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NATIONAL EDUCATION ASSOCIATION

# LEGAL GUIDANCE ON STUDENTS' RIGHTS:

DISCRIMINATION AND HARASSMENT BASED ON  
RACE, RELIGION, NATIONAL ORIGIN, AND IMMIGRATION STATUS



The National Education Association is the nation's largest professional employee organization, representing 3 million elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators, and students preparing to become teachers.

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DEFENDING  
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# INTRODUCTION AND BACKGROUND

**O**ur nation’s public schools have never been more diverse. In 2014, for the first time in our nation’s history, the percentage of public school students who identified as white was less than 50 percent.<sup>1</sup> Around 16 percent of public school students are black; 25 percent Latino; 5 percent Asian/Pacific Islander; 1 percent American Indian/Alaskan Native; and 3 percent bi-racial or multi-racial.<sup>2</sup> And the diversity of public schools is projected to continue to increase.<sup>3</sup> This diversity is very good for our students. Studies show that diverse classrooms benefit all students.<sup>4</sup> A “large body of research [] demonstrates the important *educational benefits*—cognitive, social, and emotional—for *all* students who interact with classmates from different backgrounds, cultures, and orientations to the world.”<sup>5</sup> Diversity of backgrounds and perspectives in the student population helps students develop critical thinking and problem-solving skills.<sup>6</sup> Such diversity also increases “democratic outcomes” in that students educated in diverse classrooms are more likely to be civic-minded, politically active, and engaged in their own communities.<sup>7</sup> These social and educational benefits are in addition to the basic values of empathy and tolerance that education among diverse students brings.<sup>8</sup>

Notwithstanding schools’ growing diversity, overt racist and anti-immigrant rhetoric and actions have increased in our polity. Since the 2016 presidential election, hate crimes and other racial and religious harassment are on the rise,<sup>9</sup> and our schools have not been insulated. The Southern Poverty Law Center surveyed over 10,000 educators in America’s schools to assess students’ experiences of bullying, hate, and harassment in the aftermath of the 2016 presidential election.<sup>10</sup> Eight out of ten educators reported “heightened anxiety on the part of marginalized students, including immigrants, Muslims, African Americans, and LGBT students.”<sup>11</sup> Educators report students harassing others in the following ways: drawing swastikas on chalkboards; proclaiming Latino students will have to “move back to Mexico”; sketching the n-word in the bathroom; cornering black and Latino students while repeatedly shouting “Trump!, Trump!, Trump!” at them; and demanding to “send the Muslims back because they are responsible for 9/11.”<sup>12</sup> Educators

“made a point of saying that what is happening now is something new . . . an unleashing of a spirit of hatred they had not seen before.”<sup>13</sup>

Such harassment is odious and shameful, to be sure, but it also erodes a student’s sense of safety and security and negatively impacts students’ well-being and academic performance. As educators know, “children who are fearful and anxious are unable to concentrate and have a harder time keeping up at school.”<sup>14</sup> Such harassment degrades the school climate for all students too. Bullying in general leads to negative health consequences and decreased academic achievement for victims.<sup>15</sup> But children bullied for discriminatory reasons, such as for their religion or race, suffer more significantly than they would from generalized bullying.<sup>16</sup> A student’s personal development and academic achievement depend on a positive school climate, consisting of interpersonal relationships among students, teachers, and administrators, all of which combine to

set the norms, values, and expectations at school.<sup>17</sup> The social, emotional, and physical safety of students makes up critical elements of a positive school climate.<sup>18</sup> If the safety of one group of students is threatened by increased discrimination, all efforts to create a healthy school climate are compromised.<sup>19</sup> Conversely, improvements to the school climate are associated with decreased aggression, lower incidents of violence, and increased academic achievement.<sup>20</sup>

NEA's 2017 Representative Assembly recognized the unfortunate trend of growing racial and religious harassment and responded by, among other things, passing New Business Item (NBI) 17, which recognizes that "NEA stands for all students including immigrant students, students from religious minorities, students of color, and LGBTQ students . . . ." NBI 17 called on NEA "to ensure that [students'] civil rights are fully protected by . . . [i]ssuing legal guidance and model school district policies that spell out the legal rights [of students] and provide best practices designed to ensure that students' rights are protected."

This work has taken on even greater significance. In the summer of 2017, neo-Nazis, white supremacists, and Ku Klux Klan members marched in Charlottesville and elsewhere, assaulting peaceful protestors and even killing one.<sup>21</sup> Meanwhile, the President of the United States asserted that at least some of the neo-Nazis, white supremacists, and Klan members are "some very fine people,"<sup>22</sup> retweeted anti-Muslim hate speech,<sup>23</sup> and called nations comprised of black and brown people "s\*\*\*hole countries."<sup>24</sup> Views espoused by senior political leaders can have a profound effect on attitudes and social norms, and there is, at the very least, a correlation between President Trump's rhetoric and policies targeting immigrant, Muslim, and communities of color, and the rise of hate crimes and harassment during and since the 2016 presidential election.<sup>25</sup>

Given all this, educators' role in combating hate, intolerance, and discrimination is as difficult and important as ever.

#### The purpose of this guidance is to:

- ★ provide educators with an understanding of current laws that protect students from racial, religious, and national origin harassment;
- ★ provide a model policy that school districts should adopt to ensure those protections are fully enforced;
- ★ provide responses to Frequently Asked Questions that may be useful in organizing around these issues; and
- ★ provide a list of other resources for protecting students' rights.

This guidance does not address the related and significant issues around discrimination and harassment against students based on their sex, sexual orientation, and gender identification. NEA has developed guidance specifically addressing transgender student rights, which is available [here \(https://www.nea.org/assets/docs/20184\\_Transgender%20Guide\\_v4.pdf\)](https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf). And NEA will be developing comprehensive guidance addressing student sexual harassment and discrimination in the coming year.

This guidance also does not address the related and important issues raised by potential efforts to enforce immigration laws on school campus, which unquestionably would chill some students from attending school. NEA urges all school districts to adopt Safe School Resolutions like this model policy, to clearly establish that schools should never be sites for immigration enforcement, and to strictly limit how and when any third party may come on to school property for any immigration purpose.

## FEDERAL LAW PROTECTS STUDENTS FROM DISCRIMINATION BASED ON RACE, RELIGION, OR NATIONAL ORIGIN

As explained in detail below, federal law provides students with the following protections.

- ✦ All students have the right to be free from racial, religious, and national origin discrimination at school.
  - ✦ Students have the right to enroll and remain in school, regardless of their race, ethnicity, religion, or immigration status. Students have the right to attend school without having to present a green card, visa, social security number, or any other proof of citizenship.
  - ✦ Students have the right to keep their education records private, including from police, federal agents, and immigration officials.
  - ✦ Students have the right to receive an appropriate education, regardless of their English language skills.
  - ✦ Students have the right to be free from bullying and harassment based on their race, religion, or national origin, and have the right to learn in an environment free from hateful symbols and derogatory comments. School officials have a legal duty to address hateful rhetoric and behavior.
  - ✦ Students have the right to wear religious attire in schools.
  - ✦ Students have the right to talk about their faith, join extracurricular religious clubs, and practice their religion in school (so long as it does not disrupt other school activities).
- ✦ And students have the right to speak about social and political matters at school so long as such speech is not disruptive, but students have **NO** right to engage in harassing, threatening, or intimidating speech toward other students.

# FEDERAL LAW PROTECTIONS AGAINST DISCRIMINATION AND HARASSMENT

## RACIAL, RELIGIOUS, AND NATIONAL ORIGIN DISCRIMINATION

In 1954, the Supreme Court established in *Brown v. Board of Education* that racial discrimination in schools violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.<sup>26</sup>

Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c-6(a), likewise establishes that discrimination in schools on the basis of race, color, religion, sex, or national origin violates federal law.<sup>27</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., also prohibits schools that receive Federal financial assistance—which is virtually all public schools—from discriminating against students based on race, color, or national origin.<sup>28</sup>

The two primary Federal agencies tasked with enforcing students' federal civil rights are the Office for Civil Rights (OCR) at the United States Department of Education (ED) and the United States Department of Justice (DOJ).<sup>29</sup>

## THE RIGHT TO ENROLL IN AND ATTEND SCHOOL

All children, including children who are undocumented immigrants, have the right to enroll in and attend public school. In 1982, the Supreme Court ruled in *Plyler v. Doe* that Texas's attempt to prevent undocumented children from receiving a free, public education violated the Equal Protection Clause of the U.S. Constitution.<sup>30</sup> Undocumented students are further protected by civil rights laws that prohibit discrimination

based on race and national origin. As noted, Titles IV and VI of the Civil Rights Act of 1964 prohibit public schools from discriminating against students based on their race, color, religion, sex, or national origin.<sup>31</sup> For undocumented students in public schools, there is likely overlap between their protections under Title IV and Title VI based on race and national origin discrimination, since virtually every public school also receives some form of Federal financial assistance.<sup>32</sup>

Guidance from DOJ and OCR makes clear that the right to attend school requires schools and educators to refrain from any tactics that would “chill” undocumented students from enrolling.<sup>33</sup> **Schools must not:**

- ✦ inquire about students' or their *parents'* immigration status;
- ✦ ask for any proof of citizenship—such as a United States birth certificate;
- ✦ deny admission to a student during initial enrollment or at any other time on the basis of undocumented status;
- ✦ deny enrollment to students because they provide a birth certificate from another country, or because they refuse to submit a social security number;
- ✦ treat a student differently to determine residency;
- ✦ engage in any practices that “chill” the right of access to school;
- ✦ require students or parents to disclose or document their immigration status;
- ✦ make inquiries of students or parents that has the purpose or effect of exposing their undocumented status;
- ✦ demand that parents produce drivers' licenses or other identification documents for which undocumented immigrants may not qualify; or
- ✦ require—or even ask about—social security numbers from all students.<sup>34</sup>

Resolution agreements between schools and DOJ and OCR show ways in which schools can violate undocumented students' rights to enroll. In Georgia, the DOJ reached a settlement with the Henry County School District after it improperly notified parents that their children would be withdrawn from school for failing to provide a social security number.<sup>35</sup> Further inhibiting undocumented students' access to school, Henry County also failed to communicate with students' parents about enrollment and registration in a language they could understand.<sup>36</sup> In Louisiana, the Jefferson Parish Public School District committed violations similar to those in Henry County, and had to revise its enrollment and registration materials to clarify that providing a social security number or other proof of citizenship was voluntary.<sup>37</sup>

Undocumented and immigrant students also must be able to enroll in the same schools as native-born peers. In *Methelus v. School Board of Collier County*, for example, students between 15 and 17 years old, who had recently arrived from Haiti and Guatemala, attempted to enroll in Collier County schools.<sup>38</sup> Without assessing their academic or English language skills, Collier County either denied their enrollment altogether or directed the students to English language programs for adults (which required an enrollment fee).<sup>39</sup> A federal court concluded that these practices violated the Constitution and Title VI.<sup>40</sup>

## DOCUMENTATION AND STUDENT RECORDS

Since schools typically require some documentation in order to verify students' addresses (for residency requirements) and birthdays (for age requirements), the DOJ and OCR offer acceptable documentation to avoid burdening the enrollment rights of foreign-born and undocumented students. For example, a school may ask a student for phone and water bills or lease agreements to demonstrate residency

within the district.<sup>41</sup> To determine whether age requirements have been satisfied, a school may ask a student for "a religious, hospital, or physician's certificate showing date of birth; an entry in a family bible; an adoption record; an affidavit from a parent; a birth certificate; previously verified school records; or any other documents permitted by law."<sup>42</sup>

For undocumented students who are also homeless, the McKinney-Vento Homeless Assistance Act ensures that students who struggle with homelessness still are entitled to enroll in school.<sup>43</sup> Under this law, homeless students, including undocumented homeless students, are exempted from a school's otherwise bona fide requirements in order to establish residency.<sup>44</sup> A homeless child, regardless of citizenship status, can never be required to show any documentation relating to proof of residency in order to enroll in public school.<sup>45</sup>

For sensitive records that a school does retain for purposes of residency or age requirements (such as a social security number or birth certificate), the school must take steps to ensure that such records are confidential. Student records are protected by federal law under the Family Educational Rights and Privacy Act (FERPA).<sup>46</sup> For example, if a school elects to assign to students unique identification numbers, it should assign a random sequence of numbers (rather than students' social security numbers).<sup>47</sup> Federal guidance makes clear that a school rarely would have the authority to disclose a student's records without their consent.<sup>48</sup> One such rare instance is in response to a subpoena or other court order; but otherwise, schools may not turn over such information.<sup>49</sup>

## LANGUAGE DISCRIMINATION

Discrimination based on language is also a form of unlawful national origin discrimination prohibited by both the Equal Protection Clause and Title VI.<sup>50</sup>

Adding to that, the Equal Educational Opportunities Act of 1974 (EEOA), 20 U.S.C. § 1703, provides that:

No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

The EEOA was passed to remedy the devastating effects of racially segregated school systems, and protects children's rights to "equal educational opportunity without regard to race, color, sex, or national origin[.]"<sup>51</sup> The EEOA also requires schools to take steps to ensure that students with limited English language skills may still participate equally in all school programs.<sup>52</sup> The EEOA applies with equal force to undocumented and immigrant students.<sup>53</sup>

Under the EEOA, Title IV, and Title VI, English Language Learner (ELL) and Limited English Proficient (LEP) students are entitled to the following services in school:

- ✓ assessments (such as for special education services);
- ✓ language assistance (regardless of a student's language);
- ✓ highly qualified teachers (and training for such teachers where necessary);
- ✓ an integrated-language classroom (unless segregating students based on language is absolutely necessary); and
- ✓ access to all extracurricular activities.<sup>54</sup>

Because Spanish is the most dominant language in America aside from English, some assume that a school satisfies its EEOA obligations if it offers classes to ELLs in Spanish.<sup>55</sup> Not so. Schools must accommodate students' language barriers regardless of their native language. For example, if Punjabi-speaking students seek English learner services to assist them with advanced placement courses, their school is obligated to provide language-specific translation services, even if it already does so for Spanish speakers.<sup>56</sup> The DOJ investigated a school district in Maine after it had reportedly failed to include ELLs in gifted and talented programs, and lacked an adequate number of certified English as a Second Language (ESL) teachers.<sup>57</sup> Likewise, the DOJ reached a settlement with a Virginia school district for failing to provide enough qualified teachers and administrators for ELL students, and for disproportionately disciplining ELL students.<sup>58</sup>

The EEOA applies to parents' language access in schools as well. For example, if a student from China is suspended for violating the school's code of conduct, that child's parent is entitled to a Chinese interpreter (if the parent so requests) at any meeting with the school discussing the suspension.<sup>59</sup> The DOJ investigated a school district in Florida, which had failed to provide parents and LEP students with translation and interpretation services during enrollment and discipline processes.<sup>60</sup>

## BULLYING, HOSTILITY, AND HARASSMENT IN SCHOOL

Harassment based on a student's race, religion, or national origin is a form of discrimination prohibited by federal civil rights laws.<sup>61</sup>

Harassment violates Title VI of the Civil Rights Act of 1964 when:

1. harassing conduct on the basis of race, color, or national origin is sufficiently serious as to limit or deny a student's ability to participate in or benefit from the educational program, i.e., the conduct creates a hostile environment;
2. a responsible employee of the school knew, or should have known, about the harassment; and
3. the school failed to take prompt and effective steps reasonably calculated to end the harassment, eliminate the hostile environment, prevent the harassment from recurring, and, as appropriate, remedy its effects.<sup>62</sup>

### SUFFICIENTLY SERIOUS TO CREATE A HOSTILE ENVIRONMENT

"[H]arassing conduct...is sufficiently serious" if it limits the victimized student's ability to participate in school.<sup>63</sup> If a victimized student can't sleep, is afraid to come to school, avoids certain classes, or suffers academically because of the harassing conduct, then the conduct is "sufficiently serious" that the school's intervention is required by Title IV and Title VI.<sup>64</sup>

OCR has explained that each of the following can constitute harassment in violation of Title VI:

- Using racial, ethnic, or ancestral epithets, or slurs;
- Attacking or making negative comments based on how a person or group looks, dresses, or speaks; and based on their skin color, facial features, attire, accent, or language spoken;

- Attacking or making comments based on a group's allegedly inherited traits; or
- Relying on stereotypes about people who share certain ancestral characteristics.<sup>65</sup>

### WHEN A SCHOOL KNEW OR SHOULD HAVE KNOWN ABOUT THE HARASSMENT, A DUTY TO REMEDY THE HARASSMENT AND PREVENT FUTURE HARASSMENT IS TRIGGERED

When harassment occurs, the school's responsibility is to promptly end the harassment, prevent it from recurring, and remedy any other effects the harassment might have caused.<sup>66</sup> In most situations, school administrators cannot claim ignorance of the harassing conduct if the surrounding circumstances indicate that someone at the school should have known that the harassment was occurring.<sup>67</sup> Thus, if a victimized student dramatically alters her behavior after the harassment—even if school personnel did not personally see the harassment, the harassment did not occur on school grounds, or the student did not report it—a responsible educator should be alert to the fact that harassment may be occurring.<sup>68</sup> As the Supreme Court has recognized, "sometimes adult employees are the only effective adversaries of discrimination in schools."<sup>69</sup>

For example, the DOJ concluded that a New York high school was indifferent to the persistent verbal and physical harassment of Asian students by their peers, in violation of Title IV.<sup>70</sup> In Pennsylvania, Asian students were violently attacked by their peers in and around school grounds, resulting in nearly a dozen Asian students being hospitalized, and the DOJ again found that the school's response was inadequate.<sup>71</sup> The fact that the school had disciplined some of the individual students who had participated in the violent attack was not enough for the school to comply with its duty to remedy the harassment.<sup>72</sup>

## RETALIATION PROHIBITED FOR REPORTING DISCRIMINATION OR HARASSMENT

Schools may not retaliate against anyone—staff or students—who make complaints about racial or religious harassment. Title VI’s implementing regulations make clear that schools shall not “intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [Title VI], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.”<sup>73</sup>

## EXAMPLES OF HARASSMENT BASED ON RACE AND NATIONAL ORIGIN

OCR has offered examples both of harassment and bullying that violate students’ civil rights and of school actions that constitute an adequate response. For example:

Some students anonymously inserted offensive notes into African-American students’ lockers and notebooks, used racial slurs, and threatened African-American students who tried to sit near them in the cafeteria. Some African-American students told school officials that they did not feel safe at school. The school investigated and responded to individual instances of misconduct by assigning detention to the few student perpetrators it could identify. However, racial tensions in the school continued to escalate to the point that several fights broke out between the school’s racial groups.<sup>74</sup>

OCR concluded that while the school meted out a few individual responses to the harassment, the failure to implement a systemic response was problematic.<sup>75</sup> Additionally, the school should have

reaffirm[ed] the school’s policy against discrimination (including racial harassment), publiciz[ed] the means to report allegations of racial harassment, train[ed] faculty on constructive responses to racial conflict, host[ed] class discussions about racial harassment and sensitivity to students of other races, and conduct[ed] outreach to involve parents and students in an effort to identify problems and improve the school climate.<sup>76</sup>

In another incident in an Ohio school district, in which one African-American student primarily was targeted, someone anonymously put a crude drawing of a person hanging from a noose in the student’s locker with the words “Get Ready 2 Die” and a racial slur.<sup>77</sup> The DOJ’s investigation concluded that other African-American students had also suffered from racial harassment at the school, and were penalized after they reported the harassment to school officials.<sup>78</sup>

The disproportionate discipline of students of color, particularly after a racially-charged incident, is also a violation of students’ civil rights. At one school in Minnesota, Somali-American students suffered repeated harassment that culminated in a violent altercation between Somali-American students and the white students who had been harassing them.<sup>79</sup> The DOJ found that the school had disproportionately disciplined the Somali-American students who were involved in the altercation, in violation of Title IV, Title VI, and the Equal Protection Clause.<sup>80</sup>

More subtle harassment, based on racial stereotypes, can also violate students’ civil rights. OCR described a scenario in which a “group of Asian students is hit and taunted every week in gym class by other students who say, ‘Asians are supposed to be good at math—not

basketball.”<sup>81</sup> If students reported this conduct to the teacher and were told to “ignore” the other students and just focus on doing well in gym class, such minimization would likely violate the complaining students’ rights.<sup>82</sup> The burden of swallowing the harassment does not fall on the child-victims’ shoulders.

Schools need to understand and respond effectively to harassment because harassment can quickly escalate. For a black student at a Los Angeles charter school, what began as a white boy “ask[ing] her if she wanted to know how hot she is on the black-versus-white scale,” escalated into an image circulated among her classmates depicting her with a noose around her neck.<sup>83</sup>

The purpose and effect of particular acts are important in determining whether harassment is because of race. Words and actions that in some contexts would not constitute harassment could be in other contexts. At a parking lot in Jacksonville, Florida, after a football game, white students surrounded black students from an opposing school and chanted “Donald Trump! Donald Trump! Donald Trump!”<sup>84</sup> While shouting “Trump” may not always constitute harassment, the circumstances surrounding this incident indicated that the white students were doing so with the purpose of intimidating black students because of their race. If, for example, a student responded to a query about whom his parents voted for and he said, “Trump! Trump! Trump!,” that, without more, would not be racial harassment.

Across schools, taunts against Latino students have become increasingly hostile. At a volleyball game in Texas, white students chanted, “Build the wall,” at Latino students on the other team.<sup>85</sup> The same conduct occurred at basketball games in New Jersey and California.<sup>86</sup> In Nebraska, whenever a majority-white team played the majority-Latino Schuyler High School, the white students would bring Trump

signs and shout at the Schuyler students about deportation and building a wall.<sup>87</sup> Whether the students targeted by those chants were actually immigrants or actually undocumented is irrelevant for purposes of students’ civil rights, since the effect is the same: the white students had created a hostile environment that made Latino students afraid, or at the very least, discouraged to attend school.<sup>88</sup>

The age of students perpetrating or receiving the harassment will not preclude peer-to-peer harassment from being considered a hostile environment. A white third-grader chasing a Latina third-grader while chanting “Build the wall” would likely create a hostile environment from harassing conduct based on national origin.<sup>89</sup> Similarly, the fact that the perpetrators of the harassment share the same ethnic characteristics of the victim does not alter the severity or existence of the harassment. For example, OCR described the following conduct as a violation of the civil rights laws, despite the shared characteristics of the perpetrators and victim: “A Korean-American student tells her principal that a group of Korean students has repeatedly stolen her Asian history textbook and said that she is not a ‘real Korean’ because she only speaks English. The principal tells her that because the students who are bothering her are also Korean, it was probably a misunderstanding among friends and takes no action.”<sup>90</sup>

## EXAMPLES OF HARASSMENT BASED ON RELIGION

Teachers have reported that anti-Semitism, Islamophobia, and harassment directed towards Sikh students have been on the rise. Most concerning is the alarming rise in harassment of Muslim students, which reportedly has been perpetrated not just by students but in some instances by educators as well. Indeed, one study found that “teachers and school officials have participated in one in four bullying

incidents involving Muslim students.<sup>91</sup> In one DOJ investigation, a fourth-grade Muslim girl was harassed by a school official, who told her that the “Koran teaches war and hatred,” and ridiculed her because her mother wore a headscarf.<sup>92</sup> Thereafter, other students followed the school official’s example and ridiculed the girl mercilessly. The school’s response was particularly insensitive. Its sole action was to reassign the victim—again, placing the responsibility to end the harassment on the victim’s, rather than the perpetrators’ and the school’s, shoulders.

Harassment of Muslim students by their peers is very damaging. One study found that 42 percent of Muslim parents report that their children were bullied because of their faith, compared to 23 percent of Jewish parents, and 20 percent of Protestant parents.<sup>93</sup> Peer harassment is particularly damaging where the adults in the school building do not adequately respond to it, thus signaling that they condone the harassing conduct. The DOJ and OCR have offered the following example of when a teacher’s insensitive response to the harassment of a Muslim student would violate the student’s civil rights:

During a lesson about 9/11, classmates of a Muslim middle school student call him a terrorist and told him to go back to his country. The teacher tells the class that only some Muslims are terrorists, and asks the student why Muslims have not denounced the terrorist attacks of 9/11. The student complains to a school official about the statements by his teacher and classmates, but the school official takes no steps to respond.<sup>94</sup>

Sikh students in particular “can be victims of Islamophobia because their peers—and many adults—are unfamiliar with their religious dress.”<sup>95</sup> The DOJ concluded that a school

had violated the rights of a Sikh student who had been repeatedly targeted with verbal and physical harassment based on his faith.<sup>96</sup> The student was called “Aladdin” and a “terrorist” and was told to “go back to his country.”<sup>97</sup> Like many students who have endured repeated harassment, the student was afraid that the harassment would not stop.<sup>98</sup>

The Anti-Defamation League and other groups have likewise reported dramatic recent increases in anti-Semitic hate crimes and harassment.<sup>99</sup> OCR investigations provide guidance as to how schools can best respond to such incidents. For example, in one recent case, school employees at a junior high school received reports of several incidents of anti-Semitic conduct at the school. Anti-Semitic graffiti, including swastikas, was scrawled on the stalls of the school bathroom. When custodians discovered the graffiti, and reported it to school administrators, the administrators ordered the graffiti removed but took no further action. At the same school, a teacher caught two ninth graders trying to force two seventh graders to give them money. The ninth graders told the seventh graders, “[y]ou Jews have all of the money, give us some.” When school administrators investigated the incident, they determined that the seventh graders were not actually Jewish. The school suspended the perpetrators for a week because of the serious nature of their misconduct. After that incident, younger Jewish students started avoiding the school library and computer lab because they were located in the corridor housing the lockers of the ninth graders. At the same school, a group of eighth-grade students repeatedly called a Jewish student “Drew the dirty Jew.” The responsible eighth graders were reprimanded for teasing the Jewish student.<sup>100</sup>

OCR concluded that the fact that the targeted students were not Jewish was irrelevant, “because the harassment was based on their perceived shared ancestry or ethnicity.”

Conduct—like the graffiti in the bathroom—need not be directed at a particular student in order to constitute discriminatory harassment. That the school addressed each incident in isolation was grossly insufficient, considering the evidence that the whole school had a serious problem with anti-Semitism.<sup>101</sup> More recently, OCR opened an investigation into a middle school in Colorado after an eighth-grade student reported that her peers told her “she should be put in an oven like the other six million Jews and gassed like the Zika virus.”<sup>102</sup>

### EXAMPLES OF HARASSMENT BASED ON RELIGIOUS ATTIRE

Students who wear visibly religious attire are particularly vulnerable to harassment. Just as telling a student to remove her hijab or his yarmulke would violate the right to religious expression, physically removing a student’s religious head covering also would violate those rights.<sup>103</sup> Muslim students have reported increased levels of harassment, in part based on how they are dressed. Among girls in California who wore a hijab, 29 percent reported that they were offensively touched by another student, and 27 percent reported being discriminated against by their teacher.<sup>104</sup> In Minnesota, a teen reported that a school security guard removed her headscarf and put her in handcuffs after an altercation where another student called the teen a terrorist.<sup>105</sup> And in a different Minnesota school district, a Muslim girl reported that a classmate came up behind her, removed her hijab, threw it on the ground, and then pulled her hair down in front of her other classmates.<sup>106</sup> The Council on American-Islamic Relations indicated that the school district failed to adequately respond to the abuse.<sup>107</sup> Incidents such as these, particularly those involving student-on-student harassment, require educators’ intervention not just in the form of discipline, but also in teaching religious tolerance to the school community as a whole.

### HARASSMENT, HATE SPEECH, AND POLITICAL EXPRESSION

As the Supreme Court has made clear, students do not “shed their constitutional rights to freedom of speech or expression at the school-house gate.”<sup>108</sup> But the constitutional rights of students in public school “are not automatically coextensive with the rights of adults in other settings.”<sup>109</sup> Schools may prohibit student expression that will “materially and substantially disrupt the work and discipline of the school.”<sup>110</sup> “[C]onduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”<sup>111</sup> Thus, adults outside of school, in most instances, have a constitutional right to use vulgar or offensive speech; but students may be disciplined for that very same type of speech, because among other reasons, schools are responsible for “teaching students the boundaries of socially appropriate behavior.”<sup>112</sup>

Likewise, federal courts have recognized that certain symbols—such as the Confederate flag—are so menacing that their display in school in many contexts would collide with the rights of other students, and, as such, students often do not have a First Amendment right to wear or display such symbols in school.<sup>113</sup>

Indeed, the United States Court of Appeals for the Seventh Circuit has reasoned that students wearing the Confederate flag is an example of school speech that easily forfeits First Amendment protection. As that Court explained, “the display of the Confederate flag in racially mixed schools—illustrate[s] the] rare case” where the disruption of the speech is so obvious that a school need not show facts that the speech would lead to a “substantial disruption” before the speech could be proscribed.<sup>114</sup>

On the other hand, in normal cases, the school would have to put forth some “facts which might reasonably lead school officials to forecast substantial disruption.”<sup>115</sup>

Moreover, if schools allow the Confederate flag, Nazi swastika, or other discriminatory symbols to be displayed, they may find themselves in violation of Title VI of the Civil Rights Act of 1964 on the theory that by allowing the Confederate flag or other hate symbols to be bandied about, the school is allowing a racially hostile educational environment to exist.<sup>116</sup>

Context matters a great deal. Even certain symbols that are not themselves hateful can create a racially hostile environment when used with the purpose or effect of creating a racially hostile school environment. For example, the U.S. Court of Appeals for the Ninth Circuit has held that a school did not violate the First Amendment when it asked students to cover the American flag on apparel in light of the school’s history of students using the American flag to disrupt Cinco de Mayo commemorations.<sup>117</sup>

### CYBERBULLYING

Cyberbullying, or the use of electronic communications and social media to bully or harass, can be an extension of face-to-face bullying at school. Cyberbullying allows bullies to harass students not just in school but out of school as well.

It is well established that schools may discipline students for off-campus speech in certain situations.<sup>118</sup> Courts have specifically addressed when schools, consistent with the First Amendment, can take action against students engaged in off-campus cyberbullying of other students. The test that has emerged from the Federal appellate courts is that school officials have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial

disruption.<sup>119</sup> For example, in *S.J.W. v. Lee’s Summit R-7 School District*, the U.S. Court of Appeals for the Eighth Circuit concluded that students’ off-campus online posts “contain[ing] a variety of offensive and racist comments as well as sexually explicit and degrading comments about particular female classmates, whom they identified by name,” that were eventually discovered by their classmates, were not protected speech under the First Amendment, and as such, the school was free to discipline the students for the postings.<sup>120</sup>

### RELIGIOUS DISCRIMINATION

Two constitutional provisions protect the rights of religious students. The second clause of the First Amendment, known as the Free Exercise Clause, protects students’ rights to practice and express their religion. And the Equal Protection Clause of the Fourteenth Amendment prohibits any State from “deny[ing] to any person . . . the equal protection of the laws,” and thus bars the government from treating one religious group differently from another.<sup>121</sup>

Federal civil rights statutes also protect students’ rights to be free from religious discrimination, and to be able to express themselves in accordance with their faith. Title IV prohibits public schools from discriminating against students based on their religion.<sup>122</sup> Title VI also prohibits discrimination against students if the discrimination is based on their actual (or perceived) shared ancestry, citizenship, or residency in a country where one religion is predominant.<sup>123</sup> For example, Title VI would apply if the discrimination is based on a student’s Israeli heritage (where Judaism is the predominant religion), or Pakistani heritage (where Islam is the predominant religion). And, under the federal Equal Access Act, a public school must permit students to form clubs based on religion if the school permits students to form extracurricular clubs.<sup>124</sup> The DOJ reached a

settlement with a school district in Texas that had permitted student groups to meet during their lunch period, but refused to honor Muslim students' request for a space to kneel and say midday prayers at the same time.<sup>125</sup>

### **RIGHT TO WEAR RELIGIOUS SYMBOLS AND CLOTHING AND ENGAGE IN RELIGIOUS CONDUCT IN SCHOOL**

One of the most common forms of religious discrimination in schools is improperly policing students' religious attire. An Oklahoma school violated a Muslim student's civil rights when it disciplined the student for wearing her hijab to school as a violation of its "no hats" policy.<sup>126</sup> The school's discriminatory intent was evidenced in the inconsistent enforcement of the policy: the school permitted other students to wear hats for medical, educational, and other secular purposes.<sup>127</sup> An Alabama school violated a Sikh student's rights when it would not allow the student to attend classes until he cut his hair, even though the Sikh faith prohibits him from cutting his hair.<sup>128</sup> Even if a school's desire to police students' attire was motivated by good intentions, a school can still be liable for violating a religious student's rights. Thus, if the school asked a Sikh student not to wear his turban to school "for his own safety, given recent violence targeting Muslims,"<sup>129</sup> the school would still be violating that student's right to religious expression, however benevolent the motives.<sup>130</sup>

### **RIGHT TO ENGAGE IN RELIGIOUS CONDUCT IN SCHOOL**

Students have a constitutional and statutory right to maintain their religious identity in school. This right is especially pertinent for students from religious minorities—such as Muslim, Sikh, Hindu, and Jewish students—who have been increasingly targeted for their faith.

The First Amendment's Free Exercise and Speech Clauses have been successfully

invoked by students who seek exceptions to dress and grooming codes in order to wear headcoverings,<sup>131</sup> long hair,<sup>132</sup> rosaries as necklaces,<sup>133</sup> nose rings,<sup>134</sup> and clothing that does not conform to school uniforms.<sup>135</sup> For this reason, schools must maintain an exemption in their dress codes to accommodate students' sincerely-held religious beliefs.<sup>136</sup>

### **STATE RELIGIOUS FREEDOM RESTORATION ACTS (RFRA)**

Students seeking to exercise their religion in school or wear religious garb should also consult their state's Religious Freedom Restoration Act. Twenty-one states have adopted their own versions of RFRA, known as "State RFRA,"<sup>137</sup> which generally protect individuals against substantial burdens on the exercise of their faith imposed by the government (such as school districts). For example, in *A.A. ex rel. Betenbaugh v. Needville Independent School District*, a Native American student who had a sincere religious belief in wearing his hair long, uncut, and in plain view, was entitled under Texas's Religious Freedom Restoration Act to an exemption from a school district's rule that required him to wear his hair differently.<sup>138</sup> And prohibiting Sikh students from wearing a kirpan, a ceremonial knife, also likely would violate RFRA laws.<sup>139</sup> For a comprehensive description of state RFRA laws, see NEA Office of General Counsel, *Religious Exemption Laws—A License to Discriminate?* (Dec. 2017).

### **TEACHING CULTURAL COMPETENCE**

Teaching cultural competence, proscribing intolerance, and immediately responding to incidents of hate or bias are critically important to ensuring the health and safety of all students and are often legally required.<sup>140</sup>

Researchers have found that effective teaching of cultural competence can dramatically improve students' academic performance. The NEA's research department conducted a

review of the literature assessing the impact of ethnic studies on students' academic progress. That review found that students of color experienced higher academic achievement where they participated in an ethnic studies curriculum that focused on their own ethnic backgrounds.<sup>141</sup> White students also appear to benefit academically from ethnic studies since such curricula "were designed to help students grapple with multiple perspectives," and therefore "produce[d] higher levels of thinking."<sup>142</sup> Moreover, a study from Stanford's Center for Education Policy Analysis found that culturally relevant pedagogy in San Francisco schools actually caused higher academic achievement, rather than just reflecting a correlation.<sup>143</sup> The researchers deemed San Francisco's program "extraordinarily effective in supporting the academic progression of struggling students."<sup>144</sup>

The impact of culturally competent curricula has been recognized by the judiciary. In a recent federal case<sup>145</sup> involving Tucson's Mexican-American Studies (MAS) program,<sup>146</sup> the court admired how an ethnic studies program positively affected students' academic performance. Participating students had higher high school graduation rates, and higher pass rates on standardized tests.<sup>147</sup> All students, regardless of their race or ethnicity, experienced those benefits, but Mexican-American students in particular achieved remarkable gains.<sup>148</sup> The overall academic effect of the program was all the more "impressive given that the students electing to take MAS classes had 'extremely low academic performance prior to taking the courses.'<sup>149</sup>

## TEACHING RELIGIOUS LITERACY

Schools and educators should also consider incorporating religious literacy into the school's curriculum. As one teacher and commentator noted: "Without some understanding of the world's religious traditions, students are ill equipped to understand literature, history, art, or the current political landscape. Religious illiteracy not only deprives students of the cultural richness that is their birthright as human beings, it makes for an uninformed electorate and produces students who are less equipped to compete in a global marketplace."<sup>150</sup>

Because of this, NEA, in particular, "believes that schools should teach the rights and responsibilities associated with religious heritage and diversity of the United States, respect for the beliefs of others, and the historical and cultural influences of various world religions."<sup>151</sup>

Teaching students about religions, as opposed to teaching students one particular religion, is not barred by the U.S. Constitution (specifically, by the Establishment Clause of the First Amendment).<sup>152</sup> The United States Supreme Court furthermore has encouraged schools to teach about religion (rather than to teach in favor of a particular religion).<sup>153</sup> In the 1963 decision *Abington v. Schempp*, the Court distinguished school-sponsored Bible reading (constitutionally impermissible) from teaching about religion in public schools: "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization."<sup>154</sup> As for the currently composed Court, every Supreme Court Justice (except for the newly-appointed Justice Gorsuch) has in some way endorsed public schools teaching about religion as a necessary component of civics and history instruction.<sup>155</sup> As the late Justice Scalia noted in a dissent, "maintaining respect for the religious observances of others is a fundamental civic virtue that government (including the public schools) can and should cultivate . . . ."<sup>156</sup>

What is impermissible and would violate the Establishment Clause of the Constitution is proselytizing or promoting the veracity or virtues of a particular religion.<sup>157</sup>

To navigate that line, consult the NEA-endorsed *A Teacher's Guide to Religion in the Public Schools*.<sup>158</sup> There are a few keys to teaching about religion in public schools: (1) approach religious study academically, not devotionally; (2) raise awareness about religions; do not push acceptance of any one religion; (3) study religion; do not practice it; (4) expose students to religious views; do not impose a particular religious view; (5) educate about all religions; do not denigrate or promote any particular religion; and (6) inform students about various religious beliefs; do not seek to conform students to any particular belief.

Fears that all teaching about world religions necessarily leads to proselytization are overblown.<sup>159</sup> Instead, teaching about world religions can prevent the bullying and stereotyping of minority religions, and of Muslims in particular, because American students are often only exposed to “monolithic” and extreme depictions of Islam.<sup>160</sup> Teaching about extremism—especially extremism in religious groups worldwide—can help correct the “imbalance [that] leads to a belief that all terrorists are Muslims and vice versa.”<sup>161</sup>

## CONCLUSION

The legal landscape set forth above provides the key context for educators and activists to consider in determining what actions their school district should take to ensure that all students' rights to attend school without discrimination based on race, religion, or national origin are fully respected.

# SCHOOL DISTRICT POLICIES AGAINST DISCRIMINATION BASED ON RACE, RELIGION, AND NATIONAL ORIGIN

One of the most important steps that school districts can take to protect students' rights is to adopt strong and effective policies making clear both that discrimination and harassment are prohibited and that the district will take swift and effective action if such conduct occurs. Many school districts have some policies in place already but it makes sense, particularly in light of the current environment, to review such policies to ensure they are comprehensive and clear.

To that end, the following NEA Model Policy is drafted comprehensively to serve not just as a model policy for wholesale adoption by school districts, but also as a checklist against which to compare existing school district policies to identify areas in need of improvement.

As a comprehensive policy, the attached addresses harassment and discriminatory conduct by anyone in the school environment: from educators, administrators and other school staff, as well as from students and parents. Conduct by staff raises issues that should be resolved through the existing labor-management relations process including collective bargaining. The model policy should not undermine those processes, but should instead inform those ongoing relationships and negotiations.

At a minimum, a model school district policy on these issues should include the following components:

- ✓ A statement that the school district condemns and will take effective action to prevent the prohibited discrimination and harassment;
- ✓ A clear definition of the nature of the conduct that is prohibited;
- ✓ An effective enforcement mechanism, which should clarify:
  - ❑ Who is responsible for reporting alleged violations;
  - ❑ Who will receive such reports and investigate and resolve them confidentially and without retaliation;
  - ❑ How staff and others in the school community will be informed of the policy; and
  - ❑ How staff and students will be trained on the policy.

# NEA MODEL POLICY AGAINST DISCRIMINATION BASED ON RACE, RELIGION, AND NATIONAL ORIGIN

## DISCRIMINATION AND HARASSMENT BASED ON RACE, RELIGION, AND NATIONAL ORIGIN PROHIBITED

All students in our school district are entitled to be treated equally without discrimination based on race, color, national origin, or religion. The school district will not tolerate bullying or harassment of students based on race, color, national origin, or religion. In order to ensure any such conduct is promptly stopped and appropriate remedial action is taken, the school district adopts this policy for handling and resolving any complaints of such discrimination or harassment.

## SCOPE

This policy applies to the entire school community, including educators, school and District staff, students, parents, and volunteers. This policy covers conduct that takes place in the school, on school property, at school-sponsored functions and activities, on school buses or vehicles, and at bus stops. This policy also applies to electronic technology and electronic communication that occurs in school, on school property, at school-sponsored functions and activities, on school buses or vehicles, at bus stops, and on school computers, networks, forums, and mailing lists, as well as electronic communication that occurs off school property that will foreseeably reach the school campus and cause a substantial disruption at school.

## DEFINITIONS

**BULLYING** means written, verbal, or physical conduct, or electronic communication, that adversely affects the ability of one or more students to participate in or benefit from the school's educational programs or activities by placing the student (or students) in reasonable fear of physical harm. Such bullying may consist of comments and conduct directed at a student either directly or indirectly, whether through electronic communications, in person comments or otherwise.

**HARASSMENT** means written, verbal or physical conduct, or electronic communication, that adversely affects the ability of one or more students to participate in or benefit from the school's educational programs or activities because the conduct is so severe, persistent or pervasive. Such harassment may consist of comments and conduct directed at a student either directly or indirectly, whether through electronic communications, in person comments or otherwise.

**NATIONAL ORIGIN** discrimination or harassment involves treating someone unfavorably because they are from a particular country or part of the world, because of their ethnicity or accent, or because they are perceived to be from a certain ethnic background (even if they are not).

**RACE** discrimination or harassment involves treating someone unfavorably because they are of a certain race (or are perceived to be of a certain race) or because they have personal characteristics associated with that race (such as hair texture, skin color, or certain facial features).

**COLOR** discrimination or harassment involves treating someone unfavorably because of their skin color or complexion.

**RELIGIOUS** discrimination involves treating someone unfavorably because of their perceived or actual religious beliefs, practices, customs, or heritage, or because of stereotypes about such religions regardless of whether the religions are the traditional, organized religions (such as Buddhism, Christianity, Hinduism, Islam, and Judaism) or another religion.

### **RELIGIOUS EXPRESSION**

Any school uniform policy or practice will accommodate students whose religious beliefs are burdened by a uniform requirement. Students may display religious messages on clothing to the same extent they are permitted to display comparable secular messages.

Students shall have the right to wear clothes that are expressive of their religious traditions, customs, and beliefs, including but not limited to, yarmulkes, hijabs, headscarves, and other religiously influenced head or body coverings.

### **STUDENT SPEECH**

Students shall have the right to exercise freedom of speech and of the press at school. But the right to exercise freedom of speech does not justify harassing, bullying, or intimidating actions or speech that deprive or diminish other students' right to an equal education.

### **STAFF ADVOCACY FOR STUDENTS' RIGHTS**

All staff shall have the right to inform students of their legal and constitutional rights to be free from discrimination and harassment in school, as well as their rights under this policy. Staff shall have discretion as to how to convey those messages. Classroom posters, signs, and other classroom postings making clear that the classroom is a welcome place for all students shall be encouraged and not prohibited.

### **INVESTIGATION, REMEDY AND PREVENTION PROCEDURE**

The school district encourages anyone—student, parent or guardian, volunteer, educator, or staff member—who witnesses harassment or discrimination based on a student's actual or perceived race, religion, or national origin to report the conduct to school staff. All school staff are required to promptly share any such reports to the school district administrator, whom each school district has designated to accept and process such complaints.

Complaints may be made orally or in writing. Complaints should not be dismissed for any technical reason. If additional information is needed, the designated administrator must take reasonable measures to obtain the necessary information. Anonymous reports of bullying, harassment, and cyberbullying shall be accepted and investigated in the same way as other reports.

Upon receiving a complaint for harassment, bullying, or retaliation, the designated administrator shall:

1. Take immediate steps to protect any involved students, educators, or staff;
2. Promptly and thoroughly investigate the alleged bullying or harassment;
3. Determine if bullying or harassment occurred;
4. If the administrator determines that harassment or bullying occurred, take immediate action to prevent any further harassment or bullying and to prevent future occurrences;
  - a. Such actions should include, depending on the circumstances, counseling or discipline of the harassing or bullying student, but counseling shall be favored over discipline; and

b. Actions addressing any systemic issues needed to prevent recurrence of the harassment and bullying. Where a school has experienced more than one act of bullying or harassment against students of a particular race, religion, or national origin, whether actual or perceived, the remedy shall include systemic responses such as curricula changes, professional development for staff, and/or Know Your Rights trainings for parents and students.

5. The administrator shall also promptly provide a written report to district administration and all involved students, parents, and educators, regarding the complaint, investigation, and any measures taken to remedy the harassment or bullying and prevent future occurrences. Such report shall preserve in confidence the names of the individuals involved to the greatest extent possible.
6. The administrator shall maintain written or electronic records of each complaint and its investigation and resolution including the final report and the implementation of any and all remedial actions taken.

A complainant or victim of harassment, bullying, or retaliation (or parent or guardian) has the right to appeal the designated school administrator's handling of the complaint to the Superintendent of the School District.

Should that occur, the Superintendent (or independent designee) shall conduct an independent review to determine whether the designated administrator (1) correctly analyzed the complaint; (2) conducted a sufficient investigation of the incident; (3) made a proper determination about whether bullying, harassment, or retaliation occurred; and (4) took adequate action to remedy past bullying, harassment, or retaliation, and prevent future occurrences.

## RETALIATION PROHIBITED

The school district prohibits retaliation against any individual who reports discrimination or harassment of any student on the basis of race, religion or national origin or who participates in an investigation of such a report. Retaliation is any attempt to seek retribution against an individual or group of individuals involved in filing a complaint or report under this policy, filing an external complaint, participating in a disciplinary process, or opposing in a reasonable manner an action believed to constitute a violation of this policy. Examples of retaliations include termination, demotion, refusal to promote, denial of equal educational opportunities, or any other adverse employment or school action that would discourage a reasonable person from opposing perceived discrimination and/or harassment.

There will be no retaliation by the school district against anyone who makes a good faith complaint about harassment or discrimination or who, in good faith, reports or provides information in the course of the investigation of such complaints. A complaint that such retaliation has occurred will be investigated and resolved in the same manner as other complaints under this policy. If the investigation determines that retaliation has occurred, appropriate corrective action will be taken.

## ENROLLMENT

The school's enrollment practices may not treat immigrant students or families less favorably than any other students or families. No school may require that students or their families show a particular proof of residency, such as a driver's license or state-issued identification, to enroll. Driver's license or state-issued identifications can be allowed, but cannot be required. Schools may, however, require proof of residency in the form of other documentation including: utility bills, such as phone, water,

or gas bills; lease agreements or mortgage documents; and affidavits from a parent, guardian or other relative.

Homeless students, including undocumented homeless students, are exempt from any documentation requirements in order to establish residency. A homeless child shall never be required to show any documentation relating to proof of residency in order to enroll in public school.

District personnel shall not inquire about or record a student's or a family member's immigration status, and pursuant to the Family Education Rights and Privacy Act ("FERPA"), shall not disclose, without parental consent, the immigration status of any student or other personally identifiable information.

### **EQUAL ACCESS TO EDUCATIONAL PROGRAMS FOR IMMIGRANT STUDENTS AND FAMILIES**

District personnel shall treat all students, regardless of immigration status, equitably in the receipt of all school services, including but not limited to, the free and reduced lunch program, transportation, and educational instruction.

The District will

1. Offer counseling that adequately acknowledges the impact of immigration status on students and their family members;
2. Offer Know Your Rights presentations to students and parents in their preferred language; and
3. Ensure that students are aware of opportunities to gain access to college, in-state tuition, financial aid, scholarships, internships and career opportunities, regardless of their status.

To establish a support system for immigrant students, the District shall establish on-campus resource centers for immigrant students and their families and shall establish at least one immigrant liaison, with expertise in immigrant and undocumented populations.

### **DISTRIBUTION AND IMPLEMENTATION OF THE POLICY**

This policy shall be distributed to students and staff annually, and be made part of student codes of conduct, student handbooks, and school and district websites.

### **STAFF ANTI-HARASSMENT TRAINING AND PROFESSIONAL DEVELOPMENT**

All staff are to be trained on this policy. Such training shall include: (1) how to report harassment, bullying, or retaliation; and (2) how to respond to incidents of bullying or harassment that staff witness.

Those who lead or co-lead the anti-harassment training, as well as the school district administrator of this policy, should themselves receive specific and appropriate training in issues related to race, color, national origin, religion, and cultural awareness and competency.

Staff shall also be provided professional development programs that provide them with, among other things: (i) developmentally and age-appropriate strategies to prevent bullying and harassment; (ii) developmentally and age-appropriate strategies for immediate, effective interventions to stop bullying and harassment; (iii) training on the complex interaction and power differential between harassers, victims, and witnesses to bullying and harassment; (iv) research on the causes and effects of bullying and harassment including information about specific categories of students who are particularly at risk for bullying and harassment; and (v) training on identifying cyberbullying and other internet safety issues.

Staff shall also receive necessary support to successfully teach students who come from cultures other than their own. Staff are entitled to district-sponsored and district-funded training, aimed at developing personal and interpersonal awareness and sensitivities, understanding of certain bodies of cultural knowledge, and mastery of a set of skills that, taken together, underlie effective cross-cultural teaching.

### **STUDENT ANTI-HARASSMENT AND BULLYING CURRICULUM**

As part of each school's regular curriculum, at least annually, schools shall provide education for all students (using age-appropriate materials) regarding tolerance, diversity, and respect for others. This shall include grade and age-appropriate education about the prohibition of harassment and discrimination on the basis of race, color, national origin, and religion and the District's policies with respect to such harassment and discrimination. The curriculum will also include instruction on how to prevent bullying and harassment; on how to make complaints; and on what will occur should students engage in harassment or bullying.

### **ANTI-HARASSMENT TRAININGS**

All anti-harassment trainings shall include, at a minimum, the following:

1. Instruction on the type of conduct that constitutes race, color, national origin, or religion harassment and a discussion about the negative impact that bullying and harassment have on students, employees, and the educational environment, including the long-term impact of bullying and harassment on the students who are bullied and harassed and on the offending students themselves;
2. Discussion of the importance of, sensitivity to, and respect for the diversity of the student body;

3. A facilitated discussion of the root causes of specific forms of harassment that bear emphasis in the particular school.
  - a. For example, if religious and national origin harassment against Muslim students persists in a particular school then education should focus on Muslim history and contributions as well as education about religious and national origin harassment in particular and the harms resulting from such conduct, including but not limited to, issues related to backlashes that occur after terrorist events and the perpetuation of negative stereotypes impacting the Sikh, Muslim, Arab-American, and South Asian communities;
  - b. For example, if racial and national origin harassment against immigrant students or those perceived as immigrants persists in a particular school then education about the history and contributions of immigrants should be had as well as a discussion about immigration harassment in particular and the harms resulting from such conduct, including but not limited to the perpetuation of negative stereotypes impacting immigrant communities;
4. Identification of designated staff at each school who are available to answer questions or address concerns regarding the harassment policies and procedures or other issues related to bullying and harassment;
5. Instruction that when race, color, national origin, or religious harassment occurs, staff should inform students who bully or harass others that the District accepts and respects the dignity of all students and that harassing comments or actions are inappropriate, harmful, and disruptive, and will not be tolerated at school.

# FREQUENTLY ASKED QUESTIONS

## ENROLLMENT AND IMMIGRATION ISSUES

### *Can schools require proof of citizenship to attend?*

**NO.** Immigration or citizenship status is irrelevant to a student's right to attend school. All children, including undocumented immigrants, have a constitutional right to attend school. Citizenship inquiries could violate that right by chilling undocumented students from attending school. Schools should not, under any circumstance, inquire into immigration status in a way that has the purpose or effect of chilling immigrants from attending or enrolling.

### *Can schools require proof of residency in the appropriate school or district boundary?*

**YES.** A state or district may establish bona fide residency requirements and thus might require that all prospective students show some proof of residency. But schools must allow residency documentation, such as phone or utility bills, that do not elicit immigration status or chill undocumented students from attending school. And homeless students, as defined by the Federal McKinney-Vento Homeless Assistance Act, 42 U.S.C. §§ 11301 et seq., must not be required to furnish proof of residency within the district under any circumstance. Homeless children and youth have a federal legal right to enroll in school, even if their families cannot produce the documents establishing residency.

### *What sorts of documentation should the school use to establish residency?*

Districts must permit parents to establish residency by providing a variety of documents as proof of residency and cannot require documents that would bar or chill undocumented students from attending. Such documents include: a telephone or utility bill, mortgage or lease document, parent affidavit, rent payment receipts, a copy of a money order made for payment of rent, or a letter from one of the parent's employers. Schools cannot apply different residency requirements to immigrant students than they do to others.

### *What documentation can schools use to establish that state or district age requirements are satisfied?*

Schools can use birth certificates to establish a student's age, but such use must not unlawfully bar or discourage an undocumented student, a student whose parents are undocumented, or a homeless student from enrolling in and attending school. Schools should inform parents that alternatives to birth certificates are allowed, and allow alternative documentation of age such as a religious, hospital, or physician's certificate showing date of birth; an entry in a family bible; an adoption record; an affidavit from a parent; a foreign birth certificate; previously verified school records; or any other documents permitted by law. Foreign-born students must not be barred from attending school.

### *Should schools ask for students' social security numbers?*

**NO.** Although schools are not categorically prohibited from collecting the social security numbers of prospective or current students by federal law, federal law does govern the disclosure of such numbers and requires that the confidentiality and security of the social security numbers must be safeguarded. See,

e.g., Privacy Act of 1974, Pub. L. No. 93-579, § 7, 5 U.S.C. § 552a (note). But schools cannot deny enrollment to a student for refusing to provide a social security number, and schools should make that fact known to our parents.

If districts would like to use identifying numbers, they should consider creating a randomly selected number for each student. That way, social security numbers are secure and students that do not have such numbers are not chilled from attending school.

*Can the school district disclose information to immigration officials or others from a student's education records without the consent of the student or a parent?*

**RARELY.** The Family Educational Rights and Privacy Act of 1974 (FERPA) generally prohibits school districts that receive Federal funds from the Department of Education from disclosing information in a student's education records that alone or in combination with other information can identify that student, without the prior written consent of a parent or the student (if that student is 18 years of age or older or attends a postsecondary institution). See 20 U.S.C. § 1232g. In very rare circumstances that are almost never met, a school district may disclose information from a student's education records without the student's or parent's consent.

*Should schools communicate enrollment procedures in languages other than English?*

**YES.** Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Equal Educational Opportunities Act, 20 U.S.C. § 1703 require a school district to meaningfully communicate material information about enrollment. As such, enrollment and other documents should be translated into languages other than English and schools should be able to respond to parents who do not speak English.

*Should schools proactively show immigrant parents and their children that their children are welcome in school?*

**YES.** School districts should proactively notify immigrant parents and communities about their rights to send their children to public school. Districts should engage in outreach to communities to inform parents that all students who are residents in the district are welcome to attend the district's schools.

## **BULLYING AND HARASSMENT**

*What should a student do if bullied or harassed by a classmate because of the student's or family's immigration status or because of the student's or family's religion?*

**All** students, regardless of national origin, immigration status, or religious background, have the right to an education free from bullying and harassment. Harassment and bullying should be reported to a teacher, a school administrator, or the school principal. If the bullying or harassment issue is not resolved at the school site and the district has adopted a policy similar to the NEA model policy, parents and students can use that policy procedure to ensure that the harassment is remedied and prevented. Otherwise, students should bring concerns to the district office. If the superintendent or other district administrators do not respond satisfactorily, students and their parents should voice concerns at the next meeting of your school board, if comfortable doing so. Students and their families should consult legal counsel if the harassment is not remedied or if future harassment is not prevented.

*What do I do if I see a student being bullied or harassed because of the student's race, national origin, immigration status, or religion?*

In many instances, bullied or harassed students will not report the bullying or harassment. School staff are responsible for reporting all such incidents to the appropriate staff person (under the model policy above, the school administrator), even when the student doesn't report the harassment. Be sure to follow up to ensure all proper steps have been taken to remedy and prevent the problem. Federal law prohibits retaliation against anyone for reporting illegal harassment or bullying. If an NEA member suffers retaliation for so reporting, contact your local NEA association.

*How should a parent, teacher, or student document incidents of bullying or harassment?*

Document what happened, if possible, with photos, video, audio, or written statements about the bullying or harassment, and make note of when the harassment was reported. Keep copies of any letters, emails, or written communication sent to the school and that the school sends in response. Log any phone calls or in-person meetings that occur with the school, and take notes if you can, of the date, time, and location of the meeting and what was said.

*What if the school fails to respond or takes insufficient action to stop the harassment or bullying or punishes the person who spoke out?*

The school is legally obligated to protect students from harassment and stop and prevent it. When a school fails to act, outside help may be needed. NEA members should consult their local NEA affiliate. Students and their families should consider seeking legal counsel.

*What can be done about cyberbullying of students?*

Cyberbullying, or the use of electronic communications and social media to bully or harass, can be an extension of face-to-face bullying at school. Cyberbullying allows bullies to harass students not just in school but out of school as well. When cyberbullying is an extension of school-based bullying or causes disruption to the educational environment, schools can and should take action to stop the cyberbullying and prevent future incidents.

*Do students have a First Amendment right to wear or display racially or religiously threatening images such as swastikas or confederate battle flags?*

**NO.** Students do not have a right to expression that deprives other students of equal educational opportunities. Courts have uniformly recognized that displaying swastikas, confederate flags, and other racially intimidating symbols can and should be prohibited where they deprive other students of equal educational opportunities.

## RELIGIOUS EXPRESSION IN SCHOOL

*Can students wear religious head coverings even when the school prohibits wearing hats?*

**YES.** Dress codes are not required but schools may enforce dress codes that ensure that students dress in a manner that, in addition to the following guidelines, takes into consideration the education environment, safety, health, and welfare of the student and others.

Under all circumstances, staff and students shall have the right to wear clothes that are expressive of their religious traditions, customs, and beliefs. Consistent with that, staff and students have the right to wear yarmulkes, hijabs, headscarves, and other religiously influenced head or body coverings.

A school's dress code may not be more strictly enforced against religious students than other students.

*Are students barred from praying or expressing their religion in school?*

**NO.** Students have the right to express their religion with other students in settings, such as before or after school or during lunch breaks, where student expression is not restricted to school matters. Religious expression shall not be burdened more than any other personal expression.

Consistent with this, religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as, among other things, yarmulkes, hijabs, and head scarves, and students may not be forced to wear gym clothes that they regard, on religious grounds, as immodest.

*Can staff encourage students to engage in religious activities?*

**NO.** Students have both the right to be free from staff encouragement of religion and the right to express their own religious beliefs and traditions.

Teachers and school administrators, when acting in those capacities, are representatives of the state, and, in those capacities, are themselves prohibited from encouraging or soliciting students for religious or anti-religious activity. When acting in their official capacities, staff may not engage in religious activities with their students.

Education about the world's religions, however, can and should be part of the curriculum.

# RESOURCES FOR EDUCATORS

## GENERAL RESOURCES ON HARASSMENT AND BULLYING

- ★ *Diversity Toolkit*, Nat'l Educ. Ass'n, <http://www.nea.org/tools/diversity-toolkit.html>.
- ★ *Toolkits: NEA's Bullyfree It Starts with Me*, Nat'l Educ. Ass'n, <http://www.nea.org/home/63946.htm>.
- ★ NEA Human and Civil Rights, Bullying and Sexual Harassment Prevention and Intervention Training Modules, [http://www.nea.org/assets/docs/15294\\_HCR\\_Bullying\\_Training-Rev.2-14.pdf](http://www.nea.org/assets/docs/15294_HCR_Bullying_Training-Rev.2-14.pdf).
- ★ *NEA Human and Civil Rights*, Nat'l Educ. Ass'n, <http://www.nea.org/home/64661.htm>.
- ★ Phil Nast, *Teaching Students to Prevent Bullying: Curriculum Resources Identifying, Confronting and Stopping Bullying*, Nat'l Educ. Ass'n, <http://www.nea.org/tools/lessons/teaching-students-to-prevent-bullying.html>.
- ★ Teaching Tolerance, *Responding to Hate and Bias at School: A Guide for Administrators, Counselors and Teachers*, [http://www.tolerance.org/sites/default/files/general/Responding%20to%20Hate%20at%20School%20ONLINE\\_3.pdf](http://www.tolerance.org/sites/default/files/general/Responding%20to%20Hate%20at%20School%20ONLINE_3.pdf).
- ★ *Classroom Resources*, Teaching Tolerance, <https://www.tolerance.org/classroom-resources>.
- ★ *Resources for Educators, Parents & Families*, Anti-Defamation League (2017), <https://www.adl.org/education-and-resources/resources-for-educators-parents-families>.

- ★ *Bullying & Ostracism: Classroom Materials*, Facing History and Ourselves (2017), [https://www.facinghistory.org/topics/bullying-ostracism?f%5B0%5D=fh\\_search\\_api\\_search\\_type%3Acontent](https://www.facinghistory.org/topics/bullying-ostracism?f%5B0%5D=fh_search_api_search_type%3Acontent).
- ★ Stop Hate Project et al., *Bullying Prevention Month of Action Toolkit*, <https://8449nohate.org/wp-content/uploads/2017/10/TOOLKIT.pdf>.
- ★ Yvonne Pratt-Johnson, *Communicating Cross-Culturally: What Teachers Should Know*, Internet TESL J. (Feb. 2006), <http://iteslj.org/Articles/Pratt-Johnson-CrossCultural.html>.

## RESOURCES FOR HARASSMENT BASED ON RACE, ETHNICITY, AND IMMIGRATION STATUS

- ★ Nat'l Educ. Ass'n, *All In!: How Educators Can Advocate for English Language Learners* (2015), [https://www.nea.org/assets/docs/18285\\_ELL\\_AdvocacyGuide2015\\_low-res\\_updated\\_6-23.pdf](https://www.nea.org/assets/docs/18285_ELL_AdvocacyGuide2015_low-res_updated_6-23.pdf).
- ★ Nat'l Educ. Ass'n, *Your Students and Immigration Raids: What You Can Do* (2016), <http://www.nea.org/assets/docs/ice-raids-fact-sheet-1.pdf>.
- ★ U.S. Dep't of Educ., *Resource Guide: Supporting Undocumented Youth* (Oct. 20, 2015), <https://www2.ed.gov/about/overview/focus/supporting-undocumented-youth.pdf>.
- ★ Nat'l Educ. Ass'n, *How to Respond to Incidents of Racism, Bullying and Hate in Schools*, NEA Today (Nov. 17, 2016), <http://neatoday.org/safeschools>.
- ★ Cindy Long, *Talking to Students About Charlottesville Violence and Racism*, NEA Today (Aug. 14, 2017), <http://neatoday.org/2017/08/14/talking-to-students-about-charlottesville-events>.

- ✦ *Black Lives Matter at School: Resource Toolkit for School Staff*, Rochester City Sch. Dist. (Feb. 17, 2017), [https://docs.google.com/document/d/1ou2lkNO\\_1ijC-JDfmasbAG8mx\\_7hvv1cHKmobhtcVLak/edit](https://docs.google.com/document/d/1ou2lkNO_1ijC-JDfmasbAG8mx_7hvv1cHKmobhtcVLak/edit).

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- ✦ U.S. Dep't of Justice, *Combating Religious Discrimination Today: Final Report* (July 2016), <https://www.justice.gov/crt/file/877936/download>.
- ✦ U.S. Dep't of Justice, Cmty. Relations Serv., *Twenty Plus Things Schools Can Do to Respond to or Prevent Hate Incidents Against Arab-Americans, Muslims, and Sikhs* (2012), <https://www.justice.gov/sites/default/files/crs/legacy/2012/12/17/20-plus-things.pdf>.
- ✦ *Antisemitism & Religious Intolerance, Facing History and Ourselves* (2017), [https://www.facinghistory.org/topics/antisemitism-religious-intolerance?f%5B0%5D=fh\\_search\\_api\\_search\\_type%3Acontent](https://www.facinghistory.org/topics/antisemitism-religious-intolerance?f%5B0%5D=fh_search_api_search_type%3Acontent).
- ✦ Marisa Fasciano, *Extreme Prejudice: The "Whys" and "Hows" of Teaching About Religious Radicalism*, *Teaching Tolerance* (2015), <https://www.tolerance.org/magazine/fall-2015/extreme-prejudice>.
- ✦ First Amendment Ctr., *A Teacher's Guide to Religion in the Public Schools* (May 2008), <http://www.religiousfreedomcenter.org/wp-content/uploads/2014/08/teachersguide.pdf> (endorsed by the National Education Association).

# RESOURCES FOR EDUCATION LAWYERS

## LEGAL RESOURCES FROM THE U.S.

### DEPARTMENT OF EDUCATION AND THE U.S. DEPARTMENT OF JUSTICE

- ✦ Catherine E. Lhamon, Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Guidance to Ensure All Students Have Equal Access to Educational Resources* (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resource-comp-201410.pdf>.
- ✦ Office for Civil Rights, U.S. Department of Educ., *Fact Sheet: Ensuring Students Have Equal Access to Educational Resources without Regard to Race, Color, or National Origin* (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-resource-comp-201410.pdf>.
- ✦ Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: English Learner Students and Limited English Proficient Parents* (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf> (English language learners).
- ✦ Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents* (May 8, 2014), <https://www.justice.gov/crt/about/edu/documents/plylerqa.pdf> (Enrollment and remaining in school).

- ✧ U.S. Dep't of Justice, U.S. Dep't of Educ. & White House Initiative on Asian Americans & Pacific Islanders, Combating Discrimination Against AANHPI and MASSA Students (Feb. 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/aanhpi-massa-factsheet-201606.pdf> (Race and national origin harassment).
- ✧ Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Plyler Dear Colleague Letter (May 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf> (Enrollment and remaining in school).
- ✧ Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Harassment and Bullying (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (Bullying and harassment in general).
- ✧ U.S. Dep't of Educ., Office for Civil Rights, Know Your Rights: Title VI and Religion (Jan. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf> (Harassment based on ethnicity and religion).
- ✧ Seth M. Galanter, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on the Prohibition Against Retaliation under Federal Civil Rights Laws (Apr. 24, 2013), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.pdf>.
- ✧ Resolution Agreement, Dekalb Cty. Sch. Dist. (U.S. Dep't of Justice May 7, 2013), <https://www.justice.gov/crt/about/edu/documents/dekalbagree.pdf> (multiple incidents of student-on-student harassment against Sikh students at charter school, including one student being called "Aladdin" and being told to "go back to his country"); Civil Rights Div., *Case Summaries: Dekalb County School District*, U.S. Dep't of Justice, <https://www.justice.gov/crt/case-summaries#dekalb>.
- ✧ Letter from Catherine D. Criswell, Dir., Region XV Office, Office for Civil Rights, U.S. Dep't of Educ., to Christian Williams, Esq., Richmond Heights Local Sch. Dist. (May 11, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/15111134-a.pdf> (white coach subjected African-American players to racially hostile environment, including referring to students as animals and "ghetto").
- ✧ Press Release, U.S. Dep't of Educ. News, Departments of Justice and Education Reach Agreement with Owatonna, Minnesota Public Schools to Resolve Harassment Allegations (Apr. 12, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05101148-c.pdf> (severe and persistent harassment of Somali-American students, culminating in violent fight); Resolution Agreement, Independent School District #761, OCR Docket No. 05-10-1148 (U.S. Dep't of Educ. Apr. 11, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/05101148-b.pdf>.

#### RESOLUTION AND SETTLEMENT AGREEMENTS FROM THE DEPARTMENT OF EDUCATION AND THE DEPARTMENT OF JUSTICE

- ✧ Resolution Agreement, Deer Creek Pub. Sch., OCR Docket No. 07-14-1103 (U.S. Dep't of Educ. Sept. 4, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/07141103-b.pdf> (complainant was repeatedly called a racial epithet).

# ENDNOTES

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2 *Id.*

3 *Id.* at 2 (projecting that non-white students would comprise 55% of public school students in 2026).

4 See generally Patrick Kelly, *The Value of Classroom Diversity*, HomeRoom: The Official Blog of the U.S. Dep't of Educ. (Apr. 6, 2016), <https://blog.ed.gov/2016/04/the-value-of-classroom-diversity/>; Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, The Century Found., *How Racially Diverse Schools and Classrooms Can Benefit All Students* (Feb. 2016), [https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/02/09142501/HowRaciallyDiverse\\_AmyStuartWells-11.pdf](https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf); Kristina Rizga, *3 Ways White Kids Benefit Most from Racially Diverse Schools*, Mother Jones (Jan. 15, 2016, 11:00 AM), <https://www.motherjones.com/politics/2016/01/white-kids-benefits-diverse-schools>; Anya Kamenetz, *The Evidence that White Children Benefit from Integrated Schools*, NPR (Oct. 19, 2015, 6:04 AM), <http://www.npr.org/sections/ed/2015/10/19/446085513/the-evidence-that-white-children-benefit-from-integrated-schools>.

5 Wells, Fox & Cordova-Cobo, *supra* note 4, at 4 (emphases in original).

6 *Id.* at 8, 15 (“[W]hite students in particular have been shown to benefit from racially and ethnically diverse learning contexts because the presence of students of color stimulates an increase in the complexity with which white students approach a given issue through the inclusion of different and divergent perspectives.”); Kelly, *supra* note 4; Kamenetz, *supra* note 4 (citing a study where teams with non-white members were more likely to solve a murder mystery than were the all-white teams).

7 Wells, Fox & Cordova-Cobo, *supra* note 4, at 10, 15; Kelly, *supra* note 4.

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(Nov. 13, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/11/13/hate-crimes-in-the-united-states-increased-last-year-the-fbi-says/?utm\\_term=.195493db9772](https://www.washingtonpost.com/news/post-nation/wp/2017/11/13/hate-crimes-in-the-united-states-increased-last-year-the-fbi-says/?utm_term=.195493db9772); Michelle Chen, *Donald Trump's Rise Has Coincided with an Explosion of Hate Groups*, The Nation (Mar. 24, 2017), <https://www.thenation.com/article/donald-trumps-rise-has-coincided-with-an-explosion-of-hate-groups> (citing huge spike in reported incidents of hate-fueled violence); Allison Turner, *New Survey of 50,000+ Young People Reveals Troubling Post-Election Spike in Bullying and Harassment*, Human Rights Campaign (Jan. 18, 2017), <https://www.hrc.org/blog/new-survey-of-50000-young-people-reveals-troubling-post-election-spike-in-b>.

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11 SPLC, Trump Effect, *supra* note 10, at 4.

12 See *id.* at 6-7.

13 *Id.* at 12.

14 *Id.* at 8.

15 See U.S. Dep't. of Health & Human Services, *Effects of Bullying*, [StopBullying.gov](https://www.stopbullying.gov/at-risk/effects/index.html), <https://www.stopbullying.gov/at-risk/effects/index.html> (stating that children who are bullied are more likely to experience depression, anxiety, increases in sadness and loneliness, and health complications); Dieter Wolke & Suzet Tanya Lereya, *Long-term Effects of Bullying*, 100 *Archives Disease Childhood* 879, 879 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4552909/> (children who were victims of bullying are at higher risk for anxiety disorders, depression, and thoughts of self-harm and suicide); Xiaoyan Zhang et al., *The Impact of School Social Support and Bullying Victimization on Psychological Distress among California Adolescents*, 14 *Cal. J. Health Promotion* 56, 56 (2016) (adolescents who are victims of bullying suffer from various

psychological problems like anxiety and depression, are twice as likely to suffer from serious psychological distress compared to others, and are associated with a higher risk of suicide).

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18 *Id.* at 4.

19 See, e.g., Wanda Cassidy & Margaret Jackson, *The Need for Equality in Education: An Intersectionality Examination of Labeling and Zero Tolerance Practices*, 40 McGill J. Educ. 435, 438 (2005), <http://mje.mcgill.ca/index.php/MJE/article/download/585/467> (“[C]hildren who experience discrimination on the basis of race, gender, class, disability, and/or sexual orientation may suffer from more than one form of discrimination. Those factors can be seen to intersect in ways which compound rather than simply add together in final impact. And, while the child may experience multiple levels of discrimination, multiple levels of protection may not be provided by the school.”).

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31 42 U.S.C. § 2000c-6(a); 42 U.S.C. § 2000d.

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38 *Methelus v. Sch. Bd. of Collier Cty., Fla.*, 2017 WL 1037867, at \*1 (M.D. Fla. Mar. 17, 2017).

39 *Id.* at \*2.

40 *Id.* at \*10-\*11. The DOJ filed a Statement of Interest supporting the students and their assertions that the school district's actions violated the U.S. Constitution and Title VI. See Civil Rights Div., *Case Summaries: Methelus v. School Board of Collier County*, U.S. Dep't of Justice (Sept. 26, 2016), <https://www.justice.gov/crt/case-summaries#methelus>.

41 DOJ & ED, Plyler Dear Colleague Letter, *supra* note 34, at 2.

42 DOJ & ED, Rights of All Children to Enroll, *supra* note 33, at 3.

43 See 42 U.S.C. § 11431 *et seq.*

44 See DOJ & ED, Rights of All Children to Enroll, *supra* note 33, at 1.

45 See *id.* at 2-3.

46 20 U.S.C. § 1232g. FERPA applies to any educational institution that receives funds from the Department of Education. FERPA would therefore apply to nearly every public school.

47 See DOJ & ED, Rights of All Children to Enroll, *supra* note 33, at 4.

48 See *id.* at 5.

49 See 34 C.F.R. § 99.31(a)(9) (2012).

50 *Lau v. Nichols*, 414 U.S. 563, 566-68 (1974) (holding that failure to provide English language instruction to non-English speaking student denied

meaningful participation in public education in violation of Title VI of the Civil Rights Act of 1964).

51 20 U.S.C. § 1701.

52 *Id.* § 1703(f).

53 *Id.* § 1703; DOJ & ED, Rights of All Children to Enroll, *supra* note 33, at 6.

54 U.S. Dep't of Justice & U.S. Dep't of Educ., *Ensuring English Learner Students Can Participate Meaningfully and Equally in Educational Programs* (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-el-students-201501.pdf>.

55 Ana Gonzalez-Barrera & Mark Hugo Lopez, *Spanish Is the Most Spoken Non-English Language in U.S. Homes, Even Among Non-Hispanics*, Pew Research Ctr.: Fact Tank (Aug. 13, 2013), <http://www.pewresearch.org/fact-tank/2013/08/13/spanish-is-the-most-spoken-non-english-language-in-u-s-homes-even-among-non-hispanics> (indicating that nearly 40 million persons over the age of five speak Spanish at home).

56 See U.S. Dep't of Justice, U.S. Dep't of Educ. & White House Initiative on Asian Americans & Pacific Islanders, *Combating Discrimination Against AANHPI and MASSA Students* (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/aanhpi-massa-factsheet-201606.pdf> [hereinafter DOJ, ED & White House, AANHPI and MASSA Students].

57 See Civil Rights Div., *Case Summaries: Lewiston School District*, U.S. Dep't of Justice (2007), <https://www.justice.gov/crt/case-summaries#lewiston>.

58 See Office of Pub. Affairs, *Department of Justice Reaches Settlement with Virginia School District to Ensure Equal Opportunit[i]es for English Language Learner Students*, U.S. Dep't of Justice (Sept. 5, 2013), <https://www.justice.gov/opa/pr/department-justice-reaches-settlement-virginia-school-district-ensure-equal-opportunities>.

59 See DOJ, ED & White House, AANHPI and MASSA Students, *supra* note 56.

60 See Civil Rights Div., *Case Summaries: Palm Beach County*, U.S. Dep't of Justice (2016), <https://www.justice.gov/crt/case-summaries#palmbeach>.

61 See *generally* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 47 (Mar. 10, 1994) (U.S. Dep't of Educ., Office for Civil Rights), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html#skipnav2>.

- 62 U.S. Dep't of Educ., Office for Civil Rights, Know Your Rights: Title VI and Religion (Jan. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf> [hereinafter ED, Know Your Rights: Title VI and Religion]. School indifference to peer-to-peer racial harassment can also violate the Equal Protection Clause under certain circumstances. See, e.g., *Gant ex rel. Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 140 (2d Cir. 1999).
- 63 ED, Know Your Rights: Title VI and Religion, *supra* note 62.
- 64 *Id.*
- 65 *Id.*
- 66 *Id.*
- 67 *Id.*
- 68 *Id.*
- 69 *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005) (citations, quotation marks, and brackets omitted).
- 70 Civil Rights Div., *Case Summaries: United States v. City of New York (Lafayette High School)*, U.S. Dep't of Justice (2004), <https://www.justice.gov/crt/case-summaries#lafayette>.
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- 72 *Id.*
- 73 34 C.F.R. § 100.7(e).
- 74 Ali, Dear Colleague Letter: Harassment and Bullying, *supra* note 29, at 4.
- 75 *Id.*
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- 78 Fahey, *supra* note 77.
- 79 U.S. Dep't of Justice, Departments of Justice and Education Reach Agreement with Owatonna, Minnesota Public Schools to Resolve Harassment Allegations (Apr. 12, 2011), <https://www.justice.gov/crt/about/edu/documents/owatannapr.pdf>.
- 80 *Id.*
- 81 DOJ, ED & White House, AANHPI and MASSA Students, *supra* note 56.
- 82 *Id.*
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- 84 Albert Samaha, Mike Hayes & Talal Ansari, *Kids Are Quoting Trump to Bully Their Classmates and Teachers Don't Know What to Do About It*, BuzzFeed News (June 6, 2017), [https://www.buzzfeed.com/albertsamaha/kids-are-quoting-trump-to-bully-their-classmates?utm\\_term=.gxXYmkn7k2#.odGmY5gr52](https://www.buzzfeed.com/albertsamaha/kids-are-quoting-trump-to-bully-their-classmates?utm_term=.gxXYmkn7k2#.odGmY5gr52).
- 85 *Id.*
- 86 *Id.*
- 87 *Id.*
- 88 *Id.*
- 89 *Id.*
- 90 DOJ, ED & White House, AANHPI and MASSA Students, *supra* note 56.
- 91 Akinyi Ochieng, *Muslim Schoolchildren Bullied by Fellow Students and Teachers*, NPR (Mar. 29, 2017), <http://www.npr.org/sections/codeswitch/2017/03/29/515451746/muslim-school-children-bullied-by-fellow-students-and-teachers>.
- 92 Civil Rights Div., *Religious Freedom in Focus: Volume 9*, U.S. Dep't of Justice (Mar. 2005), <https://www.justice.gov/crt/religious-freedom-focus-volume-9#2>.
- 93 Ochieng, *supra* note 91.
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- 100 Ali, Dear Colleague Letter: Harassment and Bullying, *supra* note 29, at 5.
- 101 *Id.* at 6.
- 102 Rick Sallinger, *Middle School Student Claims Harassment Because She’s Jewish*, CBS Denver (Feb. 7, 2017), <http://denver.cbslocal.com/2017/02/07/west-jefferson-middle-school-harassment-jewish/>. Compounding the harassment, a teacher told the girl she “should stick with another Jewish girl because she was being picked on because she was, too, Jewish.” *Id.*
- 103 And, if a school does not intervene or respond to a student participating in the same conduct, the school would be violating the victim’s civil rights. ED, Know Your Rights: Title VI and Religion, *supra* note 62 (discussing how a school violates Title VI if it failed to remedy student-on-student harassment).
- 104 Council on Am.-Islamic Relations-California, *Mislabeled: The Impact of School Bullying on California Muslim Students 4* (2015), <https://ca.cair.com/sfba/wp-content/uploads/2015/10/CAIR-CA-2015-Bullying-Report-Web.pdf>.
- 105 Associated Press, *Muslim Teen Says School Guard Cuffed Her, Removed Her Hijab*, N.Y. Post (June 6, 2017), <https://nypost.com/2017/06/06/muslim-teen-says-school-guard-cuffed-her-removed-her-hijab/>.
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- 107 *Id.*
- 108 *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).
- 109 *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).
- 110 *Tinker*, 393 U.S. at 513.
- 111 *Id.*
- 112 *Fraser*, 478 U.S. at 681.
- 113 See, e.g., *Scott v. Sch. Bd. of Alachua Cty.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (per curiam) (holding that ban of Confederate flags on school grounds was not an unconstitutional restriction of students’ First Amendment rights where racial tensions existed at the school, racially-based fights had occurred in the months leading up to the case, and the Confederate flag is “inappropriate in the school context” because it is so “associated with racial prejudice” that it is “likely to provoke feelings of hatred and ill will in others”). For additional discussion of the Confederate flag in school, see *Hardwick ex rel. Hardwick v. Heyward*, 711 F.3d 426, 441, 444 (4th Cir. 2013); *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 223 (5th Cir. 2009); *B.W.A. v. Farmington R-7 Sch. Dist.*, 554 F.3d 734, 739-40 (8th Cir. 2009); *Barr v. Lafon*, 538 F.3d 554, 567-68 (6th Cir. 2008); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365-66 (10th Cir. 2000).
- 114 See *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673 (7th Cir. 2008).
- 115 *Id.*
- 116 See *Bryant v. Indep. Sch. Dist. No. 1-38 of Garvin Cty., OK*, 334 F.3d 928, 933 (10th Cir. 2003) (allowing students to wear Confederate flags or swastikas can create an actionable hostile educational environment under Title VI).
- 117 See *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 779 (9th Cir. 2014).
- 118 See, e.g., *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573-74 (4th Cir. 2011) (holding that a school did not violate a student’s free speech rights by suspending her for creating and posting to a webpage).
- 119 See, e.g., *S.J.W. ex rel. Wilson v. Lee’s Summitt R7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012); *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d

- 915, 930-31 (3d Cir. 2011); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 574-75 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 38-39 (2d Cir. 2007). Some courts also require that a sufficient nexus exist between the off-campus student speech and the disruption at school. See *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 214-15 (3d Cir. 2011).
- 120 *S.J.W. ex rel. Wilson*, 696 F.3d at 773.
- 121 U.S. Const. amend. XIV, § 1.
- 122 42 U.S.C. § 2000c-6(a).
- 123 Thomas E. Perez, Assistant Attorney General, U.S. Dep't of Justice, Letter to Russlyn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., Title VI and Coverage of Religiously Identifiable Groups 1 (Sept. 8, 2010), [https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810\\_AAG\\_Perez\\_Letter\\_to\\_Ed\\_OCR\\_Title%20VI\\_and\\_Religiously\\_Identifiable\\_Groups.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/05/04/090810_AAG_Perez_Letter_to_Ed_OCR_Title%20VI_and_Religiously_Identifiable_Groups.pdf).
- 124 See 20 U.S.C. § 4071(a).
- 125 See Civil Rights Div., Combating Religious Discrimination and Protecting Religious Freedom, U.S. Dep't of Justice (Aug. 6, 2015), <https://www.justice.gov/crt/combating-religious-discrimination-and-protecting-religious-freedom-20>.
- 126 See Civil Rights Div., *Case Summaries: Hearn & United States v. Muskogee Public School District*, U.S. Dep't of Justice (2004), <https://www.justice.gov/crt/case-summaries#hearnok>.
- 127 *Id.*
- 128 *SALDEF Defends Sikh Convert's Right to Maintain the Sikh Identity in Alabama Public High School*, Sikh Am. Legal Def. & Educ. Fund (May 15, 2007), <http://saldef.org/news/sikh-american-student-in-alabama-allowed-to-return-to-school-with-both-turban-and-hair-intact/#.WpCFfKinGUL>.
- 129 Persons of the Sikh faith commonly experience discrimination because they are mistaken as Muslim. See A.C. Thompson, *Sikhs in America: A History of Hate*, ProPublica (Aug. 4, 2017), <https://www.propublica.org/article/sikhs-in-america-hate-crime-victims-and-bias> ("[I]n America, the bulk of the populace knows little to nothing about Sikhism, so they see a person with a turban and assume he's a Hindu or a Muslim."). The fact that the harassment is based on the perpetrator's ignorance or mistake does not relieve the perpetrator of liability. See, e.g., Perez, *supra* note 123, at 1-2 (emphasizing that discrimination based on a person's actual or perceived religious characteristics is still a violation of civil rights laws).
- 130 DOJ, ED & White House, AANHPI and MASSA Students, *supra* note 56.
- 131 *Isaacs ex rel. Isaacs v. Bd. of Educ. of Howard Cty., Md.*, 40 F. Supp. 2d 335, 338 (D. Md. 1999) ("If the wearing of headgear constitutes speech and also represents an exercise of religion, a student would have 'hybrid' constitutional protection arising out of both the free speech and free exercise [clauses].").
- 132 *Ala. & Coushatta Tribes of Tex. v. Trustees of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993) (same as *Isaacs*, under students' Free Exercise rights).
- 133 *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666-67 (S.D. Tex. 1997) (holding that prohibiting wearing rosaries as necklaces violated students' Free Speech rights).
- 134 *Iacono v. Croom*, No. 5:10-CV-416-H, 2010 WL 3984601, at \*2 (E.D.N.C. Oct. 8, 2010) (holding that prohibiting student in the Church of Body Modification from wearing nose ring violated Free Exercise rights).
- 135 See, e.g., *Hicks ex rel. Hicks v. Halifax Cty. Bd. of Educ.*, 93 F. Supp. 2d 649, 663 (E.D.N.C. 1999). See also *Menora v. Ill. High Sch. Ass'n*, 683 F.2d 1030, 1035-36 (7th Cir. 1982) (upholding basketball team's prohibition of head coverings, even for Jewish students wearing a yarmulke, because the team had a strong interest in players' safety, but requiring lower court to retain jurisdiction to see if Jewish students could fasten the yarmulke in a way that would both conform to their religious beliefs and would not pose safety concerns for players).
- 136 See, e.g., *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 292 (5th Cir. 2001) (recognizing that religious exemption to school dress code "was enacted to protect the reasonable state interest of fostering the free exercise of religion").
- 137 *State Religious Freedom Restoration Acts*, Nat'l Conference of State Legislatures (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.
- 138 611 F.3d 248, 272 (5th Cir. 2010).

- 139 See *Cheema v. Thompson*, 67 F.3d 883, 885–86 (9th Cir. 1995) (holding that school’s ban on weapons as-applied to Sikh students violated their rights under the federal Religious Freedom Restoration Act), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997) (holding that the federal RFRA only applied to the federal government, and not states). In *Cheema*, the students and the school district instead reached a compromise: the students could wear the kir-pans with dulled blades that were sewn into their sheaths. *Id.* at 886.
- 140 See, e.g., Lindsey O’Brennan & Catherine Bradshaw, Johns Hopkins Ctr. for the Prevention of Youth Violence, National Education Association Research Brief: Importance of School Climate (Nov. 2013), [http://www.nea.org/assets/docs/15584\\_Bully\\_Free\\_Research\\_Brief-4pg.pdf](http://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf).
- 141 Christine E. Sleeter, Nat’l Educ. Ass’n, *The Academic and Social Value of Ethnic Studies*, at vii (2011), <http://www.nea.org/assets/docs/NBI-2010-3-value-of-ethnic-studies.pdf>.
- 142 *Id.* at viii.
- 143 Thomas Dee & Emily Penner, Stanford Ctr. for Educ. Policy Analysis, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum 24* (Jan. 2016) (CEPA Working Paper No. 16-01), <http://cepa.stanford.edu/wp16-01>.
- 144 *Id.* at 25.
- 145 *González v. Douglas*, 269 F. Supp. 3d 948, 2017 WL 3611658, at \*1 (D. Ariz. Aug. 22, 2017).
- 146 Tucson’s Mexican-American Studies program is an ethnic studies program designed to respond to a court ruling in 1974, finding that Tucson had intentionally segregated its black and latino students. See *id.* at \*2. The program had components for students of all ages, and included “art, government, history, and literature courses... with each course focusing on historic and contemporary Mexican-American contributions.” *Id.*
- 147 See *id.* at \*3.
- 148 *Id.*
- 149 *Id.* (quoting the findings of the plaintiffs’ expert).
- 150 Joseph Laycock, *We Must Teach about Religion in High Schools*, Religion & Politics (Jan. 7, 2014), <http://religionandpolitics.org/2014/01/07/we-must-teach-about-religion-in-high-schools/>.
- 151 2016–2017 NEA Resolutions, I-21 Freedom of Religion.
- 152 See Melinda D. Anderson, *The Misplaced Fear of Religion in Classrooms*, The Atlantic (Oct. 19, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/09/08/schools-shouldnt-preach-but-they-should-teach-about-religion/?utm\\_term=.7b237c9745e0](https://www.washingtonpost.com/posteverything/wp/2015/09/08/schools-shouldnt-preach-but-they-should-teach-about-religion/?utm_term=.7b237c9745e0); Linda K. Wertheimer, *Public Schools Shouldn’t Preach. But They Should Teach Kids About Religion.*, Wash. Post (Sept. 8, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/09/08/schools-shouldnt-preach-but-they-should-teach-about-religion/?utm\\_term=.ee5380be294b](https://www.washingtonpost.com/posteverything/wp/2015/09/08/schools-shouldnt-preach-but-they-should-teach-about-religion/?utm_term=.ee5380be294b).
- 153 *Joint Statement of Current Law on Religion in the Public Schools*, Am. Civil Liberties Union (2017), <https://www.aclu.org/other/joint-statement-current-law-religion-public-schools>; see also Pew Forum on Religion & Pub. Life, *Religion in the Public Schools 7* (May 2007), [http://www.pewforum.org/uploadedfiles/Topics/Issues/Church-State\\_Law/religion-public-schools.pdf](http://www.pewforum.org/uploadedfiles/Topics/Issues/Church-State_Law/religion-public-schools.pdf) (“The Supreme Court’s decisions about officially sponsored religious expression in schools consistently draw a distinction between religious activities such as worship or Bible reading, which are designed to inculcate religious sentiments and values, and ‘teaching about religion,’ which is both constitutionally permissible and educationally appropriate.”).
- 154 *Abington v. Schempp*, 374 U.S. 203, 225 (1963); see also *Stone v. Graham*, 449 U.S. 39, 42 (1980) (“This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”).
- 155 See, e.g., *Skoros v. City of New York*, 437 F.3d 1, 19 (2d Cir. 2006) (discussing various Justices’ endorsement of teaching religious pluralism).
- 156 *Lee v. Weisman*, 505 U.S. 577, 638 (1992) (Scalia, J., dissenting).
- 157 See, e.g., *Hall v. Bd. of Sch. Comm’rs of Conecuh Cty.*, 656 F.2d 999, 1002–03 (5th Cir. 1981) (holding that Bible literature course in school violated First Amendment because the approved textbook, “The Bible for Youthful Patriots,” “reveals a fundamentalist Christian approach to the study of the Bible devoid of any discussion of its literary qualities” and “the examinations . . . primarily requir[ed] rote memorization of the Bible”).

158 See First Amendment Ctr., *A Teacher's Guide to Religion in the Public Schools* (2008), <http://www.religiousfreedomcenter.org/wp-content/uploads/2014/08/teachersguide.pdf>.

159 Laycock, *supra* note 150 ("If anything, I have found that the study of world religion often deepens students' appreciation for their own tradition because they are able to understand its uniqueness.").

160 Fasciano, *supra* note 95.

161 *Id.*





# DEFENDING EDUCATION

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