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July 23, 2018

NYS Education Department  
[regcomments@nysed.gov](mailto: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

To Whom It May Concern,

I write to you today on behalf of Empire Justice Center to express support and submit a request for three specific improvements to the recent emergency regulation promulgated by the New York State Education Department (“the Department”) regarding the rights of students under the Dignity for All Students Act (“DASA”) based on their actual or perceived gender (including gender identity and gender expression).

We submit this comment not only as a provider of direct civil legal services to the LGBTQ community, but as a member of a coalition of civil rights attorneys, policy advocates, parents, and licensed counselors of transgender and gender-nonconforming youth. We have worked with the Department for years to address the needs of this incredibly vibrant but vulnerable student population. Beginning in 2014, we came together to advocate for a clear regulation that would spell out, in no uncertain terms, the rights of these students and the responsibilities of our school districts. We also helped the Department develop the “Guidance to School Districts on Creating Safe and Supportive School Environment for Transgender and Gender-Nonconforming Students,” released in July 2015, a measure we viewed as important and necessary, but certainly not the final step toward securing safe school experiences for these students.

Since that time, we have worked closely with students, parents, and schools to help educate all parties about the rights of transgender and gender-nonconforming students in New York State public schools. We have advocated for countless transgender and gender-nonconforming students statewide who still experience harassment, bullying, and discrimination in school

districts that view the Guidance as merely suggestive rather than mandatory. We have also continued to work with the Department, sharing information about the uneven implementation of the Guidance, the areas in which the Guidance has improved student access to education, the areas where challenges remain, and have strongly urged the Department to promulgate regulations that clearly state the rights and protections available to students on the basis of their actual or perceived gender under DASA. We applauded the Department and State Attorney General for their joint statement of support for these students, issued on February 28, 2018, in light of the deleterious interpretations and policies of the U.S. Department of Education on these same issues.

Now it is time to put into effect a regulation that clearly and unquestionably states the legal rights of these students and the responsibilities of school districts in our state.

To that end, the Department's emergency regulation contains several vital amendments that we completely and whole-heartedly support. However, upon our careful review, we see several opportunities for improving the proposed language so that it is less confusing and easier to follow, and more aligned with the language and intent of DASA.

We ask that you consider including these three changes in the final regulation, as we believe integrating the language suggested below will lead to a stronger, more practical regulation that will more effectively accomplish the Department's stated goal of clarifying and assisting in DASA implementation statewide.

### ***Clarifying "Gender" Across the Proposed Regulation***

We appreciate the Department's clarification that "gender" includes "gender identity and gender expression." We recommend that this remain in all pertinent places throughout.

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

We strongly encourage the Department to add the following bolded language to the final regulation:

"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 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 language specifies that a student must be treated in a way that is consistent with their protected status, including their gender identity and gender expression, in all facets of the school experience. To do otherwise – that is, to treat a student in a way that is inconsistent with

their gender identity or gender expression in any facet of the school experience, including but not limited to sex-segregated facilities – will give rise to a report under DASA.

The inclusion of this language is critically important because it clarifies that a report may be triggered when issues arise beyond a student's access to appropriate restrooms, changing rooms, locker rooms, and other sex-segregated facilities. While these matters are essential for transgender and gender-nonconforming students, equal access to after school programs, student clubs, field trips, and other educational opportunities are equally important to ensuring that they are protected from harassment, bullying and discrimination in the totality of the school experience. The inclusion of this language therefore satisfies the policy goals underlying the Department's efforts to ensure true protection and equality for transgender and gender-nonconforming students in our state's public schools.

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

We strongly urge the Department to change this provision 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;”

The purpose of this provision is to specifically identify a basis of a report under DASA resulting from the use of a name and/or pronoun which is not congruent with a student's gender identity or expression. This is one of the most common forms of harassment, bullying, and discrimination transgender and gender-nonconforming students endure, and is one of the areas in which teachers, administrators, and other staff have the most questions about what is acceptable or permitted under DASA; not only from staff who may not support individual students' gender identities, but also from well-meaning staff who are doing their best to create inclusive learning environments for all students.

For these reasons, it is of paramount importance that this language addresses the issue clearly and explicitly, which the addition of the bolded language proposed above will do. We are concerned that without the inclusion of the bolded language this provision of the regulations will not provide sufficient clarity to adequately define the protections of transgender and gender-nonconforming students, thus causing confusion for students and teachers alike.

This regulatory language is constructed to expressly clarify what actions could serve as a basis of a report under DASA. A diligent investigation following such reports will identify the occasional well-meaning mistake from harmful indifference or malicious intent to harass, bully, or discriminate against the transgender or gender-nonconforming student. To leave out the

bolded language would clearly undermine the Department's stated purpose in pursuing these regulations.

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

We strongly urge the Department to add the following sub-provision regarding the privacy of transgender and gender-nonconforming students:

**“(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;”**

This final substantive protection of privacy is ripe for regulatory clarification.<sup>1</sup> The privacy of transgender and gender-nonconforming students is paramount to their safety, both in the school environment as well as at home, especially if they have not yet come out to members of their families about their gender identity or gender expression. Omission of this language by the Department would undermine the portion of its own Guidance that addresses this issue and would erroneously imply that protecting the privacy and confidentiality of our students is not a right that must be respected and fiercely guarded by our schools, when in fact it is.

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<sup>1</sup> 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. Publicly 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.”).

## **CONCLUSION**

We ask that the Department adopt these recommended additions in the final regulatory language to better clarify and assist in DASA implementation statewide, protect the rights of transgender and gender-nonconforming students under DASA, and ensure that all students in New York State have an opportunity to thrive in a school environment that is safe, supportive and free from bullying, harassment, and/or discrimination.

Sincerely,

**Eòghann Renfroe**

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