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October 23, 2019

VIA EMAIL

Julie Schreiner-Oldham
Chair
Brookline School Committee
333 Washington Street
Brookline, MA 02445

RE: Warrant Article 24 – Public Schools of Brookline

Dear Chair Schreiner-Oldham:

The Brookline School Committee has asked our firm in our capacity as school district counsel for an opinion that can be made available to the public regarding the above matter.

As we understand it, Warrant Article 24 if adopted by the Special Town Meeting would amend the Town's General By-laws, Art. 3.14, sec. 3.14.3(A)(vi), such that the Town's Commission for Diversity, Inclusion and Community Relations ("CDICR) would be responsible for investigating "discrimination" complaints against the Public Schools of Brookline ("PSB") by interviewing the complainant and witnesses, issuing findings, and recommending "appropriate action" to the Superintendent and/or School Committee. It appears that the amendment proposed in Article 24 would apply to all school-related "discrimination" complaints against PSB except those made by employees. Accordingly, as drafted it would not exclude from the CDICR process complaints by or against PSB students.

Based on these facts, we believe that Article 24 is probably not valid and also is highly inadvisable to the extent that it applies to complaints involving PSB students.

These complaints generally arise under "Title IX", 20 U.S.C., § 1681, the federal statute which bars gender discrimination (including sexual harassment) in the public schools, and under "Title VI", 42 U.S.C., § 2000d, the federal statute which for our purposes bars discrimination based on race, color, or national origin in the public schools. The Office for Civil Rights ("OCR") in the U.S. Department of Education has made it clear that the responsibility for



Valerio
Dominello &
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Julie Schreiner-Oldham
Chair

October 23, 2019

Page 2

preventing, investigating, and remedying these types of discrimination is placed directly on the schools and on their employees.

For example, the guidance which currently sets forth OCR's interpretation of the law regarding sexual harassment provides that "[a] school has a responsibility to respond promptly and effectively to sexual harassment"; requires that schools must adopt grievance procedures that enable the schools to discover harassment "as early as possible" and to "effectively correct[] problems"; and mandates that the school as part of its investigation take "immediate and appropriate steps to investigate" and take corrective steps promptly, including stopping the harassment and preventing its recurrence. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, January 2001 at 9, 14-15, 19. Moreover, OCR requires that schools designate a Title IX Coordinator who is responsible for overseeing the school's Title IX compliance, including investigations and resolutions, *id.* at 21, and that school staff be trained in Title IX requirements and procedures. Because the responsibility for all of this is placed squarely on PSB, we do not believe that OCR would consider delegation of this important task to a non-PSB entity – either initially or as a further step in the process - as adequate compliance with the obligations of PSB under the law.

We note that if the CDICR process is a further step to the PSB investigation this would create an additional legal problem. These investigations must take place and conclude with a resolution expeditiously. Adding another investigatory layer would interfere with that.

This is further complicated if the investigation involves students who are placed on individualized education plans ("IEP's") or so-called "504 plans" in compliance with the federal laws that govern special education. The schools are staffed with employees who are familiar with the requirements of these laws and how they may apply to an investigation where the complainant, the victim, or both may be on such a plan. That is an additional reason to require that the investigation and outcome be handled and completed by PSB.

Frequently a complaint involving students under Title IX or Title VI will also involve what is defined as "bullying" under Massachusetts law, G.L. c. 71, § 37O. That law requires that the school district establish a bullying prevention and intervention plan that, among other things, contains procedures for "promptly responding to and investigating reports" of bullying, §37O(a)(1) and (2). The law specifies that upon receipt of a report, "the school principal or designee shall promptly conduct an investigation", § 37O(g). We therefore do not believe that



Valerio
Dominello &
Hillman, LLC

Julie Schreiner-Oldham
Chair
October 23, 2019
Page 3

this role can be delegated to a third party – again, whether initially or as a further step. In addition, as with the Title IX/Title VI process, bullying investigations must occur and be resolved expeditiously.

Often these investigations will result in student discipline of some sort. Article 24 apparently would involve the CDICR recommending “appropriate action”. Student discipline is clearly the province of PSB officials under G.L. c. 71, §§ 37H, 37H ½, and 37H ¾, as well as 603 CMR 53.00. Getting input from the CDICR as to student discipline would also seem improper under the law.

Finally, most of the information involved in these investigations will constitute personally identifiable education information for the specific students involved. As such it is protected from unauthorized disclosure to third parties without the consent of parents or of eligible students both by Massachusetts law, G.L. c. 71, §§ 34D and 34E and 603 CMR 23.00, as a “student record” and by federal law, “FERPA”, 20 U.S.C., § 1232g, as an “education record”. Members of the CDICR are not “authorized school personnel” under 603 CMR 23.02 and do not meet the narrow exceptions for disclosure set forth in 603 CMR 23.07(4). Likewise, they do not meet the exceptions for disclosure under FERPA as set forth in 34 CFR § 99.31.

We therefore believe that the amendment proposed by Article 24 as it would affect discrimination claims by or against PSB students would be neither valid nor advisable.

Valerio Dominello & Hillman, LLC

By:

John Foskett

JF:ham

cc: Elizabeth B. Valerio, Esq.
Joslin Murphy, Esq.