



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

ASSISTANT SECRETARY

The Office for Civil Rights in the U.S. Department of Education issues this guidance to provide State educational agencies and local educational agencies with information to ensure the provisions of the Elementary and Secondary Education Act of 1965, as amended by the No Child Left Behind Act of 2001, regarding access to, participation in, and administration of, public school choice, are implemented in a nondiscriminatory manner that is consistent with the requirements of Title VI of the Civil Rights Act of 1964 and its implementing regulations (34 C.F.R. Part 100).

This guidance represents the Department's current thinking on this topic. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations.

If you are interested in commenting on this guidance, please email us your comment at OCR@ed.gov or write to us at the following address: Assistant Secretary for Civil Rights, 400 Maryland Avenue, SW, Potomac Center Plaza, Washington, D.C. 20202-1100.

Dear Colleague:

JAN - 8 2009

I write to clarify how Federal anti-discrimination laws and, in particular, Title VI of the Civil Rights Act of 1964 (Title VI), apply to local educational agencies (LEAs or school districts) and State educational agencies (SEAs) that participate in the program authorized by Title I, Part A (Title I) of the Elementary and Secondary Education Act of 1965 (ESEA), as reauthorized by the No Child Left Behind Act of 2001 (NCLB),¹ and are therefore subject to the requirement to provide parents of eligible students with options to transfer their child to another school, pursuant to the Title I public school choice provisions. 20 U.S.C. § 6316(b).²

The Office for Civil Rights (OCR) in the United States Department of Education (the Department) is responsible for enforcing, among other statutes, Title VI. Title VI prohibits discrimination on the basis of race, color, or national origin by recipients of Federal financial assistance. The Department's Title VI regulations, mirroring the Title VI statute, state, in relevant part:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

34 C.F.R. § 100.3(a).

¹ On October 29, 2008, the Department published final regulations amending several of the Title I regulations, including the regulations governing public school choice. *See* 73 Fed. Reg. 64436 (2008). These regulations became effective on November 28, 2008.

² Although this letter focuses on the application of Title VI in the context of school districts' provision of public school choice under Title I, section 9532 of the ESEA requires that each State receiving funds under the ESEA establish and implement a statewide policy requiring that students attending a persistently dangerous public elementary or secondary school, or students who become victims of a violent criminal offense while in or on the grounds of a public school that they attend, be allowed to attend a safe public school within the LEA, which may be a public charter school. *See* 20 U.S.C. § 7912.

To promote educational excellence for all students and to ensure nondiscrimination in access to educational opportunity, the Department vigorously enforces the non-discrimination requirements of Title VI as they relate to access to, participation in, and administration of, public school choice. If the Department determines that a recipient has discriminated against students based on their race, color, or national origin in the provision of access to, participation in, or administration of, public school choice as required under Title I, the Department will make a finding that the recipient has violated Title VI.³ These violations may result in enforcement action if not corrected voluntarily. A summary of the relevant Title I requirements, and a discussion of how Title VI applies to those requirements, are provided below.

Title I Public School Choice Requirements

The core objective of the public school choice provisions of Title I is to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education.” 20 U.S.C. § 6301.

Section 9534 of the ESEA states that “[n]othing in this Act shall be construed to permit discrimination on the basis of race, color, . . . sex . . . , national origin, or disability in any program funded under this Act.” 20 U.S.C. § 7914(a) (emphasis added.). Thus, under the ESEA as well as Title VI, recipients implementing public school choice requirements must not discriminate based on race, color, or national origin. The following is a short summary of the Title I public school choice requirements.

Children attending Title I schools⁴ are eligible for public school choice when their school has not made adequate yearly progress in improving student achievement (as defined by the SEA) for two or more years, and is, therefore, identified as in need of school improvement, corrective action, or restructuring. Any student attending such a school must be offered the option of transferring to another public school served by the LEA, which may be a public charter school, not identified for school improvement, corrective action, or restructuring, unless such an option is prohibited by State law. 20 U.S.C. §§ 6316(b)(1)(E), 6316(b)(5)(A), 6316(b)(7)(C)(i), 6316(b)(8)(A)(i).

The Title I regulations specify that an LEA may not claim “lack of [school] capacity” as the basis to deny eligible students the option to transfer to another public school under 20 U.S.C. § 6316(b). 34 C.F.R. § 200.44(d). Under Title I, school districts must also provide an opportunity to obtain supplemental educational services for low-income students who are

³ If a district is operating under a court desegregation order, the terms and conditions of the court’s desegregation order effectively establish the standard for racial nondiscrimination for the district. Where such a court order addresses inter-school student transfers, OCR therefore must defer to the court regarding the race discrimination aspects of such transfers. See discussion of desegregation orders and public school choice at page 6 of this letter.

⁴ Title I schools are schools that participate in programs authorized by Title I, Part A (Title I) of the ESEA, as amended by NCLB. Although this letter primarily addresses the ESEA public school choice requirements as applied to Title I schools in need of improvement, corrective action, or restructuring, the Title VI requirements of nondiscrimination based on race, color, or national origin discussed here also apply to other inter-school student transfer processes or decisions made by elementary or secondary education institutions receiving Federal financial assistance from the Department.

enrolled in schools that are in the second year of school improvement, in corrective action, or in restructuring. 20 U.S.C. §§ 6316(b)(5)(B), 6316(b)(7)(C)(iii), 6316(b)(8)(A)(ii), 6316(e)(1).⁵

Under Title I, LEAs must promptly notify parents if their child is eligible for public school choice because the child's current school has been identified for school improvement, corrective action, or restructuring. The statute also states that LEAs must provide this notice to parents "in an understandable and uniform format and, to the extent practicable, in a language the parents can understand." 20 U.S.C. § 6316(b)(6). The Title I regulations provide more details about the notice requirements, stating (in pertinent part) that an LEA's notice to parents must include the following:

- An explanation of what the identification of the child's current school (as in need of improvement, corrective action, or restructuring) means, and how the school compares to other schools served by the LEA and SEA in terms of academic achievement;
- The reasons for the school's identification as in need of improvement, corrective action, or restructuring;
- An explanation of how the parents can become involved in addressing the academic issues that led to their child's school's identification;
- An explanation of the parents' option to transfer their child to another public school (with information on the academic achievement of the school or schools to which the child may transfer), including an explanation of the district's provision of transportation to the new school. This explanation of available public school choice options must be made sufficiently in advance of, but no later than 14 calendar days before, the start of the school year so that parents have adequate time to exercise their choice option before the school year begins; and
- If the school is in its second year of improvement or subject to corrective action or restructuring, a notice explaining how eligible parents can obtain supplemental educational services for their child, including the identity of approved service providers within the LEA, a brief description of the services, qualifications, and demonstrated effectiveness of those providers, including an indication of those providers who are able to serve students with disabilities or limited English proficient students, and an explanation of the benefits of receiving supplemental educational services. This supplemental educational services notice must be clear and concise and clearly distinguishable from other information sent to parents regarding school improvement.

34 C.F.R. § 200.37(b).

⁵ Although this letter focuses on the application of Title VI in the context of school districts' provision of the Title I public school choice options, the provision of supplemental educational services under Title I must also comply with Title VI; that is, such services may not be provided in a manner that discriminates based on a student's race, color, or national origin.

Obstacles to Parents' Exercise of the Public School Choice Option

The Department's evaluation of the implementation of Title I, the *2007 National Assessment of Title I Final Report (2007 National Assessment)*,⁶ includes information on the impact, through the 2004-2005 school year, of the public school choice provisions.

In general, the *2007 National Assessment* reveals that implementation of Title I's public school choice provisions has encountered obstacles. During the 2004-2005 school year, only about one percent of the students eligible for Title I transfers actually changed schools. There doubtless were multiple reasons for this low participation rate, many of them unrelated to LEA and SEA efforts to provide nondiscriminatory transfer options to their students. However, as Secretary Spellings noted in a May 15, 2006 letter to Chief State School Officers, some LEAs had failed to implement the ESEA public school choice provisions. Audits of SEAs and LEAs found that failure to notify parents of the Title I transfer option, and failure to budget for school choice-related services, including transportation, inhibited eligible parents' exercise of their transfer options. In other cases, LEAs cited lack of school capacity at receiving schools as a reason for denying transfers, notwithstanding that, under the regulations, an LEA cannot cite lack of school capacity as a reason for not providing eligible students with Title I public school choice.

Title VI Non-Discrimination Requirements in Providing the Public School Choice Option

Title VI does not mandate the provision of any particular program, curriculum, or educational option. For this reason, under most circumstances, a recipient's failure to implement an aspect of the ESEA would not, *per se*, also constitute a violation of Title VI. Rather, Title VI requires that a recipient's educational programs and services -- including any programs or services provided under the ESEA -- be made available to all its eligible students without discrimination based on race, color, or national origin.

The Title VI regulations prohibit providing, on the basis of race, color, or national origin, any service, financial aid, or other benefit to an individual that is different, or is provided in a different manner, from that provided to others under the program. 34 C.F.R. § 100.3(b)(1)(ii). The Title VI regulations expressly apply this prohibition to different treatment in -- among a number of other contexts -- the specific context of admissions, enrollment, eligibility, or other requirements for any service, financial aid, or benefit. 34 C.F.R. § 100.3(b)(1)(v).

The option to choose to transfer to a higher-performing school under Title I is a tangible educational benefit to the transferring student, the denial or obstruction of which -- including the failure to appropriately notify eligible students and their parents -- would, if based on a student's race, color, or national origin, constitute a violation of Title VI. Where a complaint or other information suggests that there may be a denial of, a failure to notify, or other discriminatory barriers to, the exercise of public school choice, based on race, color, or national origin, OCR would apply Title VI and its regulations in examining the LEA's notification, provision and administration of the public school choice option.

⁶ Stullich, S., Eisner, E., and McCrary, J., *National Assessment of Title I: Final Report Volume I: Implementation of Title I*, U.S. Department of Education, 2007, at 98 (*2007 National Assessment*).

We note that some school representatives have asked whether, in applying Title VI, OCR would reach a Title VI compliance conclusion based on statistics alone. Statistical data alone are not sufficient to support a finding of a violation, but may be sufficient to warrant an investigation, particularly when presented in conjunction with other facts. These other facts may include -- but are not limited to -- the recipient's policies and procedures regarding public school choice, and the recipient's actual practices in this regard.

Title VI Non-Discrimination Requirements After the Student Has Transferred

A student who has transferred to a new school consistent with the public school choice provisions, is, of course, still protected under Title VI from discrimination based on race, color, or national origin in his or her new educational setting at the "receiving" school. Although this letter cannot comprehensively address all factual circumstances in elementary and secondary education to which Title VI might apply, we discuss, below, Title VI nondiscrimination requirements that align closely with the provisions of the ESEA and the Title I regulations, where a child has transferred to a new school through his or her parents' exercise of public school choice.

For example, Title I includes an obligation to provide, or pay for the provision of, transportation for students who are transferring to another school pursuant to the Title I public school choice option. 20 U.S.C. § 6316(b)(9); see 34 C.F.R. § 200.44(i). Although OCR, as noted, could not itself mandate a particular school transportation requirement, when an LEA provides, or pays for the provision of, transportation for the purpose of implementing public school choice, that provision of or payment for transportation must -- pursuant to both Title VI and Title I -- be provided in a manner that does not discriminate based on any student's race, color, or national origin.

Title VI and its regulations also prohibit subjecting a student to segregation or separate treatment, based on race, color, or national origin, in any matter related to the student's receipt of any service, financial aid, or other benefit under the program. 34 C.F.R. § 100.3(b)(1)(iii). Accordingly, students availing themselves of public school choice must not be subject to segregation or discriminatory separate treatment at their new school.

LEAs have a responsibility to ensure that students who have transferred pursuant to the public school choice provisions are not discriminated against, based on their race, color, or national origin, in any aspect of the provision or administration of the education programs at these students' new schools. In implementing the public school choice provisions, an LEA must ensure that these Title VI requirements are met. These requirements for non-discrimination apply to all aspects of the program provided at the receiving school, including -- but not limited to -- nondiscriminatory access to gifted and talented courses, advanced placement, or similarly rigorous academic curricula, and the opportunity to participate in extracurricular activities.⁷

⁷ Similarly, Title I expressly requires that all students who take advantage of the Title I public school choice option be enrolled in classes and other activities in the school to which the students transfer in the same manner as all other students in the school. 20 U.S.C. § 6316(b)(1)(F).

Desegregation Orders and Public School Choice

There is strong alignment between the goals of the civil rights laws and the ESEA. The *2007 National Assessment*, for example, suggests that the Title I public school choice provisions have -- in general, and where utilized -- helped to increase racial integration. Specifically, the *2007 National Assessment* found that, in nine urban districts, students transferring pursuant to the public school choice provisions typically moved from schools with more minority isolation to schools with greater racial integration.

However, despite this strong alignment, rare instances have arisen where the civil rights laws and the ESEA may either conflict or appear to conflict, particularly in the context of school districts operating under Federal court desegregation decrees or other mandatory desegregation orders. A few LEAs have encountered situations where specific provisions of their desegregation orders were inconsistent with aspects of the ESEA public school choice requirements. Other LEAs may have concerns about the possibility of conflicts between non-mandatory desegregation plans that the LEA adopted voluntarily and the LEA's ESEA public school choice obligations.

The Title I regulations in 34 C.F.R. § 200.44(c) state that, under such circumstances, an LEA is not exempt from the requirement to provide Title I public school choice. Rather, if, for example, a court order or other mandatory desegregation plan "forbids the LEA from offering the transfer option," the regulations provide that the LEA "must secure appropriate changes to the [desegregation] plan to permit compliance" with Title I.⁸ 34 C.F.R. § 200.44(c)(3).

Where LEAs are under court desegregation orders or similar mandates, the Department expects that school districts will make every effort to comply with both their desegregation orders and with the ESEA public school choice provisions. If an LEA requests a modification but the court (or other issuing authority) will not modify the desegregation plan so that an LEA can comply with the ESEA public school choice provisions, the LEA should notify the SEA and the Department of its request to the court, and of the court's decision. In these circumstances, the Department would consider granting the LEA a waiver of the requirements to provide public school choice to the extent that those requirements are inconsistent with the LEA's desegregation plan.

The only legal authority OCR would have under such circumstances would be if a desegregation plan that conflicted with the ESEA public school choice provisions happened to be an OCR-required desegregation plan pursuant to Title VI, rather than, for example, a court-ordered plan.⁹

⁸ Likewise, if an LEA has voluntarily -- without a court order or other mandate -- put in place a desegregation plan, and if the LEA's voluntary plan conflicts with the LEA's public school choice obligations, the Title I regulations require that the LEA modify its voluntary desegregation plan to permit compliance with Title I. 34 C.F.R. § 200.44(c)(1), (3).

⁹ As noted above, under Title VI, OCR has no independent authority to modify a court-imposed desegregation order. *See, e.g., Lee v. Macon County Board of Education*, 270 F. Supp. 859 (M.D. Ala. 1967), *aff'd. sub nom., Wallace v. U.S.*, 389 U.S. 215 (1968) (Under the separation of powers doctrine, the executive branch is without authority to terminate Federal funds on Title VI grounds to a district operating under a desegregation court order, since doing so would in effect disapprove a court-ordered plan and infringe on the power of the judiciary.).

No factual circumstance of such a conflict has yet been presented to OCR. If, in the future, a school district requests that OCR modify an OCR-required Title VI desegregation plan to address a conflict with the ESEA public school choice requirements, OCR will carefully consider such a request, with the objective of securing a resolution that comports with both the ESEA and the goals of the district's OCR-required desegregation plan.

Providing educational opportunities to all students is critical to the prosperity of our Nation. To ensure that students have the skills necessary to compete in the highly competitive global economy, I urge you to assess whether your SEA or LEA -- at the district and individual school level -- is providing equal educational opportunities to all students, including in situations where an LEA is implementing the ESEA public school choice provisions.

Please use the information provided in this letter to continue to evaluate whether your LEA or SEA is in compliance with the nondiscrimination requirements discussed above. Upon request, OCR provides technical assistance in voluntarily complying with the civil rights laws enforced by OCR. If you, or your agency, school district, or school, need additional information or assistance on these or other matters, please do not hesitate to contact the OCR enforcement office that serves your State or territory. The contact information for each office is available at: <http://wdcrocolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

Thank you for your cooperation and support in this important endeavor.

Sincerely,



Stephanie J. Monroe
Assistant Secretary for Civil Rights