



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Suzanne Bonamici
Chairwoman
Subcommittee on Civil Rights
and Human Services
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairwoman Bonamici:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²

¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to

³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵ *Id.*

⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Raúl M. Grijalva
U.S. House of Representatives
Washington, DC 20515

Dear Representative Grijalva:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil

¹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."¹⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."¹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁵ *Id.*

¹⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

¹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus
Assistant Secretary for Civil Rights

Enclosure

¹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Mark Takano
U.S. House of Representatives
Washington, DC 20515

Dear Representative Takano:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."²⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."²⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁵ *Id.*

²⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

²⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Pramila Jayapal
U.S. House of Representatives
Washington, DC 20515

Dear Representative Jayapal:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁵ *Id.*

³⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

³⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Kenneth L. Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus
Assistant Secretary for Civil Rights

Enclosure

³⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Jahana Hayes
U.S. House of Representatives
Washington, DC 20515

Dear Representative Hayes:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁴⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁵ *Id.*

⁴⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

⁴⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'K. Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Andy Levin
U.S. House of Representatives
Washington, DC 20515

Dear Representative Levin:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁵⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁵⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁵ *Id.*

⁵⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

⁵⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁶⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁶⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Alan Lowenthal
U.S. House of Representatives
Washington, DC 20515

Dear Representative Lowenthal:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁶¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁶²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁶¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁶² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁶³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁶⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁶⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁶⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁶³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁶⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁶⁵ *Id.*

⁶⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁶⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

⁶⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁶⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁶⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁷⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus
Assistant Secretary for Civil Rights

Enclosure

⁶⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁶⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁷⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Ro Khanna
U.S. House of Representatives
Washington, DC 20515

Dear Representative Khanna:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁷¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁷²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁷¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁷² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁷³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁷⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁷⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁷⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁷³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁷⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁷⁵ *Id.*

⁷⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁷⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

⁷⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁷⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁷⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁸⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁷⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁷⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁸⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Chris Pappas
U.S. House of Representatives
Washington, DC 20515

Dear Representative Pappas:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁸¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁸²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁸¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁸² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁸³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁸⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁸⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁸⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁸³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁸⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁸⁵ *Id.*

⁸⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁸⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

⁸⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁸⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁸⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁸⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁸⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Ann McLane Kuster
U.S. House of Representatives
Washington, DC 20515

Dear Representative Kuster:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁹⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁹⁵ *Id.*

⁹⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy

⁹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁰⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁰⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Ruben Gallego
U.S. House of Representatives
Washington, DC 20515

Dear Representative Gallego:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁰¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁰²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹⁰¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁰² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁰³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."¹⁰⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."¹⁰⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁰⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹⁰³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁰⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁰⁵ *Id.*

¹⁰⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁰⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹⁰⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁰⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁰⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹¹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁰⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁰⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹¹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Seth Moulton
U.S. House of Representatives
Washington, DC 20515

Dear Representative Moulton:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹¹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹¹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹¹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹¹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹¹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”¹¹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”¹¹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹¹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹¹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹¹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹¹⁵ *Id.*

¹¹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹¹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹¹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹¹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹¹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹²⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹¹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹¹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹²⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Jennifer Wexton
U.S. House of Representatives
Washington, DC 20515

Dear Representative Wexton:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹²¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹²²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹²¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹²² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹²³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."¹²⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."¹²⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹²⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹²³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹²⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹²⁵ *Id.*

¹²⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹²⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹²⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹²⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹²⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹³⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹²⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹²⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹³⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Joseph D. Morelle
U.S. House of Representatives
Washington, DC 20515

Dear Representative Morelle:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹³¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹³²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹³¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹³² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹³³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”¹³⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”¹³⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹³⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹³³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹³⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹³⁵ *Id.*

¹³⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹³⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹³⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹³⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹³⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁴⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹³⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹³⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁴⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Mark Pocan
U.S. House of Representatives
Washington, DC 20515

Dear Representative Pocan:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁴¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁴²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹⁴¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁴² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁴³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."¹⁴⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."¹⁴⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁴⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹⁴³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁴⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁴⁵ *Id.*

¹⁴⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁴⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹⁴⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁴⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁴⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁵⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁴⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁴⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁵⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Salud O. Carbajal
U.S. House of Representatives
Washington, DC 20515

Dear Representative Carbajal:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁵¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁵²

¹⁵¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁵² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁵³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”¹⁵⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”¹⁵⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁵⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to

¹⁵³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁵⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁵⁵ *Id.*

¹⁵⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁵⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

¹⁵⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁵⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁵⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁶⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁵⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁵⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁶⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Darren Soto
U.S. House of Representatives
Washington, DC 20515

Dear Representative Soto:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁶¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁶²

¹⁶¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁶² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁶³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”¹⁶⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”¹⁶⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁶⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to

¹⁶³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁶⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁶⁵ *Id.*

¹⁶⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁶⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

¹⁶⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁶⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁶⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁷⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁶⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁶⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁷⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Angie Craig
U.S. House of Representatives
Washington, DC 20515

Dear Representative Craig:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁷¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁷²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹⁷¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁷² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁷³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."¹⁷⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."¹⁷⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁷⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹⁷³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁷⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁷⁵ *Id.*

¹⁷⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁷⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹⁷⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁷⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁷⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁸⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁷⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁷⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁸⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Adriano Espaillat
U.S. House of Representatives
Washington, DC 20515

Dear Representative Espaillat:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁸¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁸²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹⁸¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁸² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁸³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."¹⁸⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."¹⁸⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁸⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹⁸³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁸⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁸⁵ *Id.*

¹⁸⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁸⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹⁸⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁸⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁸⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.¹⁹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁸⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁸⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

¹⁹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Kathy Castor
U.S. House of Representatives
Washington, DC 20515

Dear Representative Castor:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."¹⁹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.¹⁹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

¹⁹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

¹⁹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.¹⁹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”¹⁹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”¹⁹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.¹⁹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

¹⁹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

¹⁹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).¹⁹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

¹⁹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.¹⁹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.¹⁹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁰⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

¹⁹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

¹⁹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁰⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Lucille Roybal-Allard
U.S. House of Representatives
Washington, DC 20515

Dear Representative Roybal-Allard:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁰¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁰²

²⁰¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁰² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁰³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”²⁰⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”²⁰⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁰⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to

²⁰³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁰⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁰⁵ *Id.*

²⁰⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁰⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

²⁰⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁰⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁰⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²¹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁰⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁰⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²¹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Sheila Jackson Lee
U.S. House of Representatives
Washington, DC 20515

Dear Representative Jackson Lee:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²¹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²¹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²¹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²¹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²¹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”²¹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”²¹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²¹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²¹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²¹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²¹⁵ *Id.*

²¹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²¹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²¹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²¹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²¹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²²⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²¹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²¹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²²⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Eleanor Holmes Norton
U.S. House of Representatives
Washington, DC 20515

Dear Representative Norton:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²²¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²²²

²²¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²²² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²²³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”²²⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”²²⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²²⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to

²²³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²²⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²²⁵ *Id.*

²²⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²²⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

²²⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²²⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²²⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²³⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²²⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²²⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²³⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Peter A. DeFazio
U.S. House of Representatives
Washington, DC 20515

Dear Representative DeFazio:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²³¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²³²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²³¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²³² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²³³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."²³⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."²³⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²³⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²³³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²³⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²³⁵ *Id.*

²³⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²³⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²³⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²³⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²³⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁴⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²³⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²³⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁴⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Frank Pallone, Jr.
U.S. House of Representatives
Washington, DC 20515

Dear Representative Pallone:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁴¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁴²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²⁴¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁴² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁴³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."²⁴⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."²⁴⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁴⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²⁴³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁴⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁴⁵ *Id.*

²⁴⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁴⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²⁴⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁴⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁴⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁵⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁴⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁴⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁵⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Albio Sires
U.S. House of Representatives
Washington, DC 20515

Dear Representative Sires:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁵¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁵²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²⁵¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁵² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁵³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”²⁵⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”²⁵⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁵⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²⁵³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁵⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁵⁵ *Id.*

²⁵⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁵⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²⁵⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁵⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁵⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁶⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁵⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁵⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁶⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Adam B. Schiff
U.S. House of Representatives
Washington, DC 20515

Dear Representative Schiff:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁶¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁶²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²⁶¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁶² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁶³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."²⁶⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."²⁶⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁶⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²⁶³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁶⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁶⁵ *Id.*

²⁶⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁶⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²⁶⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁶⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁶⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁷⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁶⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁶⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁷⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Gwen Moore
U.S. House of Representatives
Washington, DC 20515

Dear Representative Moore:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁷¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁷²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²⁷¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁷² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁷³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”²⁷⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”²⁷⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁷⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²⁷³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁷⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁷⁵ *Id.*

²⁷⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁷⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²⁷⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁷⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁷⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁸⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁷⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁷⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁸⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Suzan K. DelBene
U.S. House of Representatives
Washington, DC 20515

Dear Representative DelBene:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁸¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁸²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²⁸¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁸² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁸³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."²⁸⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."²⁸⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁸⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²⁸³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁸⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁸⁵ *Id.*

²⁸⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁸⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²⁸⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁸⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁸⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.²⁹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁸⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁸⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

²⁹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Jan Schakowsky
U.S. House of Representatives
Washington, DC 20515

Dear Representative Schakowsky:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."²⁹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.²⁹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

²⁹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

²⁹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.²⁹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”²⁹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”²⁹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.²⁹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

²⁹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

²⁹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

²⁹⁵ *Id.*

²⁹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).²⁹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

²⁹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.²⁹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.²⁹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁰⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

²⁹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

²⁹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁰⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Linda T. Sánchez
U.S. House of Representatives
Washington, DC 20515

Dear Representative Sánchez:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁰¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁰²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁰¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁰² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁰³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³⁰⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³⁰⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁰⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁰³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁰⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁰⁵ *Id.*

³⁰⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁰⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁰⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁰⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁰⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³¹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁰⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁰⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³¹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Eliot L. Engel
U.S. House of Representatives
Washington, DC 20515

Dear Representative Engel:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³¹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³¹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³¹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³¹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³¹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”³¹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”³¹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³¹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³¹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³¹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³¹⁵ *Id.*

³¹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³¹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³¹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³¹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³¹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³²⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³¹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³¹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³²⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable William R. Keating
U.S. House of Representatives
Washington, DC 20515

Dear Representative Keating:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³²¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³²²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³²¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³²² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³²³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³²⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³²⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³²⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³²³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³²⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³²⁵ *Id.*

³²⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³²⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³²⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³²⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³²⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³³⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³²⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³²⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³³⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Gregory W. Meeks
U.S. House of Representatives
Washington, DC 20515

Dear Representative Meeks:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³³¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³³²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³³¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³³² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³³³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³³⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³³⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³³⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³³³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³³⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³³⁵ *Id.*

³³⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³³⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³³⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³³⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³³⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁴⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³³⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³³⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁴⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable John B. Larson
U.S. House of Representatives
Washington, DC 20515

Dear Representative Larson :

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁴¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁴²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁴¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁴² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁴³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³⁴⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³⁴⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁴⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁴³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁴⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁴⁵ *Id.*

³⁴⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁴⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁴⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁴⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁴⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁵⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁴⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁴⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁵⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Joseph P. Kennedy, III
U.S. House of Representatives
Washington, DC 20515

Dear Representative Kennedy:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁵¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁵²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁵¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁵² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁵³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”³⁵⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”³⁵⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁵⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁵³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁵⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁵⁵ *Id.*

³⁵⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁵⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁵⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁵⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁵⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁶⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁵⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁵⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁶⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Gilbert R. Cisneros, Jr.
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cisneros:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁶¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁶²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁶¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁶² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁶³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”³⁶⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”³⁶⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁶⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁶³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁶⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁶⁵ *Id.*

³⁶⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁶⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁶⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁶⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁶⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁷⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁶⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁶⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁷⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Rashida Tlaib
U.S. House of Representatives
Washington, DC 20515

Dear Representative Tlaib:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁷¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁷²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁷¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁷² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁷³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³⁷⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³⁷⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁷⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁷³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁷⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁷⁵ *Id.*

³⁷⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁷⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁷⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁷⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁷⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁸⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁷⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁷⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁸⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable TJ Cox
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cox:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁸¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁸²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁸¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁸² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁸³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”³⁸⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”³⁸⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁸⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁸³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁸⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁸⁵ *Id.*

³⁸⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁸⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁸⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁸⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁸⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.³⁹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁸⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁸⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

³⁹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Brenda L. Lawrence
U.S. House of Representatives
Washington, DC 20515

Dear Representative Lawrence:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."³⁹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.³⁹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

³⁹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

³⁹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.³⁹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."³⁹⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."³⁹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.³⁹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

³⁹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

³⁹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

³⁹⁵ *Id.*

³⁹⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).³⁹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

³⁹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.³⁹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.³⁹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁰⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

³⁹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

³⁹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁰⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Henry C. “Hank” Johnson, Jr.
U.S. House of Representatives
Washington, DC 20515

Dear Representative Johnson:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR’s handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR’s policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR’s enforcement record demonstrates OCR’s commitment to civil rights enforcement with faster and better results for students in OCR’s complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students’ civil rights. As Secretary DeVos stated, “Our approach has been more effective at supporting students and delivering meaningful results.”⁴⁰¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁰²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁰¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁰² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁰³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁴⁰⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁴⁰⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁰⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁰³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁰⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁰⁵ *Id.*

⁴⁰⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁰⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁰⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁰⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁰⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴¹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁰⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁰⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴¹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Adam Smith
U.S. House of Representatives
Washington, DC 20515

Dear Representative Smith:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴¹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴¹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴¹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴¹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴¹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁴¹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁴¹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴¹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴¹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴¹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴¹⁵ *Id.*

⁴¹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴¹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴¹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴¹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴¹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴²⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴¹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴¹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴²⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Danny K. Davis
U.S. House of Representatives
Washington, DC 20515

Dear Representative Davis:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴²¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴²²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴²¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴²² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴²³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁴²⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁴²⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴²⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴²³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴²⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴²⁵ *Id.*

⁴²⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴²⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴²⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴²⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴²⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴³⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴²⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴²⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴³⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Rick Larsen
U.S. House of Representatives
Washington, DC 20515

Dear Representative Larsen:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴³¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴³²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴³¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴³² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴³³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴³⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁴³⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴³⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴³³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴³⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴³⁵ *Id.*

⁴³⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴³⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴³⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴³⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴³⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁴⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴³⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴³⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁴⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Bill Foster
U.S. House of Representatives
Washington, DC 20515

Dear Representative Foster:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴⁴¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁴²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁴¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁴² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁴³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴⁴⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁴⁴⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁴⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁴³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁴⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁴⁵ *Id.*

⁴⁴⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁴⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁴⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁴⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁴⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁵⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁴⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁴⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁵⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Jerrold Nadler
U.S. House of Representatives
Washington, DC 20515

Dear Representative Nadler:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴⁵¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁵²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁵¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁵² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁵³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴⁵⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁴⁵⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁵⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁵³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁵⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁵⁵ *Id.*

⁴⁵⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁵⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁵⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁵⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁵⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁶⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁵⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁵⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁶⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Jimmy Gomez
U.S. House of Representatives
Washington, DC 20515

Dear Representative Gomez:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴⁶¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁶²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁶¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁶² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁶³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴⁶⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁴⁶⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁶⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁶³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁶⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁶⁵ *Id.*

⁴⁶⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁶⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁶⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁶⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁶⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁷⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁶⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁶⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁷⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Alcee L. Hastings
U.S. House of Representatives
Washington, DC 20515

Dear Representative Hastings:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴⁷¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁷²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁷¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁷² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁷³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁴⁷⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁴⁷⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁷⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁷³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁷⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁷⁵ *Id.*

⁴⁷⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁷⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁷⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁷⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁷⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁸⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁷⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁷⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁸⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Sylvia Garcia
U.S. House of Representatives
Washington, DC 20515

Dear Representative Garcia:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴⁸¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁸²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁸¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁸² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁸³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁴⁸⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁴⁸⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁸⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁸³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁸⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁸⁵ *Id.*

⁴⁸⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁸⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁸⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁸⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁸⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁴⁹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁸⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁸⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁴⁹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable David N. Cicilline
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cicilline:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁴⁹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁴⁹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁴⁹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁴⁹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁴⁹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁴⁹⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁴⁹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁴⁹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁴⁹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁴⁹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁴⁹⁵ *Id.*

⁴⁹⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁴⁹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁴⁹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁴⁹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁴⁹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁰⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁴⁹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁴⁹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁰⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Tony Cárdenas
U.S. House of Representatives
Washington, DC 20515

Dear Representative Cárdenas:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵⁰¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵⁰²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵⁰¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵⁰² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵⁰³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁵⁰⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁵⁰⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁰⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵⁰³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁰⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁰⁵ *Id.*

⁵⁰⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁰⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵⁰⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁰⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁰⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵¹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁰⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁰⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵¹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Grace Meng
U.S. House of Representatives
Washington, DC 20515

Dear Representative Meng:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵¹¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵¹²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵¹¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵¹² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵¹³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁵¹⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁵¹⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵¹⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵¹³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵¹⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵¹⁵ *Id.*

⁵¹⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵¹⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵¹⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵¹⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵¹⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵²⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵¹⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵¹⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵²⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Dina Titus
U.S. House of Representatives
Washington, DC 20515

Dear Representative Titus:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵²¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵²²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵²¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵²² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵²³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁵²⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁵²⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵²⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵²³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵²⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵²⁵ *Id.*

⁵²⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵²⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵²⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵²⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵²⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵³⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵²⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵²⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵³⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Daniel T. Kildee
U.S. House of Representatives
Washington, DC 20515

Dear Representative Kildee:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵³¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵³²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵³¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵³² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵³³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁵³⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁵³⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵³⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵³³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵³⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵³⁵ *Id.*

⁵³⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵³⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵³⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵³⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵³⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁴⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ken Marcus', with a long horizontal flourish extending to the right.

Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵³⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵³⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁴⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Derek Kilmer
U.S. House of Representatives
Washington, DC 20515

Dear Representative Kilmer:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵⁴¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵⁴²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵⁴¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵⁴² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵⁴³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁵⁴⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁵⁴⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁴⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵⁴³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁴⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁴⁵ *Id.*

⁵⁴⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁴⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵⁴⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁴⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁴⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁵⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁴⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁴⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁵⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Chrissy Houlahan
U.S. House of Representatives
Washington, DC 20515

Dear Representative Houlahan:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵⁵¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵⁵²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵⁵¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵⁵² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵⁵³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁵⁵⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁵⁵⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁵⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵⁵³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁵⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁵⁵ *Id.*

⁵⁵⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁵⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵⁵⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁵⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁵⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁶⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁵⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁵⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁶⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Jackie Speier
U.S. House of Representatives
Washington, DC 20515

Dear Representative Speier:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵⁶¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵⁶²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵⁶¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵⁶² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵⁶³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did "not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process."⁵⁶⁴ Additionally, the interpretation of the term "on the basis of sex" in the May 2016 DCL had "given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas." Furthermore, ED and DOJ stressed that "in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy."

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, "I remain committed to advocating for and fighting on behalf of all students. Today's meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country."⁵⁶⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR's jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁶⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵⁶³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁶⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁶⁵ *Id.*

⁵⁶⁶ See OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁶⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵⁶⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁶⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁶⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁷⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁶⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁶⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁷⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Mike Thompson
U.S. House of Representatives
Washington, DC 20515

Dear Representative Thompson:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵⁷¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵⁷²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵⁷¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵⁷² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵⁷³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁵⁷⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁵⁷⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁷⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵⁷³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁷⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁷⁵ *Id.*

⁵⁷⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁷⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵⁷⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁷⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁷⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁸⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁷⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁷⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁸⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

March 26, 2020

The Honorable Sharice L. Davids
U.S. House of Representatives
Washington, DC 20515

Dear Representative Davids:

Thank you for your October 22, 2019, letter addressed to Secretary of Education Betsy DeVos. Because your letter expressed concerns about important civil rights enforcement issues handled by the Office for Civil Rights (OCR), it was referred to me, and I am pleased to respond. An identical copy of this response has been provided to all co-signers of your letter.

Your letter encouraged OCR to work vigorously to enforce the civil rights of all students, including LGBTQ students. You also raise questions regarding OCR's handling of complaints related to sexual orientation and gender identity and urge OCR to reinstate a May 2016 Dear Colleague Letter addressing whether Title IX of the Education Amendments of 1972 (Title IX) covers gender identity discrimination. Finally, you request specific information about OCR's policies for processing sexual orientation and gender identity-related complaints.

During this administration, OCR has strengthened civil rights enforcement for the benefit of all students. As Secretary DeVos has said repeatedly, every student deserves a safe, nurturing, and nondiscriminatory learning environment. OCR's enforcement record demonstrates OCR's commitment to civil rights enforcement with faster and better results for students in OCR's complaint investigations. OCR resolved, on average, 16,000 complaints per year for fiscal years 2017 and 2018. These figures nearly doubled the average of 8,200 complaint resolutions per year under the previous administration. Significantly, OCR achieved a 60 percent increase in the number of complaint resolutions that required schools to make changes to protect students' civil rights. As Secretary DeVos stated, "Our approach has been more effective at supporting students and delivering meaningful results."⁵⁸¹

OCR has taken other steps to further demonstrate its commitment to enforcing the civil rights laws within its jurisdiction. For instance, OCR has taken several actions related to the topic of restraint and seclusion of students, including steps to ensure the accuracy of the data collected in the Civil Rights Data Collection (CRDC). This effort was part of a broader initiative announced by Secretary DeVos on January 17, 2019, to address the inappropriate use of restraint and seclusion on children with disabilities.⁵⁸²

Additionally, to better serve schools, stakeholders, and the public, on January 21, 2020, Secretary DeVos announced the launch of the Outreach, Prevention, Education and Non-

⁵⁸¹ See <https://www.ed.gov/news/press-releases/new-data-show-secretary-devos-reforms-office-civil-rights-are-driving-better-results-students>.

⁵⁸² OCR, in partnership with the Office of Special Education and Rehabilitative Services. See <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

discrimination (OPEN) Center within OCR to focus on proactive compliance with federal civil rights laws. The OPEN Center provides assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws. By investing resources in technical assistance, OCR is able to provide not only much-needed assistance to recipients, but also is able to better support students, families, and stakeholders.⁵⁸³

These major initiatives demonstrate OCR's continued priorities and commitment to ensuring that all students are able to learn in a safe and nurturing environment, while also ensuring support and outreach to schools.

With regard to the specific concerns you expressed about protecting the civil rights of LGBTQ students and complaints related to sexual orientation and gender identity, OCR remains committed to protecting the civil rights of all students, including LGBTQ students. As your letter recognizes, on February 22, 2017, the Department of Education (ED) and the U.S. Department of Justice (DOJ) rescinded the statements of policy and guidance (February 2017 DCL) reflected in the May 2016 Dear Colleague Letter discussing the application of Title IX to gender identity discrimination. (May 2016 DCL).

As ED and DOJ noted in the February 2017 DCL, the May 2016 DCL did “not contain extensive legal analysis or explain how the position [was] consistent with the express language of Title IX, nor did [it] undergo any formal public process.”⁵⁸⁴ Additionally, the interpretation of the term “on the basis of sex” in the May 2016 DCL had “given rise to significant litigation regarding school restrooms and locker rooms . . . [and] was preliminarily enjoined by a federal district court in Texas.” Furthermore, ED and DOJ stressed that “in this context, there must be due regard for the primary role of the states and local school districts in establishing educational policy.”

The rescission of the May 2016 DCL, however, did not signal that OCR will no longer protect LGBTQ students or transgender students. Indeed, following a March 8, 2017, meeting with parents and students from the transgender community, as well as leaders from LGBTQ advocacy organizations, Secretary DeVos emphatically stated, “I remain committed to advocating for and fighting on behalf of all students. Today’s meeting was compelling, moving and welcomed, and part of an ongoing dialogue with families and students throughout the country.”⁵⁸⁵

In view of this commitment, OCR continues to investigate complaints of discrimination and harassment against all students, including LGBTQ students, consistent with OCR’s jurisdiction under Title IX and the other civil rights laws that it enforces. OCR has repeatedly stated that Title IX protects all students from discrimination based on sex, including sex stereotyping, and that while Title IX does not prohibit discrimination on the basis of sexual orientation *per se*, Title IX covers sex discrimination more broadly directed at LGBTQ students.⁵⁸⁶ ED has made clear that where students, including transgender students, are penalized or harassed for failing to conform to sex-based stereotypes, these students have suffered sex discrimination prohibited by Title IX.

⁵⁸³ See <https://www.ed.gov/news/press-releases/secretary-devos-announces-new-proactive-civil-rights-compliance-center-within-office-civil-rights>.

⁵⁸⁴ February 2017 DCL at 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

⁵⁸⁵ *Id.*

⁵⁸⁶ See OCR’s *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties* at 3 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, included below are responses to the specific information requested in your letter about OCR's policies for processing sexual orientation and gender-identity related complaints.

Question 1: What instructions have OCR staff received on processing complaints, particularly those related to complaints involving sexual orientation or gender identity-based discrimination? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 1: All complaints filed with OCR are processed in accordance with OCR's regulations and the processes and procedures outlined in the Case Processing Manual (CPM).⁵⁸⁷ As referenced above, OCR has repeatedly stated—including to its staff—its commitment to enforcing Title IX for all students, including LGBTQ students. A document titled "Instructions to the Field re Complaints Involving Transgender Students" was sent to OCR staff on June 6, 2017. Since that time, we have not issued written instructions to OCR staff regarding the processing of complaints involving sexual orientation or gender identity-based discrimination other than sharing a March 9, 2020, letter addressed to a Member of Congress clarifying that Title IX protects all students from harassment predicated on sex stereotyping if it is sufficiently serious to deny or limit a student's ability to participate in or benefit from an education program or activity, but that a refusal to use transgender students' preferred pronouns, without more, does not violate Title IX. As indicated in that letter, "to the extent any prior sub-regulatory guidance, field instructions, or communications are inconsistent with this approach, they are inoperative." A copy of this letter is enclosed as a courtesy.

Question 2: In light of the February 22, 2017 Dear Colleague letter, what instructions have OCR staff received on processing complaints related to facilities access for transgender students? Please provide copies of any letters, emails, memos, policies, guidelines, training materials, or other formal or informal documents.

Answer 2: Please refer to Answer 1.

Question 3: Please provide documents sufficient to show how OCR prioritizes the processing of complaints of discrimination.

- a. Please provide documents sufficient to show all prioritization directives, instructions, or guidance provided to OCR staff. This should include, but not be limited to, those relating to claim category prioritization and claim closure prioritization.
- b. Have you asked staff to prioritize complaints filed by the Alliance Defending Freedom or the Family Research Council and, if you have, please provide documentation sufficient to show the nature of these complaints.

Answer 3a: OCR has not provided written prioritization directives, instructions, or guidance to staff that include the prioritization of types of claims or the prioritization of certain types of closures. OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM.

Answer 3b: Consistent with Answer 3a, OCR is investigating complaints filed by both the Alliance Defending Freedom and the Family Research Council. OCR is also investigating more

⁵⁸⁷ See Case Processing Manual (November 19, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

than 12,000 other complaints filed by parents, individuals, stakeholder groups, and advocacy organizations. OCR will continue to vigorously enforce federal civil rights laws while also striving to meet OCR's performance metrics pursuant to the Government Performance and Results Act; the agency will evaluate every complaint in a prompt and timely manner in accordance with the laws that it enforces and investigate complaints pursuant to the processes and procedures set forth in the CPM.

Question 4: Please provide documents sufficient to show whether OCR is currently investigating any complaints concerning transgender students' access to sex-segregated facilities or programs.

Answer 4: OCR evaluates every complaint in accordance with the laws it enforces and investigates those complaints pursuant to the processes and procedures set forth in OCR's CPM. OCR will investigate complaints of discrimination and harassment against all students, including transgender students, consistent with OCR's jurisdiction under Title IX and other civil rights laws it enforces.

Question 5: The 6th and 7th Federal circuit courts have explicitly held that Title IX protections against sex discrimination cover discrimination based on sex stereotyping, gender nonconformity, and gender identity. Please provide documents sufficient to show how OCR processes complaints alleging discrimination based on sexual orientation or gender identity originating within these circuits.

Answer 5: OCR does not process complaints in the 6th and 7th Circuits differently than other Circuits. OCR enforces civil rights law consistently throughout the country, and neither the Supreme Court nor Congress has addressed the issue of whether gender identity is covered by Title IX with respect to access to intimate facilities.

Question 6: In the jurisdictions where a federal district court has explicitly ruled that Title IX prohibits sexual orientation and gender identity discrimination, does OCR process complaints differently than other complaints?

Answer 6: No.

Question 7: Provide documents sufficient to show what factors OCR uses to determine whether information it receives about allegations of discrimination related to sexual orientation or gender identity fall outside of its jurisdiction.

Answer 7: OCR relies on the statutory text of Title IX, the Title IX regulations set forth in the Code of Federal Regulations, and the decisions of the United States Supreme Court.

Question 8: What direction did OCR receive from the White House on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 8: As you are no doubt aware, in a legal memorandum issued on October 4, 2017, the Department of Justice concluded that while Title VII of the Civil Rights Act of 1964 provides various protections to transgender individuals in the employment context, it does not prohibit

discrimination based on gender identity, *per se*.⁵⁸⁸ Noting that the statute does not reference gender identity specifically, DOJ noted that, “[s]ex’ is ordinarily defined to mean male or female.” The Equal Employment Opportunity Commission, represented by the United States Solicitor General, filed a brief in a pending Supreme Court case taking the same position regarding Title VII.⁵⁸⁹

Question 9: What direction did OCR receive from the Department of Justice on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instructions, or descriptions of orally communicated directions.

Answer 9: Please refer to Answer 8.

Question 10: What recommendations, guidance, or consultation did entities opposed to LGBTQ equality such as the Alliance Defending Freedom, the Heritage Foundation, and the Family Research Council provide to OCR on interpreting Title IX as it relates to sexual orientation or gender identity? Please provide copies of any letters, memos, emails, any other written instruction, or descriptions of orally communicated directions.

Answer 10: The Department declines to address the characterization that any group is or is not “opposed to LGBTQ equality.” However, OCR can confirm that it has received more than 120,000 comments on its proposed Title IX regulations, some of which address the topic of sexual orientation or gender identity. Of the three entities mentioned in this question, the following submitted public comments: Family Research Council and the Alliance Defending Freedom. Those documents are publicly available at Regulations.gov.⁵⁹⁰

In response to the second question, OCR does not accept instructions or direction from outside organizations and does not consider any previous communications with external groups to constitute “instructions” or “directions” from any of the named entities.

Thank you for your interest in ensuring that students have a safe learning environment that is free from discrimination. If you have any additional questions or concerns, please contact Jordan Harding, Principal Deputy Assistant Secretary, delegated the duties of the Assistant Secretary for Legislation and Congressional Affairs, at 202-401-0020.

Sincerely,



Kenneth L. Marcus

Assistant Secretary for Civil Rights

Enclosure

⁵⁸⁸ See Revised Treatment of Transgender Employment Discrimination Under Title VII of the Civil Rights Act of 1964 (October 4, 2017), at <https://www.justice.gov/ag/page/file/1006981/download>.

⁵⁸⁹ See Brief for the Federal Respondent, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (August 2019), at https://www.supremecourt.gov/DocketPDF/18/18-107/112655/20190816163010995_18-107bsUnitedStates.pdf.

⁵⁹⁰ See Comment submitted by the Family Research Council, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-10499>; see also Comment submitted by Alliance Defending Freedom, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-32712>.

