

United States Senate

WASHINGTON, DC 20510

September 29, 2022

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington, D.C. 20002

Dear Secretary Cardona,

We write regarding the Department of Education's (the Department) release of a report on June 3, 2022 entitled "Study of State Policies to Prohibit Aiding and Abetting Sexual Misconduct in Schools" (the Report). The Report examines state laws, regulations, and policies to ensure that certain school employees with a known history of engaging in sexual misconduct with minors cannot transfer schools without consequence.

Under Section 8546 of the Elementary and Secondary Education (ESEA), states are required to have such laws, regulations, or policies in place as a condition for receiving federal grant dollars. As you know, Section 8546—a provision we both sponsored—was enacted on December 10, 2015, as part of the reauthorization of the ESEA.

We authored this provision in response to a tragedy that impacted both of our states. A 12-year old student was raped and murdered by his vice principal in West Virginia. The perpetrator had previously sexually assaulted a different student while employed at a school in Pennsylvania. Instead of being fired for misconduct, he was allowed to quietly resign and transfer to a new school in West Virginia, with tragic consequences.

In 2010, the Government Accountability Office (GAO) found that "school officials allowed teachers who had engaged in sexual misconduct toward students to resign rather than face disciplinary action, often providing subsequent employers with positive references."¹ In the first six months of 2022 alone, preliminary searches of news sources illustrate at least 181 K-12 educators and administrators were arrested for child sex crimes, including sexual assault of students and possessing child pornography.

Our legislation sought to end this horrific practice, known as "passing the trash" or "aiding and abetting sexual abuse." Yet, seven years after its enactment, the patchwork of state laws identified in the Report show that many states have failed to sufficiently prohibit the practices that contributed to a student's death, such as the false letters of recommendation that allowed a school employee to transfer schools with a "clean" record. The findings in the Report underscore the need for stronger enforcement to ensure that states comply with this important provision of

¹ United States Government Accountability Office, "Selected Cases of Public and Private Schools that Hired or Retained Individuals with Histories of Sexual Misconduct," Report to the Chairman, Committee on Education and Labor, House of Representatives, Dec. 2010.

law. Further, we are concerned that the Department has yet to put into place a concrete timeline by which states must come into compliance.

The Department began work on this Report in October 2019 and entered into a contracting agreement with an outside entity to complete a survey of all 50 states and the District of Columbia. Data in the Report was collected through a survey of state entities, who answered questions about the status or types of laws in place in each state, as well as thorough reviews of public laws, regulations or policies. Ultimately, 48 state educational agencies (SEAs) or SEA representatives participated in the survey, which took place throughout October 2020.

According to the findings in the Report, all 50 states and the District of Columbia require employers to complete criminal background checks on prospective school employees as part of the hiring process. However, the Report acknowledges that these laws do have limitations, including that “applicants with a record of sexual misconduct in other states might omit or falsify their prior employment history on a job application” without facing legal ramifications.² In addition, at least 35 states had at least one other law, regulation, or policy in place to protect students by using one of four major categories of protection: (1) requirements on prospective employers to evaluate an applicant’s past; (2) mandatory disclosures for job applicants; (3) information collected from current or former employers; and (4) prohibitions on suppressing information.

However, the Report also revealed that, at minimum, 32 states do not have policies in place to meet the baseline requirements of Section 8546. According to the findings:

1. Only 19 SEAs believed that existing state laws and policies in their respective states were sufficient to meet the requirements of Section 8546.³
2. Only 18 SEAs “monitor district compliance with state laws or policies” to prohibit the practice of aiding and abetting sexual misconduct.⁴
3. 8 SEAs reported that they do not document district complaints and/or incidents of sexual misconduct and 7 SEAs did not know whether their districts documented complaints and/or incidents of sexual misconduct.⁵
4. Only 9 SEAs had laws that address all four of the significant factors identified by the Report as prohibiting the aiding and abetting of sexual assault.⁶
5. Only 20 SEAs have laws prohibiting information suppression, including prohibiting termination agreements or misleading letters of recommendation.⁷

These findings show that the Department has significant work to do to ensure that states are aware federal funding they receive is at risk if they do not comply with the law. Notably, during the survey process, many SEAs offered suggestions and recommendations for the Department to help states comply with the law. Those included requests for the Department to vet and share examples of policies and practices that other states are using to address the requirements of

² Page 8, “Study of State Policies to Prohibit Aiding and Abetting Sexual Misconduct in Schools.” <https://blog.ed.gov/2022/06/new-ed-commissioned-study-on-esea-provisions-that-protect-students/>

³ Page xi, “Study of State Policies to Prohibit Aiding and Abetting Sexual Misconduct in Schools.”

⁴ Page xiii, “Study of State Policies to Prohibit Aiding and Abetting Sexual Misconduct in Schools.”

⁵ Page xiii, “Study of State Policies to Prohibit Aiding and Abetting Sexual Misconduct in Schools.”

Section 8546, as well as clearer definitions and guidance from the Department regarding Section 8546. We strongly urge the Department to provide this requested assistance. As you said in your testimony before the Senate Appropriations Committee’s Labor, Health and Human Services, Education and Related Agencies subcommittee, on June 7, 2022, “We are going to strengthen the system. We are going to make sure states are complying with the recommendations from the report, and the expectations from the report. And again, it just goes back to making sure we are holding states accountable and following the law.”⁸

We urge the Department to immediately put the recommendations from this Report into practice to ensure that all policies in place to protect children are enforced, especially the ESEA’s prohibition on aiding and abetting sexual abuse. Specifically, we urge the Department to issue formal guidance to states to ensure states are fully aware of how they can comply with their obligations under the law. We also ask you to respond to the following questions regarding the Department’s plan to ensure state compliance moving forward:

1. In a letter dated June 3, 2022, you stated that “Withholding [funds] is also an available enforcement action.”
 - a. Does the Department plan to use the authorities it outlined in the Secretary’s reply to our letter, including withholding of funds?
 - b. Which funds does the Department intend to withhold?
 - c. When does the Department expect that these enforcement measures will go into effect? Please be specific.
2. On July 21, 2022, the Department held a webinar to help educate states and SEAs on what Section 8546 requires.
 - a. What follow-on efforts will the Department conduct after the webinar to “[hold] states accountable” for their obligations under Section 8546?
3. The Report evaluated state laws to prevent the aiding and abetting of sexual abuse using four categories of protection: (1) prospective employer requirements, (2) job applicant requirements, (3) current/former employer requirements, and (4) prohibitions on information suppression. Only nine states had laws to address all four categories.
 - a. Does the Department plan to use these metrics to evaluate state compliance?
 - b. Does the Department plan to issue guidance explaining how they will evaluate state compliance?
4. Has the Department identified any challenges to enforcement? If so, please describe in detail.

⁸ US Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services (6/7/22)
<https://www.appropriations.senate.gov/hearings/hearing-on-the-presidents-fiscal-year-2023-budget-request-for-the-united-states-department-of-education1>

We look forward to continuing to work on this issue with you to ensure that we are keeping students safe at school. We ask that you provide answers to these inquiries by October 27th, 2022.

Sincerely,



Pat Toomey
United States Senator



Joe Manchin III
United States Senator