



September 20, 2017

The Honorable Betsy DeVos  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

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

Dear Secretary DeVos,

On behalf of Lambda Legal, we write to offer our views 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 regulations that may be appropriate for repeal, replacement, or modification. We present our comments as advocates to ensure equal access to education and to promote educational excellence for all children in the United States, especially those who are LGBTQ.

The U.S. Department of Education (“Department”), through its Office for Civil Rights (“OCR”), is responsible for protecting students from discrimination, harassment, and retaliation on the basis of race, color, national origin, sex, age, and disability. Under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 (“Title IX”), the Age Discrimination Act of 1975, Section 504 of the Rehabilitation Act, and Title II of the Americans with Disabilities Act of 1990, the Department is tasked with the vigorous enforcement of civil rights in response to complaints of discrimination and through proactive compliance reviews, directed investigations, technical assistance, data collection, regulations, and policy guidance. In addition, landmark education laws including the Individuals with Disabilities Education Act (IDEA), the Elementary and Secondary Education Act (ESEA), the Carl D. Perkins Career and Technical Education Act, and the Higher Education Act (HEA) provide critical funding that help to make equal opportunity meaningful in the lives of students.

All of these laws require regulations, guidance, oversight, and enforcement in order to provide their intended benefit to students. We reject any effort to undermine the protections and critical funding these laws provide through the rescission or modification of the regulations and guidance documents used to ensure compliance and inform all parties of their rights and obligations under the law.

The Department should maintain all regulations and guidance documents making clear that Title IX prohibits discrimination on the basis of sex, including protection on the basis of sexual orientation and gender identity. This interpretation is consistent with many federal agencies, including the Equal Employment Opportunity Commission (EEOC).<sup>1</sup> These interpretations reflect the compounding trend in federal courts, which have consistently held that civil rights laws that prohibit sex discrimination

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<sup>1</sup> The EEOC has definitively interpreted Title VII to cover gender identity and sexual orientation-related discrimination as sex discrimination. See *Baldwin v. Fox*, 2015 WL 4397641 (E.E.O.C. July 16, 2015); *Lusardi v. Dep’t of the Army*, 2015 WL 1607756 (Apr. 1, 2015); *Macy v. Dep’t of Justice*, 2012 WL 1435995 (E.E.O.C Apr. 20, 2012).

prohibit discrimination based on sexual orientation and gender identity.<sup>2</sup> In the Title IX context, for example, a federal judge held in *Videckis v. Pepperdine University* that two female students had an actionable sex discrimination claim under Title IX against Pepperdine University for discrimination on the basis of sexual orientation.<sup>3</sup> Most recently in *Whitaker v. Kenosha Unified School District*, the U.S. Court of Appeals for the Seventh Circuit affirmed that a school's denial of a transgender boy's access to the boys' restroom was a violation of both Title IX and the Equal Protection Clause.<sup>4</sup>

We oppose any effort by this administration to repeal, replace, or modify any of the Department's regulations or significant guidance documents. OCR must continue enforcing these protections so that all students have an opportunity to learn and thrive. LGBTQ students need to know that their schools will support them. Students should be able to count on their schools' support to protect their safety and ensure they have an equal chance at an education. Students deserve a Department of Education committed to protecting all students from discrimination and ensuring that each and every child receives equal educational opportunities. If you have any questions, please contact Sasha Buchert at [sbuchert@lambdalegal.org](mailto:sbuchert@lambdalegal.org).

Sincerely,



Paul Castillo  
Senior Staff Attorney  
[pcastillo@lambdalegal.org](mailto:pcastillo@lambdalegal.org)

*Sasha J. Buchert*

Sasha Buchert  
Staff Attorney  
[sbuchert@lambdalegal.org](mailto:sbuchert@lambdalegal.org)

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<sup>2</sup> See, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339 (7th Cir. 2017); *Chavez v. Credit Nation Auto Sales, L.L.C.*, 2016 WL 158820 (11th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Boutillier v. Hartford Pub. Schs.*, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cty., Bd. Of Cty. Comm'rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., Inc.*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Koren v. Ohio Bell Tel Co.* 894 F. Supp. 2d 1032 (N.D. Ohio 2012); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. Salem*, 378 F.3d 566 (6th Cir. 2004); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenck v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Mickens v. General Electric Co.*, No. 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 2016 WL 5843046 (D. Nev. 2016); *Doe v. Ariz.*, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *Fabian v. Hosp. of Central Conn.*, 172 F.Supp. 3d 509 (D. Conn. 2016); *Lewis v. High Point Regional Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015); *Finkle v. Howard Cty., Md.*, 12 F.Supp. 3d 780 (D. Md. 2014); *Radtke v. Miscellaneous Drivers & Helpers Union Local #638 Health, Welfare, Eye, & Dental Fund*, 867 F. Sup. 2d 1023 (D. Minn. 2012); *Schroer v. Billington*, 577 F.Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D. Pa. 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. 2003); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

<sup>3</sup> *Videckis v. Pepperdine University*, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

<sup>4</sup> *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).