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Protecting Students from Discrimination, Harassment and Retaliation: A Checklist for Compliance with Federal Laws

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Protecting students from discrimination, harassment and retaliation serves at least three important objectives for public schools. First, it serves to help shield students from physical harm and stressors often associated with these types of issues and which can be counterproductive to students' academic and social development. Second, protecting students from various forms of discrimination tends to help foster a harmonious environment at the school, so that the schools are or may be likely to spend less time having to redress instances of claims of discrimination, harassment or retaliation. Third, protecting students from discrimination helps protect schools in terms of reducing liability exposure associated with claims of discrimination, harassment and retaliation—or can at least help mitigate exposure.

This article provides a checklist for promoting an understanding of the relevance of federal antidiscrimination laws to public schools and procedures that can help effectively respond to complaints or reports of unlawful discrimination or harassment, which, in turn, and when followed in earnest, can serve to help mitigate liability exposure, as well as help educators spend more time on imparting knowledge.

1. Multiple federal antidiscrimination laws apply to public schools. The extent to which school administrators fully appreciate the scope of federal antidiscrimination laws that apply to their schools varies. The following is a brief review of several important antidiscrimination laws applicable to public schools:

- **Title VI of the Civil Rights of 1964** (“Title VI”), 42 U.S.C. §§ 2000d, 34 C.F.R. Part 100, prohibits discrimination based on race, color or national origin in any program or activity receiving federal financial assistance. Further, the U.S. Department of Education’s Office for Civil Rights (“OCR”) interprets this statute to apply where a religious

group is the target of discrimination based on the group’s actual or perceived ancestry or ethnic characteristics or actual or perceived citizenship or residency in a country with a dominant or distinct religious identity.¹

- **Title IX of the Education Amendments of 1972** (“Title IX”), as amended, 20 U.S.C. §§ 1681 et seq., 34 C.F.R. Part 106, prohibits discrimination based on sex in any education program or activity receiving federal financial assistance.
- **Section 504 of the Rehabilitation Act of 1973** (“Section 504”), 29 U.S.C. § 794, 34 C.F.R. Part 104, prohibits discrimination based on disability in any program receiving federal financial assistance or activity conducted by an executive agency or the U.S. Postal Service.
- **Title II of the Americans with Disabilities Act of 1990**, 42 U.S.C. §§ 12131 et seq., 28 C.F.R. Part 35, prohibits discrimination based on disability in relation to services provided by a public entity.
- **Title IV of the Civil Rights Act of 1964**, 42 U.S.C. §§ 2000c-2000c-9, authorizes the U.S. Attorney General (U.S. Department of Justice) to address complaints of discrimination on the basis of race, color, religion, sex, and national origin in public schools and institutions of higher learning.
- **Age Discrimination Act of 1975**, 42 U.S.C. §§ 6101 et seq., 34 C.F.R. Part 110, prohibits discrimination based on age in programs receiving federal assistance.
- **Individuals with Disabilities Education Act** (“IDEA”), 20 U.S.C. § 1400, 34 C.F.R. Parts 300 and 301. The aim of the IDEA is to make available a free appropriate public education to eligible children with disabilities and ensure special education and related services to those children. IDEA

requires public schools to develop an appropriate Individualized Education Program (“IEP”) for each child, whereby the special education services and related services identified within are to reflect the individualized needs of the student. The IEP is to be developed by a team of knowledgeable persons and reviewed annually.

- **Equal Educational Opportunities Act of 1974**, 20 U.S.C. § 1703, prohibits states from denying equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by way of deliberate segregation, failure to remove vestiges of deliberate segregation, and failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.
- **Boy Scouts of America Equal Access Act**, 20 U.S.C.S. § 7905, prohibits any public school that has a designated open forum or limited public forum and that receives funds through the Department of Education from discriminating against any group officially affiliated with the Boy Scouts of America.

2. **Federal agencies enforce these federal laws—irrespective of whether a parent or student files a complaint through any internal procedure.** Federal agencies may enforce these civil rights laws against public schools. Many of the civil rights laws reviewed above are enforced by OCR. Some of these laws are also enforced by the Civil Rights Division of U.S. Department of Justice (“DOJ”). Both agencies have broad investigative authority and enforcement mechanisms, and it is important that school administrators understand the authority these agencies have the authority to investigate discrimination complaints and review information retained by schools, including student records. A brief review of the scope of authority of each of these agencies may help.

3. **OCR: What it is and what it can do.** OCR is the civil rights enforcement arm of the U.S. Department of Education. OCR enforces the following laws, several of which are the same as those referenced above:

- **Title VI of the Civil Rights of 1964** (race, color, national origin, and membership in religious

group that is a target of discrimination based on historical or perceived ancestry).

- **Title IX of the Education Amendments of 1972** (prohibits discrimination based on sex).
- **Section 504 of the Rehabilitation Act of 1973** (prohibits discrimination based on disability).
- **Title II of the Americans with Disabilities Act of 1990** (prohibits discrimination based on disability).
- **Age Discrimination Act of 1975** (prohibits discrimination based on age).
- **Boy Scouts of America Equal Access Act** (prohibits discrimination against groups affiliated with the Boy Scouts of America).

By way of enforcement authority, OCR can do the following:

- Investigate written complaints (not necessarily from student or parent).
- Require public schools to provide extensive information about students and campuses, including, but not limited to, personally identifiable student records.
- Issue findings that may result in findings of noncompliance, directives for remedial measures, trainings, and reporting requirements.
- Monitor resolution agreements; and
- Initiate enforcement action, including referral to the DOJ.

When OCR is unable to negotiate a resolution agreement with the recipient, OCR will initiate enforcement action. OCR may either:

- Initiate administrative proceedings to suspend, terminate or refuse to grant or continue financial assistance; or
- Refer the cases to DOJ for judicial proceedings to enforce any rights of the United States under any law of the United States.

OCR can enforce for denial of access to information and employees.

4. Take any opportunity OCR offers to resolve the complaint seriously. Because of the scope of OCR's enforcement powers, OCR investigations can be costly and administratively burdensome, but *these expenses and administrative headaches will only be multiplied if the outcome of an OCR investigation is that a school or school district is found to be noncompliant*. Resolution of the complaint may sometimes be pursued at various stages of the investigative process, including directly with the complaining party at the early stages of the complaint process. Sometimes resolutions may be reached directly with OCR before any investigative findings. If the complaint is not resolved before findings are made, then, at the conclusion of the investigation, OCR will determine, using a preponderance of the evidence standard, whether:

1. There is insufficient evidence to support a conclusion of noncompliance; or
2. The evidence supports a conclusion of noncompliance.

Those findings will be made known to the complainant. School administrators should be aware that adverse findings could be relied upon by complainants as plaintiffs in litigation against the school.

The suggestion that any opportunity for resolution, especially without any findings, be taken seriously is not to encourage settlement where there is no legitimate basis for the complaint. It is a reminder that schools cannot control what OCR will determine and that if OCR makes a finding against a school, liability exposure goes up—not only in relation to OCR but also, as will be explained further below, the possibility of a lawsuit filed by a parent/student.

5. DOJ can investigate complaints, too. The Educational Opportunities Section of the Civil Rights Division of the DOJ also enforces federal laws that protect students from harassment or discrimination. Specifically, the Education Opportunities Section of the Civil Rights Division is responsible for enforcing:

- Title IV of the Civil Rights Act of 1964.
- Equal Educational Opportunities Act of 1974.

- Americans with Disabilities Act.
- DOJ also assists in enforcing Title VI, Title IX and Section 504.

From time to time, DOJ issues joint guidance with OCR regarding compliance with federal civil rights laws.

As for the complaint process, the DOJ Civil Rights Division does not have a complaint form, but there is also no time limit for filing. As for who may file a complaint, DOJ will review complaints from anyone with information about possible unlawful discrimination in schools, colleges or universities, including students, parents, community members, organizations, interested individuals. Complaints may be submitted by email, telephone, facsimile and letter. DOJ cannot open every complaint for investigation. It also may refer the complaint to another federal agency.

6. Irrespective of OCR or DOJ involvement, parents can sue under most of the above-referenced federal antidiscrimination laws as means of enforcement.

Separate and apart from OCR or DOJ authority to enforce federal civil rights law in the public education setting, private individuals may sue to enforce certain federal civil rights statutes. This sometime seems a less well-known or underappreciated reality of student discrimination issues, so it is emphasized below. Except as otherwise noted below, there is no administrative prerequisite to meet before filing the complaint in court:

- **Title VI of the Civil Rights Act of 1964 (race, color and national origin discrimination):** Private individuals may sue to enforce the Section 601 prohibition against intentional discrimination based on race, color or national origin.²
- **Title II of the ADA (disability discrimination):** To prove a violation under Title II of the ADA, a plaintiff must show (1) that he is a qualified individual within the meaning of the ADA; (2) that he was excluded from participation in or denied the benefits of services, programs or activities for which a public entity is responsible, or was otherwise subjected to discrimination by a public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of plaintiff's disability.³

- **Section 504 (disability discrimination):** Section 794 of Title 29 provides that no otherwise qualified individual with a disability, as defined in the statute, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity by executive agency or the U.S. Postal Service. To prevail on a failure to provide claim under Section 504, a plaintiff must show that a defendant refused to provide reasonable accommodations for the disabled plaintiff to receive the full benefits of the school program.⁴
 - **Title IX (sex discrimination):** The U.S. Supreme Court has ruled, “We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination.”⁵
 - **Age:** The Age Discrimination Act affords beneficiaries an administrative remedy and judicial remedy. Complainants may file an administrative complaint, and if the relevant agency takes no action or finds in favor of the recipient of federal funding, the complaint may seek injunctive relief in a judicial forum.
 - **IDEA:** The IDEA provides various means for parents to assert complaints and resolve disputes relating to special education services their child is or is not receiving. In addition to mediation as an option, parents or guardians may file complaints at the state level, which are then investigated. Or parents may file a request for a due process hearing, which results in the appointment of a hearing officer and a litigated administrative proceeding. Money damages are not available, but various educational, compensatory and/or related services are among the types of relief available, and attorney’s fees can be pursued in federal court by the party prevailing at the administrative level. In relation to discrimination or harassment complaints, never forget that OCR expects the IEP team to review whether FAPE has been impacted by an instance of bullying or harassment. Failure to do so could result in an instance of bullying or harassment giving rise to a due process complaint based on failure to adjust the educational programming in relation to the impact of the incident.
7. **Additionally, plaintiffs may sue for harassment as a form of discrimination based on various characteristics.** The following are examples of specific causes of action relating to various civil rights statutes in public educational contexts, and notice that it is *imperative that schools not be deliberately indifferent to the harassment*:
- **Student-on-student harassment under Section 504 (disability discrimination):** A plaintiff must show: (1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) defendant knew about the harassment, and (5) defendant was deliberately indifferent to the harassment.⁶
 - **Student-on-student sexual harassment under Title IX:** A plaintiff must allege facts shown that: (1) the school had actual knowledge of the harassment, (2) the harasser was under the school’s control, (3) the harassment was based on the victim’s sex, (4) the harassment was so severe, persistent and objectively offensive that it effectively barred the victim’s access to an educational opportunity or benefit, and (5) the school was deliberately indifferent to the harassment.⁷
 - **Under Title VI, public school districts may be liable for student-to-student harassment if the school district was deliberately indifferent to the known harassment.**⁸ The harassment must be so severe, pervasive and objectively offensive that it denies its victims equal access to education.⁹
- There are other sources of federal civil rights claims, too. For example, Section 1983 of Title 42 of the U.S. Code provides a mechanism for enforcing individual rights secured elsewhere, particularly rights independently provided for by the U.S. Constitution and laws of the United States. Title IX, to illustrate, does not preclude a plaintiff from seeking to remedy sex discrimination by suing under Section 1983 based on the Equal Protection Clause of the U.S. Consti-

tution. Section 1983 also may be used as a means for challenging racial discrimination under the Equal Protection Clause of the U.S. Constitution.¹¹

8. **Recognize that retaliation against a complainant or someone cooperating with an investigation into a complaint also is unlawful—and will expose the school to liability.**¹² Discrimination claims can bring about strong emotional responses. For example, “They’re calling me a racist!” But taking adverse action against a person for making a complaint or cooperating with the investigation into will only make matters worse. In fact, it could result in liability exposure even when the underlying complaint was without merit.
9. **Have an accessible policy protecting student from unlawful discrimination, harassment and retaliation that (1) defines key terms, (2) explains how to report violations of this policy/law and (3) addresses investigations into complaints and notices of outcome to the complainant.** School antidiscrimination policy should define various forms of discrimination, harassment and retaliation that are prohibited under law and school law. If the school fails to have policy in place, it invites a finding of deliberate indifference (liability) with respect to any complaint that the school failed to prevent or earnestly respond to a claim of student discrimination, harassment or retaliation.
10. **Train employees on the policy, so that all know what to report and to whom.** Having a policy is important, but it means little if administrators and staff generally do not know it and act upon it.
11. **When a complaint or report triggers an investigation under school antidiscrimination policy, investigate in earnest.** Some complaints of discrimination or harassment may be misinformed as to the meanings of the term “discrimination” or do not state a complaint of complaint, discrimination or retaliation when the complaint is reviewed. But, generally speaking, when a complaint of discrimination, harassment or retaliation is adequately asserted, investigate and do so in earnest. A thorough investigation is an opportunity to determine whether the complaint has any merit, whether there is some situation that requires correcting even if it does not mean that there

has been a violation of the law; or if the complaint has merit, it is better to address it as soon as possible in order to stop the harm and help mitigate some of the liability exposure. If a thorough investigation is done, the school can point to a serious investigation into the allegations. This will demonstrate to the student and/or parents the school’s commitment to enforcing anti-discrimination policy. If a report or complaint about the matter goes to OCR or DOJ, the schools will be able to show compliance with its policy that is grounded in federal antidiscrimination law, that it investigated the matter and took what actions it deemed appropriate based on an earnest investigation. The parties to the complaint may not agree with the outcome of the investigation, but a well-conducted investigation will put the school in a better defensive posture should litigation arise. Indeed, a proper investigation can help avoid liability under antidiscrimination law.¹³

12. **A well-done investigative summary will typically have three components: (1) a review of the issues investigated, (2) a review of methodology, and (3) key findings of fact.** How to investigate an allegation of discrimination, harassment or retaliation is beyond the scope of this article. But an investigative summary, in my assessment should include the three components referenced above.
13. **OCR and DOJ publish guidance pieces that may help inform an investigation into a student discrimination complaint.** A small sampling of these guidance pieces includes:
 - Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, U.S. Department of Education, Office for Civil Rights (December 28, 2016)
 - Dear Colleague Letter: Charter Schools, U.S. Department of Education, Office for Civil Rights (May 14, 2014)
 - Dear Colleague Letter: Retaliation, U.S. Department of Education, Office for Civil Rights (April 23, 2013)
 - Dear Colleague Letter: Title IX Coordinator, U.S. Department of Education, Office for Civil Rights (April 24, 2015)

14. When action needs to be taken regarding an instance of discrimination, harassment or retaliation, think not only in terms of discipline or narrow remedy but also in terms of corrective action.

Where there has been an instance of, say, harassment, do not limit the analysis of how to respond to considerations of discipline. Also, consider how the victim

has been impacted. If the victim receives special education services, has FAPE been impacted by the incident(s)? Does the offender need help, too? If an entire classroom or perhaps campus has been affected by an incident, teach pieces may be warranted.

Endnotes

- ¹ See OCR Dear Colleague Letter, Oct. 26, 2010.
- ² *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Mohamed v. Irving Indep. Sch. Dist.*, 252 F.Supp3d 602, 626 (N.D. Tex., May 18, 2017).
- ³ *I.A. v. Seguin Indep. Sch. Dist.*, 881 F.Supp.2d 770, 776 (W.D. Tex. 2012).
- ⁴ *Reed v. Kerens Indep. Sch. Dist.*, 2017 WL 2463275 (N.D. Tex. June 6, 2017).
- ⁵ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 702 (1979).
- ⁶ *Reed v. Kerens Indep. Sch. Dist.*, 2017 WL 2463275 *13.
- ⁷ *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011).
- ⁸ See *Fennell v. Marion Indep. Sch. Dist.*, 963 F.Supp.2d 623, 644-646 (W.D. Tex. 2013).
- ⁹ *Id.*
- ¹⁰ See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009).
- ¹¹ See, e.g., *Fennel v. Marion Indep. Sch. Dist.*, 963 F.Supp. 623, 633 (W.D. Tex. 1983).
- ¹² See, e.g., *Jackson v. Birmingham Bd of Educ.*, 544 U.S. 167, 178 (2005)(recognizing Title IX's private cause of action encompasses suits for retaliation).
- ¹³ See *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1000 (5th Cir. 2014) (court found that the record evidenced a pattern of active responses by the school district to incidents involving a student with special needs who ultimately committed suicide).