UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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Questions and Answers for K-12 Public Schools In the Current COVID-19 Environment

The U.S. Department of Education's (Department) Office for Civil Rights (OCR) issues the following technical assistance document to assist elementary and secondary (K-12) schools with meeting their obligations under the Federal civil rights laws enforced by OCR. In recent guidance, the Centers for Disease Control and Prevention (CDC) has urged communities to "make every effort to support the reopening of schools safely for in- person learning in the fall" and advised local officials to consider a number of factors, including the importance of in-person education to the social, emotional, and academic growth and well-being of students, before making a decision to close schools for in-person learning. Along with the CDC, the Department strongly believes that "the unique and critical role that schools play" in supporting the health, safety, and well-being of their communities "makes them a priority for opening and remaining open."

The Department recognizes that State education leaders and local school districts have been evaluating and monitoring COVID-19-related developments and making decisions regarding the provision of educational services for all children. In addition to monitoring local circumstances, States and school districts have also now had months to plan and develop systems and processes that ensure the provision of high-quality instruction and educational services moving forward. It is the Department's expectation that any phase-in plans designed and implemented by school districts will provide the full benefit of educational opportunities for all students *and* will meet the requirements of Federal civil rights laws. Consistent with CDC guidance, the Department expects States and school districts to make every effort to return to the classroom and provide equal access to educational opportunities to all children, and to do so in a way that fully complies with the civil rights laws enforced by OCR.

Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Question 1:

As school districts phase in the use of physical facilities and in-person instruction as a part of their reopening plans, may they prioritize students' return to in-person instruction based on their race, color, or national origin?

Answer:

No. A reopening plan—or any school policy—that prioritizes, otherwise gives preference to, or limits programs, supports or services to students based on their race, color, or national origin—regardless of how that plan is formulated—would likely violate Title VI of the Civil Rights of 1964.[1] Under U.S. Supreme Court precedent, any classification based on race is presumptively invalid unless the classification satisfies strict scrutiny.[2] This means that such classifications are constitutional only if they are narrowly tailored to further a compelling governmental interest that has been recognized by the U.S. Supreme Court.[3] As part of the narrow tailoring requirement, school districts bear the "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."[4]

Question 2:

What should school districts consider if they are phasing in the use of physical facilities and in-person instruction for students with disabilities before others?

Answer:

The Department understands that there may be circumstances where schools decide to prioritize in-person instruction for students with disabilities, in order to provide the services necessary to ensure that those students receive a free appropriate public education (FAPE) under Section 504 of the Rehabilitation Act of 1973 (Section 504).[5]

Whether a school district that is phasing in in-person instruction may be *required* to give priority to a student with a disability, however, will depend on an individualized determination of the student's educational and disability-related needs, and whether providing in-person instruction or services would be a reasonable modification to a reopening policy that is necessary to provide a student a FAPE or otherwise to avoid discrimination on the basis of disability. Moreover, as the Department explained in its March 16 Fact Sheet, provision must be made to provide special education and related services for students who have Individualized Education Programs (IEPs) developed through the IDEA or are receiving services under Section 504 and who are required or advised to

[1] *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (discrimination that violates Equal Protection Clause of Fourteenth Amendment committed by institution that accepts federal funds also constitutes violation of Title VI).
[2] *See Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (quoting *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979)); *Gratz*, 539 U.S. at 270.
[3] *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007) (noting that in evaluating the use of racial classifications in the school context, the Court has recognized two interests that qualify as compelling: "remedying the effects of past intentional discrimination" and "diversity in higher education").
[4] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (city's use of race was not narrowly tailored because "there [did] not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including . . . the efficacy of alternative remedies . . . ")).
[5] This document does not address any related requirements under Part B of the Individuals with Disabilities Education Act (IDEA). For recent Department of Education guidance on COVID-19 and IDEA requirements, *see* the Office of Special Education Program's June 30, 2020, Q&A.

stay home by public health authorities or school officials for an extended period of time because of COVID-19. This also applies if a student is absent from school as advised by the student's treating physician, consistent with school policy and documentation requirements.

Question 3:

Under what circumstances must a school district waive a face covering requirement for a student with a disability?

Answer:

In recent guidance, the Centers for Disease Control and Prevention (CDC) has advised school districts to address adherence to behaviors that prevent the spread of COVID-19 as a part of their reopening plans, including the appropriate use of cloth face coverings. The Department understands that using a face covering can be challenging for some students, teachers, and staff, especially those students with special educational or other healthcare needs. And in some instances, such as where a child with a disability has extreme sensory issues and cannot tolerate wearing a face covering in school or at all, OCR also recognizes that enforcing a face covering requirement could impede the child's ability to receive the FAPE required by Section 504. School districts should therefore make reasonable modifications in their policies, practices, or procedures—including any addressing the use of face coverings—when those modifications can be made consistent with the health, safety, and well-being of all students and staff, and are necessary to avoid discrimination on the basis of disability.[6]

For tips and suggestions for helping younger students safely use face coverings, OCR encourages school districts to consult the Office for Special Education Program's resources related to COVID-19.

Question 4:

Do State- or district-wide decisions that specifically reduce or limit services for students with disabilities, without regard to their individualized needs, violate Section 504?

Answer:

Yes. Section 504 requires individual decision-making regarding the type, frequency, and manner in which special education and related services will be provided to students with disabilities. As such, State-wide or district-wide policies that reduce or limit services specifically for students with

[6] OCR notes that Title II of the Americans with Disabilities Act (Title II) does not require school districts to permit an individual with a disability to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others. 28 C.F.R. § 35.139(a). Whether or not an individual poses such a threat—including in cases where students, teachers, or staff may be unable to wear a face covering—will depend on an individualized assessment of the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary aids or services will mitigate the risk. *Id.* § 35.139(b). All such assessments must be based, moreover, on reasonable judgment that relies on current medical knowledge or on the best available objective evidence. *Id.*

disabilities in a particular jurisdiction, without regard to any reasonable modifications or services that may be necessary to meet the individualized needs of those students, run afoul of Section 504.[7]

Question 5:

Do schools that provide distance learning still have to comply with Section 504 and Title II of the Americans with Disabilities Act (Title II)?

Answer:

Yes. As the Department has explained in its March 16 Fact Sheet and March 21 Supplemental Fact Sheet, schools must still meet the requirements of Section 504 and Title II of the Americans with Disabilities Act (Title II), as well as other Federal disability laws, as appropriate.[8]

To meet the requirements of Section 504 and Title II, schools must make local decisions that take into consideration the health, safety, and well-being of all their students and staff, as well as their obligation to ensure that students with disabilities are receiving a FAPE. This includes making individualized decisions regarding how to provide special education and related services to students with disabilities. OCR reminds schools that failing to implement aids, services, or accommodations/modifications identified in a student's IEP or Section 504 plan could deny the student a FAPE, violating Section 504. However, not every failure to implement an aid, service, or accommodation/modification in an IEP or Section 504 plan constitutes a denial of a FAPE. And OCR will continue to take into consideration all relevant circumstances when evaluating a school district's implementation of an IEP or Section 504 plan, including the impact that any discrepancies from an IEP or Section 504 plan have on the student's ability to participate in or benefit from the school district's services, programs, and activities.

Question 6:

If a school district is offering only distance learning, is it required to conduct evaluations and reevaluations under Section 504?

Answer:

Yes. Schools must continue to meet the requirements of Section 504, consistent with the need to protect the health, safety, and well-being of students, school staff, and other individuals responsible for providing special education and related aids and services to students with disabilities.

Section 504 requires school districts to conduct an evaluation in a timely manner of any student who needs or is believed to need special education or related services because of a disability before taking

[7] *See* 34 C.F.R. §§ 104.33–104.35.

[8] This document does not address any related requirements under Part B of the Individuals with Disabilities Education Act (IDEA). For the most recent Department of Education guidance on COVID-19 and IDEA requirements, *see* the Office of Special Education Program's June 30, 2020, Q&A.

any action with respect to the student's initial placement in regular or special education, and requires "periodic" reevaluation of students who have been provided special education or related services. Section 504 also requires school districts to conduct evaluations prior to any subsequent significant changes in placement. Evaluations and reevaluations should take place within a reasonable time frame under the current circumstances, and the Department typically looks to the timelines set by the IDEA and State law when determining whether the time taken to complete an evaluation was reasonable. However, nothing in Section 504 prohibits parents and school personnel from mutually agreeing to waive or postpone governing timelines on evaluations or reevaluations.

Question 7:

What should a school district do if an evaluation under Section 504 requires in-person or a face-to-face administration of an assessment tool or instrument?

Answer:

The Department understands that in some cases, social distancing measures and other restrictions due to COVID-19 may make in-person evaluations impracticable or place limitations on how evaluations and reevaluations are conducted under Section 504. In those cases where in-person evaluations are not possible, schools should make good-faith efforts to conduct assessments virtually or via other comparable methods, to the extent that they can be administered by trained personnel in conformance with the test producer's instructions, and in a manner otherwise consistent with 34 C.F.R. § 104.35(b). However, nothing in Section 504 prohibits parents and school personnel from mutually agreeing to postpone the timelines and utilize a diagnostic placement for a child suspected of having a disability until an appropriate comprehensive evaluation can be conducted safely.

Question 8:

If a school is experiencing operational challenges relating to COVID-19, including suspending in-person instruction and offering distance learning, must the school revise plans developed to meet the requirements of Section 504 to reflect the change to distance learning?

Answer:

Placement decisions and educational settings in effect at the time that a school suspends in-person instruction in response to concerns over COVID-19 do not need to be changed or updated solely to reflect a *temporary* shift to distance learning. However, State and local decisions that require schools to limit or suspend in-person instruction do not relieve school districts of the obligation to provide a FAPE to students with a disability. And as explained in Question 5, failing to implement aids, services, or accommodations/modifications identified in an IEP or Section 504 plan could in some cases deny a student a FAPE, violating Section 504. School districts should therefore continue to make individualized determinations as to whether students' IEPs or Section 504 plans need to be revised to ensure students with disabilities are provided a FAPE, including by identifying how the

special education or related aids and services called for by a student's IEP or Section 504 plan may be provided through a variety of instructional methods and settings. School staff and parents are encouraged to work together to find ways to meet the needs of students with disabilities, notwithstanding challenges due to COVID-19.

Question 9:

May a school district require parents to sign waivers before the district delivers online services to students with disabilities under Section 504?

Answer:

No. Public school districts may not require parents of students with disabilities to waive any rights afforded to students under Section 504 as a condition of receiving a FAPE.

Question 10:

Should schools still accept harassment complaints made under Title IX of the Education Amendments of 1972 (Title IX), Title VI of the Civil Rights Act of 1964, and other civil rights statutes if they are offering only distance learning?

Answer:

Yes. While the Department's expectation is that schools make every effort to return to in-person educational settings, schools must continue to accept reports and complaints of discriminatory harassment while providing distance learning. Schools should respond appropriately to reports of harassment covered by Federal civil rights laws, including harassment on the basis of race, color, national origin, sex, or disability, including allegations of harassment that occur in distance learning platforms, in a manner consistent with protecting the health, safety, and well-being of all students and staff.

Question 11:

If a school district is only offering virtual or online education (distance learning), is the school district still required to continue with its investigations of sexual harassment complaints under Title IX (including pending complaints)?

Answer:

Yes. Please note that on May 6, 2020, the Department announced a new Title IX Rule to enshrine protections from sexual harassment into law, and to ensure that schools provide adequate due

process protections to students accused of sexual harassment who are subject to discipline.[9] The new Title IX Rule became effective on August 14, 2020. OCR will enforce the new Title IX Rule prospectively. As discussed in OCR's August 5, 2020, blog post, the Rule does not apply to schools' responses to sexual harassment that allegedly occurred prior to August 14, 2020.

Regardless of when sexual harassment allegedly occurred, schools may neither adopt a blanket policy putting all investigations or proceedings on hold until school districts resume normal operations nor adopt a policy of refusing to accept and respond to new complaints. Instead, schools should make a good-faith effort—and document the steps the school took—to respond to reports of sexual harassment while also taking into consideration the health, safety, and well-being of all their students and staff.

Question 12:

What if a school district needs more time than usual to complete a Title IX sexual harassment investigation and adjudication due to circumstances arising from operational challenges relating to COVID-19?

Answer:

As stated in Question 11, the new Title IX Rule became effective on August 14, 2020, and applies to allegations of sexual harassment that allegedly occurred on or after that date. Accordingly, any delay in a school's response to sexual harassment that allegedly occurred on or after August 14, 2020, must comply with the requirements of the new Title IX Rule. For example, Section 106.45(b)(1)(v) requires that a school's grievance process include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes, if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

The examples of good cause listed in Section 106.45(b)(1)(v) of the new Rule are illustrative, not exhaustive. The ongoing situation related to COVID-19 may, in some circumstances, qualify as "good cause" under Title IX for reasonable, temporary delays or extensions of time frames related to the grievance process. The Department trusts recipients to make sound determinations regarding the length of a brief delay; we believe recipients are in the best position to make these decisions as they have a deeper understanding of how to balance the interests of promptness, fairness to the parties, and accuracy of adjudications in each case within their school communities.

For sexual harassment that allegedly occurred prior to August 14, 2020, we will apply the previous version of 34 CFR § 106.8. Historical documents that interpret those provisions are clear that reasonableness and good faith are the key elements of compliance with Title IX, including as to

[9] The unofficial version of the Rule is available at https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf. More information and technical assistance about the Rule are available at https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/crt-ta.html.

whether an investigation is concluded promptly. Schools should not delay investigations or hearings solely on the basis that in-person interviews or hearings are cumbersome or not feasible, so long as the school is able to comply with the requirements in 34 CFR § 106.8 (in effect prior to August 14, 2020)to resolve complaints promptly and equitably. However, OCR will evaluate a school's good-faith effort to conduct a fair, impartial investigation and adjudication in a timely manner, on a case-by-case basis that takes into account time frames that are impacted by COVID-19 and reasons why delays due to COVID-19 may be unavoidable in particular cases.

Importantly, schools should promptly advise all parties of any COVID-19 related delays that are anticipated in an individual case, including the reasons for the delay and the estimated length of the delay. Schools should also endeavor to notify complainants and respondents of the status of pending investigations; to notify parties of scheduled investigative interviews, meetings, and hearings in pending cases; and to notify complainants and respondents of case outcomes and appeal opportunities following resolutions of complaints.

Regardless of whether a school's response to sexual harassment is governed by the new Rule or the prior regulations,[10] the Department recognizes that there may be some circumstances where Title IX investigatory methods or timetables will be impacted by social distancing or other issues raised by the current situation. However, even where in-person interviews or hearings are not possible, schools should use technology, as appropriate, to conduct these activities remotely, while ensuring that this is done in a timely manner and consistent with the applicable law. Schools should carefully consider confidentiality and privacy implications of electronic communications and virtual conduct of investigations and adjudications, including obligations under the Family Educational Rights and Privacy Act (FERPA). The Department refers schools to the "FERPA and Virtual Learning Related Resources" document list, the March 30, 2020, webinar, and related materials from the Department's Student Privacy Policy Office (SPPO), available at https://studentprivacy.ed.gov.

Question 13:

If a school is experiencing operational challenges relating to COVID-19, including suspending in-person instruction and offering distance learning, may it modify its Title IX procedures for resolving sexual harassment complaints due to the current circumstances?

Answer:

Yes, with limitations. As discussed in Questions 11 and 12, a school's response to sexual harassment that allegedly occurred on or after August 14, 2020, must comply with the Department's new Title IX Rule. The ongoing situation due to COVID-19 may, in some circumstances, qualify as "good

[10] To the extent the 2017 Q&A is helpful to recipients as guidance for how to appropriately respond to sexual harassment that allegedly occurred prior to August 14, 2020, that document remains accessible on the Department's website at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

cause" under Title IX for reasonable, temporary delays or extensions of time frames related to the grievance process, and for modification of other procedures, such as whether investigatory interviews or hearings are held in-person.

Even as to sexual harassment that allegedly occurred prior to August 14, 2020, COVID-19-related disruptions do not relieve schools of their obligation to comply with the requirement of 34 C.F.R. § 106.8 (in effect prior to August 14, 2020) that a school's grievance procedures must provide for the prompt and equitable resolution of student and employee complaints of sex discrimination. As set forth in historical guidance in which OCR described its interpretation of these regulations,[11] this includes adequate, reliable, and impartial investigations, which provide the parties with the equal right to review and respond to evidence and the equal right to have an adviser of choice present during meetings and proceedings. Such procedures, however, may be implemented remotely, using appropriate technology.

If a school's methods for receiving student and employee complaints of sex discrimination (including sexual harassment) have changed as a result of a COVID-19-related interruption, the school should promptly notify its students and employees of such changes. For example, if contact information for the school's Title IX Coordinator or other similar point of contact has changed due to remote work locations, or if a school is offering a web-based portal for reports or complaints of harassment rather than relying on in-person appointments, the school should disseminate that information to its students and employees, including by prominently displaying current, updated information on the school's website.

[11] To the extent the 2001 Revised Guidance on Sexual Harassment is helpful to recipients as guidance for how to appropriately respond to sexual harassment that allegedly occurred prior to August 14, 2020, that document remains accessible on the Department's website at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.