



MEMORANDUM

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

TO School District Clients and Friends

FROM Maree Sneed
Michelle Tellock

DATE October 29, 2014

SUBJECT **Office for Civil Rights Issues Dear Colleague Letter on Equitable Access to Educational Resources**

On October 8, the United States Department of Education Office for Civil Rights (“OCR”) issued a three-part Guidance Package to assist schools in meeting their obligations under Federal law to provide students with equal access to educational resources without discriminating on the basis of race, color, or national origin. See Resource Comparability Guidance Package, <http://www2.ed.gov/about/offices/list/ocr/resourcecomparability.html>. The Department noted that its guidance was issued in response to findings that, sixty years after the United States Supreme Court stated in *Brown v. Board of Education* that education “is a right which must be made available to all on equal terms”, chronic and widespread disparities persist in access to educational resources such as rigorous courses, academic programs, and extracurricular activities; stable workforces of effective teachers, leaders, and support staff; safe and appropriate school buildings and facilities; and modern technology and high-quality instructional materials. This memorandum summarizes the key points addressed by the Guidance Package and, in particular, the Dear Colleague Letter contained therein. See Dear Colleague Letter: Resource Comparability (Oct. 1, 2014) (“Dear Colleague Letter”), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

While OCR recognizes that states, school districts, and schools have faced shrinking budgets that have made it increasingly difficult to provide the resources necessary to ensure a high-quality education for every student, Federal law prohibits public school districts from discriminating in the allocation of school resources based on certain personal characteristics: Title VI of the Civil Rights Act of 1964 (“Title VI”) and its implementing regulations prohibit discrimination based on race, color, or national origin by recipients of Federal financial assistance. OCR is responsible for enforcing Title VI. OCR has found that schools serving more students of color are less likely to offer advanced courses and gifted and talented programs than schools serving mostly white populations. See Dear Colleague Letter at 3. Similarly, schools serving the most black and Latino students are 1.5 times as likely to employ new, less-effective

teachers, and schools with the most students of color are more likely to have temporary, portable buildings and permanent buildings with poor conditions. See Id. at 4.

The Dear Colleague Letter explains the nondiscrimination requirements of Title VI and reminds schools of their legal obligations to allocate school resources without discriminating on the basis of race, color, or national origin. School resource allocation can result in unlawful discrimination in two ways. First, a school district or school could allocate educational resources on the basis of race, color, or national origin. OCR describes this as “intentional discrimination,” although the category of “different treatment” is broader than the category of policies that are discriminatory on their face. For example, a school could allocate educational resources by acting on a racially discriminatory motive, providing educational resources only to members of select races, adopting facially neutral policies with an invidious intent to target students of certain races, or applying a facially neutral policy in a discriminatory manner. Whether OCR finds that a school has engaged in intentional discrimination is based on an analysis of the facts and circumstances surrounding the particular event. OCR asks whether a student or group of students was treated differently with respect to providing access to educational resources, whether the school can articulate a legitimate nondiscriminatory reason for the treatment, and whether the reason articulated is a pretext for discrimination. See Dear Colleague Letter at pages 6-7. Second, schools violate Federal law if they implement facially neutral policies and practices that have an unjustified effect of discriminating against students on the basis of race, even if they were not adopted with the intent to discriminate. The resulting discrimination is referred to as “disparate impact.” In determining whether a facially neutral policy has an unlawful disparate impact, OCR engages in a three-party inquiry that asks whether the policy has had an adverse impact, whether the policy is necessary to meet an important educational goal, and whether alternative policies or practices could meet the stated educational goal with less of a burden or adverse impact. See Dear Colleague Letter at page 8.

During an investigation, OCR will examine various facts and information, which may include analyses of any or all of the resources discussed in the Dear Colleague Letter, including:

- *Courses, academic programs, and extracurricular activities*, including early childhood programs, Advanced Placement and International Baccalaureate courses, gifted and talented programs, career and technical education programs, language immersion programs, online and distance learning opportunities, performing and visual arts, athletics, and extracurricular activities such as college-preparatory programs, clubs, and honor societies
- *Strong teaching, leadership, and support*, including data on teacher and leader effectiveness, data on the relative stability of teacher and school- and district-level leadership (e.g., turnover, absenteeism, use of substitutes, vacancies), data on characteristics and qualifications of teachers and school leaders (e.g., licensure and certification status, training and professional development, whether teachers are inexperienced, teaching out of their field), access to support staff (paraprofessionals, guidance counselors, psychologists, librarians, specialized therapy providers, social workers)

- *School facilities*, including overall physical condition of facilities, availability of sufficient maintenance staff, location and surrounding environment of school buildings and facilities, availability and quality of transportation services, location of and quality of facilities for programs for English language learners and students with disabilities, relative quantity and quality of specialized spaces such as laboratories, auditoriums, and athletic facilities
- *Technology and instructional materials*, including comparable access to technological tools given to teachers and students (e.g., number, type, and age of devices such as laptops, tablets, A/V equipment), availability and speed of internet access, professional development and technical support available, library collections (e.g., size, content, age of print, video, and digital resources), access to other materials such as textbooks, graphing calculators, digital materials and simulations, and hands-on science and math materials

See Dear Colleague Letter at 9-19. OCR’s investigations focus on the “scope and severity of resource disparities” as well as a school district’s “processes for allocating resources to determine the extent to which the district is exacerbating or eliminating such disparities.” Id. at 10. The Dear Colleague Letter also provides examples of the types of remedies that OCR may seek if it concludes that a school is in violation of Title VI in the allocation of educational resources. See id. at 21-25.

We note that the Guidance Package components do not constitute new regulations, nor do they add requirements to applicable law. However, as a “significant guidance document” designed to provide information and examples about how OCR evaluates whether covered entities are complying with their legal obligations, courts would likely show deference to OCR’s interpretations and guidance contained in the Dear Colleague Letter. Therefore, we recommend that schools proactively assess their policies and practices for allocation of educational resources (e.g., policies for determining when and where to build or renovate facilities) in light of the information contained in the Guidance Package, paying attention to distribution of resources both across and within schools. Such self-assessment may be informed by reference to OCR’s Civil Rights Data Collection, including several “snapshots” from March 2014 on the subjects of College and Career Readiness; Teacher and Counselor Equity; and Early Childhood Education. See Civil Rights Data Collection Snapshots, available at <http://www2.ed.gov/about/offices/list/ocr/resourcecomparability.html>. OCR also recommends that self-assessment include notice to the school community of rights and responsibilities under Title VI and the procedure by which students, parents, and employees may report concerns.

We hope this information is useful to you as you consider your schools’ policies and practices for resource allocation to ensure that all students are receiving educational resources without regard to their race, color, or national origin.

If you have questions about the Guidance Package or Title VI more generally, or if we can assist you in reviewing your course offerings and other educational resources to determine whether your district is in compliance, please contact Maree Sneed at 202-637-6416 or maree.sneed@hoganlovells.com.