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OHIO SCHOOL BOARDS ASSOCIATION
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“Dealing with Discrimination Claims”

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I. Introduction

II. Relevant Federal Law

- A. Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of federal financial assistance.

- B. Under Title VII, “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race color, religion, sex, or national origin.”
- C. Title IX states that, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

III. Protected Classifications

- A. Sex;
- B. Race or Color;
- C. Religion;
- D. National Origin or Ancestry;
- E. Age; and
- F. Disability.

IV. U.S. Department of Education Office of Civil Rights (“OCR”)

- A. OCR enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education.
- B. Complaint Process.
 - 1. A complaint of discrimination can be filed by anyone who believes that an education institution that receives federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, disability, or age. The person or organization filing the complaint does not need to be the victim of the alleged discrimination.

2. A complaint must be filed with OCR within 180 calendar days from the time that the last allegedly discriminatory act occurred. If the complaint is not filed on time, the OCR may decide to grant a waiver of the filing requirement.
3. OCR will dismiss the complaint if it determines that:
 - a. OCR does not have legal authority to investigate the complaint, i.e., the complaint does not allege a violation of one of the federal civil rights laws that it enforces;
 - b. The complaint fails to state a violation;
 - c. The complaint was not filed timely and a waiver will not be granted;
 - d. The allegations raised by the complaint have been resolved;
 - e. The complaint is unclear or incomplete and the complainant fails to provide requested additional information within 20 calendar days; OR
 - f. The complaint has been investigated, or is currently being investigated, by another federal, state, or local civil rights agency or through internal grievance procedures, including due process proceedings, and the resolution meets OCR's standards or is anticipated to meet OCR's standards, or the allegations have been filed in court.
4. If OCR does not dismiss the complaint and instead decides to investigate it, OCR will act as a neutral fact-finder and may use a variety of fact-finding techniques, including: reviewing documentary evidence submitted by both parties, conducting interviews, and/or site visits.
5. At the conclusion of the investigation, OCR will determine whether a preponderance of the evidence supports a conclusion that the recipient violated the law.
6. If OCR determines that a recipient violated the law, OCR will contact the recipient and will attempt to reach a voluntary resolution agreement, which describes the specific remedial actions that the recipient will take.

7. If the recipient is unwilling to reach a voluntary resolution, OCR will either initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance or it will refer the matter to the Department of Justice.

C. Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline, (Jan. 8, 2014).

1. Joint letter issued from OCR and the U.S. Department of Justice, Civil Rights Division, to address differences in the frequency and severity of discipline imposed on students of different racial or ethnic groups.
2. Federal law prohibit schools from intentionally disciplining students differently based on race, which includes, but is not limited to, disciplining similarly situated students of different races differently for the same offense.
 - a. Did the school district limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race by treating them differently from a similarly situated student or groups of students of another race?
 - b. Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?
 - c. Is the reason articulated a pretext for discrimination?
3. Federal law prohibits schools from implementing facially neutral policies that have a disparate impact on students based on race.
 - a. Has the disciplinary policy resulted in an adverse impact on students of a particular race as compared with students of other races?
 - b. Is the discipline policy necessary to meet an important educational goal?
 - c. Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial

group, or is the school's proffered justification a pretext for discrimination?

D. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, (Jan. 2001).

1. To comply with the requirements set forth in the Title IX regulations, school districts need to recognize and respond to sexual harassment of students by teachers and other employees, by other students, and by third parties.
2. Factors used to evaluate hostile environment sexual harassment:
 - a. The degree to which the conduct affected one or more students' education;
 - b. The type, frequency, and duration of the conduct;
 - c. The identity of and relationship between the alleged harasser and the subject or subjects of the harassment;
 - d. The number of individuals involved;
 - e. The age and sex of the alleged harasser and the subject or subjects of the harassment;
 - f. The size of the school, location of the incidents, and context in which they occurred;
 - g. Other incidents at the school; and
 - h. Incidents of gender-based, but nonsexual harassment.
3. "A school has a duty to respond to harassment about which it reasonably should have known, i.e., if it would have learned of the harassment if it had exercised reasonable care or made a 'reasonably diligent inquiry.'"
 - a. The school district must conduct a prompt, thorough, and impartial investigation.

- b. The school district may need to take interim measures during the investigation of the complaint.
 - c. If the school district determines harassment has occurred, it should take reasonable, timely, age-appropriate, and effective corrective action.
 - d. The school district should take steps to eliminate any hostile environment that has been created, and, if necessary, provide services to the student who was harassed to address the effects of harassment on that student.
 - e. The school district should take steps to prevent any further harassment and to prevent retaliation.
4. "Schools are required by the Title IX regulations to adopt and publish a policy against sex discrimination and grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex. Accordingly, regardless of whether harassment occurred, a school violates this requirement of the Title IX regulations if it does not have those procedures and policy in place."
5. In evaluating whether a school district's grievance procedures are prompt and equitable, OCR will consider whether the procedures provide for:
- a. Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
 - b. Application of the procedure to complainants alleging harassment carried out by employees, other students, or third parties;
 - c. Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
 - d. Designated and reasonably prompt timeframes for the major stages of the complaint process;
 - e. Notice to the parties of the outcome of the complaint; and

- f. An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.
- E. Employee training.
 1. Board policies regarding discrimination and harassment should be reviewed annually and updated.
 2. Board policies should be widely disseminated and discussed with employees.
 3. The Board should conduct regular employee in-services regarding school district obligations under Board policy and federal law.
- F. Effective Investigatory Procedures.
 1. Review relevant Board policy regarding discrimination and harassment.
 - a. Policy should designate a person responsible for receiving and investigating complaints of discrimination or harassment.
 - b. Policy should set forth the time line and procedure for investigating and resolving the complaint.
 - c. Policy should set forth the requirements for a written report or findings of facts regarding the investigation's outcome.
 - d. Policy should set forth whether the parties have the right to appeal the decision, and if, so, the procedure that must be followed.
 2. The administrator as "investigator" – assess limitations and strengths.
 - a. Does he or she have experience, expertise, training or time?
 - b. Is he or she unbiased/neutral?
 - c. Consider the role of outside counsel.

3. Begin investigation with interview and statement of complainant.
 - a. Get the details – who, what, where, when, and how.
 - b. Obtain a chronological account of events.
 - c. Obtain the name of every person the complainant knows or believes may have information and/or persons with whom the witness has spoken regarding the matter.
 - d. Believability of allegations – could this have happened? This is a different question than whether there is sufficient evidence to prove the incident.
 - e. Complainant's credibility as a witness.
 - f. Expect questions about the process for investigating and resolving the matter.
4. Interview other witnesses: makes case more than complainant's word against the accused's word.
 - a. If witnesses are part of a bargaining unit, offer to have representation present.
 - b. Take notes of interview.
 - c. Obtain signed written statement from witness.
 - d. Obtain names of other witnesses who may have relevant information.
5. Review relevant documentary and other evidence.
 - a. When an employee is the alleged wrongdoer, review the personnel file and any prior investigations.
 - b. Emails, text messages, etc.
 - c. Security camera tapes.

6. Interview the alleged wrongdoer.
 - a. Schedule after all other witnesses have been interviewed.
 - b. Allow the alleged wrongdoer the opportunity to fully respond. Document all responses to the allegations.
 - c. May be new allegations after interview.
7. Complete written report as required by Board policy.
8. Permit appeal of the decision pursuant to Board policy.

V. Equal Employment Opportunity Commission ("EEOC") or the Ohio Civil Rights Commission ("OCRC")

A. Complaint Process.

1. Charge may be filed by an employee or group of employees against an employer, or by a third person on behalf of an employee.
2. Charge must detail allegations supporting charge of discrimination, and identify the nature of the alleged discrimination.
3. For EEOC claims, the charge must be filed within 300 days of the event or events giving rise to the allegation of discrimination. For OCRC, the charge must be filed within 180 days. (Unless it is a housing charge.)
 - a. Repeated occurrences of the same discriminatory employment action, such as a weekly request for a reasonable accommodation by a disabled employee, can be challenged as long as one discriminatory act occurred within the charge filing period.
 - b. Individual discrete acts that occur before the filing period will generally be untimely – and therefore not actionable – even if they are arguably related to acts that occurred within the filing period. Nonetheless, untimely discrete discriminatory acts may be considered as background evidence if they are relevant to the determination of whether acts taken inside the filing period were discriminatory.

- c. Hostile work environment claims: Because the incidents that make up a hostile work environment claim collectively constitute one “unlawful employment practice,” the entire claim is actionable, as long as at least one incident that is part of the claim occurred within the filing period.
- 4. After response by employer to the charge of discrimination, the EEOC or OCRC investigator may conduct any further investigation he or she deems appropriate.
- 5. After completion of the investigation, the administrative agency makes a determination as to whether there is probable cause to believe the employer engaged in unlawful discriminatory conduct.
 - a. Under the EEOC:
 - (1) If the determination is no probable cause, the EEOC issues a “right to sue letter” to the claimant, who then has a right to file a lawsuit in federal court within 90 days.
 - (2) If the determination is probable cause, the EEOC will first try to “conciliate” the matter.
 - (3) If the matter is not resolved through conciliation, the EEOC may either file a complaint directly against the employer, or issue the claimant a “right to sue” letter so that the claimant may file suit against the employer.
 - b. Under the OCRC:
 - (1) If the determination is no probable cause by the OCRC, the claimant has a right to request reconsideration before appealing the decision to the court of common pleas within 30 days.
 - (2) If the determination is probable cause, the OCRC will first attempt conciliation between the employer and the claimant.

- (3) If conciliation is unsuccessful, the OCRC will issue an administrative complaint against the employer to be heard before a hearing examiner pursuant to the OCRC's rules.
 - c. Under Ohio law, aggrieved employees also have a right to proceed directly to court under O.R.C. §4112.99 within six years of the date of the alleged discriminatory act.
- B. Documenting the hiring process.
 - 1. Decision to create and/or fill a vacancy.
 - a. Creating a detailed job description that includes the essential and non-essential job duties;
 - b. Drafting of job posting; and
 - c. Where, and for how long, post job opening.
 - 2. Bona Fide Occupational Qualification ("BFOQ").
 - a. The Ohio Supreme Court identified in Little Forest Med. Ctr. Of Akron v. Ohio Civ. Rights Comm., 61 Ohio St.3d 607 (1991), *cert. denied*, 112 S.Ct. 1263, 503 U.S. 906, the following requirements for a BFOQ:
 - (1) That the gender-based criteria involves the essence of the employer's business; and
 - (2) Either that: (a) all or substantially all members of the gender excluded by the employer are incapable of performing the job safely and efficiently, or (b) it is impossible or impractical to make determinations of each applicant's qualifications in a nondiscriminatory manner.
 - b. O.A.C. 4112-5-05(A), states, "[t]he BFOQ exception as to sex shall be narrowly construed so as to prohibit employment practices which tend to deny employment opportunities unnecessarily to one sex or the other. Requests for a BFOQ must be submitted pursuant to rule 4112-3-15 of the Administrative Code."

- c. O.A.C. 4112-3-15(A) requires employers seeking a BFOQ to submit a written application to the OCRC.
- 3. Collection and retention of applicant information.
 - a. Prospective applicants should indicate interest in writing.
 - b. Applicants should include resume and/or statement of qualifications.
 - c. Does the district require that the applicant fill out an application? If so, has this occurred? Has the application form been reviewed for EEO issues?
 - d. All submissions for the position should be retained for at least two years.
- 4. Interview/hiring process.
 - a. Interview any applicants, all applicants, or some? If only some, how to decide who to interview and who not to interview?
 - b. Who interviews the applicant? Who decides who interviews the applicants?
 - c. What questions are asked of applicants? Are the same questions asked of each applicant? Take notes of applicants' responses, and what follow up questions, if any, are asked.
 - d. Are applicants ranked? How does the employer decide the method of ranking? Who ranks them? Is this process documented?
 - e. How is the employment offer made? Is the offer contingent upon any pre-employment examination?
- C. Documenting the employment history and job performance of employees.
 - 1. Evaluation "do's".
 - a. Write detailed, fact-specific employee observations/evaluations.

- b. Adhere to format established by negotiated observation and evaluation forms.
 - c. Use professionally appropriate and grammatically correct language.
 - d. Document deficiencies with as much detail as possible.
 - e. Tie in other documented incidents which bear upon overall performance.
 - f. Be specific on recommendations for improvement and means of assistance.
 - g. Use language establishing timeline to improve, and placing burden of following up on employee rather than administrator.
 - h. Connect prior evaluations to current one to illustrate patterns of performance.
 - i. Take the time to be thorough.
2. Evaluation "don'ts".
- a. Have an "official" personnel file that is not up to date.
 - b. End the evaluation with a warm hug.
- D. Documenting the investigation and determination of adverse employment actions.
- 1. Written rules regarding staff conduct.
 - a. Are rules disseminated and explained to employees?
 - b. Are such rules periodically reviewed and updated by the employer?
 - 2. Know the history of how rules have been applied and interpreted in the past with respect to other employees.

- a. Review prior applications of work rules to the current situation to ensure similarly situated employees are treated the same.
 - b. If deviate from prior applications of work rules, then should be able to state why.
 - c. Degree of discipline should reasonably relate to seriousness of employee's offense and the record of employee's service.
3. Investigation procedure for allegations of misconduct.
 - a. Who investigates? How to determine method of investigation?
 - b. Document investigation – witness statements, collection of evidence, investigator notes, etc.
 - c. Written findings and recommendation provided to decision-maker regarding investigation.
4. Discipline decision should be clearly communicated to employee.
5. If employee is required to take certain action as part of discipline (receive training, undergo testing, etc.), then should ensure that such action by employee occurs and is documented.
6. If discipline requires Board action, should have a clearly worded resolution for adoption by the Board as to what action it is taking.

VI. Conclusion