

# United States Senate

WASHINGTON, DC 20510

September 12, 2022

The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington DC 20202

Catherine E. Lhamon  
Assistant Secretary, Office of Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington DC 20202

Re: Proposed Rule – Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance [RIN 1870-AA16]

Dear Secretary Cardona and Assistant Secretary Lhamon:

We write to provide comments on the U.S. Department of Education’s (the Department) proposed rule detailing the responsibilities of K-12 schools, colleges, and universities (“schools”) to ensure educational equity for all students regardless of sex in accordance with Title IX of the Education Amendments of 1972 (“Title IX”).

Congress passed Title IX to prohibit discrimination on the basis of sex in education settings, and for 50 years, Title IX has improved access to educational programs and benefits for all students, including by ensuring that schools address sexual harassment and assault. As we commemorate the 50<sup>th</sup> anniversary of Title IX and the tremendous progress made, we must recognize that much work remains to secure the equal rights and opportunity promised to all by this landmark civil rights law. Today, far too many students experience sexual assault and violence in school. Among elementary and secondary schools, one in four girls will experience some form of child sexual abuse before turning 18 years old and more than fifty percent of girls in grades 7 through 12 experience sexual harassment.<sup>1</sup> On college campuses, one in five undergraduate women are sexually assaulted.<sup>2</sup> LGBTQIA+ students are twice as likely to experience sexual assault, harassment, and other forms of discrimination based on their sexual orientation and gender identity.<sup>3</sup> Nearly one in three undergraduate women with disabilities reported nonconsensual sexual contact.<sup>4</sup> Those who experience campus sexual assault also face academic, interpersonal, and mental health challenges.<sup>5</sup> LGBTQIA+ students, for example, also suffer from higher rates

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<sup>1</sup> Children and Teens: Statistics, RAINN, <https://www.rainn.org/statistics/children-and-teens> (last accessed August 22, 2022); Gender & Sexual Violence, PUBLIC JUSTICE, <https://www.publicjustice.net/what-we-do/gender-sexual-violence/> (last accessed August 22, 2022).

<sup>2</sup> Public Justice, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> National Council on Disability, *Not on the Radar: Sexual Assault of College Students with Disabilities* 11, 17 (2018).

<sup>5</sup> See e.g., Victims of Sexual Violence: Statistics, RAINN, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Aug 23, 2022).

of suicide and other mental health issues.<sup>6</sup> Other forms of discrimination also continue to deny students equal access to educational programs. Pregnant and parenting students are more likely to be pushed out of high school compared to other students.<sup>7</sup> Additionally, Black and Latina girls are more likely to receive out-of-school suspensions and expulsions than their peers.<sup>8</sup>

Clearly, critical work ahead is needed to ensure equal opportunity for all students, regardless of sex, and we applaud the Department for taking important steps forward in their proposed regulations. The Department's efforts undo many of the harmful provisions in the 2020 DeVos Title IX regulations ("DeVos rule") that made it harder for students to report sexual assault and harassment and allowed schools to avoid accountability for their responsibilities under Title IX. We are pleased that the Department's proposed rule clarifies the scope and application of Title IX's prohibitions on all forms of discrimination, including discrimination based on sex, sex stereotypes, sex characteristics, and sexual orientation – explicitly extending these protections to trans students. The rule also clarifies protections for pregnant or parenting students. Importantly, the rule would also ensure schools are held accountable for addressing sexual assault and discrimination, including by obligating them to respond to complaints, take prompt action to prevent and remedy sex discrimination, and provide more comprehensive and supportive measures to those affected by sex discrimination. These changes represent important progress to restore and enhance the protections under Title IX for sex-based harassment and other discrimination. As the Department works to finalize the rule, we urge you to build on this progress and offer the following comments on the proposed rule, including to further strengthen protections for LGBTQIA+ students and pregnant and parenting students.

### **Clarifying and Expanding Scope of Title IX Protections**

The DeVos rule limited schools' ability to prevent and respond to sex-based harassment by narrowing definitions, creating unreasonable standards, and failing to grapple with how students and schools actually experience discrimination and harassment when it occurs. The new proposed rule remedies much of the harm done by the DeVos rule and holds schools accountable for ensuring all students, regardless of sex, have access to education.

We support the Department's proposed changes requiring schools to respond to a wider range of incidents of sexual harassment and other sex-based harassment including requirements that schools address all reports of sex discrimination,<sup>9</sup> and defining sex-based harassment to include harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity, and other sex-based conduct including quid pro quo harassment, and

<sup>6</sup> See e.g., National Public Radio et al., *Discrimination in America: Experiences and Views of LGBTQ Americans* (2017); Facts about LGBTQ Youth Suicide, THE TREVOR PROJECT (2022), <https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/>.

<sup>7</sup> Linda Mangel, *Teen Pregnancy, Discrimination, and the Drop Out Rate*, ACLU Washington (October 25, 2010); Reproductive Health: Teen Pregnancy, CTR. FOR DISEASE CONTROL (November 15, 2021), <https://www.cdc.gov/teenpregnancy/about/index.htm#:~:text=Pregnancy%20and%20birth%20are%20significant,adolescence%20graduate%20from%20high%20school>.

<sup>8</sup> Julian Glover, *Pushed Out: How Excessive School Discipline Against Black Girls Leads to Drop Out, Incarceration*, ABC7 (March 10, 2021), <https://abc7news.com/black-girls-suspended-more-than-white-pushed-out-school-to-prison-pipeline-school-pushout/10405118/>.

<sup>9</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41464 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. 106).

hostile environment harassment.<sup>10</sup> The proposed rule would require schools to respond to reports of sexual harassment, including online conduct, off-campus conduct, and conduct occurring outside the United States, if it creates a hostile environment in an education program or activity.<sup>11</sup> This clarification recognizes the reality that most college students reside off campus, a vast majority of sexual assaults do not take place in dorm rooms or on school property, and that the prevalence of online harassment has risen during the pandemic.<sup>12</sup>

We also applaud the proposed rule’s reinstatement of the Department’s longstanding definition of “hostile environment” harassment to be harassment that is so “sufficiently severe *or* pervasive” both “subjectively and objectively” that it “denies or *limits* a person’s ability to participate in or benefit from... the education program or activity”<sup>13</sup> (emphasis added). This definition means schools can no longer dismiss a student’s report of harassment simply because it did not result in complete denial of education. Returning to this longstanding harassment definition is consistent with Congress’ intent to allow schools to address harassing behavior early and encourage survivors or victims of harassment to reach out for support.

The proposed rule further stipulates that the DeVos rule’s “actual knowledge” standard is improper for determining compliance with Title IX, and instead requires schools to respond whenever any employee has notice of sexual harassment.<sup>14</sup> This revision recognizes the challenges that students often face when reporting sexual harassment or assault and the realities that survivors may only share with people they trust, regardless of whether those individuals are the designated official with authority to act.<sup>15</sup> While this clarification is welcomed, the Department should issue additional guidance for schools on how to respond to harassment and other discrimination while protecting the privacy and safety of vulnerable students. This includes LGBTQIA+ students and employees, who may not feel safe to share their sexual orientation or gender identity, and pregnant students and employees, who may be at risk of legal ramifications for seeking an abortion or having a miscarriage depending on where they reside.

The proposed rule ensures former students, visiting students, or former employees are protected under Title IX, so long as they experienced the harassment when they were participating or attempting to participate in the school’s education program or activity. However, the school would still be able to dismiss complaints if the respondent has transferred, graduated, or retired,

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<sup>10</sup> *Id.* at 41568-69.

<sup>11</sup> *Id.* at 41402, 41571.

<sup>12</sup> Collin Binkley, *Rule Could Limit College Response to Off-Campus Sex Assaults*, THE ASSOCIATED PRESS (Feb. 12, 2019), <https://apnews.com/article/north-america-us-news-ap-top-news-education-sexual-assault-3823e7c2ca3349e1a77487e62cfbf891>; Miriam Berger, *Gender-based Online Abuse Surged during the Pandemic. Laws Haven’t Kept Up, Activists Say*, WASH. POST (Nov. 24, 2021), <https://www.washingtonpost.com/world/2021/11/24/online-abuse-surged-during-pandemic-laws-havent-kept-up-activists-say/>.

<sup>13</sup> 87 Fed. Reg. 41390, 41569. The proposed rule’s “severe *or* pervasive” standard would represent a return to the Department’s definition of hostile environment claims from 1997 until 2020. *See, e.g.*, Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014; rescinded Sept. 22, 2017) [hereinafter 2014 Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011; rescinded Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>14</sup> 87 Fed. Reg. 41390, 41432.

<sup>15</sup> *See Id.* at 41432.

even if an investigation is pending. While the rule does clarify additional supports that may be provided to complainants in this situation and requires that the school must take “prompt and effective steps” to ensure the discrimination does not persist, we urge the Department to outline the steps the school must take, including remedial efforts, supplemental training, and investigation requirements, which may help determine whether there were other victims and whether school staff knew about the incident(s) but attempted to conceal it or ignored it.<sup>16</sup>

The proposed rule also revises the complaint requirements and definition to ensure schools respond to prohibited conduct. The proposed rule no longer requires a formal written complaint, but instead allows for either oral or written requests to initiate the grievance procedure for complaints of sex discrimination under Title IX.<sup>17</sup> All employees, with the exception of “confidential employees,” are required, upon learning about possible sex discrimination, to report to the Title IX coordinator or explain how to contact the Title IX coordinator.<sup>18</sup> However, to protect the privacy and autonomy of individuals who face sex discrimination, we ask the Department to require, rather than simply allow, schools to designate some employees as “confidential employees.”<sup>19</sup>

### **Schools’ Obligations Regarding Sex-Based Harassment**

Overall, we believe the Department’s proposed rule restores the appropriate responsibility to schools to prevent and address sex-based harassment. The DeVos rule removed too many accountability measures and weakened schools’ obligations to such an extent that the entire framework of Title IX protections for students was largely unenforceable and unrealized. In particular, we are supportive of the Department’s decision to remove the DeVos rule’s “deliberate indifference” standard and replace it with “prompt and effective action” standard, which will allow the Department to better hold schools accountable under Title IX when they fail to respond to the needs of survivors.<sup>20</sup> The new requirements to better prevent and monitor sex-based harassment and other sex discrimination will also encourage schools to prevent sex-based harassment from occurring in the first place and encourage survivors to report incidents of harassment, discrimination, assault, and violence.<sup>21</sup>

Similarly, the proposed rule’s requirement that schools provide survivors who report sexual harassment or assault with supportive measures, regardless of whether they have requested an investigation or an informal resolution, respects the need to address and remedy potential harm.<sup>22</sup> To ensure students are able to fully benefit from the full range of supportive measures, we encourage the Department to provide additional examples of potential academic supportive measures.<sup>23</sup>

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<sup>16</sup> *Id.* at 41573.

<sup>17</sup> *Id.* at 41567.

<sup>18</sup> *Id.* at 41567, 41573.

<sup>19</sup> *Id.* at 41567, 41573.

<sup>20</sup> *Id.* at 41431.

<sup>21</sup> *Id.* at 41572.

<sup>22</sup> *Id.* at 41569.

<sup>23</sup> *Id.* at 41569. For example, if a party requests a certain supportive measure and it is “reasonably available,” then the school must provide it, or if the school is aware that the supportive measure offered are ineffective, then the school must modify it or offer additional supportive measures. *Doe v. Sch. Bd. of Broward Cty., Fla.*, 604 F.3d

Finally, we appreciate the Department’s focus on schools’ obligations to prevent and address any retaliation against survivors. Given the prevalence of reports of retaliation,<sup>24</sup> we urge the Department to clarify the scope of what types of behavior constitute prohibited retaliation so schools and students are clear about the types of retaliatory actions that are prohibited under Title IX. For example, it is unclear if retaliation would include disciplining a complainant for actions that the school should know are connected to the harassment or other discrimination, such as missing classes, telling others about the harassment, or when the complainant is subject to a counter-complaint alleging harassment from the respondent. It is also unclear if requiring the complainant to enter a confidentiality agreement or to leave the education program would be considered retaliation.

### **Changes to the School Grievance Process**

We appreciate that the proposed rule updates the requirements for schools’ grievance procedures addressing incidents of sexual violence to provide more flexibility for schools, allow processes that are not punitive and do not disincentive reporting, and include guardrails to ensure all students, including complainants and respondents, have appropriate process protections. We appreciate that, consistent with other, similar types of complaints, the proposed rule requires schools to use the “preponderance of evidence standard” to evaluate Title IX claims unless the school uses the “clear and convincing evidence” standard for all other comparable investigations.<sup>25</sup> And we applaud the Department’s proposed rule for removing the DeVos rule’s requirement that colleges and universities have a live hearing with cross-examination for allegation of sexual harassment and have a separate decision maker.<sup>26</sup> The harmful live hearing and cross-examination process, which is wholly unnecessary to determine what happened in a particular incident, re-traumatizes survivors who have already been abused, harassed, and discriminated against and unfairly provides an advantage to the more resourced party.<sup>27</sup>

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1248, 1261 (11th Cir. 2010) (quoting *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 261 (6th Cir. 2000)).

<sup>24</sup> See, e.g., Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 13-16 (Mar. 2021), <https://www.knowyourix.org/thecostofreporting>; Zachary Hansen, *Fayette teen sues school district, says she was expelled for reporting sexual assault*, Atlanta Journal-Constitution (Aug. 27, 2019), <https://www.ajc.com/news/crime--law/fayette-teen-sues-school-district-says-she-was-expelled-for-reporting-sexual-assault/wiSFAISBcgNzQ0YT2oKTbO>; Tyler Kingkade, *Schools Keep Punishing Girls – Especially Girls of Color – Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, The 74 (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it>; Sarah Brown, *BYU Is Under Fire, Again, for Punishing Sex-Assault Victims*, Chronicle of Higher Education (Aug. 6, 2018), <https://www.chronicle.com/article/BYU-Is-Under-Fire-Again-for/244164>; Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Aviva Stahl, *‘This Is an Epidemic’: How NYC Public Schools Punish Girls for Being Raped*, Vice (June 8, 2016), [https://broadly.vice.com/en\\_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped](https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped); Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, N.Y. Times (June 7, 2016), <https://www.nytimes.com/2016/06/08/nyregion/schools-punished-teenagers-for-being-victims-of-sexual-assault-complaints-say.html>; Letter from Equal Rights Advocates, L.L. Dunn Law Firm, PLLC, and 35 Other Survivor Advocate Organizations to Catherine Lhamon, Ass’t Sec’y for Civil Rights (June 2, 2022), <https://www.equalrights.org/wp-content/uploads/2022/06/20220602-Letter-to-OCR-Regarding-Title-IX-Unconscionable-Agreements.pdf>.

<sup>25</sup> 87 Fed. Reg. 41390, 41576.

<sup>26</sup> *Id.*

While the proposed rule eliminates the blanket requirement to have a hearing and live cross-examination, we ask that the Department provide additional guidance on how colleges and universities can minimize reliance on cross-examinations. We ask that the Department outline additional safeguards on how colleges and universities make a credibility determination. In addition, we ask the Department to remove the presumption that the respondent is not responsible for sex discrimination until a determination is made.<sup>28</sup> This presumption is not required in any other type of school proceeding and perpetuates the harmful and false stereotypes that those who report sex-based harassment are being untruthful.<sup>29</sup>

### **Protections for Pregnant and Parenting Students**

We are pleased with the proposed rule's articulation of schools' obligations to ensure pregnant and parenting students have equal access to education. These long-awaited updates will go a long way to ensure schools address barriers to education for these students. Given the changing landscape of abortion rights and efforts to harass, discriminate against, and intimidate students who exercise their reproductive rights, we request the Department provide further instructions on how schools should protect students' privacy and records documenting students' pregnancy status.

### **Protections for LGBTQIA+ Students**

We applaud the proposed rule for explicitly stating that discrimination on the basis of sex in education includes discrimination based on sexual orientation, gender identity, sex stereotypes, or sex characteristics (including intersex traits), consistent with the interpretation of the Supreme Court decision in *Bostock* and federal anti-discrimination laws.<sup>30</sup> This explicit inclusion of sexual orientation, gender identity, and intersex traits advances the promise of equality for all. We hope the explicit inclusion of LGBTQIA+ students in the Department's articulation of Title IX's protections will help address the recent onslaught of discriminatory legislative attacks on transgender and nonbinary students. These efforts range from criminalizing gender affirming care, to banning discussions about LGBTQIA+ identities in schools, to denying trans students access to bathrooms and locker rooms matching their gender identities.<sup>31</sup>

We urge the Department to clarify the scope of prohibited discrimination. Specifically, we recommend the rule address that students must be housed consistent with their gender identity and specify that intentional misgendering is a form of harassment. In doing so, we ask the Department to specify what treatment amounts to a violation of Title IX. We also urge the

<sup>27</sup> Jessica McCarrick et al., Men's Experience of the Criminal Justice System Following Female Perpetrated Intimate Partner Violence, 31 J. FAM. VIOLENCE 203, 204 (2016); Jana Robinson, The Experience of the Child Witness: Legal and Psychological Issues, 42-43 INT'L J. OF L. & PSYCHIATRY 168, 173- 74 (2015); Sarah M. Guerette & Sandra L. Caron, Assessing the Impact of Acquaintance Rape: Interviews with Women Who Are Victims/Survivors of Sexual Assault While in College, 22(2) J. OF C. STUDENT PSYCHOTHERAPY 31, 33, 42-44 (2007).

<sup>28</sup> 87 Fed. Reg. 41390, 41575, 41577. See also 34 C.F.R. §§ 106.45(b)(1)(iv), 106.45(b)(2)(i)(B).

<sup>29</sup> See e.g., National Sexual Violence Resource Center, False reporting, 2012, [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf).

<sup>30</sup> 87 Fed. Reg. 41390, 41571.

<sup>31</sup> See e.g., Lindsey Dawson et al., Youth Access to Gender Affirming Care: The Federal and State Policy Landscape, KFF (Jun. 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape/>.

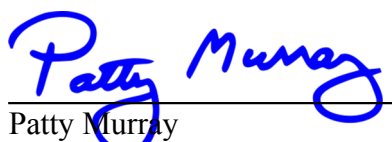
Department to move forward with proposed rulemaking to address students' eligibility to participate in athletics. All students, including transgender and nonbinary students, benefit from participating in sports. Research shows that there are significant academic benefits to sports participation, with students who play sports being more likely to graduate from high school, attend college, and achieve higher grades and scores on assessments.<sup>32</sup> Sports participation also fosters a sense of self-confidence in youth, as well as community among peers.<sup>33</sup> Protecting transgender students' rights to participate in athletic activities consistent with their gender identity in no way disadvantages their fellow students, and does not take away or undermine the protections Title IX provides for women and girls.

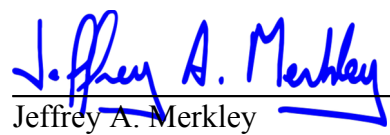
Lastly, we request the Department to consider explicitly prohibiting dress and appearance codes in schools based on sex, including by restoring and updating the dress and appearance code regulations that were rescinded in 1982. Girls and women of color as well as LGBTQIA+ students are more likely to be targeted and disciplined for violating dress and appearance codes.<sup>34</sup>

### **Conclusion**

The Department's proposed rule offers much-needed updates and clarifications to better protect students and hold schools accountable for their responsibilities under Title IX. We urge you to quickly finalize this proposed rule to restore, clarify, and expand Title IX protections against sex-based harassment and other forms of sex discrimination for students and employees. Thank you for your consideration of our requests.

Sincerely,

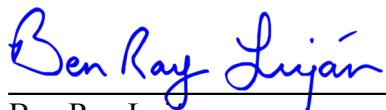
  
 Patty Murray  
 United States Senator

  
 Jeffrey A. Merkley  
 United States Senator

<sup>32</sup> National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* at 41 (2017), <https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf>.

<sup>33</sup> See, e.g., *id.* at 42; Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 *J. of Sport Management* 349, 349-50 (2013). R. Bailey, *Physical education and sport in schools: A Review of benefits and outcomes*, 76 *J. of School Health* 397-401 (2006); M. R. Eime et al., *A systematic review of the psychological and social benefits of participation in sport for children and adolescents: Informing development of a conceptual model of health through sport*, 10 *Int'l J. of Behavioral Nutrition & Physical Activity* 98 (2013).

<sup>34</sup> Press Release, National Women's Law Center, *Racist, Sexist School Dress Codes Examined in New NWLC Report*, (Sept. 4, 2019), <https://nwlc.org/press-releases/nwlc-reacts-to-mcdonalds-announcement-of-training-program-to-address-sexual-harassment-2/>.



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Ben Ray Lujan  
United States Senator



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Benjamin L. Cardin  
United States Senator




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Tim Kaine  
United States Senator



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Jack Reed  
United States Senator



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Elizabeth Warren  
United States Senator



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Tammy Baldwin  
United States Senator



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Mazie K. Hirono  
United States Senator



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Richard Blumenthal  
United States Senator



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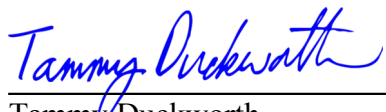
Amy Klobuchar  
United States Senator



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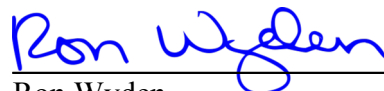
Robert P. Casey, Jr.  
United States Senator





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Tammy Duckworth  
United States Senator



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Ron Wyden  
United States Senator



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Jacky Rosen  
United States Senator



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Alex Padilla  
United States Senator



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Cory A. Booker  
United States Senator



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Bernard Sanders  
United States Senator



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Tina Smith  
United States Senator