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Shield and Sword

The law is a driver for educational equity

FOR DECADES, ADVOCATES FOR

students, parents, and other community members have used civil rights law to chip away at perceived barriers to equity in schools. Federal laws, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990, provide protections against civil rights violations in U.S. schools.

In state and federal courts and administrative proceedings, challenges to school policies and practices impacting students based on race, color, national origin, disability, sex, and gender incrementally have encouraged changes in schools that made them more equitable. School boards have often, although cer-

tainly not always, played a defensive role in such conflicts, expending significant legal resources in an effort to preserve internal control. Advocates used the law as a vehicle to control school district decisions from the outside looking in.

In recent years, however, a shakeup has occurred. Rather than seeking to maintain the equity status quo in schools, school boards and administrators increasingly have joined forces with external equity advocates, including parents and students, to think about how to increase equity for students.

With districts and boards playing offense rather than defense, it is only fitting that the law play a different role in these struggles. Rather than being a source of fear and concern for school leaders,

civil rights law is an important shield for schools in supporting decisions aimed at increasing equity. Boards can use the law as a driver for internal reforms supporting equity in public schools.

FINDING SUPPORT

A recent example from Illinois is illustrative of the changed role that civil rights law can play in the quest for equity in American schools.

On Aug. 9, 2019, the Illinois governor signed a bill into law that requires, among other things, that public schools teach “the roles and contributions of lesbian, gay, bisexual, and transgender [“LGBT”] people in the history of this country and this State.” The new law also requires that history textbooks purchased by schools also must include the topic. It takes effect in July.

Of course, LGBTQ curriculum has been taught in public schools for years, but only on an ad hoc basis. The Illinois law for the first time requires that curriculum to be addressed. The response from critics has been strong.

As school districts prepare to implement the law, many have asked whether parents should have the right to opt out. Citing research that has long suggested that teaching LGBTQ curriculum in schools promotes school safety, some schools do not wish to allow opt-outs.

This is where law can act as a driver of educational equity internally within schools. For school districts seeking to require LGBTQ curriculum for all students, the law becomes a valuable shield against opt-out requests. The state code allows parents to opt out of sexual education. However, the LGBTQ curriculum deals only with historical matters.

Rather than defending against allegations of violating state law by those who would like to increase equity in schools, the law allows districts seeking to increase educational equity an opportunity to do so.

There are many reasons for board members and administrators to think differently about civil rights law.

AUDITING COMPLIANCE

Another way that school leaders can use law to support equity is by considering what changes would be required in an administrative civil rights complaint and making those changes even if no complaint has been filed. The U.S. Department of Education’s Office for Civil Rights (OCR) is the federal agency tasked with investigating complaints against schools under Title VI, Title IX, and Section 504/the ADA.

If an OCR investigation uncovers noncompliance with a federal law, OCR requires the district to enter into a resolution agreement with it to address any issues found. OCR investigations are notoriously lengthy and costly, and resolution agreements can lead to oversight for years. That “monitoring” by OCR often necessitates expending significant amounts of money, time, and other resources to address issues found during an investigation.

In January 2020, the U.S. Department of Education announced a new center through OCR focused on “proactive compliance with federal civil rights law.” The Outreach, Prevention and Non-discrimination (OPEN) Center will “provide assistance and support to schools, educators, families, and students to ensure better awareness of the requirements and protections of federal non-discrimination laws” through “targeted support to recipient institutions and the public.”

Districts that have experienced data and interview requests from OCR will be understandably wary of opening their doors to the OPEN Center. Even if the center is aimed at helping schools reach civil rights compliance, the housing of it

within an office that has a reputation for excoriating school districts publicly when it finds civil rights violations—even under the more-lenient leadership of the Trump administration and U.S. Education Secretary Betsy DeVos—should cause many school leaders pause.

Yet, the idea of taking a more proactive approach to civil rights compliance is an important one to consider. Rather than waiting for an OCR complaint to then dedicate time and resources, including that of legal counsel, to a civil rights concern, school leaders can deploy those resources on the front end before a complaint has been filed.

Notably, such audits can be done in a confidential manner that mitigates the risk of public disclosure under open records requests through an internal audit, preferably with the assistance of legal counsel.

Legal counsel may even be able to contact OCR or the OPEN Center for guidance or other technical assistance without identifying the educational institution. This allows the benefits that likely motivated the new OPEN Center without the risks of voluntarily putting the district under OCR’s microscope.

Internal audits decrease the risk that individuals who feel a matter has been handled incorrectly by an educational institution will file a complaint with OCR. Even if an individual files a complaint, if a district has investigated and addressed the issue previously, OCR will defer to the district’s findings. The fact that the institution took the initiative to audit its civil rights compliance before a complaint was filed will reflect favorably on

the institution both with OCR and in the media. Thus, devoting time and resources to an audit on the front end can lead to significant savings on the back end.

There are many reasons for board members and administrators to think differently about civil rights law and its role in efforts to increase equity in public schools. In the past, civil rights law was used as a hammer, with the goal of chipping away at perceived inequities and putting institutional leaders on the defensive. Today, civil rights law provides a tool for schools seeking to increase equity and defend against critics of equity measures.

By employing legal counsel or other parties to conduct internal audits, schools can gain the benefits offered by resources, such as the OPEN Center, without OCR’s spotlight on an institution. Civil rights law can be an important shield for educational institutions seeking to increase equity.



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