



September 20, 2017

U.S. Secretary of Education
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Re: Comments from GLSEN regarding the Evaluation of Existing U.S. Department of Education Regulations [ED-2017-OS-0074]

GLSEN is responding to the U.S. Department of Education's notice seeking comments on the implementation of Executive Order 13777, "Enforcing the Regulatory Reform Agenda," which requires the Department to evaluate existing regulations and make recommendations regarding their repeal, replacement, or modification. GLSEN's mission centers on efforts to ensure that all students are able to learn and grow in a K-12 school environment where they are valued and respected, regardless of their sexual orientation, gender identity, or gender expression.

We recognize and support the critical role of the U.S. Department of Education in helping ensure that America's children attend high-quality schools and are prepared to contribute successfully to society as thoughtful, engaged citizens. Central to that mission is ensuring that students are able to learn in a safe, welcoming, and non-discriminatory setting so they can do their best to succeed. As a consequence, GLSEN strongly opposes any effort to weaken or overturn federal regulations and guidance that ensures federal protections against discrimination. The U.S. Department of Education's commitment to protect *all* students demands no less.

To ensure full protection of all students regardless of background or circumstance – including lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ) youth – GLSEN respectfully requests that the Department:

Uphold regulations and guidance that protect civil rights and promote educational equity for all students.

- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Regulations (34 CFR 106)¹

¹ <https://www.ecfr.gov/cgi-bin/text-idx?SID=97f09c94cdfc367cde92ae76b94daa95&mc=true&node=pt34.1.106&rgn=div5>

Significance:

These regulations implement Title IX of the Education Amendments of 1972 (Title IX), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution.

- Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (January 19, 2001)²

Significance:

Grounded in decades of U.S. Supreme Court and other federal court decisions, 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)³ and Key Policy Letter related to the Equal Access Act (June 14, 2011)⁴

Significance:

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 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."⁵

- Dear Colleague Letter on Anti-Bullying Policies (October 26, 2010)⁶ and Key Policy Letter Illustrating Examples of State Anti-Bullying Policies (December 16, 2010)⁷

² <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

³ <https://www.ecfr.gov/cgi-bin/text-idx?SID=4263214896db2240b59cdd0655663c49&mc=true&node=pt34.1.108&rgn=div5>

⁴ <https://www2.ed.gov/policy/elsec/guid/secletter/110607.html>

⁵ Ibid.

⁶ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>

⁷ <https://www2.ed.gov/policy/gen/guid/secletter/101215.html>

Significance:

Through the Dear Colleague letter issued on October 26, 2010, the U.S. Department of Education 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.”⁸ In follow up, the Department then issued a Key Policy letter on December 16, 2010 providing “assistance to states in crafting effective anti-bullying laws and policies.”⁹ This included “examples that illustrate[d] how some states have tried to prevent and reduce bullying through legislation.”¹⁰

- Equity Assistance Centers Regulations (34 CFR 270 and 272)¹¹

Significance:

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.”¹²

Maintain guidance aimed at promoting safe, healthy, affirming, and inclusive school environments for all students.

- Student Support and Academic Enrichment Grants Guidance (October 2016)¹³

Significance:

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 harassment against all students, including bullying and harassment based on a student’s (or their associates) actual or perceived race, color,

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ <https://www.ecfr.gov/cgi-bin/text-idx?SID=51bce8aa5ea0e78e5bce043d6b24a643&mc=true&node=pt34.1.270&rgn=div5>

¹² Ibid.

¹³ <https://www2.ed.gov/policy/elsec/leg/essa/essassaagrantguid10212016.pdf>

national origin, sex (including gender identity), disability, sexual orientation, religion, or any other distinguishing characteristics that may be identified by the state or LEA.”¹⁴

- Education for Homeless Children and Youth Program Guidance (July 27, 2016)¹⁵

Significance:

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 as according to a 2012 study conducted by the Williams Institute at UCLA Law, 40% of homeless youth identify LGBT.¹⁶ 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.”¹⁷

- Examples of Policies and Emerging Practices for Supporting Transgender Students¹⁸

Significance:

ED’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.¹⁹

- Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline (January 8, 2014)²⁰ and “Guiding Principles: A Resource Guide for Improving School Climate and Discipline”²¹

Significance:

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

¹⁴ Ibid.

¹⁵ <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>

¹⁶ <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>

¹⁷ <https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf>

¹⁸ <https://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>

¹⁹ Ibid.

²⁰ <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>

²¹ <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>

explicitly addresses only race discrimination, much of the analytical framework laid out in the document also applies to discrimination on other prohibited grounds.”²² 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.”²³

Along with the Dear Colleague Letter, the Departments released additional comprehensive guidance on “Guiding Principles: A Resource Guide for Improving School Climate and Discipline,”²⁴ designed to share best practices and policies for educators and school and district leaders to establish safe and inclusive school climates.

Continue implementation of the mandatory Civil Rights Data Collection in a manner that enhances transparency, monitoring, and enforcement of civil rights issues in our nation’s public schools.

- Civil Rights Data Collection (Section 203(c)(1) of the 1979 Department of Education Organization Act²⁵ and 34 CFR 106²⁶)

Significance:

To ensure that all students have equitable educational experiences 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. The collection of data about the number of allegations received by a school of bullying and harassment on the basis of sexual orientation was approved in February 2014 as optional for the CRDC for school year 2013-2014 and mandatory for school year 2015-2016. GLSEN supports the OCR plan to continue to require the mandatory collection of data involving allegations of bullying or harassment based on sexual orientation and religion for the CRDC for school year 2017-2018. Additionally, the 2015-2016 CRDC clarified for the first time that harassment or bullying on the basis of sex includes harassment or bullying on the basis of gender identity, gender expression, and nonconformity with gender stereotypes. GLSEN also supports the OCR plan to continue to make this clarification in the CRDC for school year 2017-2018. Further, GLSEN urges OCR to require additional disaggregation of harassment or bullying on the basis of gender identity, gender expression, or nonconformity with gender stereotypes.

²² <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>

²³ Ibid.

²⁴ <https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>

²⁵ <https://history.nih.gov/research/downloads/PL96-88.pdf>

²⁶ <https://www.ecfr.gov/cgi-bin/text-idx?SID=830bebb6a2c93b75267b5de768936&mc=true&node=pt34.1.106&rgn=div5>

Given that the U.S. Department of Education is charged with the responsibility to ensure that all children can learn in school environments free from discrimination, GLSEN strongly urges the Department to maintain the above regulations and guidance. If you have any questions or would like to discuss these recommendations, please contact GLSEN's Director of Public Policy, Nathan Smith, at nathan.smith@glsen.org or 202-621-5815.

Thank you again for considering these recommendations.