

MAKE SURE YOUR DIVERSITY WORK IS CONSISTENT WITH YOUR LEGAL OBLIGATIONS

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Whether your school is aiming to be more diverse and inclusive or wanting to be in the best possible position to enforce religious tenets, it is important to consult with experienced independent or private school legal counsel as you engage in diversity work for the school. Many schools solely undertake this work by retaining consultants, such as those focusing on diversity, equity, and inclusion matters, or those with a religious liberty focus. No doubt their voices and perspectives are important to the process. However, what is commonly overlooked are the *legal* ramifications of such work. Lack of continuity between this work and the school's overall policies – including those set forth in employee and student handbooks as well as employment and enrollment contracts – can lead to legal liability.

Diversity Statements

Your school's administration and its board may go to great lengths putting in extensive time, money, and effort to develop and draft a diversity statement or other similar documents. These typically provide for inclusiveness based on race, religion, national origin, gender, sexual orientation, gender identity, gender expression, and disability, among other things. That diversity statement is then often supplanted onto your school's website and into the student handbooks, employee handbooks, enrollment contracts, employment agreements, and marketing materials without further ado. However, such diversity statements may be unknowingly incongruent with the school's non-

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discrimination policies or with the protections the school is legally required to provide.

Take Local Laws into Account

When considering what kinds of diversity statements to adopt, it is also important to review any applicable state laws or local ordinances, especially those relating to non-discrimination. Cities, counties, or states often require protection for individuals beyond that required by federal law. For example, many local governments provide legal protection for transgender people by way of public accommodations statutes or ordinances. Private secular or religious schools may or may not be exempt from public accommodation depending on the language of the statute or ordinance. If your school is subject to a public accommodations requirement and your school's diversity statement does not include those categories, a fact finder (i.e. judge, jury, EEOC, or other governmental agency) may construe the absence as the school's intent to discriminate or otherwise hold the absence against the school in litigation.

Consider Categories of Protection

A diversity statement most often contains more categories of protection than what is legally required. By expanding the categories of protection, your school may be extending legal protection to individuals who would not otherwise be protected. If a school *wants* to provide this additional legal protection, that is perfectly acceptable – but it is important that the administration and the board make a knowing and informed judgment call when deciding to do so because it expands the school's legal liability. While doing so will not necessarily provide *statutory* rights to such individuals, there could be *contractual* claims if the school fails to live up to its promises. Thus, if your school chooses to provide protection outside the scope of the legally required categories, then it must follow through on its own statements. So, for example, if a diversity statement indicates that a school does not discriminate on the basis of gender identity, then it needs to accommodate transgender students.

Insurance Considerations

In that same vein, your school should check with its insurance broker as you develop your diversity statement.

You'll want to ensure that you will have insurance coverage over a claim if you choose to extend diversity promises beyond what it is legally obligated and your school is alleged to have fallen short.

Religious Schools Should Not Ignore Diversity Issues

On the other hand, if your school is seeking to enforce its religious tenets, it is equally important that you consider diversity issues as well.

Statements of Faith

To start, you should not simply adopt a "Statement of Faith" and call it a day. Religious schools still must have non-discrimination policies, and they can often be narrower than those required for secular schools. However, that also means that religious schools that do not employ LGBTQ employees based on the school's religious tenets, for example, should not have extensive policies talking about diversity and inclusivity based on sexual orientation or gender identity. Consistency between your Statement of Faith, your non-discrimination policy, the employee handbook, student handbook, board policies, governance documents, and facilities use agreements (among others) is the key to positioning your school to be able to withstand legal review when enforcing the school's religious tenets.

Legal Exemptions

Religious schools should do an analysis with legal counsel to determine whether the school is "religious enough" to withstand scrutiny for various legal exemptions available to some religious schools. This analysis should include whether, how broadly, and to which employees your school can apply the ministerial exception and whether certain actions by your school fall under the protection of ecclesiastical abstention.

- The **ministerial exception** exempts religious institutions from anti-discrimination lawsuits in some employment situations.
- If applicable, the **ecclesiastical abstention doctrine** provides that civil courts do not have jurisdiction over lawsuits involving religious doctrine, membership in religious organizations, management of internal affairs, standards of conduct, and morality or church discipline.

If your religious school plans to take advantage of these doctrines, you should know that courts will look at a myriad of factors when reviewing employment discrimination cases to determine whether the ministerial exception applies. This review may include everything from whether the teacher leads the children in prayer, to what kind of food is served in the school café, to whether the school's facilities are rented to organizations inconsistent with the school's religious mission, and beyond. This means that, among others, employee agreements, enrollment agreements, food service vendor contracts, and facilities use agreements all need to be consistent with the work the school is doing to enforce its religious tenets.

Final Considerations

For both religious and secular schools, it is not uncommon for courts reviewing employee or student discrimination cases to look to the school's mission, marketing materials, and various policies and procedures to see how the school talks about diversity, non-discrimination, and inclusion. Your school's position could be weakened substantially if any of those policies or documents are inconsistent with the approach the school took with respect to a particular employee or student situation. For example, it would be incongruent for a school to talk in its admissions materials or on its website about celebrating differences in family structure if the school does not admit families with two moms or two dads.

In short, diversity work should not be done in a vacuum without the benefit of a legal perspective and how the work can impact a school's liability. We monitor developments related to these issues and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney on our [Education Team](#).