Cooley

Shifting Guidance and Widespread University Investigations – The Trump Administration's Aggressive First Moves Enforcing Title VI in Education

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The US Department of Education (ED) recently announced two separate groups of enforcement investigations to assess university compliance with civil rights obligations. The first, announced on March 10, includes 60 colleges and universities that ED alleges did not adequately address antisemitism on campus. The second, announced on March 14, alleges that 52 institutions violated Title VI of the Civil Rights Act of 1964 through "race-exclusionary practices in their graduate programs" or "impermissible race-based scholarships and race-based segregation." For the public and private colleges and universities that now find themselves subject to significant ED (and likely eventual congressional) oversight, understanding the intent of these investigations and potential consequences will be key.

Regulatory context

On February 14, the ED Office for Civil Rights (OCR) issued a Dear Colleague Letter (DCL) outlining the obligations of educational institutions pursuant to Title VI and the 2023 US Supreme Court ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*). The letter noted ED's intent to begin assessing compliance by February 28, 2025, and warns that institutions found to be in violation could risk losing access to federal funds.

On February 25, a coalition of educators and sociologists filed a lawsuit against the OCR regarding the DCL. The suit challenges the DCL on First and Fifth amendment grounds, and argues that following its guidance "will do a disservice to students and ultimately the nation by weakening schools as portals to opportunity." Soon thereafter, on March 5, another legal complaint relating to the DCL, this time with different plaintiffs, was filed against the department also under the First and Fifth amendments, but with multiple additional claims under the Administrative Procedure Act (APA).

Three days after the first suit was filed, OCR released a document, Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act (FAQ), which provides some further details regarding the types of activities ED now considers to be unlawful. However, other areas of the FAQ remain hazy, especially regarding enforcement processes. This post follows our review of the DCL and summarizes the suits filed challenging the guidance, provides key points of clarification from the FAQ that followed and discusses the possible enforcement mechanisms for noncompliance.

OCR's Title VI FAQ

Following the filing of the first lawsuit, and on the day of the DCL's compliance deadline, OCR issued a nine-page FAQ that clarifies the Title VI obligations for schools, colleges and other federally funded entities. The FAQ also sheds light on several prior areas of confusion and provides a clearer picture of OCR's enforcement priorities.

- **Admissions essays and policies**: The FAQ acknowledges that Supreme Court precedent allows schools to consider "an applicant's discussion of how race affected the applicant's life," but warns against "attempting to circumvent" the *SFFA* decision by asking essay questions related to race. Prohibited practices explicitly outlined in the FAQ include "crafting essay prompts in a way that require applicants to disclose their race" and "admissions policies that hold brief interviews in order to visually assess an applicant's race."
- **Cultural and historical observances and programs**: The FAQ explains that cultural and historical observances and programs focused on interests of cultures, heritages and areas of the world are permissible if they are open to all students. In particular, ED wrote, "educational, cultural, or historical observances – such as Black History Month, International Holocaust Remembrance Day, or similar events – that celebrate or recognize historical events and contributions" are lawful "so long as they do not engage in racial exclusion or discrimination."
- **Curriculum**: The FAQ clarifies that ED can only punish schools in certain circumstances, citing the Department of Education Organization Act, which "prohibit the Department from exercising control over the content of school curricula."
- **Diversity, equity and inclusion (DEI) programs**: The FAQ seems to take a more measured approach to DEI programs than previous executive orders and the DCL that deemed DEI programs generally unlawful. The FAQ

notes, "whether a policy or program violates Title VI does not depend on the use of specific terminology such as 'diversity,' 'equity,' or 'inclusion.'" Instead, "OCR will examine the facts and circumstances of each case, including the nature of the educational institution, the age of the students and the relationships of the individuals involved" in its determinations. The FAQ emphasizes that DEI programs that involve discrimination "on the basis of race, color, or national origin" or that "treat students differently based on race, engage in racial stereotyping, or create hostile environments for students of particular races" are unlawful.
- **"Extreme" practices**: The FAQ explicitly condemns certain practices, including the segregation of students by race for events, the mandatory participation in protests or assigning students tasks differentiated by race. Specifically, the FAQ notes that "extreme practices at a university – such as requiring students to participate in privilege walks, pressuring them to participate in protests or take certain positions on racially charged issues," and "mandating courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes – are all forms of school-on-student harassment that could create a hostile environment under Title VI."
- **Scholarships**: Schools are prohibited from administering or advertising third-party scholarships or other opportunities based on race, even if the school itself does not sponsor such opportunities.
- **Third-party contractors**: The FAQ underscores that any race-based preferences in the procurement and selection of contractors will prompt OCR scrutiny. Likewise, schools cannot engage in racial preferences by outsourcing those processes to third parties.

Legal challenges to the DCL

American Federation of Teachers et al. v. Dept. of Education

In the February 25 suit noted above, *American Federation of Teachers v. Dept. of Education,* the plaintiffs claim that the DCL "radically upends and re-writes otherwise well-established jurisprudence" by attempting to ban efforts to advance DEI in education without "the lawmaking power of Congress nor the interpretative power of the courts." In particular, the plaintiffs allege that the DCL misrepresents the state of the law under the Constitution and Title VI in the wake of the Supreme Court's decision in *SFFA*, which prohibits colleges and universities from considering race, color or national origin in school admissions programs. The plaintiffs further argue that the DCL's newly announced standard for evaluating discrimination claims under Title VI is unconstitutionally vague, and that its apparent prohibition on certain teaching methods and practices is unconstitutional.

Specifically, the plaintiffs have challenged the DCL on three grounds. First, the plaintiffs contend that the DCL infringes on First Amendment rights to free speech, expression and association by threatening investigations and enforcement actions against institutions that implement DEI programs. Second, the plaintiffs assert that the DCL violates the Fifth Amendment's due process protections by establishing vague standards that "authorize or encourage seriously discriminatory enforcement." Finally, under the APA, the plaintiffs argue that ED exceeded its statutory authority, and that the DCL is arbitrary and capricious.

Notably, the lawsuit was filed in the same court that had issued a nationwide preliminary injunction blocking several provisions of Executive Order 14173, which sought to curtail DEI practices in the private sector, including higher education. The Maryland federal district court's initial ruling on February 21 granting a nationwide preliminary injunction temporarily prohibited the administration from enforcing certain aspects of the executive order, pending further legal proceedings; however, on March 14, a panel from the US Court of Appeals for the Fourth Circuit ruled without explanation that the Trump administration satisfied grounds for a stay of enforcement of the preliminary injunction pending appeal.

ACLU of New Hampshire et al. v. Dept. of Education

The second suit, filed on March 5, alleges that the DCL unconstitutionally restricts speech under the First Amendment by prohibiting teaching about race, diversity, equity and inclusion in schools receiving federal funding. In higher education, academic freedom prohibits the government from dictating what is taught, and in K-12 schools, Congress has prohibited ED from dictating curriculum.

The DCL also fails to define key terms and practices, creating uncertainty about what is prohibited in violation of the Fifth Amendment, leaving schools vulnerable to arbitrary enforcement. The plaintiffs claim these new policies are creating fear among educators about lessons or discussions of race or racism in history and literature, including the cancelling of Advanced Placement (AP) courses in African American Studies and impermissibly limiting free speech.

In addition to the constitutional challenges, the suit alleges that the DCL issues new federal agency guidance that imposes obligations without following the APA's required process and without a reasoned justification. The American

Civil Liberties Union (ACLU) alleges that, by doing so, ED is acting outside its authority, ignoring decades of legal precedent and its own prior guidance, without explanation.

Finally, the suit alleges that the DCL misstates and overstates the Supreme Court's 2023 ruling in *SFFA*. The decision only addressed race as a formal admissions factor in college and university admissions decisions – it did not ban any other form of diversity initiatives.

Enforcement activities

Although ED claims that enforcement of Title VI and civil rights laws remains largely unchanged, with investigations and determinations still led by OCR at ED, recent threats of losing Title IV funding for noncompliance with this new interpretation of antidiscrimination laws adds complexity to the enforcement landscape. Notably, the initiative is advancing despite the fact that ED recently terminated nearly all of the employees in the agency's OCR as part of the government-wide efforts to reduce employee headcount.

According to the FAQ, OCR findings of noncompliance with Title VI and civil rights laws may lead to voluntary resolution agreements or "consequences" – including administrative or judicial proceedings to enforce compliance. Although the DCL threatened noncomplying institutions with the potential loss of federal funds and Title IV eligibility, the FAQ only lays out the enforcement process for investigations led by the OCR, which have traditionally only resulted in monetary penalties for noncompliance. If ED intends to link Title VI noncompliance with loss of Title IV eligibility, it may have to deviate from traditional settlement practices. Historically, the loss of Title IV funding has been governed by processes outlined in the Title IV regulations and addressed in our review of the DCL. However, under 34 CFR 100.8(c), OCR also has the authority to terminate, refuse to grant or continue federal financial assistance as a result of noncompliance with Title VI of the Civil Rights Act of 1964.

It is worth noting that ED has already started enforcement of its interpretation of federal law and, delivering on a campaign promise, initiated actions against institutions it perceives as violating student rights. On March 7, the Department of Justice, the Department of Health and Human Services (HHS), the General Services Administration (GSA) and ED announced an immediate "cancellation" of approximately $400 million in federal grants and contracts to Columbia University, based on the administration's position that Columbia has not acted to address "persistent harassment of Jewish students." ED announced that this would be the first round of enforcement actions and more were expected to follow.

On March 13, Columbia received a letter from ED, HHS and GSA demanding material changes to university policies and structures. Note that some of these actions may be contractual in nature, and therefore not subject to the agency administrative processes, but also are unlikely to occur without corresponding agency inquiries, as evidenced by the fact that Columbia also was on the list of recipients of the March 10 enforcement letter discussed above.

Next steps

Whether or not your university is the recipient of an enforcement letter, you should know the rights, obligations and expectations associated with the agency outreach. If that experience is not in house, engage resources to provide the foundations regarding regulatory obligations, contractual requirements with government agencies and ED administrative processes. Cooley has represented clients in ED civil rights cases, advising universities on high-stakes sensitive matters and helping clients navigate the specific issues around antisemitism. Subject-matter knowledge is crucial, and Cooley has extensive civil rights, government investigations, litigation, and higher education institutional experience with university practitioners and former regulators to advise on key compliance matters.

Vanessa Agudelo practices education law with an emphasis on helping postsecondary institutions, K-12 schools and education-related companies navigate complex regulatory challenges.

Kate Lee Carey focuses on the legal, accreditation, administrative and regulatory aspects of regionally and nationally accredited higher education institutions and companies that provide services to the education industry.

Dan Shackelford helps postsecondary institutions, K-12 schools and education-related companies navigate complex regulatory issues.

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