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RE: Docket ID: ED-2017-OS-0074, Evaluation of Existing Regulations

The National Center for Transgender Equality (NCTE) submits the following comments to stress the critical importance of maintaining regulations and guidance documents that protect students' equitable access to quality education. NCTE is one of the nation's leading social justice organizations working for life-saving change for the over 1.5 million transgender Americans and their families.

The Department of Education has played an indispensable role in ensuring that students have equal access to educational opportunities regardless of race, religion, national origin, disability, and sex (including transgender status and nonconformity to sex stereotypes). The Department bears the vital responsibility of enforcing numerous federal civil rights laws, including Title IX of the Educational Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act, through compliance reviews, data collection, regulations, policy guidance, and complaint resolutions. Rescinding key guidance documents or rules, many of which have been in place for years, may create confusion regarding schools' obligations under federal law, make it more difficult for students to understand and access rights and benefits, and undermine the Department's ability to enforce federal law in a robust, consistent, and effective manner.

We strongly urge the Department to preserve these regulations and guidance documents and enforce them robustly to allow all students—including transgender students—to attend our nation's schools free from discrimination, and we oppose any effort to rescind, modify, or otherwise erode these regulations and guidelines.

Preserving Title IX guidance

As an essential component of its enforcement of Title IX, the Department has released critical guidelines and regulations, including its April 4, 2011, Dear Colleague letter on sexual violence and harassment¹ and its 2014

¹ U.S. Dep't of Educ., *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter *Dear Colleague Letter*].

publication *Questions and Answers on Title IX and Sexual Violence*.² These guidance documents clarify that, consistent with federal case law, sexual harassment or violence may violate a student's rights under Title IX when it is sufficiently serious to deny or limit the student's equal access to the benefits of an educational program. Additionally, these documents provided detailed guidelines for schools to assist them in determining whether a student's Title IX rights had been violated and implementing grievance and remedial procedures. These guidelines were firmly grounded in years of Title IX case law and provided much-needed clarity for educational institutions that helped them ensure their compliance with federal law and adoption of best practices that promote transparency, fairness, and consistency when handling incidents of sexual harassment and violence. This guidance also provided survivors of sexual violence an important resource that helped many understand their rights and navigate the often difficult process of reporting and resolving complaints, in addition to providing students whose conduct was being investigated with greater clarity about the extensive procedural safeguards they enjoy under the law.

Rescinding these guidance documents will create confusion for school administrators and students alike, lead to inconsistency and unpredictability in sexual assault investigations, and send the misleading and incorrect signal that the principles formalized in these documents do not reflect Title IX's legal requirements. Most importantly, withdrawing them will impose yet more burdens on students who have faced violence and harassment and strip the Department of one of the most critical tools it possesses in combating and preventing campus sexual violence.

While some have raised concerns about the adequacy of the fair process safeguards in these guidance documents, these concerns are misplaced. The detailed protections for student respondents included in these guidelines are extensive, fair, and consistent with federal law. For example, the guidelines stress that both the complainant and the respondent must be given "similar and timely access to any information that will be used at the hearing,"³ "equal opportunity to present relevant witnesses and other evidence,"⁴ and equal access to the appeals process recommended by the Department.⁵ In determining whether the complainant's Title IX rights were violated, schools are required under the guidelines to apply the same standard of review that a court would apply to determine whether a Title IX violation occurred. Indeed, these guidelines are not only consistent with fair process requirements under federal law, but also provide recommendations that exceed the minimum requirements of the law.

Failing to provide a sufficiently fair process for a respondent student may constitute a violation of that student's rights under Title IX. In the event that such a failure occurs, the Department can and should enforce Title IX to protect that student's rights, as it has done in the past. For example, in 2016, the Department found that Wesley College "failed to adopt and implement Title IX grievance policies and procedures that fully comply with the requirements of Title IX" when it did not provide a respondent student a fair process.⁶ Such instances

² U.S. Dep't of Educ. *Questions and Answers on Title IX and Sexual Violence* (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter *Questions and Answers on Title IX and Sexual Violence*].

³ *Dear Colleague Letter*, supra note 1, at 11.

⁴ *Id.*

⁵ *Questions and Answers on Title IX and Sexual Violence*, supra note 2, at 37–38.

⁶ Letter of Finding from Beth Gellman-Beer, Office of Civil Rights of the U.S. Department of Education, to Robert E. Clark, President of Wesley College (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf>.

stress the Department's obligation to enforce Title IX and hold schools to the standards laid out in its guidance documents, rather than undermine those critical protections.

Importance of existing Title IX guidance for transgender students

While all students rely on a fair and robust enforcement of Title IX, the protections clarified in the 2011 and 2014 guidelines are particularly important for transgender students. It is estimated that 0.7 percent of individuals aged 13–24 in the United States are transgender, representing approximately 360,000 people in that age range, in addition to at least tens of thousands of transgender students aged 12 and younger.⁷ Studies indicate that transgender youth and adults face particularly high levels of sexual violence and harassment. According to the U.S. Transgender Survey, a 2015 study of nearly 28,000 transgender adults in the United States, nearly half (47 percent) of respondents were survivors of sexual assault, and one in ten had been sexually assaulted in the previous year alone.⁸ The same study also revealed high levels of sexual assault at school. Out of those who were out as transgender in K–12 or reported that classmates, teachers, or school staff thought they were transgender, nearly one in seven (13 percent) were sexually assaulted at school because people thought they were transgender.⁹ Additionally, more than half (54 percent) of those respondents faced verbal harassment related to their gender identity or expression and 24 percent were physically attacked because they were transgender.¹⁰ For many of these respondents, these incidents of gender-related assault and harassment were so severe that they had to leave school: 17 percent left a K–12 school because of the severity of the mistreatment they faced. Respondents also experienced frequent harassment related to their transgender status in post-secondary institutions, with 24 percent of those who were out or perceived as transgender in college or vocational school being sexually, verbally, or physically harassed because of their gender identity or expression. Survey participants who shared personal stories after completing the survey underscored the impact of sexual assault in educational settings and the importance of protections reinforced in the Department's guidelines. One respondent reported:

I was sexually assaulted at my university.... I was also attacked and stalked. The university didn't do anything to help me, instead it threatened to punish me. I lived in terror the entire time I was on campus.

In addition to being vulnerable to violence, transgender survivors often face barriers or hostility related to their gender identity when reporting sexual violence or harassment. Many transgender people are reluctant to seek police assistance when they are victims of crimes for fear of mistreatment or discrimination. According to the U.S. Transgender Survey, 57% of transgender adults would feel somewhat or very uncomfortable asking the police for help if they needed it. Those who did interact with police faced frequent mistreatment: in the past year alone, 58% of survey respondents who interacted with law enforcement officers who knew they were transgender reported facing some form of mistreatment or abuse, including physical and sexual violence and

⁷ Jody L. Herman et al., *Age of Individuals Who Identify as Transgender* 3 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

⁸ Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 205 (2016), www.ustranssurvey.org/report.

⁹ *Id.* at 132; see also Joseph G. Kosciw et al., *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* 24 (2016), <https://www.glsen.org/article/2015-national-school-climate-survey> (finding that 60% of lesbian, gay, bisexual, transgender, or queer students experienced sexual harassment at school).

¹⁰ *Id.*

verbal harassment related to their gender. After completing the survey, many survey respondents shared negative experiences they had when reporting sexual violence to police. One individual reported:

I was denied a rape kit or anything like that, because I was transgender and the police were completely uninterested because of that, even though there was evidence of what happened.

Another wrote:

I was found in a ditch after being brutally raped.... I was taken to an emergency room. There I met an officer who told me I deserved it for attempting to be a woman and should have died. He also refused to take a report.

For transgender students who face barriers when reporting sexual violence to police, a school's Title IX resolution process may be their only viable avenue to find an appropriate remedy that would allow them to safely continue their education. The protections explained in the Department's guidance documents, which make this avenue a feasible option for many students, are therefore particularly critical for transgender students, especially for transgender students who would otherwise face hostility or discrimination by school officials. The withdrawal of these guidance documents—on top of the Department's previous withdrawal of the guidance clarifying the rights of transgender students—would exacerbate the obstacles many transgender students experience in reporting sexual violence and seeking remedies that would allow them equal access to educational opportunities.

The 2014 guidance is critical to protecting equal opportunity for transgender students in another way: namely, it incorporated the statement that discrimination based on gender identity is prohibited under Title IX, and remains one of only a few Department guidance documents to continue to affirm this recognition. Withdrawing this guidance will further erode the Department's commitment to the understanding that Title IX prohibits discrimination based on gender identity or nonconformity to gender stereotypes, potentially weakening school policies protecting transgender students as well as the Department's own enforcement of the law. We strongly urge the Department to maintain all regulations and guidelines that clarify that Title IX prohibits discrimination based on gender identity and sex stereotyping (including sex stereotyping of lesbian, gay, and bisexual students). This understanding of the law is consistent with that of the vast majority of courts to have considered the issue.¹¹

¹¹ See, e.g., *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121 (N.D. Ill. Oct. 18, 2016); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850 (S.D. Ohio 2016), *stay pending appeal denied sub nom.* *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016). The majority of courts to have considered this issue have similarly concluded that anti-transgender discrimination is prohibited under Title VII of the Civil Rights Act of 1964, which courts have typically looked to for guidance when assessing Title IX claims. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (Title VII of the 1964 Civil Rights Act); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act); *Smith v. Avanti*, --- F.Supp.3d --- 2017 WL 1284723 (D. Colo. Apr. 5, 2017) (Fair Housing Act); *Mickens v. Gen. Elec. Co.* No. 16-603, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016) (Title VII); *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509 (D. Conn. 2016) (Title VII); *U.S. v. S.E. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (Title VII); *Finkle v. Howard Cty.*, 12 F.Supp.3d 780 (D. Md. 2014) (Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F.Supp.2d 653 (S.D. Tex. 2008) (Title VII); *Mitchell v. Axcen Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. 2006) (Title VII); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (Title VII). See also *Hively v. Ivy Tech*, 853 F.3d 339 (7th Cir. Apr. 4, 2017) (en banc) (citing gender identity cases favorably and holding that sexual orientation discrimination constitutes sex

Regulations and guidance documents on other civil rights laws

In addition to documents clarifying requirements under Title IX, the Department has promulgated important rules and guidance documents pertaining to other civil rights laws that prohibit discrimination on the basis of race, color, national origin, religion, and disability, including Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. These regulations—many of which have been in place since the enactment of the laws—clarify the types of discrimination that are prohibited and the manner in which the Department will meet its responsibility of enforcing these laws. For example, Title VI of the Civil Rights Act prohibits individuals from being excluded from participation in, being denied the benefits of, or being subjected to discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance.¹² Over two dozen agencies, including the Department, have longstanding regulations effectuating Title VI that prohibit both actions and policies that intentionally treat individuals differently because of their race, color or national origin, and those that have an unjustified discriminatory impact.¹³ Protecting this nation’s residents from all forms of discrimination, intentional and unintentional, is a legal obligation of federal agencies that has been acknowledged by both Republican and Democratic administrations for more than 50 years. Similarly, the Individuals with Disabilities Education Act (IDEA) and the related regulation address standards for ensuring students with disabilities’ meaningful access to educational opportunities and disproportionality based on race and ethnicity in the areas of identification, placement in restrictive settings, and discipline. The Department of Education should not repeal, replace, or modify any of these or other related or similar regulations and guidance documents.

Conclusion

For decades, the Department of Education has played a central role as a guarantor of equal educational opportunity through the enforcement of our civil rights laws, opening up opportunities for students to thrive and learn. We strongly urge the Department to refrain from repealing, reopening, or modifying rules and guidance documents that protect the rights of all students—including transgender students—equal educational opportunities. Enforcing federal laws robustly is at the core of the Department’s obligation to the nation’s students. We call on the Department to fulfill this responsibility and strengthen, rather than undermine, these fundamental protections.

discrimination); *Hunter v. United Parcel Service*, 697 F.3d 697, 703 (8th Cir. 2012) (assuming gender identity claims are covered under Title VII); *Tovar v. Essentia Health*, 857 F.3d 771 (8th Cir. May 24, 2017) (same under Title VII and the ACA). *But see* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (relying on now-overturned Seventh Circuit precedent to hold that anti-transgender discrimination is not covered per se under Title VII but may be covered as sex stereotyping discrimination).

¹² 42 U.S.C. § 2000d.

¹³ See, for example, 34 C.F.R. §100.3(b)(2).