

FALL 2014 NEWSLETTER

SCHOOL LAW UPDATE

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Recent Administrative Agency Guidance for Schools

This year federal agencies, specifically the Department of Education’s Office for Civil Rights (“OCR”) and the Civil Rights Division of the Department of Justice, have significantly increased the intensity of their investigations of school districts in Texas and across the country. In addition, the Departments of Education and Justice have provided new guidance materials relating to this increased oversight. School districts should prepare for more frequent and more disruptive interactions with these agencies with respect to student discipline, equal educational opportunities for minority students, and disability-based bullying or harassment. Additionally, school districts should expect the OCR to show heightened sensitivity toward districts’ responses to student-on-student sexual violence.

Student Discipline

In January of this year, the Departments of Education and Justice issued a joint “Dear Colleague Letter” concerning discriminatory discipline practices in public schools. A copy of this letter can be found [here](#). The DOE and DOJ expressed particular concern that students of protected classes, particularly racial and ethnic minority students, were being disproportionately subjected to discipline which excluded them from the classroom. The Dear Colleague Letter emphasized the importance of developing a positive school climate, the value of positive behavioral interventions as a first step in discipline, and the need for schools to collect and analyze data concerning their discipline practices.

In March of this year, the OCR released a “Data Snapshot” reflecting its compilation of information collected in the Civil Rights Data Collection (“CRDC”), which drew information from all school districts throughout the country during the 2011-2012 school year. A copy of this report can be found [here](#). This report indicates disproportionate rates of suspensions and expulsions for students of color and disproportionate rates of restraint and seclusion by race and disability status.

Additionally, in April of this year, the OCR revised significant portions of its Case Processing Manual including Section 602 which addresses data collection and information gathering, the OCR’s authority to obtain information, interviews with district personnel and students, and actions constituting denial of access by school districts. The Case Processing Manual can be found [here](#).

Since January, both the DOE and DOJ have been giving high priority to investigating complaints that implicate discipline practices. Both the OCR and the DOJ have recently begun issuing extensive requests for information in response to student complaints involving discipline. These go far beyond routine requests for the districts’ policies and procedures and for information

concerning the complainant. Now, these agencies are requesting access to districts' internal student data systems and are seeking massive amounts of detailed information concerning district personnel, students, and individual disciplinary events district-wide. Complying with these requests is costly and time-consuming.

OCR staff members have explained that when they receive a student complaint which implicates discipline, they will examine the target district's CRDC profile and, if they perceive any problems with that data, they will broaden their investigation of the student's complaint to include class-based issues regarding discriminatory discipline. This may occur even if the district's CRDC data does not reflect any disproportion with respect to the protected class represented by the student-complainant. Additionally, since January, the DOE has specifically instructed local OCR offices not to permit Early Complaint Resolution (in which the OCR acts, essentially, as a mediator between the complainant and the district) for complaints that involve discipline issues. Instead, investigations continue for an extended period and often include extensive, and sometimes hostile, on-site interviews with district personnel and students. Districts across the country are complaining about being strong-armed into burdensome consent agreements by the DOE and DOJ's investigations.

School districts need to be sensitive to the administrative agencies' focus and tactics as districts review their discipline policies and procedures and as district teachers and administrators respond to students and parents who express concern about specific disciplinary events. Additionally, districts should be proactive in creating a welcoming school climate, employing rewards to encourage appropriate student behavior, and monitoring student discipline data to identify and address any troublesome patterns concerning groups of students receiving discipline or district personnel imposing discipline.

Title IX and Sexual Violence

On April 29th of this year, OCR released a significant guidance document entitled "Questions and Answers on Title IX and Sexual Violence." A copy of this document can be found [here](#).

This guidance document is intended to assist elementary, secondary, and post-secondary institutions in preventing or responding to student-on-student sexual violence. OCR reiterated its previous guidance that when a responsible school employee knows, or should know, of student-on-student sexual violence that is sufficiently severe to create a hostile environment, the school must take prompt and effective steps to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and remedy its effects.

According to the OCR, a school district may receive notice of sexual violence against a student either directly, through a report from a student, parent, or friend to a teacher, principal, or school law enforcement officer, or indirectly, through social networking sites or the media. Alternatively, such notice may be imputed to the district if its students are broadly aware of student-on-student sexual violence. The OCR explains that "if a school would have found out about the sexual violence had it made a proper inquiry, knowledge of the sexual violence will be imputed to the school even if the school failed to make an inquiry." A school's knowledge that a

student experienced sexual violence may trigger child-find obligations under IDEA or Section 504, as the student may develop mental health issues caused by the violence.

A school's grievance procedures concerning sexual violence must contain certain elements in order to comply with Title IX, including: the opportunity to present witnesses and evidence; use of a preponderance of the evidence standard of review; prompt time frames for the complaint process; and written notice to the complainant and the alleged perpetrator regarding the outcome of the investigation. Even if a criminal investigation is on-going, a school must still conduct its own Title IX investigation, and the school should not wait until the conclusion of the criminal investigation to conduct its own inquiry. Generally, a school's investigation process should be completed within 60 days of the complaint.

OCR explains that schools are obligated to investigate incidents of student-on-student sexual violence which occur off-campus in order to determine whether there are any continuing effects on campus that are creating a hostile environment. If so, the school must address the hostile environment as it would if the conduct had occurred on campus. OCR believes that the mere presence of the alleged perpetrator of off-campus sexual violence can create a hostile environment on campus.

OCR strongly emphasizes the school's obligation to protect students who complain of sexual violence. During the investigation of the student's complaint, the school must provide interim measures to protect the student complainant, such as: separation from the alleged perpetrator; access to counseling; and modification of assignments or due dates. The school must also be sensitive to the possibility that the complainant may be subjected to retaliation by students for making a complaint. Should the school become aware of student retaliation that is sufficiently severe to create a hostile environment, the school must take prompt and effective steps to end the retaliation, eliminate the hostile environment created by the retaliation, prevent its recurrence, and remedy its effects.

When student-on-student sexual violence has occurred, merely imposing sanctions against the perpetrator will probably not be sufficient to satisfy a school's obligations under Title IX. Instead, OCR suggests that remedies for the complainant may also include: moving the perpetrator to a different campus (or a complainant who requests to be moved); providing counseling; and providing tutoring or other academic support. More broadly, a proper response will also include community-wide remedies including training and education regarding sexual violence, which may include training targeted to a group of students such as a sports team.

The OCR has recently been increasing its investigations into student sexual violence at post-secondary educational institutions, but this guidance document applies as well to primary and secondary schools. School districts are being asked to be aware of and responsive to information on social media, information in the news, and information that is "well-known among students" when this information involves student sexual violence. Districts should be pro-active in providing training on student sexual violence and Title IX reporting procedures to the school community including school personnel, students, and parents.

Charter Schools

On May 14th of this year, OCR released a Dear Colleague Letter addressing charter schools' obligations to follow federal civil rights laws. A copy of this letter can be found [here](#).

OCR explains that all public charter schools, regardless of whether they receive federal funding through the Department of Education's Charter Schools Program, are subject to federal non-discrimination provisions of Title VI, Section 504 of the Rehabilitation Act, and Title IX.

In this letter, OCR reminds public charter schools that they are prohibited from discriminating on the basis of race, color, national origin, or disability in their admissions policies and practices. Specifically, charter schools must provide meaningful access to admission and school-related information to non-English proficient parents and to disabled parents. Eligibility criteria must be applied in a nondiscriminatory manner and must not have the effect of excluding students on the basis of race, color, or national origin.

OCR also reviews charter schools' obligation to provide free appropriate public education for students with disabilities, which OCR and the Office of Special Education and Rehabilitative Services will address in greater depth in a joint guidance letter that they will soon issue. Additionally, OCR addresses charter schools' obligation to help English language learners overcome language barriers in order to participate meaningfully in charter school's educational programs and the need for charter schools to avoid discrimination in student discipline, particularly discipline which removes students from the classroom.

Given this guidance, public charter schools, like traditional public schools, need to be attentive to OCR's other guidance documents and to current trends in administrative agencies' investigation practices.

Equal Access to Educational Opportunities

On October 1st of this year, OCR released a Dear Colleague Letter addressing school districts' legal obligation to provide students with equal access to educational resources and opportunities without regard to race, color, or national origin. A copy of this letter can be found [here](#).

OCR expresses concern that students of color are less likely to have access to: advanced placement classes; talented and gifted programs; experienced teachers; safe and modern facilities; technology; and educational materials. In this letter, OCR also objects to school funding mechanisms that result in lower spending per-student in schools or districts with higher populations of students of color, and OCR repeatedly addresses its guidance to states as well as school districts.

OCR may find intentional discrimination in violation of Title VI if a district allocates educational resources differently among schools that have different student populations with respect to race, color, and national origin but which are otherwise similarly situated. OCR may also find intentional discrimination if it finds similarly situated groups of students of different races having demonstrably different access to specific educational resources within the same school. Additionally, if a district's allocation of educational resources creates quantitative or qualitative

racial disparities, OCR will investigate whether such disparities are the result of discrimination in violation of Title VI.

OCR believes that inequitable allocation of advanced placement classes, talented and gifted programs, experienced teachers, technology, and updated facilities tends to be adverse for the students who are under resourced. OCR will consider a district's explanation for disparities in resource allocation, and it may find inequitable allocations that benefit traditionally underserved student populations to be acceptable, but OCR will give only limited deference to educators' expertise and decisions regarding resource allocation. When considering a district's per student funding, OCR's focus is not on whether the dollar amount is equal but on whether the money spent is providing equal educational opportunity.

In this letter, OCR reviews the types of information it will collect and analyze as part of its impending investigations, and the agency strongly recommends that districts proactively self-assess their compliance with Title VI with respect to allocation of educational resources. Such self-assessment should include use of CRDC data reports, notice to the school community, and designation of a Title VI coordinator. Districts that uncover disparities in resource allocation, take proactive efforts to eliminate the inequities, and remedy their effects, may avoid a Title VI violation and may bypass entering into a resolution agreement with OCR.

However, if OCR identifies a violation, components of a resolution agreement may include: developing additional programs and training; relocating specialized educational programs; reassigning school leadership personnel; providing incentives to attract experienced teachers to hard-to-staff schools; purchasing additional technology and educational materials for underserved schools; and allocating more funds for maintenance and repair of older facilities.

OCR also provides some surprising guidance concerning potential resolution agreement components involving funding and labor relations. With regard to funding, OCR suggests provisions to increase the involvement of community organizations and businesses as partners and private sources of educational funding. OCR also seems to advocate for Robin Hood-type plans for seeking and distributing funding from outside sources which would involve pairing or grouping schools seeking such supplementary funding. As for labor relations, OCR explicitly states that, "[w]hen a district's adherence to collective bargaining agreements or State law has caused or contributed to discrimination against students on the basis of race, color, or national origin, Federal civil rights obligations may require a school district to renegotiate agreements, revise its personnel policies, or take other steps to remedy the discrimination." Dear Colleague Letter of October 1, 2014, p. 23.

We believe that school districts should expect an increase in OCR investigations concerning inequitable allocation of educational resources, and we believe these investigations will be widely publicized. In light of OCR's apparent embrace of private funding mechanisms and labor contract renegotiations, resolution agreements stemming from such investigations are likely to be particularly controversial. Given its repeated emphasis on states' actions in this letter, OCR may initially concentrate its investigations in a few states. We would not be surprised if Texas school districts were targeted for early investigations.

Bullying or Harassment of Disabled Students

On October 21st of this year, OCR released a Dear Colleague Letter addressing the impact of bullying and harassment on students with disabilities. A copy of this letter can be found [here](#).

OCR reiterated its previous guidance that when a school knows or should know of bullying based on a student's disability, the school must take immediate and appropriate action to investigate, and, if such bullying occurred and was sufficiently serious to interfere with a student's ability to participate in or benefit from the school's services, the school must promptly end the bullying and remedy its effects.

In its new letter, OCR broadens its perspective on bullying of disabled students, stating that OCR believes that such bullying may result in a denial of a free, appropriate public education (FAPE), in violation of Section 504 of the Rehabilitation Act or the Individuals with Disabilities Education Act (IDEA), regardless of whether the bullying was based on the student's disability, and regardless of whether the bullying constitutes disability discrimination. OCR strongly encourages schools to convene the student's 504 team or Individual Education Plan (IEP) team in response to any report of bullying of a student with disabilities in order to determine whether the student's services need to be adjusted.

OCR investigations of complaints of disability-based bullying have increased in both frequency and intensity in recent years and have resulted in burdensome resolution agreements for school districts across the country. School districts will want to be sensitive to OCR's expanding concern with disability-based bullying as they develop and implement training programs and reporting protocols for their staff and students in this area. Schools should monitor the effectiveness of their responses to bully reports involving students with disabilities, should emphasize positive behavioral interventions and supports in these responses, and should proactively investigate whether bullying episodes are impacting a disabled student's need for educational and related services.