



National School Boards Association
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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.

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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 July 21, 2020,² and in the comments NSBA submitted as part of the rulemaking process.³ Some provisions of the recent Title IX regulations, such as the clear definition for sexual harassment, have proven relatively helpful to school districts as they strive to promote consistent and clear policies. Other provisions, such as the extensive procedures, have proven to be a poor fit for many K-12 school environments. The new rules asked school districts, already adjusting attendance and operations during the pandemic, to layer a new procedural framework onto known discipline and Title IX complaint procedures in practice for many years.

To the extent the regulations adopt the legal standard for money damages established by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), they have proven helpful. In *Davis*, the Court articulated the standard to be used in assessing monetary liability for schools receiving federal funds under Title IX. The Court held that schools “are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁴

The *Davis* standard provided practical instruction to schools for Title IX enforcement. And twenty-one years after it was handed down, the *Davis* standard is widely understood by school districts and their counsel. Moreover, it is universally adopted into policy and training materials and accepted by courts.

As the Department considers whether to propose changes to the regulations, we urge you to consider the realities in K-12 school buildings as described below.

i. The definition of sexual harassment.

² NSBA’s request for clarification on the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rule (Title IX Rule) can be found here: [NSBA Letter on Department of Education Title IX Rule](#).

³ NSBA’s comments on Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance Rule (Title IX Rule) can be found here: [NSBA Comments on Department of Education Proposed Title IX Rule](#).

⁴ 526 U.S. at 650.

The current regulations narrow the scope of Title IX’s definition of sexual harassment from previous guidance and provide more explicit direction to schools about what conduct constitutes sexual harassment for Title IX purposes. So, too, the definition more precisely delineates what constitutes sexual harassment in egregious circumstances involving quid pro quo sexual harassment, sexual assault, dating violence, domestic violence, and stalking.

School officials address student conduct tinged with sexual meaning on a daily basis. In middle and high schools, unwelcome sexual banter or flirtation or other typical conduct between teenagers may well warrant attention and even discipline, but may not rise to the level of a Title IX sexual harassment claim or federal investigation. As a Spending Clause statute, Title IX, its regulations, and jurisprudence simply have not provided sufficient notice to public schools that they are to sweep up every sexual phrase exchanged between students into Title IX authority. As any middle school principal could attest, the large majority of discipline issues involving students of different sexes, gender identities or sexual orientation – and even many of the same sex -- would be covered by the “sexual harassment” definitions provided from past guidance. School officials of course must assess the severity of any concerning conduct between students, but must also take into account the thought processes, age, maturity, and developmental stage of the students themselves.

The Department’s 2011 Dear Colleague Letter, later rescinded, broadly defined sexual harassment as “unwelcome conduct of a sexual nature” that includes “requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”⁵ This definition encompassed a range between unwanted verbiage to serious claims of rape and proved to be unworkable in many instances for school districts in that all claims, regardless of severity, could be deemed sexual harassment and thus subject to OCR investigation. For example, in one Georgia school district, the behavior of a three-year-old student triggered an investigation because the student “touched” another student “inappropriately.” In another Georgia district, high school students who exchanged insults – one with a sexual connotation – during an argument involving thrown slushies were also subjected to an investigation. School districts saw a significant rise in the number of claims and were required to expend resources and time to investigate all of them, regardless of how serious or specious. School districts found it difficult to preside, navigate, and deliberate the volume of claims, often to the detriment of more serious claims.

NSBA urges the Department to retain the definition in the Title IX regulations because it minimizes litigation, reduces school districts’ obligations to apply extensive Title IX procedures to any behavior remotely tinged with sexual innuendo or terminology, and thus places a greater emphasis on claims of more severe and pervasive conduct for formal investigation. NSBA suggests that school districts be granted deference to manage incidents at the lowest level, consistent with state rules and district processes, particularly where there are questionable issues of fact. In sum,

⁵ Department of Education, Dear Colleague Letter: Sexual Violence, April 4, 2011: [\[RESCINDED\] Dear Colleague: From Assistant Secretary for Civil Rights, Russlynn Ali \(PDF\)](#).

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.

ii. Express boundaries for school districts' Title IX responsibilities.

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 meet other legal obligations and to keep the school environment safe for all students. When harassing behavior occurs online, for example, the effect on other students and the school community as a whole can be severe. As NSBA has explained to the Supreme Court, when such behavior is brought to school officials' attention, they may decide to address it.⁷ But we believe the distinction in the Title IX regs between on- and off-campus activity makes clear that, although school officials may choose to address such conduct, they are not legally required to do so under Title IX.

iii. Imputing actual knowledge to the LEA

As NSBA has pointed out in past comments, Section 106.30 of the Rule defines "actual knowledge" more expansively in the elementary and secondary school context than courts have defined the term in suits for money damages under Title IX. The regulations state that a school district will be deemed to have "actual knowledge" of sexual harassment whenever "*any* employee of an elementary or secondary school" (emphasis added) has notice of sexual harassment or

⁶ Department of Education, Office for Civil Rights, [RESCINDED] Questions and Answers on Title IX and Sexual Violence (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁷ See Brief of National School Boards Association et al. as Amici Curiae in Support of Petitioner, <https://www.nsba.org/-/media/NSBA/File/legal-mahanoy-area-school-district-v-bl-amicus-brief-2021.pdf?la=en&hash=D45C85E6A43A17471C10E0FAB337996D7EF03AA2>, noting nothing in *Tinker v. Des Moines Ind. Comm. Sch. Dist.*, 393 U.S. 503 (1969) or subsequent cases supports a categorical limit on school authority based on where speech originates and that schools are able to regulate student expressive activity that poses a reasonable threat of materially disrupting the school environment.

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 *Davis* “actual knowledge” standard to avoid increased financial and legal impediments for K-12 school districts.

iv. Extensive procedural requirements

The complex and formal Title IX procedures designed for higher education environments pose significant challenges for public K-12 school districts, especially in situations involving young children. Educators need flexibility to address harassment situations consistent with the age of the student and the nature of the allegation.

Under the current Title IX regulations, investigations are unreasonably lengthy and conflict with and/or delay student and/or employee disciplinary investigative processes. For example, in Washington, state law requires that student discipline matters be resolved within the current academic term.¹⁰ In some collective bargaining states, school districts must operate under agreements that outline specific procedural rights for employees. In many states, most school investigations into bullying and harassment are completed within ten school days. But under the laborious procedures required by the Title IX regulations, a school’s investigation and resolution of a sexual harassment claim can last three months or more.

Before the current Title IX regulations, districts would have investigated and determined consequences in most student-to-student incidents involving sexual banter or verbal aggression in

⁸ (a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a)....

34 CFR 106.30(a)(emphasis added).

⁹ See *Salazar v. South San Antonio Ind. Sch. Dist.*, 953 F.3d 273 (5th Circ. 2017) (judicially implied private right of action under Title IX did not impose liability on school district based on elementary school principal's repeated sexual molestation of student, even though principal had been designated by the district as an appropriate person to institute corrective measures on the district's behalf in response to sexual harassment by others, where principal was the only district employee or representative who had actual knowledge of the abuse at the time it occurred and that the abuse violated the district's policies prohibiting and condemning sexual contact with or abuse of a student).

¹⁰ Wash. Admin. Code § 392-400-440 (2021).

a matter of days. Now, if there is a potential for sexual harassment claim, schools must wait for a parent or guardian to decide whether they are going to file a complaint before interviewing the respondent, creating a period of limbo during which the school cannot investigate. This can be exceptionally challenging in a K-12 setting, where trained educators should be able to implement age and setting-appropriate responses, including questioning students involved in an incident.

The regulations require a separation of roles during the Title IX grievance process.¹¹ The investigator, decision-maker, and appellate decision-maker must be different individuals or panels. While the Title IX coordinator can act as an investigator, this individual can never be a decision-maker or the appellate decision-maker. Requiring an unbiased appeal person or tribunal is a legitimate goal for any adjudicatory process; however, the separation of duties with respect to the investigator and initial decision-maker (and excluding the Title IX coordinator from being a decision-maker) is problematic for many districts. For example, some K-8 districts in states including Oklahoma are quite small, where the superintendent also serves as the principal (and the only administrator on campus). Officials there do not employ enough administrative staff to meet the required separation of duties. The option of delving into teaching ranks to find a Title IX coordinator or investigator poses additional problems in that it would exceed the traditional duties of classroom instructors.

In larger districts with multiple school buildings, staff are often reassigned from one campus to serve another to eliminate potential biases or conflicts. Where an investigation cannot be accomplished with district employees, however, a district must outsource it. For example, one Texas school district with a student population of 35,000 was required to outsource two sexual harassment investigations to law firms to preserve a fair process. This outsourcing resulted in an unbudgeted bill for legal services of approximately \$20,000.00. That district is not alone in costs overruns due to these investigations. These unanticipated costs can deplete school district budgets. The time and training associated with these investigations is financially debilitating for many school districts.

v. Confidentiality requirements not considered

Lastly, the lack of confidentiality requirements under the Title IX regulations present difficulties for administrative staff. The current procedures allow both “sides” access to information akin to discovery. Yet, administrators question the propriety of disclosing such evidence to others in light of privacy concerns and requirements, including those of the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. 1232g; 34 CFR Par 99, and its state counterparts. School personnel understand, as a general rule, student-specific information or data is considered private and confidential and cannot be disclosed without consent or judicial intervention. The provisions of the Title IX regulations which permit the disclosure of personally identifiable student information appear to conflict with confidentiality rules under FERPA: rather starkly in many instances. District staff are in a quandary about what federal law takes precedence.

¹¹ 34 CFR 106.45(b)(7)(i).

NSBA asks the Department to clarify the inconsistency between the spirit of FERPA and the Title IX regulations' disclosure requirements.

NSBA urges the Administration to consider K-12 school officials' input as it reexamines the Title IX regulations. These trained educators, administrators, and attorneys are experienced in addressing incidents in an age-appropriate context, with far less formality and more expediency than the regulations currently permit. NSBA believes that K-12 educators should not be burdened by more restrictive measures that have yet to be proven effective in the K-12 setting.

II. District-Wide Compliance Reviews

NSBA asks that the Department consider the adverse effects of unnecessary district-wide compliance reviews. During the Obama Administration, single complaints were often expanded into district-wide compliance reviews, especially if the individual complaint raised certain issues that had been assigned priority. These district-wide reviews not only required staff to expend many hours retrieving documents and data, but often created an unnecessarily adversarial relationship between OCR and the district. Regional offices that previously maintained cooperative relationships with school districts, and would have pursued only the single complaint, were overridden by orders from headquarters to conduct these district-wide investigations.

This approach could be harmful in several ways. First, it created an unnecessarily hostile relationship between the regional OCR office and the district. Second, when OCR broadened a relatively narrow issue in one complaint, without evidence of more generalized systemic issues, OCR's regional office was not prepared to process the extensive data requested nor to advise on remedial steps if indicated. Third, the review unnecessarily drew school staff away from providing student educational services and into data collection, photocopying, and preparing reports.

A more helpful approach would have been to work collaboratively with the district to investigate the complaint, and if a violation is found, to work with the district to help it examine other areas of its programs. School districts generally are very cooperative with such an approach, as it provides the district some assurance that it is taking steps to protect students from discrimination and, in the process, to protect itself from liability.

The Department has undertaken two initiatives that may serve as models for proactive, collaborative approaches to enforcement. In 2018, OCR created a program in which it provided technical assistance to schools on website accessibility. It was described as a "technical assistance initiative to assist schools, districts, state education agencies, libraries, colleges and universities in making their websites and online programs accessible to individuals with disabilities." The non-punitive approach used in that initiative worked efficiently. Time was spent working on bringing schools into compliance with modern technology standards, rather than enforcement. Similarly, the Department's Privacy Technical Assistance Center and Student Privacy Policy Office operate the Protecting Student Privacy site – a clearinghouse of resources, guidance letters, training materials, and events to assist schools as they attempt to comply with the near-50-year-old FERPA statute. NSBA believes that this collaborative clearinghouse approach to support schools is much

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 "gender-based harassment or bullying" and to include instead "bullying based on sex stereotyping." The net effect is to remove from the definition "nonsexual intimidation or abusive behavior... based on the student's... gender identity, gender expression, and nonconformity with gender stereotypes," and to replace it with "acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex stereotyping, but not involving conduct of a sexual nature." The Department supported the change by explaining that it is consistent with CRDC's long-standing definition of "sex," in place since the 2009-10 collection, which incorporates a definition of sex as "the concept describing the biological traits that distinguish the males and females of a species." The Department urged

¹² Beliefs and Policies of the National School Boards Association, Art. I, § 1

¹³ Beliefs and Policies of the National School Boards Association, Art. III, § 4.1(e): NSBA opposes attempts by the federal and state government to expand the scope of information that it collects from school districts in a manner that is confusing, burdensome, and conflicts with the responsibilities of school districts and the rights of students unless the data collection is authorized by the statute.

¹⁴ As an example of staff time spent in responding to the CRDC, in a mid-size school district with 39,000 students and 55 school campuses, the data collection process takes about 2 weeks of work including gathering information, verifying definitions and data with responsible departments, and data verification. About 90% of this time is spent during the collection year. 10% or less of the total time is spent in a non-collection year gathering documentation and reports that will be needed for the next collection.

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 *Bostock* 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 that conduct fall into the definition of bullying/harassment based on sex? It appears to address the student’s gender identity, but perhaps does not address sex stereotyping. The hairs will be excruciatingly difficult to split.

Understanding that this administration holds a different view of the impact of *Bostock* on Title IX’s application to alleged discrimination based on gender identity, NSBA urges the Department to make any proposed changes with an eye toward keeping the CRDC consistent and easy for school personnel to understand. NSBA asks that the Department consider including the concepts of gender identity, sexual orientation, and other gender-based concepts within the definition of “sex,” so that schools will include conduct asked to be included in the previous CRDC, and likely to be included in most district’s policies against bullying and harassment, given the state of federal law after *Bostock*.

Similarly, although NSBA appreciates the time savings that may result by the Department’s decision to drop certain elements from the CRDC, NSBA cautions that adding and subtracting elements from collection to collection inherently creates inconsistency and inefficiencies. At the same time the Department dropped elements including financial data and number of documented incidents involving firearms or explosives, it added elements (optional this collection, but likely mandatory in the next) involving allegations of sexual offenses by staff and bullying of students based on religion. Changes like these often create time-consuming challenges for non-legal school officials as they struggle to understand and respond to the shifts.

¹⁵ See, e.g., Gillian R. Brassil, How Some States Are Moving to Restrict Transgender Women in Sports, *New York Times*, March 11, 2021, updated April 12, 2021, <https://www.nytimes.com/2021/03/11/sports/transgender-athletes-bills.html>.

For the reasons above, NSBA urges the Department to continue to strengthen its technical assistance to schools as they complete the CRDC. This includes the Department's helplines, CRDC Resource Center web page, and Partner Support Center. As we expressed during our meeting, we urge the Department to continue active outreach and support to school districts, so they understand how to use available resources to decrease response time and increase accuracy of responses. NSBA is pleased to partner with the Department in this effort.

IV. Transgender Student Rights

School districts also need greater clarity with regard to their responsibilities to transgender students, especially in the contexts of bathroom/locker room use and athletics. The Administration's interpretation of Title IX after *Bostock v. Clayton County*, 590 US __ (2020) was reflected as early as the January 20 Executive Order on Preventing and Combating Discrimination Based on Gender Identity or Sexual Orientation asserting that children should be able to learn without worrying about whether they will be denied access to the restroom, locker room, or school sports. School districts are concerned about the potential liability in states whose legislatures are now requiring the opposite approach in the athletics context.

The Administration also should clarify the confidentiality requirements for transgender students vis-à-vis parents. A very small number of courts have recognized a public school student's reasonable expectation of privacy in his or her sexual orientation, which suggests there would be a corresponding expectation for transgender status. *C.N. v. Wolf*, 410 F. Supp. 2d 894 (C.D. Cal. 2005); *Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121 HRL, 2009 WL 3918930 (N.D. Cal. Nov. 18, 2009). But a few courts have also recognized that this right of privacy is not absolute and may be outweighed in situations where schools have a legitimate or compelling reason to disclose information to parents that directly or implicitly reveals their child's sexual orientation or sexual activity. *Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal. 2007) (no violation of right to privacy under First Amendment when principal disclosed a student's sexual orientation to mother in carrying out statutory duty to advise parents of circumstances leading to student's suspension); *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013) (no clearly established right to privacy under the Fourteenth Amendment barring public secondary school officials from discussing student's sexual activity with parents). Public school officials must balance the privacy interests of the student with the rights of his or her parents.

Given the sensitivity of this issue, and the need to protect students from harassment and to support them in their educational environment, coupled with the concerns of their communities, some districts have requested that the Administration be thoughtful about incremental steps some states or counties may feel the need to take as they adopt inclusive policies and practices. Communities are different. School boards, which reflect and interact with their communities, must be responsive to their concerns.

If the Department seeks to regulate or issue guidance on this topic, it should issue a Notice of a Proposed Rule or Guidance on transgender student rights to permit all interested parties to comment.

V. Conclusion

NSBA appreciates the opportunity to provide input into the Department's efforts to support our common goal to keep schools free from discrimination. In furtherance of our collaborative efforts, as explained above, we suggest that OCR institute a non-adversarial assistance initiative, akin to the Department's 2018 program to assist schools in developing websites and online programs for individuals with disabilities, to address many of the issues outlined above. NSBA believe school districts would welcome this opportunity.

We continue to be available to OCR and the Department to provide the perspective of school boards and their counsel. NSBA stands ready to work in partnership with OCR on these and other issues of importance to our members, and to the nation's public school children.

Sincerely,



Francisco M. Negrón, Jr.
Chief Legal Officer
National School Boards Association