

Feasibility of implementing new non-discrimination requirements for Invest in Kids voucher schools

Many schools participating in the Invest in Kids voucher program are discriminating on the basis of disability status, gender identity, sexual orientation, language, pregnancy or parenting status, or religion. ([List of examples here.](#))

Currently, the [IL Administrative Code](#) regulating schools that qualify to receive vouchers, says that for any registered private school (emphasis added):

“The chief school administrator of each school shall provide assurances to the State Superintendent that the school can document the following: [...] it complies with **applicable** federal and State laws prohibiting discrimination, including, but not limited to, Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Individuals with Disabilities Education Improvement Act of 2004 (20 U.S.C. 1400 et seq.), the Age Discrimination in Employment, Act of 1967 (29 U.S.C. 621 et seq.), Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq., 2000e et seq.), the Americans With Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), the School Code, and relevant case law;”

Federal non-discrimination laws for the most part do not apply to religious schools, even those accepting federal funding under the National School Lunch Program, the Every Student Succeeds Act and other programs. These programs exempt religious schools from requirements under Title IX of the Education Amendments of 1972, Titles VI and VII of the Civil Rights Act of 1964, and the ADA. Religious schools cannot discriminate based on race, but this is due to the prohibition of the IRS which applies to entities with a tax exempt status.

In addition, parents who choose to place their child in private school cede most of their child’s rights under IDEA.

Almost all schools in Illinois enrolling Invest in Kids voucher recipients are religious schools, 95% in the 2021-2022 school year, and so these federal laws do not prohibit most Illinois voucher schools from discriminating.

At the state level, the Illinois Human Rights Act (IHRA) also does not apply to religious voucher schools because non-sectarian schools are not considered public accommodations under the IHRA.

In order to prevent voucher schools from discriminating, could Illinois require religious schools to follow federal or state laws barring discrimination on the basis of race, religion, national origin, disability status or sex, including sexual orientation or gender identity?

As an example, at least [one bill](#) introduced in the 102nd General Assembly proposed requiring voucher schools to “comply with (i) all provisions of federal and State laws and rules applicable to public schools pertaining to special education and the instruction of English learners and (ii) paragraphs (1) through (12) of subsection (g) of Section [27A-5 of the School Code](#).”

What would such requirements look like in practice?

Religious schools would still not be required to comply with federal laws by the *federal* government, and so enforcement mechanisms such as a private right of action under federal law or the ability to file a complaint with the USED’s Office of Civil Rights would not be available to those discriminated against.

As such, the path to compliance would have to be through state-level remedies. Unfortunately, ISBE is, for the most part, an under-resourced state agency. With respect to students with disabilities, ISBE has insufficient capacity to compel public schools under its jurisdiction to comply with federal and state requirements to serve students with disabilities and ensure their right to a free and appropriate public education. For example, complaints filed with ISBE for violations of students’ special education rights may take months or years to resolve. The entire district of Chicago Public Schools was placed under [a state monitor from 2018 to 2022](#) due to its massive and deliberate withholding of special education services from 2016-2018, and yet, students and families have continued to struggle to get the district to comply with the rights of SWDs.

- *Chicago Sun-Times*: [CPS Chicago Public School special education plagued with troubles 3 years after state ordered reforms](#) (Aug 2021)
- *Chicago Sun-Times*: [Some CPS special ed students endure 2-hour bus rides as transportation problems continue to start year](#) (Aug 2022)

The idea that ISBE would be willing and/or able to take on such a burden for hundreds of private schools around the state is deeply unrealistic. With respect to English-language learners, the problem would simply be compounded, and adding on rights guaranteed under Title IX and Title VI and VII is even more impractical. Currently, there are essentially no state level procedures for students and families to pursue race and sex discrimination complaints in public schools without engaging private legal assistance. Such mechanisms and agency support for this would have to be built from scratch and taken on by new or existing administrative agencies.

Alternatively, families fighting discrimination could be given a private right of action. Given that the Invest in Kids voucher program is designed to serve primarily low-income families, it is unlikely that a family fighting discrimination will have the resources to pursue a lawsuit against a school that (1) may not have even enrolled their child yet, in the case of admissions discrimination, or (2) likely has a policy of at-will expulsion on the discretion of the school, in the case of existing students.

Could the Invest in Kids program be reworked to only serve non-sectarian schools in order to avoid these issues?

Unfortunately, given recent Supreme Court decisions (*Espinoza v Montana Department of Revenue*; *Carson v Makin*), there is little chance such a system would withstand legal challenges.

Moreover, those cases may have implications for the legal status of applying non-discrimination requirements to religious schools. If the basis of exempting religious schools from federal laws and requiring states to not discriminate on the basis of religion is the Establishment Clause, then what will the basis for *not* exempting them from similar state laws be? Who will decide which religious precepts are a permissible basis for discrimination at religious schools and which are not? Who will determine whether the Bishop of the Diocese of Springfield's [Pastoral Guidance](#) is not an acceptable basis for school policies?

Given (1) the existing [lack of transparency and oversight](#) over the Invest in Kids program, (2) IL State Board of Education's lack of capacity and (3) the unanswered legal questions surrounding prohibiting discrimination by religious schools, there is no realistic, practical legislative solution that could mitigate the harm done with respect to discrimination by voucher schools against students, as well as families and employees, in most protected categories. The simplest solution in this case is to end the Invest in Kids program, and reserve public funding for public schools, which must serve all children and families.