



August 3, 2020

Kim Richey
Acting Assistant Secretary for Civil Rights
U.S. Department of Education
400 Maryland Ave.
Washington, DC 20202

Dear Acting Assistant Secretary Richey,

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 220 national organizations to promote and protect the civil and human rights of all persons in the United States, and the undersigned civil rights and education organizations, we write regarding the civil rights of and equal educational opportunity for LGBTQ students in the wake of the Supreme Court's ruling in *Bostock v. Clayton County*. As you assume this new role, you have a new opportunity and responsibility to ensure that all students – including those who are LGBTQ – are protected from discrimination and benefit from the Office for Civil Rights' robust enforcement of our civil rights law.

Secretary DeVos has previously stated that she considers "protecting all students, including LGBTQ students, not only a key priority for the department, but for every school in America."¹ Yet, the Department of Education selectively delayed and fast-tracked investigations regarding LGBTQ students based on partisan considerations all while claiming that it was waiting "until the Supreme Court opines" on the legal issue whether discrimination on the basis of sex included discrimination on the basis of sexual orientation or gender identity.² That question has now been answered.

On June 15, 2020, the Supreme Court held in *Bostock v. Clayton County* that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." In a decision authored by Justice Neil Gorsuch, the Court explained that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" because "homosexuality and transgender status are inextricably bound up with sex."

In light of *Bostock* and Secretary DeVos' prior statements about the Department's "key priority" of protecting LGBTQ students, we urge the Office for Civil Rights (OCR) to immediately take the following steps to protect LGBTQ students and educators.

¹ <https://www.ed.gov/news/press-releases/us-secretary-education-betsy-devos-issues-statement-new-title-ix-guidance> (Feb. 22, 2017).

² *Examining the Policies and Priorities of the U.S. Department of Education*: Hearing Before the House Comm. on Education and the Workforce, 115th Cong. at 1:22:57 (May 22, 2018), available at <https://www.c-span.org/video/?445809-1/education-secretary-devos-testifies-agency-priorities>

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First, OCR must revise the information on its website, including its complaint form and online Complaint Assessment System, to make clear to parents, students, and other members of the public that OCR will accept complaints alleging that schools have discriminated on the basis of sexual orientation or gender identity.

This action would be consistent with OCR’s current practice of making clear to the public what types of discrimination fall within the scope of OCR’s jurisdiction when it may not be obvious at first glance. For example, in describing race discrimination complaints, OCR advises that complaints can cover claims such as discrimination on the basis of “limited English proficiency or English learner status; and actual or perceived shared ancestry or ethnic characteristics, including membership in a religion that may be perceived to exhibit such characteristics (such as Hindu, Jewish, Muslim, and Sikh individuals).”³ The same kind of detailed clarity is required about what constitutes sex discrimination. Absent this simple step of notifying the public of the breadth of OCR’s jurisdiction, injured people will not even know that they can seek assistance from OCR.

Second, OCR must identify all complaints that were closed or narrowed on the grounds that discrimination on the basis of sex did not encompass discrimination on the basis of sexual orientation and gender identity. Once identified, the Department must contact all the complainants and provide them with a reasonable opportunity to request that OCR reopen investigations into the issues and claims that were closed or for which OCR refused to exercise jurisdiction. OCR must also review all cases that involve complaints challenging policies that seek to include transgender students fully in the school community and revise and reverse any determinations that rely on the view that gender identity discrimination is not sex discrimination.

These actions would be consistent with OCR’s actions in other situations where an intervening event demonstrated numerous complaints of discrimination were improperly resolved as a matter of law. For example, OCR contacted complainants in more than 800 cases and, at the complainants’ requests, “reopened over 500 complaints that previously had been closed or had too narrow a focus” based on the Supreme Court’s overturned decision in *Grove City v. Bell* (1984).⁴ More recently, OCR promised to use variety of procedural mechanisms to reopen more than 700 complaints that had been dismissed based on a repealed provision of OCR’s Case Processing Manual, making sure that complainants were notified about the reopening and resolution of those complaints.⁵ We expect the number of cases that need to be reopened in response to *Bostock* will pale in comparison to these prior efforts.

³ See, e.g., <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html>;
<https://www2.ed.gov/about/offices/list/ocr/complaintintro.html>.

⁴ U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement* 11 (June 1995), available at https://play.google.com/books/reader?id=pst1aKDA_M0C&hl=en&pg=GBS.PA11; see also *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations for 1989, Part 6: Hearings before Subcomm. of the House Comm. on Appropriations, 100th Cong., 2d Sess. 1378* (March 1, 1988) (OCR’s Assistant Secretary noting “[o]ver 800 cases will be screened and the complainants contacted”), available at <https://play.google.com/books/reader?id=LRxV5eKkMgAC&hl=en&pg=GBS.PA1378>.

⁵ See *The National Federation of the Blind v. U.S. Department of Education*, 407 F.Supp.3d 524, 537 (D. Md. 2019); Settlement Agreement ¶ 2 (Feb. 4, 2020), available at <https://www.nfb.org/sites/www.nfb.org/files/files-pdf/countersigned-settlement-agreement-ace-for-website.pdf>.

Third, OCR must collect data on gender identity harassment in the Civil Rights Data Collection (CRDC) for the 2020-21 school year as well as continue to collect data on sexual orientation harassment. Although released in early July 2020, OCR’s discussion of the data items to be collected was clearly drafted prior to *Bostock*. OCR declined to retain in the definition harassment based on sex “harassment based on gender identity” because it was not “in line with [the definition used in] OCR’s complaint adjudication process.”⁶ But, as we noted above, it is the definition in the complaint adjudication process that must be modified in light of *Bostock*. The definition previously used in the CRDC, which expressly incorporated gender identity, accurately predicted the outcome of *Bostock*.

As OCR has recognized, “data are an important and valuable tool to be used in its efforts to combat and correct discrimination.”⁷ Collecting separate data for harassment based on gender identity, even more than OCR’s current proposal to add 14 sub-elements for harassment based on religion, “would enhance ED’s and the public’s understanding of this occurrence;” “would aid in the identification of the root causes of such prohibited conduct;” and would “aid OCR’s overall mission of civil rights enforcement.”⁸

Bostock has definitively resolved that discrimination on the basis of sexual orientation or gender identity *is* sex discrimination. In order to provide justice to students and their families who have been (and will continue to be) injured by forms of sex discrimination that OCR previously refused to acknowledge, OCR must immediately take the steps above to align itself with the Court’s holding. If you have any questions, please contact Liz King, Leadership Conference education equity program director, at king@civilrights.org or Aaron Ridings, GLSEN director of public policy, at aaron.ridings@glsen.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
American School Counselor Association
GLSEN
Human Rights Campaign
Lambda Legal
National Association of School Psychologists
National Center for Lesbian Rights
National Center for Transgender Equality
National Center for Youth Law
National PTA
National Women’s Law Center

⁶ *CRDC Data Set for School Year 2020–21: Attachment B: Response to First Round Public Comment*, at B-35 (July 2020), available at <https://www.regulations.gov/contentStreamer?documentId=ED-2019-ICCD-0119-0607&attachmentNumber=6&contentType=msw12>.

⁷ *Id.* at B-31 (discussing harassment on the basis of religion).

⁸ *Id.* at B-31, B-33.