

LATE APPLICATIONS

Protecting Students' Civil Rights
in the Digital Age

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The [Center for Democracy & Technology](#) (CDT) is the leading nonpartisan, nonprofit organization fighting to advance civil rights and civil liberties in the digital age. We shape technology policy, governance, and design with a focus on equity and democratic values. Established in 1994, CDT has been a trusted advocate for digital rights since the earliest days of the internet. The organization is headquartered in Washington, D.C. and has a Europe Office in Brussels, Belgium.

As governments expand their use of technology and data, it is critical that they do so in ways that affirm individual privacy, respect civil rights, foster inclusive participatory systems, promote transparent and accountable oversight, and advance just social structures within the broader community. CDT's [Equity in Civic Technology Project](#) furthers these goals by providing balanced advocacy that promotes the responsible use of data and technology while protecting the privacy and civil rights of individuals. We engage with these issues from both technical and policyminded perspectives, creating solutions-oriented policy resources and actionable technical guidance.

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Executive Summary

Education data and technology continue to expand their role in students', teachers', and parents' lives. While issues of school safety, student mental health, and achievement gaps remain at the forefront of education, emerging technologies such as predictive analytics, monitoring software, and facial recognition are becoming more popular. As these technologies expand, so have questions about how they might be used responsibly and without inflicting negative consequences on students, especially historically marginalized students.

The education sector has been responsible for protecting the civil rights of students for decades. **Existing civil rights laws provide an important foundation to ensure that data and technology practices in schools achieve their intended function without inadvertently having discriminatory effects against students on the basis of race, sex, or disability.**

Analysis of data that is disaggregated by a number of student demographics is crucial to understanding trends regarding protected classes of students and illustrates why an ongoing focus on student civil rights is necessary; however, the analysis contained in this report focuses on the use of technology and data in real time to make decisions about individual students, rather than the use of data to identify overall trends.

Examining the current uses of education data and technology under various civil rights concepts, this report offers guidance to help policymakers and education leaders understand how to better center civil rights in the digital age with respect to their practices and policies, especially regarding nondiscrimination and technology procurement. This guidance includes recommendations for school leaders to ensure that education data and technology uses do not run afoul of civil rights laws and that all students are positioned to be successful in school and beyond:

- **Audit** existing nondiscrimination policies, practices, and notices.
- **Update** or **create new policies** to address data and technology use.
- Revise or implement a **procurement policy** for education technologies.
- **Consolidate** and **make readily available** all required nondiscrimination notices.
- **Post** the consolidated policy in district buildings and on school websites.
- **Designate specific personnel** to be responsible for ensuring compliance with nondiscrimination laws regarding education data and technology.
- **Conduct analysis** and **publicly report information** on nondiscrimination policies and practices for data and technology on an ongoing basis.

I. Introduction

As schools continue to adopt new technologies and data practices to improve instruction and alleviate administrative burdens, the education sector faces complex questions about the responsible and ethical uses of technology and data. In particular, it needs to ensure that these technologies and practices do not have discriminatory effects — or lead to discriminatory outcomes — for students who have been historically marginalized. Fortunately, a long-standing body of antidiscrimination law already governs the policies and practices of education institutions and their third-party vendors, with the aim of ensuring a nondiscriminatory environment for students in protected categories. Education agencies need to ensure that their use of technology and data complies with these laws.

II. Background

Antidiscrimination laws prohibit a number of protected categories, including race, sex, and disability, from being the basis for differing treatment except in extremely narrow circumstances. These categories are protected because, historically, they have been more vulnerable and have experienced discrimination at higher rates — and unfortunately those differences persist today. For example, despite being underrepresented in the K–12 student population, Black students and students with disabilities are overrepresented among students disciplined in school (specifically by out-of-school suspension), regardless of socioeconomic status.¹ The same groups, as well as male Hispanic students, are also overrepresented in alternative schools, where they are typically placed due to disciplinary issues and where they have less access to support staff such as counselors and social workers.²

Students with disabilities account for 70 percent of public school students who are restrained or secluded.³ Additionally, the overall high school graduation rate for the 2019–20 school year was 86.5 percent, while the high school graduation rate for students with disabilities was 70.6 percent.⁴ Compared to their peers, LGBTQ+ students who experience harassment or unequal treatment based on their sexual orientation or gender identity report missing more days of school, lower grade point averages, lower educational aspirations, and higher rates of school discipline — all factors contributing to worsened academic outcomes.^a

These statistics reinforce the importance of legal protections that have been in place for decades, aimed at preventing discrimination by race, sex, and disability status. These protections apply equally to the use of technology and data in school settings.

a Joseph G. Kosciw, Caitlin M. Clark & Leesh Menard, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools*, Gay, Lesbian & Straight Educ. Network 92 (2022), <https://perma.cc/XX44-T2AS>. Studies have shown that higher rates of suspensions and disciplinary action increase the likelihood of dropping out by 15 percent and decrease the likelihood of attending a four-year college by 11 percent, showing a significant impact on educational attainment for those most affected by discipline. See Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *The School to Prison Pipeline: Long-Run Impacts of School Suspensions on Adult Crime*, Nat'l Bureau of Econ. Rsch. 4, 18 (Sept. 2019), <https://perma.cc/U6Y2-UB4G>.

A. RACE- AND SEX-BASED DISCRIMINATION

The Civil Rights Act of 1964 (the Act) was enacted to end state-sponsored segregation and inequality in crucial arenas of public life, including education. While the Act governs many types of discrimination, the following discussion will focus on two categories: race and sex. Title VI of the Act protects students from discrimination on the basis of race and was enacted to prevent (and in some cases, mandate action to actively reverse) historical racial segregation in schools. Since Title VI's enactment, strides have been made to close the racial achievement gap in education: A decade after the Act, the dropout rate for Black students was 20.5 percent as opposed to 12 percent for white students;⁵ in 2021, it was 5.9 percent as opposed to 4.1 percent, respectively.⁶ While the gap has narrowed, the impact of racial inequity persists, and the strength of Title VI's protection remains vital to ensuring equal opportunity in education.

Title IX of the Act, enacted in 1972, protects students from discrimination on the basis of sex and was initially enacted to provide equal access in public education for women and girls. In the five to six years following its enactment, girls' participation in sports rose by 600 percent — from 294,105 to 2.1 million.⁷ In the several decades since, the continued increase has had a direct effect on women's education and employment (with one study concluding it was responsible for 20 percent of the overall increase in women's educational attainment), as well as being correlated with lower teenage pregnancy rates, better grades, and higher self-esteem.⁸ Title IX's reach has evolved over time to protect individuals from various forms of sex discrimination, including sexual harassment, pregnancy discrimination, and discrimination based on sexual orientation and gender identity. As of 2021, the U.S. Department of Education explicitly recognizes sexual orientation and gender identity as protected and enforceable under Title IX.^b

b *U.S. Department of Education Confirms Title IX Protects Students From Discrimination Based on Sexual Orientation and Gender Identity*, U.S. Dep't of Educ. (Jun. 16, 2021), <https://perma.cc/FN3S-T3LY>. The Department of Education has chosen to adopt the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County* as applicable to Title IX and will now enforce it as such. In a pending rulemaking, the Department has proposed to amend Title IX regulations to expressly include sexual orientation and gender identity. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022) (to be codified at 34 C.F.R. § 106), <https://perma.cc/2P6P-2Z3A>. Pending litigation on the Department's authority to enforce its interpretation of *Bostock* has temporarily limited enforcement in the states of Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, Tennessee, South Carolina, South Dakota, and West Virginia. *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (Jun. 22, 2021), <https://perma.cc/87UE-J7PM>.

B. DISABILITY-BASED DISCRIMINATION

In 1973, the Rehabilitation Act — which was modeled after the Civil Rights Act — became the first federal law to protect the civil rights of people with disabilities.⁹ Section 504 of the Rehabilitation Act (Section 504) specifically protects individuals from disability discrimination at the hands of publicly funded entities, including public schools.¹⁰ It requires that school districts provide all students with a “free appropriate public education” (FAPE), regardless of the nature or severity of their disability.¹¹ Students can be eligible for services under Section 504 regardless of whether they also qualify for services under the Individuals with Disabilities Education Act (IDEA), as discussed below.¹²

Building on Section 504, the 1975 IDEA¹³ explains how states, schools, and school districts should provide proper intervention and special education to eligible students with disabilities.¹⁴ IDEA reinforces FAPE and requires that education and related services should be “provided in conformity with [a student’s] individualized education program [(IEP)].”¹⁵ While students who are protected under IDEA are also protected by Section 504 and the Americans with Disabilities Act (ADA, described below), not every student protected by Section 504 and the ADA is also protected by IDEA.¹⁶ Notably, IDEA also provides eligible students with particular privacy protections that ensure that their personally identifiable information is kept confidential in accordance with the Family Educational Rights and Privacy Act (FERPA).¹⁷ Children are eligible for services under IDEA only if an evaluation finds that to “be involved in and progress in the general education curriculum” they need special education and related services due to one or more disabilities.¹⁸

Finally, the 1990 ADA extends the protections of Section 504 to include all public entities and accommodations, regardless of whether or not they receive public funding.¹⁹ Title II of the ADA (Title II) extends Section 504’s nondiscrimination laws to state and local government services.²⁰ Because public school systems fall under such “state and local government services,” they are required to comply with both the ADA and Section 504.²¹ The overarching idea of Title II’s regulation of public schools is that the schools must provide disabled students equal opportunity to obtain the same results, gain the same benefits, and reach the same levels of achievement as nondisabled students.²² Under Title II, public schools may not discriminate against disabled students, such as by excluding them from participation in or denying them the benefits of the school’s services, programs, or activities on the basis of their disability.²³ Especially pertinent to disabled students’ privacy and use of technology, Title II states that public schools must provide these students with auxiliary aids and services in a way that protects their privacy and independence.²⁴

III. Core Discrimination Concepts

The history of enforcement and litigation under these nondiscrimination statutes has created a body of antidiscrimination law specific to the education sector. From this body of law, several core concepts emerge to form the basis for four main causes of action that are available to students and families when alleging discrimination. These claims are: (i) disparate treatment, (ii) disparate impact, (iii) hostile learning environment, and (iv) denial of FAPE. Each of these causes of action could apply to the use of data and technology in education. These claims are also often intersectional — examples of one claim might also be used to illustrate another. This intersectionality is particularly common for hostile learning environments and denial of FAPE, where instances of disparate treatment may constitute the existence of a hostile learning environment or denial of FAPE in addition to the standalone claim of disparate treatment.

A. DISPARATE TREATMENT

Disparate treatment is the term that describes intentional discrimination.²⁵ Disparate treatment can arise if a neutral policy is enforced disproportionately against members of a protected class or if a policy or practice explicitly targets a protected class. A student alleging disparate treatment must show that the alleged discriminatory conduct was intentional and was based, at least partially, on the student's protected characteristics. Examples of how disparate treatment could arise in the context of education data and technology practices include:

Disparate treatment criteria	Education data and technology examples
Neutral policy that is disproportionately enforced	Unequal application of disciplinary policies to students in a protected class for conduct or commentary flagged by surveillance technologies (e.g., when a student of color is disciplined — but a white student is not — for the same type of alleged misconduct).
Explicit targeting	Targeted surveillance or algorithmic focus on protected classes or on words directly implicating protected classes (e.g., when programs are set to flag activity and terms related to sexuality or gender identity, LGBTQ+ students are explicitly targeted for increased surveillance as compared to non-LGBTQ+ students).

Consider these scenarios: If a school had a policy that subjected Black, Hispanic, LGBTQ+, or disabled students to additional examination and oversight by school staff^c but did not subject students who are white, not LGBTQ+, or not disabled to the same additional examination, the situation would be a clear instance of a policy or practice explicitly targeting members of a protected class for different treatment.

Where this additional assessment and oversight is built into an algorithmic program, it has the same discriminatory impact on students in protected classes as if it were conducted by an employee of the school. What’s more, where protected classes are explicitly flagged as key inputs in programs that lead to these discriminatory outcomes, proving intent becomes easier. Traditionally, intent to base an action on someone’s race or sex is in an employee’s mind: It must either be confessed or be heavily inferred from external evidence. A confession or mound of evidence would be unnecessary if a review of the algorithm showed that the protected category was at least one element of the decision-making. It is important to remember that the action need only be based “at least in part” on the protected category to be discriminatory.

Unfortunately, these scenarios are not just hypothetical. As illustrated by Wisconsin’s early warning system (and throughout the remainder of this report), current school technology, data practices, and policies may already run afoul of existing civil rights protections.

^c With regard to students with disabilities, this hypothetical refers to additional examination and oversight beyond what is required or otherwise justified by the student’s accommodations or other official arrangements.

EXAMPLE

Wisconsin includes race as a key data input to identify at-risk students

In Wisconsin, the state education agency implemented an algorithmic model called the Dropout Early Warning System (DEWS) to predict the likelihood of timely high school graduation for then-current middle schoolers. After a decade of implementation, an investigation into the program found that DEWS is significantly more likely to falsely predict that Black and Hispanic students would drop out than it is for white students.^d

Administrators and educators receive color-coded ratings indicating each student's purported risk for dropout: green for low, yellow for moderate, and red for high. These labels may be negatively influencing how educators perceive their students, and students reported that the high-risk labels are stigmatizing and discouraging. Given the disproportionately high false alarm rate for Black and Hispanic students, this negative influence can create the type of bias that leads to unequal application of disciplinary policies, further affecting students who have potentially already been improperly categorized.

The investigation further revealed that student race and gender are input variables in the algorithm used to make the risk determination. Without knowledge of exactly how the algorithm works, the role that race and sex play in making the algorithmic determinations is unclear. Nevertheless, the findings raise the possibility that a student's protected characteristics are being used to make decisions for differential treatment. While Wisconsin's intent in implementing DEWS was to close the large racial graduation gap that persists in its education system, the data shows that DEWS ultimately has no impact on graduation rates for the students it labels high risk. Clearly, however, the algorithm is less accurate in its predictions for Black and Hispanic students, disproportionately placing a stigmatizing label on these students and altering the level of attention (be it more or less) that they receive from school staff.^e

d “The algorithm's false alarm rate—how frequently a student it predicted wouldn't graduate on time actually did graduate on time—was 42 percentage points higher for Black students than white students. ... The false alarm rate was 18 percentage points higher for Hispanic students than white students.” Todd Feathers, *Takeaways From Our Investigation Into Wisconsin's Racially Inequitable Dropout Algorithm*, Markup (Apr. 27, 2023, 8:00 AM), <https://perma.cc/3DV3-6TAK>.

e A relevant distinction here: Some algorithmic programs are built by the education agencies themselves, and some are acquired through third-party vendors. This particular example focuses on the programs that education agencies have built themselves, as the agency has insight into and control over how that algorithm functions and what inputs it operates on.

EXAMPLE

Private company targets “gay” and “lesbian” students for monitoring

A student activity monitoring company that uses artificial intelligence to comb through billions of student chats and monitor student accounts (even on a personal device) was found to have been flagging the terms “lesbian,” “gay,” and “transgender” for manual review. By programming the algorithm to flag these terms, students were being explicitly targeted based on these protected characteristics. This practice ultimately resulted in the outing of LGBTQ+ youth to their administrators, teachers, and parents, without any data to suggest the efficacy of this practice in achieving its intended impact of increasing student safety.²⁶ The practice drew a considerable amount of criticism and was eventually discontinued.

“Outing is when someone discloses the sexual orientation or gender identity of an LGBTQ+ person without their consent. Outing creates issues of privacy, choice, and harm. ... Outing is a harmful act that can traumatize the person being outed [and] can also lead to someone experiencing violence or ... dangerous situations.” — Stephen Nelson, *What Is Outing and Why Is It Harmful?*²⁷

B. DISPARATE IMPACT

Disparate impact differs from disparate treatment in that it does not require a finding of intent to constitute actionable discrimination. Disparate impact occurs where a neutral policy, even when applied equally, has an adverse and disproportionate impact on members of a protected class.²⁸ As it relates to students with disabilities, the U.S. Department of Education has stated that even if a policy has a disparate impact on only one type of disability, that policy would be considered discriminatory against students with disabilities — and, thus, unlawful — under the ADA and Section 504.^f Under this framework, emerging uses of data and technology in education are particularly likely to have a disparate impact on protected classes with regard to school discipline and forced outing.

^f Office for C.R., *Supporting Students With Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973*, U.S. Dept of Educ. 31 (Jul. 2022), <https://perma.cc/B59M-7HFP> (“Even when a school criterion, policy, practice, or procedure ... is neutral on its face, it may still have ... discriminatory effect.”). Evidence of a policy’s disparate impact on one person with a particular disability can be evidence of that policy’s disparate impact on all individuals with that disability and can also be evidence in general that that policy discriminates on the basis of a disability. Guidance from the Department of Education provides an example in which a school’s policy of issuing automatic detentions for profanity use is considered to be unlawfully discriminatory against disabled students because the policy had a discriminatory effect on a student whose Tourette’s Syndrome sometimes causes the student to curse involuntarily.

Take school-issued devices, for example. To ensure that all students have equal access to an increasingly digital education landscape, many education agencies now provide school-issued laptops and tablets to students who otherwise cannot afford their own personal devices. These devices are frequently subject to continuous, around-the-clock activity monitoring, regardless of the fact that many students also use the devices outside of school hours and off school property.²⁹ Schools have seemingly neutral policies regarding student activity monitoring: Most do not apply the monitoring requirements differently to different groups of students, nor do they explicitly target protected classes of students for heightened surveillance.

However, recent data on the impact of student activity monitoring shows that certain groups of students, such as Black and Hispanic students, are more likely to use these school-issued devices than their peers.³⁰ Therefore, these students are targeted for surveillance at a higher rate and are more likely to be subject to the negative consequences of monitoring, including but not limited to disciplinary action, contact with law enforcement, or forced outing. Outside of student activity monitoring, Black, Hispanic, and disabled students are already disproportionately subject to discipline (children with disabilities are also overrepresented in the incarcerated youth population),³¹ and student activity monitoring, which is frequently used to discipline students, can exacerbate that existing inequity.³² Similarly, this kind of monitoring and subsequent intervention can and does have the effect of outing LGBTQ+ students to their administrators, teachers, family, and peers. Outing is widely considered a traumatic experience and can happen only as a result of someone's membership in a protected class. As these groups already suffer from varying (and perhaps intersectional) disparities, these data and technology practices are likely to widen these gaps. Where a neutral policy has this kind of disproportionately harmful impact on protected classes of students, there may be a claim for unlawful discrimination under a disparate impact analysis.

EXAMPLE

Monitoring software flagged a student's mental health assignment and outed another in Minneapolis

In 2021, a student in Minneapolis was targeted when surveillance software flagged mental health keywords in his writing. The student submitted a writing assignment discussing his struggle with depression and how those struggles were exacerbated to the point of a suicide attempt.³³ The essay was about the student's recovery and overcoming this obstacle. The essay made clear that this struggle was in the past — not current. He had recently graduated from weekly therapy and was doing much better. Despite that context, the assignment was flagged and reported to his parents by a school counselor. In this instance, the policy seems neutral: flagging content that indicates a student is in crisis and may need life-saving intervention. This type of neutral policy can have a disparate impact on students with psychological disabilities and emotional disorders, such as depression, especially where the lack of contextual analysis of a student's writing or activity leads the humans in charge to report the content to the student's parents regardless of the veracity of the flag. Such interventions might have the opposite intended effect, leading to feelings of betrayal and dissuading students from being open with their teachers or counselors about their concerns moving forward.³⁴

Also in Minneapolis, students reported in their school paper that a classmate was involuntarily outed as LGBTQ+ by this same surveillance software, with no opportunity to provide context for the flag before it was reported to the student's parents.³⁵

These examples illustrate that the whole process — not just the technology — matters as to whether there is a discriminatory impact. As stated by the CEO of the company in this example, the company does not make any contextual judgments before forwarding flags to a school administrator.³⁶ School officials, teachers, and school counselors who receive these flags might often err on the side of disclosure to parents out of concern for being “left holding the bag,” so to speak, even after examining for context.

EXAMPLE

Data input and visibility oversight outed transgender students to peers, teachers

During the shift to online learning during COVID-19, many transgender students in the state of North Carolina were outed when an education technology software company automatically populated their legal names — different from the ones they used socially and in the classroom — into virtual platforms such as Google Classroom and Canvas, effectively outing them to their peers.³⁷ The software also automatically populated students' legal sex in a way that was visible to teachers, outing students to their instructors as well.³⁸ In this case, there was no intent to treat any group of students differently than another. However, the practice of populating students' legal names, while facially neutral, had a disparate impact on transgender students compared to cisgender students who, for example, used a nickname in the classroom (e.g., Katie vs. Katherine) or simply went by their legal names. The company did take action to remedy the issue by removing students' legal names from public view, but for those students the damage was already done.

C. HOSTILE LEARNING ENVIRONMENT

Education agencies have a general obligation to provide a nondiscriminatory environment for their students and must immediately take action to investigate and remedy conduct that constitutes a hostile learning environment.³⁹ A hostile learning environment occurs where a student — or group of students — experiences severe, pervasive, or persistent treatment that interferes with the student's ability to participate in or benefit from services or activities provided by the school. The treatment does not need to be by an agent of the education institution but can be at the hands of a third party, such as a vendor, a contractor, a visitor, or another third party who engages with students.

A single extremely severe event can constitute a hostile environment on its own. Severe events that could occur as a result of the use of data and technology include:

- **Improper arrest** pursuant to flagged activity (such as student activity and social media monitoring) where the activity did not pose any real threat to school safety or the arrest was the result of improper/misidentified facial or movement recognition;
- **Interactions with law enforcement** other than an arrest (such as a home visit, questioning at school, or parent contact) pursuant to flagged activity, misidentified facial/movement recognition, or flags raised by data repositories;

- **Outing of LGBTQ+ students** or unauthorized disclosure of a student’s disability to peers, instructors, or families pursuant to flagged activity or improper data practices;
- **Emergency psychiatric intervention** pursuant to flagged activity that did not actually pose a threat of self-harm; or
- **Suspension or other disciplinary action** pursuant to online exam proctoring flags, inaccurate facial/movement recognition, or other flagged activities that did not pose a threat to school safety or otherwise obstruct school operations.

Typically, a combination of severity, pervasiveness, and persistence constitutes the hostile environment. Pervasiveness and persistence refer to the palpability (i.e., the undeniable presence, from the student’s perspective, whether outwardly visible or not) of the harassing or discriminatory conduct. This is often determined by examining the duration and frequency of the conduct. For example, a school’s visitor management system whose video-surveillance component does not work as well on darker skin tones and thus impedes students of color from seamlessly entering school on a daily basis has a pervasive and persistent impact that lasts as long as students are coming to school in person.⁴⁰ Similarly, a remote proctoring system that does not work well for students with disabilities (or, again, students with darker skin tones) can subject these students to difficult testing environments or even result in discipline if the system concludes that the student has cheated. Where students in protected classes are being disproportionately disciplined or otherwise affected by the continuous cycle of algorithmic surveillance, flagging, and adverse action, students who belong to those classes, whether they have been affected directly or not, are fearful of adverse consequences such as being disciplined or outed. This fear can be constant and take a significant toll on student mental health.⁴¹ Such feelings of anxiety and fear significantly detract from a student’s ability to meaningfully benefit from educational services, thus amounting to a hostile learning environment. Additionally, students who are removed from class to institute any of the previously mentioned disciplinary or intervening actions where justification is not sufficient are wrongfully denied participation in the benefits and services their school provides.

For a discrimination claim to be actionable, education agencies need to have been on notice of the discriminatory conduct either directly or constructively — essentially a “knew or should have known” notice requirement. Agencies can receive this type of notice through complaints by students and families, staff reports, “the grapevine” of school personnel or other communities, or the media.⁴² Additionally, notice is

attributed to the agency if any of its agents are made aware — directly or indirectly — of the discriminatory conduct. As it stands today, extensive media coverage of student surveillance technologies, along with guidance from the U.S. Department of Education on emerging education technologies such as artificial intelligence, could suffice as having put education agencies on notice of the above disproportionate impacts of education data and technology.⁴³

EXAMPLE

State legislation and school board measures increasingly focus on outing LGBTQ+ students to parents and communities

The existence of a hostile learning environment depends on the totality of circumstances. As such, factors outside of an individual school's policies or practices can contribute to the determination of whether students are experiencing this type of discrimination.

In Florida, the Sarasota County School District adopted new guidelines requiring all school staff to notify a parent if a student disclosed their sexual orientation or requested to use a different name or pronouns at school.⁴⁴ In Leon County, the school board approved a measure that mandated the reporting to parents of “all affected students” if a student in their child's orbit disclosed a gender identity other than that reflected in their records. In Texas, transgender students were being pulled from their classrooms for questioning about their gender identity and medical history pursuant to a directive mandating an investigation by the state's child protective services department.⁴⁵ In some instances, these reports were being made directly to the department by teachers.⁴⁶

Where discriminatory motives against a protected class are evident in emerging state legislation, additional voluntary implementation of data and technology that would more readily target and identify students in that protected class may contribute to the likelihood of harmful disclosure and potentially extreme intervention such as the examples proffered in this report. The state law examples may mandate disclosure of information that an education agency has, but they do not mandate the implementation of data or technology practices to actively identify students for these disclosures. Education agencies must remember that state law cannot relieve them of their duty to comply with nondiscrimination law, and discriminatory state laws may in fact contribute to the overall context when determining whether a student is experiencing a hostile learning environment or not. To this end, education agencies should strive to comply with applicable state law without implementing unprescribed surveillance mechanisms to flag information that could be implicated for mandatory disclosure.

D. DENIAL OF A FREE APPROPRIATE PUBLIC EDUCATION

Students with disabilities are entitled to FAPE under Section 504⁴⁷ and IDEA.⁴⁸ Failing to provide, or disrupting the provision of, FAPE can be a violation of Section 504, IDEA, or both, depending on a student’s eligibility.⁴⁹ According to the U.S. Department of Education, when exclusionary discipline^g constitutes a “significant change in [a student’s] placement” and is issued because of a student’s disability-based behavior, it can constitute a disruption to FAPE.⁵⁰ Under Section 504, a “significant change in placement” is an exclusion of more than 10 consecutive school days⁵¹ or a pattern of removal made up of short-term nonconsecutive removals that total more than 10 school days during the school year.⁵²

Ensuring that students are not disciplined for manifestations of their disabilities is particularly important to conversations surrounding data and technology use in and by schools. For example, behavior threat assessments have gained popularity as schools seek to prevent acts of mass violence (e.g., school shootings). Behavior threat assessments are intended to prevent violence through assessment and intervention by determining whether a student poses a threat of violence and whether they have the intent and means to carry out the threat. These processes often rely on data about students collected through means such as social media monitoring, student activity monitoring, or even video surveillance, in addition to information on past disciplinary incidents, family information, and academic indicators. In fact, the Florida Department of Education was legally required in the Marjory Stoneman Douglas High School Public Safety Act to create a statewide data repository to include information from the Department of Juvenile Justice, the Department of Children and Families, the Department of Law Enforcement, and social media information in response to the Parkland school shooting. Descriptions of the new

g Exclusionary discipline is the formal or informal removal, whether on a short-term or long-term basis, of a student from a class, school, or other educational program or activity for violating a school rule or code of conduct. Examples can include detentions, in-school suspensions, out-of-school suspensions, suspensions from riding the school bus, expulsions, disciplinary transfers to alternative schools, and referrals to law enforcement, including referrals that result in school-related arrests. An in-school suspension is an instance in which a child is temporarily removed from his or her regular classroom(s) for at least half a day for disciplinary purposes, but remains under the direct supervision of school personnel. Direct supervision means school personnel are physically in the same location as students under their supervision.

U.S. Dep’t of Educ., *supra* footnote f, at A-1 to -2. Informal exclusions — removing a student without invoking the school’s disciplinary procedures — are subject to the same Section 504 requirements, including recordkeeping. *Id.* at 22–23. When determining Section 504 compliance, the Office for Civil Rights assesses “the educational impact on the student, rather than the specific words used to describe the removal,” such as “excused absence.” *Id.* at 24.

obligations explicitly laid out social media monitoring procurement as a Florida Department of Education action item for this purpose.⁵³

Students with disabilities are up to four times more likely to be subjected to behavior threat assessments than their peers.⁵⁴ Threat assessments are known to disproportionately affect students with disabilities in ways that run afoul of Section 504, IDEA, and the ADA.⁵⁵ For example, in Albuquerque, NM, disabled students make up 18 percent of the total student population but 56 percent of the student population subject to threat assessments.⁵⁶ If a student is removed from classes because of a threat assessment based on data from discriminatory monitoring software, the school could be held liable for violating Section 504 — even if the disciplinary procedure resulting from such an assessment is facially neutral.^h There may be ADA claims in these scenarios as well.

Remote proctoring software (including programs used to monitor students taking exams outside of a typical classroom environment) is also known to disproportionately affect students with disabilities.⁵⁷ Reports describe students being kicked out of virtually proctored exams⁵⁸ for “atypical eye movements” by movement-monitoring software.⁵⁹ This situation can have the effect of negating a student’s current testing accommodations and generally creates additional hurdles for fair and successful completion of examinations. Such software can specifically and disproportionately affect the expression of students with disabilities and thus deny these students’ right to FAPE.⁶⁰

^h See U.S. Dep’t of Educ., *supra* footnote f, at 31 (“Even when a school criterion, policy, practice, or procedure ... is neutral on its face, it may still have the discriminatory effect of denying a student with a disability meaningful access to the school’s aid, benefits, or services, or of excluding the student based on disability.”).

EXAMPLE

The impact of threat assessments and student monitoring on students with disabilities is disproportionate

After the mass shooting at Marjory Stoneman Douglas High School in Parkland, FL, the School Public Safety Commission issued a report suggesting that “threat assessment teams” and IEP committees “coordinate information” and subject all students with otherwise documented behavioral challenges, as well as arbitrarily selected students with IEPs, to mandatory evaluations by “threat assessment teams.”⁶¹ These threat assessments almost always require disabled students to miss school — in Oregon, an autistic student was repeatedly forced to miss school to submit to the threat assessment process and eventually transferred from full-time school to night school, where he received only two hours of instruction each evening.⁶² Certain monitoring software programs designed for threat assessments combine data from students’ social media pages with records of students’ psychiatric and behavioral history, which immediately implicates students with disabilities for assessment at a higher rate than nondisabled students.⁶³

Civil Rights, Parental Rights of Access, and Student Privacy

FERPA governs student privacy as it relates to schools’ handling of education records and students’ personally identifiable information. It affords specific rights to parents to inspect, seek to amend, and authorize disclosure of student records on behalf of minor students. Information maintained by vendors and third parties acting on behalf of the school is also subject to FERPA.⁶⁴ FERPA creates a floor for student privacy that can then be supplemented by state student privacy laws. Some examples of additional state student privacy protections include requiring specific language in vendor contracts to prohibit unauthorized uses of student data, creating breach notification procedures,⁶⁵ establishing student privacy task forces to oversee and make recommendations on student privacy,⁶⁶ requiring annual privacy notices to students and parents,⁶⁷ and notifying and providing opportunity to comment prior to implementing data collection pertaining to students’ social media.

In certain situations, these laws may raise conflicts with education civil rights laws. For example, notwithstanding privacy laws, a student’s personally identifiable information can be shared without consent for due process purposes in Title IX investigations.

Where state laws or schools explicitly target certain groups of students, important questions arise about whether civil rights protections supersede parental rights of access to information, such as those rights contained in FERPA. State policies that target students based on their gender identity or sexual orientation are becoming more common. Of particular concern is the mandated disclosure of information to parents that may result in mental or emotional distress for students or even abandonment, abuse, or neglect. Such disclosures might include whether the student spoke to a counselor about being LGBTQ+, whether the student expressed a preference for pronouns or a name, how a student dresses or presents themselves at school, or information flagged by monitoring software related to LGBTQ+ identity or activity.

In its 2020 rulemaking on Title IX, the U.S. Department of Education ruled that it will resolve conflicts between the Civil Rights Act and FERPA in favor of the Civil Rights Act,⁶⁸ stating that “[t]he General Education Provisions Act (GEPA), of which FERPA is a part, states: ‘Nothing in this chapter shall be construed to affect the applicability of title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, ... or other statutes prohibiting discrimination, to any applicable program.’ The legislative history underlying this provision in GEPA demonstrates that Congress did not intend for GEPA to limit the implementation or enforcement of the Civil Rights Act of 1964.”⁶⁹ Further, as explicitly stated in the text of the Act, obligations to comply with Title IX’s prohibition on sex discrimination are not obviated or alleviated by any state or local law.⁷⁰ As such, state and local laws that permit, encourage, or mandate the outing of LGBTQ+ students arguably do not provide protection to the extent those disclosures would violate Title IX.

IV. Consequences of Violation

Allegations of Title VI and IX violations can trigger an investigation by the U.S. Department of Education's Office for Civil Rights (OCR) in addition to legal action by affected students and their families or by interest groups on behalf of protected students/classes. If OCR finds a violation, the matter can be referred to the U.S. Department of Justice for additional enforcement action with penalties as severe as withdrawal of federal funding. If liability is found by the court, monetary penalties and associated attorney's fees may be assessed. If a school violates the ADA, Section 504, or IDEA, it can also be subject to an OCR investigation and sued for significant damages, including punitive damages and attorney's fees. Even in cases where liability is not found, defending or settling an alleged violation via OCR complaint or lawsuit can be costly to the education agency.

V. Recommendations

Compliance with civil rights protections is the floor, not the ceiling, to ensure that all students receive a quality education that will position them for success. Because these protections have been in existence for decades, education agencies have existing infrastructure, including policies and people, that can be used to apply civil rights laws to emerging data and technology uses. The following recommendations are intended to assist education leaders in assessing their current policies and practices with respect to nondiscrimination obligations and the use of data and technology — with the ultimate goal of supporting the success of all students.

Audit existing nondiscrimination policies, practices, and notices. Education agencies are already required by the laws discussed in this report to have nondiscrimination policies. A first step in incorporating data and technology practices requires a review of these existing policies to assess their adequacy, including whether and how they address current and planned uses of technology and data. Specific actions would include:

- Review how Title IX discrimination is defined in district policy and ensure that district policy is inclusive of the various forms of sex discrimination, including (but not limited to) sexual orientation and gender identity.
- Examine policies for any explicit or implicit mentions of data and/or technology as applicable to discrimination policy.
- Identify existing data or technology practices that might implicate civil rights laws, paying special attention to:
 - ◆ Algorithms/analysis that include a demographic variable that is directly related to protected classes;⁷¹
 - ◆ Data collection/tracking/surveillance that is likely to occur more often among protected classes of students (e.g., tracking on school-issued devices);

- ◆ Technology with well-documented disparities in performance among protected classes of students (e.g., facial recognition technology); and
- ◆ Policies that treat students in protected classes differently than their peers, such as requiring behavior threat assessments for certain groups of students or proactively disclosing or redisclosing information for certain groups of students.

- Understand whether/what measurable outcomes are in use to identify discrimination, including but not limited to monitoring discipline statistics under these frameworks.

Update or create new policies to address data and technology use. Based on the previously referenced audit, if current policies have gaps related to current and planned uses of data and technology, update the policies. Education agencies should:

- Consult with subject matter experts and internal agency stakeholders to gauge the current landscape and opportunities to improve the application of civil rights protections to uses of education data and technology. This work could include input from privacy officers, civil rights coordinators, information technologists, teachers who have firsthand experience using and facilitating student use of education technologies, and legal counsel.
- Provide opportunities for community engagement. Most parents and students indicate a desire to participate in decisions about student data use and implementation of new technologies, but few report ever having been consulted on these issues.⁷²
- Use this feedback to update policies (or create new policies where needed) to comply with applicable civil rights laws and to prevent discriminatory uses of education data and technology and the resulting harm to students.

Revise or implement a procurement policy for education technologies. A specific procurement policy should be crafted to place obligations on vendors that would minimize potential harms and civil rights implications for students and the education agency. This policy should include:

- Due diligence regarding the product's or service's potential for discriminatory processes or outcomes prior to purchase.

- Ongoing review and assessment of existing contracts for changes in service that might implicate the agency's nondiscrimination policy.
- Contractual provisions required in each contract that set forth:
 - ◆ Clearly defined terms regarding the coverage of the nondiscrimination policy to education data and technology products and services;
 - ◆ Vendor obligations in connection with the nondiscrimination policy, tailored to the service or product being provided; and
 - ◆ Vendor obligations of transparency as it relates to processes that might implicate the nondiscrimination policy.

Consolidate and make readily available all required nondiscrimination notices.

Requirements for visibility of nondiscrimination notices and their contents vary across various civil rights statutes.⁷³ For efficiency and rigor:

- Combine all nondiscrimination notices into one comprehensive nondiscrimination policy. This consolidation puts all vital information together into one resource that can easily be shared, rather than having to source the requisite information from a patchwork of notices/policies in various locations.
- Ensure that the policy is written in plain language with parents and the public in mind.
- Proactively disseminate the policy to important stakeholders through multiple methods:
 - ◆ *School administration and staff:* Include the consolidated policy in annual communication at the start of each school year, in the employee handbook, and in professional development sessions, and post it in common areas such as on bulletin boards in lounges, kitchens, and break rooms.
 - ◆ *Students:* Prominently feature the consolidated policy in the student handbook and post it outside of the cafeteria or other common areas.
 - ◆ *Parents:* Include the consolidated policy in parent communications, PTA meetings, and shared documents and have it posted outside the entrance of school board meetings.
 - ◆ *Vendors:* Include the consolidated policy as a provision or addendum to all requests for proposals.

Post the consolidated policy in district buildings and on school websites. In addition to the dissemination methods recommended previously, the consolidated policy should be universally available in a common space.

- Prominently post nondiscrimination policies on school websites and include an easy-to-understand summary, frequently asked questions, and information on points of contact and complaint processes. Online resources are increasingly the go-to method for seeking information and should be used as one of the main avenues for public access to district policy. Providing information on internal grievance processes is especially helpful as it allows parents and students the opportunity to voice their concerns and address these issues directly with the education agency, rather than turning to OCR or the courts for relief.
- Create an easy-to-understand summary poster of the consolidated nondiscrimination policy and post it in school buildings. In addition to making information available online, education leaders should also make this information prominently visible to school visitors and other members of the public.

Designate specific personnel to be responsible for ensuring compliance with nondiscrimination laws regarding education data and technology. Title IX, Title II, and Section 504 all currently require the “[d]esignation of [a] responsible employee,” whose information must be made available to “all interested individuals,” and “adoption of grievance procedures” that must be published.⁷⁴ Education agencies also have at least some staff dedicated to data and technology. Additional measures should include:

- Designate a point person or governance committee to be responsible for integrating data and technology into nondiscrimination policies and practices. Regardless of the form, the needed expertise should be multidisciplinary and include subject matter experts in civil rights, privacy, technology, community engagement, and legal skills as well as other existing subject matter experts. Student civil rights compliance should be an interdepartmental mission with identified designees for both internal and external coordination.
- Appoint a Title VI coordinator (or staff member focused on preventing race-based discrimination). While a designated coordinator is not statutorily required, identifying an individual to whom concerns can be brought ensures ongoing awareness of activity inconsistent with Title VI compliance.

- Train a designated privacy officer (or other staff member charged with privacy compliance and strategy) on the education agency's nondiscrimination policies. This individual should be cognizant of any data and technology practices that could be implicated.

Conduct analysis and publicly report information on nondiscrimination policies and practices for data and technology on an ongoing basis. This analysis is to understand whether current uses of data and technology could have a disproportionate effect on protected classes of students and to track progress toward mitigating discrimination through data and technology. This work could include the following steps:

- Establish metrics, in consultation with communities, to measure whether technologies are disproportionately affecting protected classes of students and monitor those metrics on a regular basis.
- Take mitigating steps (including ceasing to use the technology) as needed.
- Establish a recurring timeline by which analysis will be conducted.
- Post publicly, in an easily understood manner, information regarding the agency's use of data and technology and its proactive efforts to protect student privacy and prevent discrimination, which can be useful in preempting allegations of inappropriate data and technology use.

VI. Conclusion

The education civil rights landscape has been crafted over decades and continues to evolve through the expansion of protected conduct and categories deemed necessary to ensure all students' equal access and participation. These important concepts that currently govern education practices must continue to evolve to account for the growing use of data and technology in schools. While legal compliance is an important priority, centering the spirit and intent of these laws by ensuring that all students have the opportunity to be successful, regardless of race, sex, gender, sexual orientation, or disability, is even more important.


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