3 “(iii) provided supportive measures that
4 had the purpose and effect of preserving and
5 restoring the aggrieved person’s equal access to
6 the education program or activity, regardless of
7 whether the aggrieved person requested an in-
8 vestigation; and

9 “(iv) after receiving notice, taken other
10 necessary, immediate, and appropriate correc-
11 tive action designed to stop the harassment that
12 occurred and correct its effects, regardless of
13 whether the aggrieved person experienced sub-
14 sequent harassment.”.

15 (b) CIVIL ACTION.—Section 902 of the Education
16 Amendments of 1972 (20 U.S.C. 1682) is amended—

17 (1) by inserting “(a)” before “Each Federal de-
18 partment and agency which is empowered”; and

19 (2) by adding at the end the following:

20 “(b) Any person aggrieved by the failure of a covered
21 entity to comply with this title, including any regulation
22 promulgated pursuant to this title, may bring a civil action
23 in any court of competent jurisdiction to enforce such per-
24 son’s rights.”.

1 (c) ACTIONS BROUGHT BY AGGRIEVED PERSONS.—
2 Title IX of the Education Amendments of 1972 (20
3 U.S.C. 1681 et. seq.) is amended by inserting after section
4 902 the following:

5 **“SEC. 902A. ACTIONS BROUGHT BY OR ON BEHALF OF AG-**
6 **GRIEVED PERSONS.**

7 “‘In an action brought against a covered entity by (in-
8 cluding on behalf of) an aggrieved person who has been
9 subjected to discrimination prohibited under this title (in-
10 cluding its implementing regulations), the plaintiff may re-
11 cover equitable and legal relief (including compensatory
12 and punitive damages), and attorney’s fees (including ex-
13 pert fees).’”.

○