

An update on federal guidance documents impacting schools

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The U.S. Department of Education (DOE) has issued more than a dozen guidance documents in the last year of key interest to school districts. Through the use of “Dear Colleague Letters” (DCL), frequently asked question documents (FAQ) and other memoranda, these documents attempt to explain the

department’s interpretation of its regulations. Let’s examine these documents and why they matter to Ohio public schools, as well as review DOE’s authority in issuing guidance.

Racial disparities

In January 2014, DOE partnered with the U.S. Department of Justice (DOJ) to

issue a DCL on the nondiscriminatory administration of school discipline. The DCL’s stated purpose is to “assist public elementary and secondary schools in meeting their obligations under federal law to administer student discipline without discriminating on the basis of race, color or national origin.” While the letter focuses primarily on race, it also reminds schools that federal law prohibits discriminatory discipline based on other factors, including disability, religion and sex.

In response to the DCL, district administrators are encouraged to familiarize themselves with their district’s discipline data; receive regular reports on student discipline, disaggregated by subgroup; identify parents or problems that need to be addressed; and act on data that may indicate a problem in the district. A copy of the letter is available at: <http://links.ohioschoolboards.org/14726>.

In October 2014, DOE’s Office for Civil Rights (OCR) issued a separate DCL that focuses on “chronic and widespread racial disparities” for student access to educational resources. The letter significantly expands the areas of a school district’s operations that are covered and now subject to examination. Previously, “educational resources” meant faculty and staff, facilities, school funding and instructional resources. The DCL’s new understanding of “educational resources” now includes extracurricular and cocurricular programs, gifted and talented programs, musical programs and rigorous academic programs; teaching quality, facility quality and instructional quality; technology and

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The letter states that OCR will focus on the scope and severity of resource disparities and the district's process for allocating resources to determine if it is exacerbating or eliminating such disparities. It recommends that districts proactively self-assess and monitor Title VI compliance. The letter also delineates remedies OCR could implement if a violation is found, including additional programs, training and resources. A copy of the DCL is available at: <http://links.ohioschoolboards.org/68009>.

Privacy and use of student data

DOE, through its Privacy Technical Assistance Center (PTAC), issued a document in February 2014 designed to address privacy and security considerations related to computer software, apps and other Web-based tools that students access online and use as part of a school activity. The guidance document provides the legal requirements and best practices on the use, storage and security of student data when schools use online educational resources. A copy of the document is available at: <http://links.ohioschoolboards.org/74574>.

In July 2014, PTAC issued another guidance document with the stated goal of helping schools and local educational agencies achieve greater transparency with their data practices. It informs schools and districts of the basics of legal compliance, and encourages educational organizations to go beyond the minimum notifications required under federal law and keep parents and students better informed about what student data is collected and how it is used. A copy of the document is available at: <http://links.ohioschoolboards.org/33052>.

Sex discrimination

OCR issued a question-and-answer document (Q&A) in April 2014 that discusses a school's obligation to respond to sexual violence. Although posed as a clarification of earlier guidance, the document provides what appears to be a

multitude of new steps OCR considers required for districts to complete in order to be found in compliance with Title IX with respect to sexual violence. Title IX is the federal law that prohibits discrimination on the basis of sex.

The new guidance includes an expanded definition of the type of sexual violence claims that fall under Title IX, which now specifically includes claims of discrimination based on gender identity and sexual orientation. It also expands the concept of the "notice" requirement

as it relates to a district's obligation to address any sexual violence act about which a responsible employee "knew or should have known." A copy of the Q&A is available at: <http://links.ohioschoolboards.org/56575>.

In December 2014, OCR issued a Q&A on Title IX and single-sex classes and extracurricular activities. In the document, OCR indicates that schools may offer single-sex classes and extracurricular activities, but only when there are contact sports in physical



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education classes; when classes or portions of classes deal primarily with human sexuality; and in nonvocational classes and extracurricular activities when certain criteria are met.

That criteria includes a showing that the separation is based on the school's "important objective" to either improve its students' educational achievement through its overall established policies to provide diverse educational opportunities or to meet identified educational needs of its students. In either case, the single-sex nature of the class must be "substantially related" to achieving the important objective. A copy of the Q&A is available at: <http://links.ohioschoolboards.org/17998>.

Charter schools

In May 2014, DOE issued a DCL affirming that federal civil rights laws, regulations and guidance that apply to public schools also apply to charter schools. The DCL makes clear that federal civil rights laws extend to all operations of a charter school, including recruiting; admissions; academics; educational services and testing; school climate (including the prevention of harassment); disciplinary measures; athletics and other nonacademic and extracurricular services and activities; and accessible buildings and technology. A copy of the DCL appears at: <http://links.ohioschoolboards.org/25191>.

Students with disabilities

Building on guidance issued in 2013 by DOE's Office of Special Education and Rehabilitative Services (OSERS), OCR issued a DCL in October 2014 explaining that bullying a student with a disability on *any* basis can result in a denial of a free appropriate public education (FAPE) under Section 504 that must be remedied. In other words, even if OCR determines there is no disability-based harassment violation, OCR still may investigate whether the alleged bullying or harassment resulted in a denial of FAPE under Section 504.

In addition, the letter reiterates schools' obligations to address conduct that

may constitute a disability-based harassment violation and explains that a school also must remedy the denial of FAPE resulting from disability-based harassment. The guidance also offers some insight into what OCR might require of a school to remedy instances of bullying upon a finding of disability discrimination. A copy of the DCL is available at: <http://links.ohioschoolboards.org/59132>.

In November 2014, OCR and OSERS partnered with DOJ to issue a two-page DCL and a 30-page FAQ. In the documents, the departments take the position that school districts must make a separate and distinct analysis under both the Individuals with Disabilities Education Act (IDEA) and the Americans with Disabilities Act (ADA) as to what services students with hearing, vision or speech disabilities may be eligible to receive. The documents acknowledge that, in many cases, an appropriate individualized education program (IEP) developed pursuant to IDEA also will meet the effective communication regulations under ADA. However, there may be situations where districts may have to provide auxiliary aides or services in addition to, or different from, those required to provide a FAPE under IDEA. A copy of the DCL is available at: <http://links.ohioschoolboards.org/61050>. The letter includes a link to the FAQ.

DOE's authority

DOE's stated purpose in issuing many of these documents is to "clarify" the agency's interpretation of its regulations or enabling legislation. However, some argue that these types of documents go beyond just "clarifying" the laws and regulations and actually step into the realm of imposing new requirements on public school districts. This belief seems to be garnering support as courts begin to rely on and cite language from comparable guidance documents issued by DOE.

Those who share this belief argue that these types of documents, because they

impact individual rights and impose new obligations, should be subject to the notice and comment procedure provided for in the Administrative Procedure Act. That procedure requires federal agencies to notify the public of proposed rule making and allow them to participate by submitting comments and concerns within a specified period of time. After considering issues raised by the public, the agency may publish its final rule, but it must first respond to any comments received and explain how the agency resolved any significant problems raised by the comments.

In October 2014, the National School Boards Association joined other state and local government associations in an amicus brief in the case *Perez v. Mortgage Bankers Association*. In the brief, the associations argued that the notice and comment procedures should be followed before federal agencies make significant changes to definitive agency interpretations of regulations. They also argued that such a procedure is necessary to safeguard state and local reliance interests and preserve the appropriate balance between state and federal power. In early March, a unanimous U.S. Supreme Court rejected these arguments, holding that because a federal agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it also is not required to use those procedures to amend or repeal that rule.

At a minimum, the guidance documents serve as a look at some of DOE's current priorities and initiatives. The documents provide best practices and strategies that many districts will successfully implement in their schools. If you have questions about any of the documents or their guidance, contact the OSBA Division of Legal Services. ■

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