



September 20, 2017

Hilary Malawer
U.S. Department of Education
400 Maryland Avenue SW., Room 6E231
Washington, DC 20202

RE: Docket ID: ED-2017-OS-0074

Dear Ms. Malawer,

The National Center for Lesbian Rights (NCLR) is pleased to offer these comments in response to the notice posted in the Federal Register on June 22, 2017 in accordance with Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” and the request for input on Department of Education (the Department) regulations that may be appropriate for repeal, replacement, or modification.

NCLR is a non-profit, public interest law firm that litigates precedent-setting cases at the trial and appellate court levels, advocates for equitable public policies affecting the lesbian, gay, bisexual, and transgender (LGBT) community, provides free legal assistance to LGBT people and their advocates, and conducts community education on LGBT issues. NCLR has been advancing the civil and human rights of LGBT people and their families across the United States through litigation, legislation, policy, and public education since its founding in 1977. We also seek to empower individuals and communities to assert their own legal rights and to increase public support for LGBT equality through community and public education.

NCLR joined comments submitted by The Leadership Conference on Civil and Human Rights in response to this request, and we write separately here to emphasize the need for the Department to maintain and follow all regulations and guidance that clarify that Title IX of the Education Amendments, as well as other federal statutes that prohibit discrimination on the basis of sex, include protection on the basis of sexual orientation and gender identity. In addition, we highlight herein certain regulations and guidance that are particularly critical to protecting the civil rights of LGBT students and to ensuring educational equity for all.

The Department Must Enforce Prohibitions on Discrimination Based on Gender Identity and Sexual Orientation

Gender Identity

We were deeply troubled when the Department rescinded its May 13, 2016 guidance pertaining to transgender students, as that guidance was consistent with prevailing federal law and

provided needed clarity to schools throughout the country as to their obligations to transgender students. It also sent the inaccurate and harmful message to transgender students and their peers that federal law does not protect transgender people, nor will the federal government safeguard the right of transgender students to equal educational opportunity. That rescission of course has no effect on the Department's continuing duty to uphold all applicable federal laws relating to sex discrimination, as described below.

Discrimination against a transgender person is inherently based on sex; by definition, transgender people do not conform to sex stereotypes. Therefore discrimination against transgender individuals constitutes discrimination "on the basis of sex" under federal anti-discrimination laws, as the United States Supreme Court ruled decades ago that discrimination on the basis of sex includes sex stereotyping.¹ This application of the law has been upheld in numerous federal circuits in cases involving both Title IX and Title VII of the Civil Rights Act of 1964,² as well as the Equal Protection Clause.³

In addition, the Equal Employment Opportunity Commission (EEOC) held in 2012 that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII."⁴ The Attorney General affirmed this interpretation in a 2014 memorandum.⁵

Sexual Orientation

Discrimination based on sexual orientation also violates federal laws against sex discrimination. The recognition that sexual orientation discrimination is based on sex is compelled by a principled analysis of the law and is essential to ensure equal protection for lesbian, gay and bisexual people. As a recent EEOC decision holds,⁶ discrimination on the basis of sexual orientation is sex-based discrimination for at least three reasons. First, any discrimination based on sexual orientation necessarily involves sex-based considerations. Sexual orientation is defined by whether a person is attracted to same-sex or different-sex partners. It is thus impossible to discriminate based on sexual orientation without taking the category of sex into account; in the most direct sense, discrimination on the basis of sexual orientation is sex-based. Second, any discrimination based on sexual orientation is associational discrimination on the basis of sex. For example, just as discrimination against an

¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

² 42 U.S.C. § 2000e *et seq.* Courts often look to Title VII jurisprudence for guidance in applying Title IX. *See, e.g., Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (the legislative history of Title IX "strongly suggests that Congress meant for similar substantive standards to apply under Title IX as had been developed under Title VII").

³ *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017); *Dodds v. US Dep't of Educ.*, 845 F.3d 217 (2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

⁴ *Macy v. Holder*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, *12 (Apr. 20, 2012).

⁵ ATTORNEY GEN. MEMORANDUM, TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Dec. 15, 2014), *available at* <http://www.justice.gov/file/188671/download>.

⁶ *Baldwin v. Foxx*, E.E.O.C., Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015).

individual because she is dating or in a relationship with someone of a different race constitutes discrimination on the basis of race, discrimination against an individual because she is dating or in a relationship with another woman is discrimination on the basis of sex.⁷ Finally, sexual orientation discrimination is also sex discrimination because it is based on gender stereotypes. As noted above, the Supreme Court held in *Price Waterhouse* that discrimination based on gender stereotyping is prohibited by Title VII.

“[T]he [EEOC] and a number of federal courts have concluded [that] discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior. . . . Sexual orientation discrimination and harassment are often, if not always, motivated by a desire to enforce heterosexually defined gender norms. . . . In fact, stereotypes about homosexuality are directly related to . . . stereotypes about the proper roles of men and women. . . . The harasser may discriminate against an openly gay co-worker that he perceives to be gay, whether effeminate or not, because he thinks, ‘real’ men should date women, and not other men”⁸

Thus any discrimination motivated by the target of discrimination not following the sex-stereotype of heterosexuality is sex discrimination.⁹

Like the EEOC, numerous federal courts throughout the country have now held that prohibitions on sex discrimination in Title VII and Title IX encompass discrimination based on sexual orientation.¹⁰

In the workplace and in our schools, it is clear that longstanding federal statutory protections against discrimination based on sex necessarily proscribe discrimination based on sexual orientation and gender identity. It is essential that the Department, in enforcing Title IX and all rules and guidance addressing sex discrimination, adhere to this prevailing interpretation so that all students are given equal opportunity in education.

⁷ See *Isaacs v. Felder Services*, 2015 WL 6560655 at *3 (M.D. Ala. Oct. 29, 2015) (quoting *Baldwin*, *supra* note 84, at *7).

⁸ *Baldwin*, *supra* note 6, at *7-8 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass 2002)).

⁹ The EEOC developed this interpretation in a long series of decisions prior to *Baldwin*. See, e.g., *Complainant v. Johnson*, EEOC Appeal No. 0120110576 (Aug. 20, 2014); *Complainant v. Cordray*, EEOC Appeal No. 0120141108 (Dec. 18, 2014); *Complainant v. Donahoe*, EEOC Appeal No. 0120132452 (Nov. 18, 2014); *Complainant v. Sec’y, Dep’t. of Veterans Affairs*, EEOC Appeal No. 0120110145 (Oct. 23, 2014); *Couch v. Dep’t of Energy*, EEOC Appeal No. 0120131136 (Aug. 13, 2013); *Brooker v. U.S. Postal Service*, EEOC Appeal No. 0120112085 (May 20, 2013); *Culp v. Dep’t of Homeland Security*, EEOC Appeal No. 0720130012 (May 7, 2013); *Castello v. U.S. Postal Service*, Appeal No. 0120111795 (Dec. 20, 2011); *Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (July 1, 2011).

¹⁰ *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Videckis v. Pepperdine University*, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015); *Isaacs v. Felder Services*, 2015 WL 6560655 at *3 (M.D. Ala. Oct. 29, 2015); *Deneffe v. SkyWest, Inc.*, 2015 WL 2265373 at *6 (D. Colo. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Boutillier v. Hartford Pub. Sch.*, 2014 WL 4794527 (D. Conn. 2014); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass 2002); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

The Department Should Retain Critical Protections for LGBT Students

As noted above, NCLR supports the retention of all regulations and guidance documents set forth in the letter submitted by The Leadership Conference on Civil and Human Rights. We note here the particular importance of a subset of those rules that help to ensure that LGBT students are afforded equal educational opportunities and urge the retention and robust enforcement of their provisions.

- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Regulations (34 CFR 106)¹¹

These regulations implement Title IX of the Education Amendments of 1972 (Title IX), which is designed to eliminate discrimination on the basis of sex in any education program or activity receiving federal financial assistance.

- Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 19, 2001)¹²

This revised guidance reaffirms the compliance standards that the U.S. Department of Education's Office for Civil Rights applies in investigations and administrative enforcement of Title IX regarding sexual harassment. The guidance clarifies that gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from the program. Similarly, the Department's sexual harassment guidance confirms that same-sex harassment can result in a Title IX violation.

- Equal Access Act Regulations (34 CFR 108)¹³ and Key Policy Letter related to the Equal Access Act (June 14, 2011)¹⁴

The Key Policy Letter states: "In 1984, Congress passed and President Ronald Reagan signed into law the Equal Access Act, requiring public secondary schools to provide equal access for extracurricular clubs. Rooted in principles of equal treatment and freedom of expression, the Act protects student-initiated groups of all types...By allowing students to discuss difficult issues openly and honestly, in a civil manner, our schools become forums for combating ignorance, bigotry, hatred, and discrimination. The Act requires public secondary schools to treat all student-initiated groups equally, regardless of the religious, political, philosophical, or other subject matters discussed at their meetings. Its protections

¹¹ <https://www.ecfr.gov/cgi-bin/text-idx?SID=97f09c94cdfc367cde92ae76b94daa95&mc=true&node=pt34.1.106&rqn=div5>

¹² <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

¹³ <https://www.ecfr.gov/cgi-bin/text-idx?SID=4263214896db2240b59cdd0655663c49&mc=true&node=pt34.1.108&rqn=div5>

¹⁴ <https://www2.ed.gov/policy/elsec/guid/secletter/110607.html>

apply to groups that address issues relating to LGBT students and matters involving sexual orientation and gender identity, just as they apply to religious and other student groups.”¹⁵

- Dear Colleague Letter on Anti-Bullying Policies (October 26, 2010)¹⁶ and Key Policy Letter Illustrating Examples of State Anti-Bullying Policies (December 16, 2010)¹⁷

In the Dear Colleague letter issued on October 26, 2010, the Department reminded schools “how, under certain circumstances, bullying may trigger legal responsibilities for schools under the civil rights laws enforced by OCR and the Department of Justice that prohibit discrimination and harassment based on race, color, national origin, sex, disability, and religion.”¹⁸ The Department then issued a Key Policy letter on December 16, 2010 providing “assistance to states in crafting effective anti-bullying laws and policies.”¹⁹ This included “examples that illustrate[d] how some states have tried to prevent and reduce bullying through legislation.”²⁰

- Equity Assistance Centers Regulations (34 CFR 270 and 272)²¹

Equity Assistance Centers (EACs) were established as a response to the Civil Rights Act of 1964 and provide technical assistance and training, upon request, in the areas of race, sex, national origin, and religion to public school districts. This includes technical assistance and training on sex desegregation. These regulations were updated recently to clarify that the definition of sex desegregation means “the assignment of students to public schools and within those schools without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she is attracted to or is in a relationship with a person of the same sex; and pregnancy and related conditions), including providing students with a full opportunity for participation in all educational programs regardless of their sex.”²²

- Student Support and Academic Enrichment Grants Guidance (October 2016)²³

The Every Student Succeeds Act (ESSA) newly authorized Student Support and Academic Enrichment (SSAE) Grants with the goal of increasing the capacity of states, school districts, and schools to provide all students a well-rounded education and to improve school conditions for student learning, among other purposes. Specifically, the Department stated in the guidance that “funds can be used to reduce incidences of bullying and

¹⁵ Ibid.

¹⁶ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

¹⁷ <https://www2.ed.gov/policy/gen/guid/secletter/101215.html>

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ <https://www.ecfr.gov/cgi-bin/text-idx?SID=51bce8aa5ea0e78e5bce043d6b24a643&mc=true&node=pt34.1.270&rgn=div5>

²² Ibid.

²³ <https://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf>

harassment against all students, including bullying and harassment based on a student's (or their associates) actual or perceived race, color, national origin, sex (including gender identity), disability, sexual orientation, religion, or any other distinguishing characteristics that may be identified by the state or LEA.”²⁴

- Education for Homeless Children and Youth Program Guidance (July 27, 2016)²⁵

Under the McKinney-Vento Act, which authorizes the Education for Homeless Children and Youth program, states must ensure that each homeless child and youth has equal access to the same free, appropriate public education as other children and youths. The protections provided by the Act are particularly important to LGBT youth; according to a 2012 study conducted by the Williams Institute at UCLA Law, 40% of homeless youth identify LGBT.²⁶ Recently, the Department issued guidance to states and school districts on the implementation of the Education for Homeless Children and Youth program, noting that they must consistently review their policies and practices to ensure that homeless children and youths are receiving the free, appropriate public education to which they are entitled. As part of the guidance, the Department stated that the “process of reviewing and revising policies should include a review of school discipline policies that disproportionately impact homeless students, including...those who identify as LGBTQ.”²⁷

- Examples of Policies and Emerging Practices for Supporting Transgender Students²⁸

The Department's Office of Elementary and Secondary Education compiled and published examples of policies and emerging practices that states and districts have adopted to ensure non-discrimination against transgender students.²⁹

- Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (January 8, 2014)³⁰ and “Guiding Principles: A Resource Guide for Improving School Climate and Discipline”³¹

This joint Dear Colleague letter by the U.S. Department of Justice and the U.S. Department of Education provided guidance on administering student discipline without discriminating on the basis of race, color, or national origin. The Departments jointly stated that this guidance on how to identify, avoid, and remedy discriminatory discipline was to assist schools in providing all students with equal educational opportunities. This Dear Colleague letter states that “while it explicitly addresses only race discrimination, much of the analytical framework laid out in the document also applies to discrimination on other

²⁴ Ibid.

²⁵ <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>

²⁶ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>

²⁷ <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>

²⁸ <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>

²⁹ Ibid.

³⁰ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>

³¹ <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>

prohibited grounds.”³² Additionally, the Dear Colleague letter acknowledges that, “fair and equitable discipline policies are an important component of creating an environment where all students feel safe and welcome. Schools are safer when all students feel comfortable and are engaged in the school community, and when teachers and administrators have the tools and training to prevent and address conflicts and challenges as they arise.”³³

Along with the Dear Colleague Letter, the Departments released additional comprehensive guidance on “Guiding Principles: A Resource Guide for Improving School Climate and Discipline,”³⁴ designed to share best practices and policies for educators and school and district leaders to establish safe and inclusive school climates.

- Civil Rights Data Collection (Section 203(c)(1) of the 1979 Department of Education Organization Act³⁵ and 34 CFR 106³⁶)

To ensure that all students have equitable educational experiences free from discrimination (regardless of, e.g., their race, color, national origin, sex, disability, or religion, in addition to their sexual orientation, gender identity, or gender expression) data collection and reporting through the Civil Rights Data Collection (CRDC) is necessary. CRDC should collect data regarding the number of allegations received by a school of bullying and harassment on the basis of sexual orientation as well as sex, with the data on sex disaggregated to reflect harassment or bullying on the basis of gender identity, gender expression, or nonconformity with gender stereotypes.

Because the Department is charged with the responsibility to ensure that all children can learn in school environments free from discrimination, NCLR strongly urges the Department to maintain the above regulations and guidance.

Thank you for the opportunity to comment on this request. Should you have any questions, please feel free to contact NCLR’s federal policy director, Julie Gonen, at jgonen@nclrights.org or 202-734-3547.

National Center for Lesbian Rights

³² <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>

³³ Ibid.

³⁴ <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>

³⁵ <https://history.nih.gov/research/downloads/PL96-88.pdf>

³⁶ <https://www.ecfr.gov/cgi-bin/text-idx?SID=830bebb6aaea2c93b75267b5de768936&mc=true&node=pt34.1.106&rgn=div5>