

# Insights

## **Educate Your School: K-12 Public School Compliance with Federal Civil Rights Laws In the COVID-19 Environment**

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On September 28, 2020, the U.S. Department of Education's Office for Civil Rights ("OCR") issued a set of questions and answers containing guidance on how K-12 schools that are governed by Federal civil rights laws can cope with the COVID-19 environment and still comply with Federal civil rights laws that are enforced by OCR, including Title VI of the Civil Rights of 1964, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and Title IX of the Education Amendments of 1972. Many schools still offering a form of remote instruction will at some point make the transition to in-person instruction. In fact, OCR points to Center for Disease Control and Prevention guidance that urges communities to "make every effort to support the reopening of schools safely for in-person learning in the fall" and that because of the critical role schools play, communities should prioritize opening schools and keeping them open. Although these questions and answers do not have the force of law, they will assist schools by providing clarity on what the laws require with respect to a number of issues they are either facing or will face in the coming months.

### **I. Title VI of the Civil Rights Act**

Under Title VI of the Civil Rights Act, as districts phase in the use of their physical facilities and in-person instruction, K-12 schools cannot prioritize students' return based on their race, color, or national origin. Any such plan that prioritizes, gives preference to, or limits programs, supports or services to students based on their race, color, or national origin will likely violate Title VI of the Civil Rights Act. Schools must remain unbiased and nondiscriminatory in their plans to return students to in-person instruction.

### **II. Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act**

With respect to the use of physical facilities and in person instruction for students with disabilities before others, OCR acknowledges that schools may prioritize services necessary to ensure compliance with free appropriate public education ("FAPE") under Section 504 of the Rehabilitation Act of 1973 ("Section 504"). However, whether a school will be required to give priority to a student with a disability will depend on an individualized determination of the student's needs and whether in-person instruction or services would be a reasonable modification to a re-opening plan that would be necessary to provide FAPE or avoid a disability discrimination claim.

Provisions must be made for students with an Individualized Education Plan ("IEP") to provide special education and services while those students are required to stay home, regardless of whether the individual student is prioritized. Further, OCR explains that state or district-wide decisions that reduce or limit services for students with disabilities without regard for their individualized needs, violates Section 504. Thus, districts should always take into account a student's individualized needs when making a determination regarding

services available.

In addition, as a part of its reopening plan, a district should address safety measures including mask wearing. In some instances, wearing a mask could impede the child's ability to receive the FAPE required by Section 504. Thus, schools should make modifications to their policies, practices, or procedures that are consistent with the health, safety, and well-being of students and staff while avoiding discrimination on the basis of a disability.

OCR confirms that under Section 504 and Title II of the Americans with Disabilities Act ("ADA"), schools must consider individualized needs in determinations related to distance learning. Specifically, OCR explains that schools must still comply with Section 504 and Title II of the ADA while providing distance learning and that state and local directives that require limiting in-person instruction do not relieve a district's obligations to provide a FAPE to a student with a disability. Schools must still conduct evaluations and re-evaluations under Section 504 even if only providing distance learning. OCR explains that if an evaluation under Section 504 requires an in-person face-to-face administration of an assessment, schools must make a good-faith effort to conduct assessments virtually or via other comparable methods where in-person meetings cannot be accommodated. However, OCR notes that temporary shifts to distance learning do not require schools to change or update placement decisions or educational settings in effect at the time.

Last, OCR clarifies that requiring parents to sign waivers before a district delivers online services to a student with disabilities under Section 504 is prohibited. Public school districts may not require parents to waive any rights afforded to students under Section 504 as a condition of receiving a FAPE.

### **III. Title IX of the Education Amendments of 1972**

Since the initiation of distance learning, districts and schools have wondered how harassment complaints will be handled. OCR confirms that schools must accept complaints of discriminatory harassment covered by Federal civil rights laws (including those based on race, color, national origin, sex or disability) and must investigate reports of harassment, including sexual harassment under Title IX of the Education Amendments of 1972 ("Title IX"). OCR further affirms that it will enforce the new Title IX regulations as applied to K-12 schools that went into effect on August 14, 2020. Schools may not adopt a policy of putting all Title IX investigations or proceedings on hold until the district resumes normal operation.

In addition, OCR anticipates that delays in Title IX investigations may occur, but refers schools to the examples of "good cause" for delays under Title IX in Section 106.45(b)(1)(v) of the new rule. OCR states that schools should promptly advise all parties of any COVID-19 delays and the estimated length of that delay. Further, Title IX investigations may be conducted remotely, but adequate, reliable, and impartial investigations must still take place.

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It is important that K-12 schools understand their obligations under Federal civil rights laws and be equipped to comply with those obligations even during the COVID-19 Pandemic. If your school has questions or concerns about your obligations under Federal civil rights laws or has an issue involving Federal civil rights laws please contact Elizabeth M. Roberson, Deborah J. Daniels, Robert A. Greising, or another one of our Education and School Law Professionals for assistance.

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