



Department of Education
ED-2021-1190
Alejandro Reyes
Director
Program Legal Group, Office for Civil Rights
Potomac Center Plaza, Rm 6125,
550 12th Street SW,
Washington, DC, 20024

Re: Nondiscriminatory Administration of School Discipline—Docket ID ED-2021-1190

To Whom it May Concern,

First Liberty Institute (“First Liberty”) submits this comment responding to the request for information regarding the nondiscriminatory administration of school discipline, issued by the Department of Education’s (“The Department’s”) Office for Civil Rights (“OCR”). First Liberty writes to state, first, that OCR neglected to include its legal duties to religious students in OCR’s request for information. Indeed, OCR made no mention of religious discrimination in the context of school discipline, even though OCR enforces civil rights laws and other federal statutes that prohibit certain instances of religious discrimination,¹ and despite the fact that OCR has previously stated that no OCR policy should be construed to permit, much less require, any form of religious discrimination or any encroachment upon the free exercise of religion.² Accordingly, First Liberty asks OCR to note these legal duties in any future guidance documents or rulemakings on school discipline, and to robustly enforce all relevant statutes and regulations that protect the rights of religious students. Second, First Liberty writes, in response to Question #2, that First Liberty has observed numerous examples of discrimination in school discipline, and that OCR’s recent guidance on LGBTQI+ harassment encourages schools to incorrectly identify, and therefore punish, certain mainstream religious beliefs as sex discrimination or harassment.

First Liberty is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans through pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, the Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom before the courts, including the Supreme Court, as well as testifying before Congress, and advising federal, state, and local officials about existing constitutional and statutory protections for religious liberty.

Statutory Protections for Religious Students

¹ See, e.g., 20 U.S.C. § 1681(a)(3); 42 U.S.C. §§ 2000d, 2000bb-1(b).

² See *Dear Colleague Letter*, U.S. DEP’T OF EDUC. (September 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

Several federal statutes enforceable by OCR protect religious exercise. Two federal civil rights laws—Title VI and Title IX—protect religious exercise where discrimination on the basis of religion overlaps with discrimination on the basis of race or sex. OCR already acknowledges in guidance documents that Title VI, which protects students from race, color, and national origin discrimination, prohibits discrimination against students of any religion, including Buddhists, Christians, Hindus, Jews, Muslims, or Sikhs, when the discrimination involves racial, ethnic, or ancestral epithets, how a person looks, dresses, or speaks if linked to ethnicity, or stereotypes about people who share certain ancestral or ethnic characteristics.³ Likewise, Title IX protects the exercise of religion for educational institutions that are controlled by a religious organization when the application of Title IX would conflict with the religious tenets of the institution.⁴ The Department charges OCR with ensuring that these institutions’ exercise of religion is protected.⁵

OCR has previously addressed the right of religious students to be free from discrimination in our schools under both Title VI and Title IX.⁶ Noting that some cases of religious discrimination may also involve racial, ethnic, or sex discrimination, OCR has investigated alleged racial or ethnic harassment against Arab, Muslim, Sikh, and Jewish students, as well as alleged racial and sex discrimination claims by a white, male Christian who was reportedly harassed by a teacher for expressing conservative Christian views during a classroom discussion regarding homosexuality.⁷ OCR has clearly stated, “No OCR policy should be construed to permit, much less require, any form of religious discrimination or any encroachment upon the free exercise of religion.”⁸ This statement comports with the requirements of the Religious Freedom Restoration Act, which constrains every action OCR and the Department undertakes.⁹

And finally, section 8524(a) of the Elementary and Secondary Education Act of 1965 (“ESEA”), as amended by the Every Student Succeeds Act,¹⁰ requires the Secretary to issue guidance on constitutionally protected prayer in public elementary and secondary schools.¹¹ The Secretary must also secure compliance with the Secretary’s rules and orders with respect to local educational agencies that deny students the ability to participate in constitutionally protected prayer.¹² Note also that the Equal Access Act of 1984 likewise protects religious expression in

³ See *Know Your Rights: Title VI and Religion*, U.S. DEP’T OF EDUC. (last visited July 22, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf>

⁴ See 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a).

⁵ See *AS Singleton Memo*, U.S. DEP’T OF EDUC. (February 19, 1985), <https://www2.ed.gov/about/offices/list/ocr/docs/singleton-memo-19850219.pdf>.

⁶ See *Dear Colleague Letter*, U.S. DEP’T OF EDUC. (September 13, 2004), <https://www2.ed.gov/about/offices/list/ocr/religious-rights2004.html>.

⁷ *Id.*

⁸ *Id.*

⁹ See 42 U.S.C. § 2000bb-1(b)

¹⁰ See 20 U.S.C. § 7904(a).

¹¹ *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, U.S. DEP’T OF EDUC. (last modified Jan. 16, 2020), https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; see 20 U.S.C.A § 7904(a).

¹² See 20 U.S.C.A § 7904(c).

public schools by prohibiting discrimination against, or the denial of equal access for, any students wishing to conduct a meeting and engage in religious speech.¹³

Answer to Question #2

What ongoing or emerging school discipline policies or practices are relevant to you or the communities you serve, including any that you believe raise concerns about potentially discriminatory implementation or effects on students' access to educational opportunities based on race, color, national origin, sex, or disability?

Over the past thirty years, First Liberty has represented numerous K-12 students who experienced discrimination in a school's administration of school discipline, including students who were punished, censored, denied a reasonable accommodation, or denied access to school facilities by their schools for:

- Referencing their religious beliefs in a public ceremony such as a graduation speech,
- Referencing their religious beliefs in class assignments,
- Wearing nondisruptive jewelry that displayed a religious symbol,
- Engaging in private, student-initiated, student-led prayer during non-instructional time at school,
- Handing out, during non-instructional times, notes or trinkets that school officials deemed to contain religious messages,
- Objecting to school requirements that they read explicit material as part of a school assignment, or that, as a condition of graduation, they must pledge to engage with and strongly consider a school's views on gender and sexuality,
- Seeking to form religious clubs just like other students were permitted to form similarly situated secular clubs, and
- Seeking to meet in religious clubs during times that secular clubs were allowed to meet.

Moreover, First Liberty is also aware of additional instances where schools punished students for wearing religious clothing,¹⁴ sacred items,¹⁵ or hairstyles.¹⁶

Although First Liberty and other advocacy organizations were able to resolve some of the above cases under the First Amendment's requirements, the administration of school discipline in some of the above cases also violated Titles VI and IX, as well as section 8524(a) of the

¹³ See 20 U.S.C. § 4071(a).

¹⁴ *ACLU-DE Protects Students' Rights to Religious Freedom*, AM. CIV. LIBERTIES UNION (January 9, 2018), <https://www.aclu-de.org/en/news/aclu-de-protects-students-rights-religious-freedom>.

¹⁵ *ACLU Urges Dysart Unified School District to Allow Graduation Dress Accommodations for Native American Religious Beliefs*, AM. CIV. LIBERTIES UNION, (May 15, 2019), <https://www.aclu.org/letter/aclu-urges-dysart-unified-school-district-allow-graduation-dress-accommodations-native>.

¹⁶ *ACLU Says Louisiana Dress Code Denies Rastafarian Children the Right to an Education*, AM. CIV. LIBERTIES UNION (September 18, 2000), <https://www.aclu.org/press-releases/aclu-says-louisiana-dress-code-denies-rastafarian-children-right-education?redirect=free-speech/aclu-says-louisiana-dress-code-denies-rastafarian-children-right-education>.

ESEA¹⁷ and the Equal Access Act.¹⁸ The administration of school discipline against school-age children often causes these children tremendous stress and social anxiety, and can encourage ostracization by peers at a time when social bonds are developmentally most important to students.

In some of the above instances of school discipline, school officials punished First Liberty's clients ironically out of a desire to forcibly foster a positive and inclusive learning environment. First Liberty has witnessed numerous school officials and local educational agencies that attempt to create culturally homogenous learning environments that quickly become hostile to diverse cultures, beliefs, or practices—including religious culture, belief, and practice. Often these school officials view the idea of a “positive” or “safe” school climate in so narrow a way as to become hostile towards any student whose religious exercise causes that student to exhibit a different culture, or to think or speak according to different, sincerely held beliefs. This includes students that exhibit both ethnic and religious characteristics, such as Arab Muslims and Christians, Jews, and Sikhs, as well as any student that exhibits cultural beliefs that differ from the beliefs of the majority in a given school environment.

Therefore, First Liberty writes to ask OCR not to repeat its forgetfulness towards religious students in future guidance and technical assistance. This includes instances where the religious exercise of Buddhist, Christian, Hindu, Jewish, Muslim, Sikh, or other students may conflict with OCR guidance. For example, OCR recently published a factsheet on LGBTQI+ harassment with the Educational Opportunities Section of the Civil Rights Division at the U.S. Department of Justice.¹⁹ In one of the examples from the factsheet, OCR describes a teacher who engages in unprofessional, inappropriate behavior towards an elementary school student with intersex traits.²⁰ But as part of that example, OCR describes the teacher as also saying “[T]here are only boys and girls and anyone who thinks otherwise has something wrong with them.”²¹ Numerous religions teach, and numerous religious students believe, that gender is binary.²² Believing that gender is binary, and even expressing that opinion, does not constitute sex discrimination or sexual harassment. But when OCR uses the statement “there are only boys and girls” as part of an example of harassment, and lists that statement alongside other clearly inappropriate behaviors, OCR encourages schools to misunderstand numerous religions’ teachings about gender as amounting to harassment, and opens the door to causing additional discrimination against religious students. Numerous schools will interpret OCR’s guidance as

¹⁷ See 20 U.S.C.A § 7904

¹⁸ See 20 U.S.C. § 4071.

¹⁹ See *Confronting Anti-LGBTQI+ Harassment in Schools*, (last visited July 22, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>.

²⁰ “An elementary school student with intersex traits dresses in a gender neutral way, identifies as nonbinary, and uses they/them pronouns. The student’s teacher laughs when other students ask if they are “a boy or a girl” and comments that there is “only one way to find out.” The teacher tells the class that there are only boys and girls and anyone who thinks otherwise has something wrong with them. The student tells an administrator, who remarks “you have to be able to laugh at yourself sometimes.”

²¹ *Id.*

²² See, e.g., Leviticus 18:22, 20:13; [Qur'an 4:119](#), [Sahih al-Bukhari 5885](#), [Sunan Abi Dawud 4107](#), [Sunan Abi Dawud 4928](#); Kevin Deyoung, *What does the Bible Say About Transgenderism?*, THE GOSPEL COALITION, (September 8, 2016), <https://www.thegospelcoalition.org/blogs/kevin-deyoung/what-does-the-bible-say-about-transgenderism/>.

recommending that the school discipline students because of their religious exercise or viewpoint on gender identity and expression.

This sort of “us vs. them” guidance is inappropriate for a federal division like OCR that is charged with protecting the civil rights of all Americans, including religious Americans. There is room in the classroom for all students, including religious students.

Conclusion

Based on First Liberty’s thirty years of experience helping religious students who experienced discrimination in the administration of school discipline, OCR would be remiss not to inform the public of its authority to investigate certain religious discrimination complaints. Moreover, OCR should not encourage discrimination against religious students through its guidance documents. Therefore, First Liberty strongly recommends that OCR revise the factsheet discussed above and remove the problematic statement. OCR should also ensure that future guidance does not encourage schools to discipline students because of their religion or incorrectly identify certain mainstream religious beliefs as sex discrimination or harassment.

Sincerely,



Christine Pratt
Counsel
First Liberty Institute