Advocates for Children of New York
Protecting every child's right to learn

July 21, 2018

BY EMAIL

Renee Rider
Associate Commissioner, NYSED
Office of School Operations and Management Services
New York State Education Department
89 Washington Avenue, 319M EB
Albany, NY 12234
REGCOMMENTS@nysed.gov

Re: Emergency/Proposed Rulemaking ID No. EDU-21-18-00039-EP
Proposed Action: Addition of Section 100.2(kk)(1)(x) to Title 8 NYCRR
Reports of Incidents of Harassment, Bullying and/or Discrimination Pursuant to DASA

Dear Ms. Rider,

Advocates for Children of New York (AFC) submits these comments in support of the New York State Education Department (NYSED) proposal to amend Section 100.2(kk)(1) of the Regulations of the Commissioner of Education to add a new subparagraph (x) to include illustrative examples of the types of incidents of harassment, bullying and/or discrimination which must be reported to the principal, superintendent or designee as possible violations of the Dignity for All Students Act (DASA).

For more than forty-five years, AFC has worked to ensure a high-quality education for New York students who face barriers to academic success, focusing on students from low-income backgrounds. AFC provides a range of direct services, including know-your-rights trainings for professionals, parents and students about bullying, and free individual case advocacy supporting students who have been involved in bullying incidents. AFC has worked on more than 100 cases with students where LGBTQ status or gender identity was an issue in the case.

We support the proposed amendment. We believe that the list of practical and easy-to-understand examples described in the amendment will be useful to professionals who are unsure how to recognize bullying and harassment.

Proposed Clarification of "Gender" Across the Regulation

We appreciate NYSED's efforts to clarify that DASA protects all aspects of gender and strongly support the amendment's reference to "gender identity and expression" each time gender is referenced.

Recommendations for Proposed Changes

While we strongly support the amendment, we have a few suggestions for clarifying and strengthening the language.

Section 100.2(kk)(1)(x)(a)

We encourage the addition of the following bolded language to subsection (a) of the proposed amendment:

> "a report regarding the denial of access to school facilities, functions, opportunities, or programs, including but not limited to, restrooms, changing rooms, locker rooms, and/or field trips, **consistent with a person's gender identity or expression, or a denial of access to school facilities, functions, opportunities, or programs that is otherwise** based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex; or"

This proposed additional language will remind all stakeholders that DASA protects students' right to be treated in a way that is consistent with their DASA-protected gender identify or expression. This language will help ensure that schools know, for example, that denying students access to the restroom or locker room that is consistent with the students' gender identity or expression is a DASA violation. Furthermore, this change will help promote transgender and gender nonconforming students' equal access to the full range of educational opportunities, including after-school programs, student clubs, and field trips, and help clarify that DASA protects transgender and gender nonconforming students' access to every aspect of education, not just access to gender-segregated facilities.

Section 100.2(kk)(1)(x)(c)

To protect students from a very common form of bullying, harassment, and discrimination, we urge the Regents to amend subsection (c) to read as follows:

> "a report regarding the use of name(s) **or** pronoun(s) or the pronunciation of name(s) **that is inconsistent with a person's gender identity or expression or is otherwise** based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex;"

Transgender and gender-nonconforming students frequently endure harassment, bullying, and discrimination when they are called a name or pronoun that does not match their gender identity. In our experience, school professionals often have questions or are unsure about what naming conventions are permitted under DASA. Our suggested language will address this confusion both for school staff who are hostile toward individual students' gender identities and for the many school personnel who strive to create inclusive environments for all students.

Our proposed language provides an important clarification by explicitly identifying the use of a name or pronoun inconsistent with a person's gender identify or expression as a basis for making a report under DASA. A diligent investigation following such reports will distinguish the occasional careless error from incidents where there is harmful indifference or an intent to harass, bully or discriminate against a transgender or gender-nonconforming student.

Section 100.2(kk)(1)(x)(e)

Finally, to protect the privacy of transgender and gender-nonconforming students, we urge the Regents to add the following provision to the proposed amendment:

> **"(e) a report regarding the disclosure of a student's transgender status or sexual orientation or related private medical information (i.e., the "outing" of a student's gender identity or sexual orientation), without that student's express consent, or a disclosure that otherwise targets a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender (which includes gender identity and/or expression), or sex;"**

The ability of transgender and gender-nonconforming students to control who is aware of their identity is paramount to maintaining their safety at school and at home. This protection is ripe for regulatory clarification.[1] Moreover, such an addition would be consistent with NYSED's own guidance on the rights of transgender and gender-nonconforming students. NYSED guidance (http://www.p12.nysed.gov/dignityact/documents/Transg_GNCGuidanceFINAL.pdf) rightly notes that students' ability to protect their gender status is essential for their safety, particularly for students who have not come out to members of their family about their gender identity or gender expression. Including privacy protections in the proposed amendments is critical for creating safe spaces for young people in school and beyond the schoolhouse door.

[1] In addition to the confidentiality guaranteed to students regarding personally identifiable information and educational records under New York State Education Law § 2-d and FERPA, 20 U.S.C. 1232g; C.F.R. Part 99, case law supports the proposition that students have a strong privacy interest in maintaining the confidentiality of their transgender status. See *Karnoski v. Trump*, No. 2:17-cv-1297-MJP, slip op. at 16–17 (W.D. Wash. Dec. 11, 2017) (finding a likelihood of success for a substantive due process claim that being denied transgender-related healthcare and the ability to serve openly in the military infringes on fundamental interests such as individual dignity, autonomy, and freedom from government intrusion, including the right to make decisions concerning bodily integrity and self-definition, which are central to individual identity); *see also Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (holding that "the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism") (citing *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (in the context of other potentially stigmatizing diagnoses, plaintiffs "clearly possess a constitutional right to privacy regarding their condition")); *cf. C.N. v. Wolf*, 410 F. Supp. 2d 894, 903 (C.D. Cal. 2005) (holding that the plaintiff "alleged a serious invasion of her privacy interest by Wolf when he disclosed her sexual orientation to her mother" and finding that she had consequently stated a claim against her school for outing her); *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) ("It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity. . . . We can, therefore, readily conclude that Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection under *Whalen*."); *Bloch v. Ribar*, 156 F.3d 673, 685–86 (6th Cir. 1998) ("Our sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood. Publically revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private. Indeed, for many of these reasons, a number of our sister circuits have concluded that information regarding private sexual matters warrants constitutional protection against public dissemination.").

Thank you for considering our comments. If you have any questions or would like to discuss our comments further, you can reach me at **gmiller@advocatesforchildren.org** or (646) 582-1846.

Sincerely,

Gena Miller

Gena Miller, Esq.
Equal Justice Works Fellow
Sponsored by Greenberg Traurig