

HIGHER EDUCATION INFORMATION MEMO

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OCR Issues Dear Colleague Letter Addressing DEI Programs Under Title VI

On Jan. 21, 2025, President Trump signed an Executive Order (EO), “Ending Illegal Discrimination and Restoring Merit-Based Opportunity.” Broadly speaking, the EO purported to prohibit what it characterized as unlawful “Diversity, Equity and Inclusion” programs (a term it did not explicitly define). Among other things, the EO encouraged enforcement action against organizations or institutions sponsoring such programs, and directed the Attorney General and the Secretary of Education to issue guidance to institutions of higher education that receive federal grants or participate in Title IV FSA programs regarding measures and practices required to comply with the Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*.

On Feb. 14, 2025, some initial guidance was issued, in the form of a Dear Colleague Letter (DCL) from the federal Department of Education, Office for Civil Rights. The February 14 DCL provides a statement of the position of the Department of Education (Department) on the “nondiscrimination obligations of schools and other entities that receive federal financial assistance from the Department.” The DCL “explains and reiterates” the Department’s view of “existing legal requirements under Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the United States Constitution, and other relevant authorities.”

The DCL states that discrimination on the basis of race, color and national origin has been and will continue to be illegal. The DCL discusses the Supreme Court’s decision in *SFFA* and states that, although the decision addressed college admissions, the holding of *SFFA* applies more broadly, “If an educational institution treats a person of one race differently than another person because of that person’s race, the educational institution violates the law.”

The DCL expands upon the Department’s view of this principle:

Federal law thus prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life. Put simply, educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race.

The DCL takes a position on several issues that may have been features of some post-*SFFA* DEI programs. For example, the DCL states that a “school may not use students’ personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student’s race and favoring or disfavoring such students.” This statement references the *SFFA* decision which states that “universities may not simply establish through application essays or other means the regime we hold unlawful today.” In this regard, the use of these items in ways that do not predict an applicant’s race or favor or disfavor an applicant based on race does not appear to violate the Department’s interpretation of *SFFA*.

The DCL also states that “relying on non-racial information as a proxy for race and making decisions based on that information, violates the law.” Again, the facts would seem to matter greatly here as to what is a proxy for protected characteristics versus what criteria are lawful.

The DCL states that “It would, for instance, be unlawful for an educational institution to eliminate standardized

testing to achieve a desired racial balance or to increase racial diversity.” Elimination of criteria not tied to race – for instance, not using standardized tests post-pandemic after proceeding without them during the pandemic years – should remain permissible under the DCL unless tied to achieving certain demographic results.

The DCL also calls into question DEI program features that:

[P]reference certain racial groups and teach students that certain racial groups bear unique moral burdens that others do not. Such programs stigmatize students who belong to particular racial groups based on crude racial stereotypes. Consequently, they deny students the ability to participate fully in the life of a school.

The DCL concludes with the following summary of the Department’s position:

The Department intends to take appropriate measures to assess compliance with the applicable statutes and regulations based on the understanding embodied in this letter beginning no later than 14 days from today’s date, including antidiscrimination requirements that are a condition of receiving federal funding.

All educational institutions are advised to: (1) ensure that their policies and actions comply with existing civil rights law; (2) cease all efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means to accomplish such ends; and (3) cease all reliance on third-party contractors, clearinghouses, or aggregators that are being used by institutions in an effort to circumvent prohibited uses of race. Institutions that fail to comply with federal civil rights law may, consistent with applicable law, face potential loss of federal funding.

The DCL requires immediate analysis by educational institutions. The first area noted in the advice section – ensuring that policies comply with the existing civil rights laws – should be undertaken if such an analysis has not been conducted recently. The *SFFA* decision, the Trump Administration executive orders, and this DCL letter should all be considered and taken into account in that analysis. The second area noted – use of proxies for race – is simple to state but more nuanced and complicated to analyze, as the law has shifted for higher education institutions based on Supreme Court interpretations and institutional approaches and rationales have also likely shifted over time. The third area – use of third parties – is less clear as to scope and the Department’s interpretation, and its impact on current practices. This will require a case-by-case assessment of the program features and their history and usage, as well as consideration of the DCL’s positions and the underlying law.

We anticipate that some of the interpretations of current law as set forth in this DCL may be subject to legal challenge. This DCL arrives in the same week that several states’ Attorneys General asserted a different interpretation of what is permitted by federal law than that articulated in the Executive Order underlying the DCL. Given the flurry of activity, we recommend prompt consultation with legal counsel to assess the impact of these developments on your institution.

Bond attorneys are following these, and related legal developments, closely. If your institution would like further guidance, please reach out to an attorney in our [higher education practice](#) or the Bond attorney with whom you are regularly in contact.

