

June 9, 2021

The Honorable Suzanne Goldberg
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Follow up from Meeting on April 9, 2021

Dear Acting Assistant Secretary Goldberg:

It was a pleasure speaking to you and your staff to discuss various challenges our nation's K-12 school districts are facing as they strive to protect student civil rights while meeting regulatory requirements. As you know, the National School Boards Association (NSBA) shares the goals of the Department of Education's Office for Civil Rights to protect students from all forms of discrimination to enable them to participate fully in the programs our public schools offer, and to promote student achievement by fostering educational excellence and equal access. NSBA is committed to helping school districts develop and implement policies to address discrimination and to promote student rights.¹

NSBA appreciates the opportunity to provide insight, input, and examples from school districts on a number of issues at the forefront of schools' civil rights efforts. These include: the

¹Among many policy statements expressing its commitment to safe, supportive learning environments, and preventing discrimination against all students, NSBA's Delegate Assembly adopted the following:

Beliefs and Policies, Art. II, § 3.2: NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, gender identity, age, pregnancy, disability, or sexual orientation.

Beliefs and Policies, Art. IV, § 2.9: NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior includes, but is not limited to, physical violence, "bullying" by any means, disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs and Policies, Art. IV, § 2.12: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include an effective complaint mechanism. Districts should institute in-service programs to train all school personnel, including volunteers to recognize and prevent harassment against employees and students. Districts should investigate complaints, initiate education programs for students, and institute programs to eliminate harassment.

new Title IX regulations, the Civil Rights Data Collection, district-wide compliance reviews, and transgender student rights. On behalf of our member state associations, the 3,200 members of our Council of School Attorneys, and school boards across the country, we urge the Department to consider the following.

I. Title IX Regulations

The Title IX regulations that went into effect August 14, 2020, amid the COVID-19 pandemic, have created new challenges for K-12 school districts, many of which were anticipated in the request for clarification NSBA submitted to the Department on 6/10/20.

The current regulations narrow the scope of

a definition that recognizes the realities of the multiplicity of contexts faced by school officials is better suited to the operational realities with which administrators deal on a daily basis, and more likely to enhance the ability of schools to focus their limited resources on serious claims that rise to the level of sexual discrimination and harassment.

The current Title IX regulations limit K-12 schools' responsibility to address all off-campus conduct that could be sexual harassment, while still acknowledging the importance of districts providing supportive services regardless of where or when the conduct occurred. The new regulations' approach is more within reach for school districts than that of OCR's 2014 guidance. That guidance required schools to "process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct ... had continuing effects on campus." Schools were required to address those "continuing effects" by providing "appropriate remedies for the complainant, and, where necessary, the broader school population," even in instances where the districts had no power to prevent or control the misconduct.⁶

Although the current regulations appear to limit schools' legal responsibility, we caution that school officials may determine that they need to address certain behavior that occurs off-campus to ensure the safety of school officials and students.

allegations thereof.⁸ This includes not only teachers but also educational support staff, bus drivers, coaches, clerical, and cafeteria staff. As a result, the regulations say that if any school staff person is aware of potential sexual harassment, the school district is potentially responsible. This suggests that the Department will hold school districts responsible when only the perpetrator of alleged harassment has knowledge, contrary to court interpretations of the liability standard.⁹ The training burden imposed by this standard is high. This burden falls on K-12 schools, and not on higher education institutions. NSBA asks the Department to readopt the “actual knowledge” standard to avoid increased financial and legal impediments for K-12 school districts.

The complex and formal Title IX procedures designed for higher education environments pose significant challenges for public K-12 school districts, especially in situations

a matter of days. Now,

NSBA asks t

more effective than district-wide compliance reviews initiated with no evidence of systemic civil rights violations.

NSBA asks the Administration to limit district-wide reviews to situations in which there is a demonstrated basis for such a review. As a civil rights enforcement tool, an unfounded compliance review is ineffective at best -- focusing limited district resources on all claims regardless of impact, harm, and seriousness -- and harmful at worst, leading to unnecessary loss of confidence among the community who erroneously conclude that a district-wide compliance review (regardless of whether it flows from serious issues, or a forced patchwork of minor claims) means systemic flaws exist.

III. Civil Rights Data Collection

NSBA supports local school districts' efforts to collect relevant data on which to base decisions to achieve breakthroughs in school improvement and student achievement.¹² With respect to data collection by federal and state government, however, NSBA favors accurate, consistent, and unburdensome data collection over periods of years so that trends are evident.¹³ Specifically with respect to the Department's Civil Rights Data Collection (CRDC), NSBA is concerned about consistency in the definitions of key terms from one collection to the next, increased burdens for schools who must dedicate staff time to respond to questions, and technical assistance for school staff completing the collection.¹⁴

Of particular concern with the 2020-2021 collection is the change in definition of "sex" for purposes of the bullying/harassment element. In the latest round of CRDC changes approved by OMB on December 28, 2020 (Control Number 1870-0504), the Department changed the "harassment or bullying on the basis of sex" definition to remove "g(d)-10 (e (g(d)-)-2 (e)4[Tj0.32 T8.94))3

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schools to report data consistent with that definition. “Further,” the Department explained, “Title IX prohibits discrimination on the basis of sex, so OCR must continue collecting data based on the disaggregation category of sex, rather than gender identity.” Finally, the Department noted that under Title IX, “schools currently must respond to harassment on the basis of sex stereotyping.” The Department disagreed that the Supreme Court’s 2020 decision in the _____ case requires it to include in the definition of the “sex” gender identity or sexual orientation. The Department also said, “the collection of data based on gender identity is not related to the enforcement of civil rights laws under OCR’s jurisdiction.” But the Department also said schools should include in their CRDC responses incidents that involve discrimination on the basis of homosexuality or identification as transgender to the extent that involves discrimination based on biological sex.

NSBA respectfully submits that this change in definition to “sex” for purposes of bullying and harassment is confusing, and will be applied inconsistently from state to state, district to district, and perhaps even building to building. If we set aside for the moment the quickly-shifting legal landscape in which school districts in many states find themselves on the topic of gender identity,¹⁵ this single definitional change alone, clearly intended to be a shift from the previous CRDC definition, will cause many questions and potentially hours of consultation with legal counsel. If a transgender boy is subjected to mean taunts like “you call yourself a man...,” does

