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Kun Mullan
PRA Coordinator
Strategic Collections and Clearance Governance and Strategy Division
Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development
U.S. Department of Education
400 Maryland Avenue, SW, LBJ, Room 4C210
Washington, DC 20202–1200
Attention: Marcos Cerdeira

Re: Agency Information Collection Activities; Comment Request; Monitoring of Section 8546 Prohibition on Aiding and Abetting Sexual Abuse State Educational Agency Self-Assessment
Docket ID: ED–2024–SCC–0122
Document Number: 2024–22464

Dear Coordinator Mullan:

The Defense of Freedom Institute for Policy Studies (“DFI”) is a national nonprofit organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Former senior leaders of the U.S. Department of Education (“Department”) who are experts in education law and policy founded DFI in 2021. DFI contributes its expertise to policy and legal debates concerning education law and policy, including the Department’s authority to address sexual misconduct in elementary and secondary schools (“K–12 schools”).

In 2015, Congress reauthorized the Elementary and Secondary Education Act (“ESEA”) by enacting the Every Student Succeeds Act (“ESSA”). Section 8546 of ESSA provides as follows: “A State, State educational agency, or local educational agency . . . shall have laws, regulations, or policies that prohibit any . . . school employee . . . from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in



violation of the law.”¹ This provision targets the abhorrent and disturbingly frequent practice of “passing the trash,” in which school district officials and school administrators pass sexually abusive teachers and staff to other schools and districts rather than investigate allegations of misconduct against them.² Nine years after Congress enacted this provision as part of ESSA, most states have failed to adopt laws and policies that comply with Section 8546,³ and the Department has not enforced Section 8546 against noncompliant states.

On October 1, 2024, in response to a direction from Congress to provide information on the status of states’ compliance with Section 8546, the Department published a notice in the *Federal Register* for a new information collection request (“ICR”) seeking information on state laws and policies.⁴ Included with the ICR is a proposed State Education Agency (“SEA”) Self-Assessment regarding compliance with Section 8546.

As an initial matter, DFI believes that the Department’s survey with respect to SEA compliance with Section 8546 is long overdue and will likely yield valuable information on policies across the country to combat the practice of “passing the trash.” As discussed in DFI’s 2023 report titled *Catching the Trash*, teacher unions and school bureaucracies have for too long shielded sex abusers operating in our nation’s public schools, resulting in these abusers being passed from school to school and district to district—often with favorable recommendations from their colleagues—instead of facing investigations of sexual assault allegations against them. The Department has an important role to play, both under Section 8546 and Title IX of the Education Amendments of 1972 (“Title IX”), to ensure that states have policies that adequately address sexual misconduct in their education programs and activities.

DFI’s concern with regard to the self-assessment the Department proposes to issue to SEAs relates to its breadth. Question A1 on the self-assessment requires SEAs to review information in Appendix A representing “laws and regulations in your State responsive to section 8546” that was collected in 2020 as part of a Department study on sexual abuse in K–12 schools. But Appendix A does not merely represent laws and regulations responsive to Section 8546; in fact, it contains many laws and policies that, while no doubt beneficial, have nothing to do with prohibiting the aiding and abetting of school employees who have sexually abused minors in obtaining new jobs. The list includes, for instance, policies requiring criminal background checks, the checking of certifications, applicant disclosures, and timely responses by former employers to prospective employers seeking information. In fact, out of all of the types of laws and regulations listed, only

¹ Pub. L. No. 114-95, 129 Stat. 2120 (Dec. 10, 2015) (codified at 20 U.S.C. § 7926).

² See <https://dfipolicy.org/wp-content/uploads/2023/05/Catching-the-Trash-FNL.pdf> (citing a 2018 study finding that a teacher who sexually abuses children is, on average, transferred to three different school districts and can have as many as 73 victims).

³ Leslie M. Anderson et al., *Study of State Policies to Prohibit Aiding and Abetting Sexual Misconduct in Schools*, x (2022).

⁴ 89 FED. REG. 79903 (Oct. 1, 2024).



one appears to be directly in compliance with Section 8546: “Provisions barring letters of recommendation that omit information about incidents or allegations of sexual misconduct with a student or minor.”

The Department’s information collection specifically regarding Section 8546 as listed on the self-assessment is thus both too narrow and too broad. It is too narrow because it does not directly refer to laws and regulations that prohibit all types of conduct, including but not limited to providing letters of recommendation, aiding and abetting sexual abusers in obtaining new employment—which is exactly what Section 8546 requires. And it is too broad because the Department proposes to collect information on state employment laws and regulations relating to K–12 schools that goes far beyond whether such laws comply with the Section 8546 mandate. It is simply inaccurate to state that criminal background checks, as one example, comply with Section 8546 when such checks do nothing to prohibit aiding and abetting sex abusers in obtaining new employment. The Department should not allow states that have no law prohibiting such aiding and abetting to check a box indicating that they have compliant laws and policies. This will lead to confusion on the part of the Department, Congress, and the public regarding which states are actually in compliance with Section 8546. Such confusion does a disservice to the enforcement of the law and to anyone trying to understand what laws and policies currently exist that target the practice of passing the trash.

DFI recommends that the Department include the following two questions at the outset of its assessment:

- “Does your State have any law or regulation that prohibits any school employee from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law? If the answer is yes, list all laws and regulations that do so.”
- “Does the SEA maintain a policy or policies that prohibit any school employee from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law? If the answer is yes, list all policies that do so.”

These questions track the language of Section 8546 and thus would solicit information on laws, regulations, and policies that are actually responsive to this mandate. Such information would be much more relevant to Congress’s request for information on state compliance with Section 8546 than information about a broad array of employment policies that do not actually comply with the statute.



Regarding these other questions, DFI does believe that they may be helpful in informing Congress, government officials, and the public of what state-level laws, regulations, and policies exist that protect children against sexual abuse in K–12 schools. In particular, information about laws, regulations, and policies listed in Appendix A under “Prohibitions on information suppression” would be useful to legislators, regulators, and anyone else seeking to understand effective policies that combat the practice of passing the trash. As we discuss in our report *Catching the Trash*, such policies can work in tandem with policies prohibiting the aiding and abetting of sex abusers in obtaining new employment to ensure that prospective employers receive complete information regarding past investigations and findings of sexual misconduct against school employees; however, state and local agencies should adopt such policies *in addition to*, not in place of, prohibitions on aiding and abetting sex abusers, and these information-suppression prohibitions should not be confused with laws directly complying with Section 8546.

In sum, we call on the Department to use this SEA self-assessment as an opportunity to actually collect information from the states regarding whether they are in compliance with Section 8546. This will ensure that Congress is kept informed on compliance with that law and that the Department can consider, now or in the future, how it can encourage compliance with this critical provision of federal law.

DFI appreciates the opportunity to provide input on this important issue and the Department’s consideration of these recommendations.

Sincerely,

/s/ Paul F. Zimmerman

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Defense of Freedom Institute for Policy Studies