

Office of the Secretary
U.S. Department of Education
400 Maryland Ave SW
Washington, D.C. 20202

RE: Evaluation of Existing Regulations (ED-2017-OS-0074)

To Whom It May Concern:

On behalf of the Human Rights Campaign's 3 million members and supporters nationwide, I write in response to the request for public comment regarding existing regulations in response to Executive Order 13777 published June 22. As the nation's largest organization working to achieve equal rights for the lesbian, gay, bisexual, transgender, and queer (LGBTQ) community, HRC strongly urges the Department to retain and enforce existing regulations that ensure that all people, including LGBTQ individuals, are able to access the best possible education without facing discrimination, harassment, bullying, or sexual assault. Additionally, HRC urges the Department to maintain the structures which allow students to seek redress.

Before beginning a particularized analysis, we want to make it clear that we believe that all existing regulations and guidance documents are critical for the well-being of students, educators, and other school employees.

Maintain Interpretations of "Sex" which Include Sexual Orientation, Sex-Stereotyping, and Gender Identity

This Department has a significant history of protecting LGBTQ students under Title IX. As early as 2001, this Department recognized that gender-based harassment and harassment based on sex-stereotyping is covered by Title IX and therefore harassment based on an individual's perceived failure to conform with gender stereotypes can be discrimination if it is sufficiently serious.¹ A later guidance document clarified that this harassment does not need to be sexual in nature, but can include "acts of verbal, nonverbal, or physical aggression, intimidations, or hostility based on sex or sex-stereotyping."² In the significant guidance document titled *Questions and Answers on Title IX and Sexual Violence*, this Department echoed this, writing that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity."³ Further, this Department

¹ U.S. Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* v, 3 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

² U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* nt. 9 (April 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. See also U.S. Department of Education, Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 7–8 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (discussing gender-based harassment and bullying).

³ U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 5 (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

noted that “actual or perceived sexual orientation or gender identity of parties does not change a school’s obligations” and that LGBTQ students experience a high rate of harassment and bullying.⁴

This Department recognized that LGBTQ students are the target of disproportionate levels of harassment and bullying in an earlier guidance document, taking note of the important role that Gay-Straight Alliances and similar LGBTQ student groups can play to ameliorate this problem.⁵ That Dear Colleague letter cited statistics showing that during the 2008–2009 school year, 90% of LGBTQ 6th through 12th graders reported being verbally harassed and almost half reported being physically harassed.⁶ Several years later, the number of LGBTQ students facing bullying and harassment is still unacceptably high. In the most recent follow-up to the survey relied upon by this Department, 85.2% of LGBTQ students reported being verbally harassed, 34.7% reported physical harassment, and 15.5% reported physical assault.⁷ Additionally, 59.6% reported being sexually harassed at school, with 16.7% reporting that the sexual harassment occurred often or frequently.⁸

The 2015 survey report also indicates that large numbers of students experience discrimination by the school itself. Nearly two-thirds (66.2%) of LGBTQ students reported experiences with these discriminatory policies or practices including 19.9% who were prevented from using preferred name and pronouns, the almost 30% who were disciplined for public affection when non-LGBTQ students would not be disciplined for the same behavior, and 15.6% who were prohibited from attending a school dance with a same-gender date.⁹ In light of these statistics, it is imperative that the Department continues to view gender-based harassment and harassment based on perceived nonconformance with sex-stereotypes as sex discrimination under Title IX. This Department should be hesitant to take any steps that would further strip critical protections from LGBTQ students.

Uphold Prohibitions Against and Remedies for Disparate Impact Discrimination

Disparate impact discrimination is a particularly insidious form of discrimination that has been recognized in multiple areas of civil rights law,¹⁰ including education. In the Joint Dear Colleague Letter, *Nondiscriminatory Administration of School Discipline*, alongside the U.S. Department of Justice, this Department issued guidance on what actions and policies constitute

⁴ *Id.*

⁵ U.S. Department of Education, *Dear Colleague Letter: Equal Access Act and the Recognition of Student-Led Noncurricular Group* (June 14, 2011), <https://www2.ed.gov/policy/elsec/guid/secletter/110607.html>.

⁶ *Id.* (citing JOSEPH G. KOZCIW ET AL., GLSEN, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY 26 (2010)).

⁷ JOSEPH G. KOZCIW ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY 22–23 (2016).

⁸ *Id.* at 24.

⁹ *Id.* at 37.

¹⁰ *See, e.g.*, Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460 (Feb. 15, 2013) (Fair Housing).

disparate impact and how to investigate disparate impact claims.¹¹ This guidance document focuses on the unacceptable disparate impact school disciplinary policies have on students of color—particularly African American students—and how this Department is meant to protect those students from further discrimination. The issue of disparate impact stretches beyond race and ethnicity into other protected categories. In a 2014 issue brief, this Department found that 13% of students with disabilities received out-of-school suspensions, more than twice the rate of students without disabilities.¹² Additionally, despite students with disabilities making up only 12% of public school enrollment, these students represented 75% of those subjected to physical restraint and 58% of those subjected to seclusion.¹³

Upholding and continuing to follow the guidance on disparate impact discrimination in education is critical to ensure that students can seek redress for unfair and unequal treatment in education as is required of the Department.

Retain Guidance on Sexual Violence

The current guidance that protects students in the face of sexual harassment and sexual violence is critical for helping schools understand their obligations to students. In a 2011 Dear Colleague letter, this Department wrote that “[s]exual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.”¹⁴ The Department is required to protect students from sexual harassment and violence and therefore, any reduction or repeal of existing guidance would be in conflict with the purpose of Title IX.

In a recent climate survey by the Association of American Universities, 11.7% of students reported experiencing “nonconsensual penetration or sexual touching by force or incapacitation” since enrolling in higher education.¹⁵ 23.1% of undergraduates and 8.8% of graduate students identifying as female reported experiencing sexual violence.¹⁶ Those identifying as transgender, gender-nonconforming, questioning, or something not otherwise listed also face a significant risk, as 24.1% of undergraduates and 15.5% of graduate students reported similar experiences.¹⁷ 5.4% of undergraduates identifying as male reported experiencing sexual violence, as did 2.2%

¹¹ U.S. Department of Education, Office for Civil Rights & U.S. Department of Justice, Civil Rights Division, *Dear Colleague: Nondiscriminatory Administration of School Discipline* (Jan. 8, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

¹² U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE 3 (March 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf>.

¹³ *Id.* at 9.

¹⁴ U.S. Department of Education, Office for Civil Rights, *Dear Colleague: Sexual Violence 1* (April 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

¹⁵ DAVID CANTOR ET AL., THE ASSOCIATION OF AMERICAN UNIVERSITIES, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 13 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

¹⁶ *Id.* at 14.

¹⁷ *Id.*

of graduate students.¹⁸ The continued threat of sexual assault on college campuses is not an opening for the Department to rescind this critical guidance. These statistics should stand as an indication to this Department that it must increase support for these students. Additionally, the Department should maintain the mechanisms that grants students access to a Title IX coordinator and allows them to seek redress if they so choose, as well as make the existence of such resources more widely known and easier to access.

This Department has also acknowledged that a school's response to complaints of sexual harassment and violence must be appropriate "irrespective of the sex or the sexes of the parties involved."¹⁹ Thus, the Department must also ensure that they are protecting students who are assaulted by someone of the same sex in the same manner as if the accused was a different sex.

Contrary to the claims made by those who oppose this guidance, the guidance does not impose a "guilty until proven innocent" regime that falls unfairly on those who are accused of sexual harassment and sexual violence. Rather, the guidance requires the Title IX coordinators, investigators, and adjudicators to be thoroughly trained and impartial in order to have a truly equitable process.²⁰

¹⁸ *Id.*

¹⁹ U.S. Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 5 (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

²⁰ U.S. Department of Education, Office for Civil Rights, *Dear Colleague: Sexual Violence* 12 (April 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.