LEGAL UPDATES

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U.S. Department of Education Releases Dear Colleague Letter Addressing the Use of Race in Education, Announces Enforcement Forthcoming

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On February 14, 2025, the U.S. Department of Education released a Dear Colleague Letter (DCL) concerning discrimination based on race, color, and national origin in K-12 and higher education. The DCL articulates the department's view that the Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard (SFFA)* effectively forecloses the use of racial preferences and race-based separation in all education programs and activities, except in the narrowest of circumstances. Although the DCL does not itself have the force and effect of law, it signals the department's intent to aggressively enforce relevant civil rights laws consistent with the department's view of *SFFA*.

In *SFFA*, the Supreme Court held that Title VI and the Equal Protection Clause of the Fourteenth Amendment prohibit private and public colleges and universities from using race as an eligibility criterion in determining admissions. While *SFFA* focused specifically on admissions programs, the Supreme Court's reasoning effectively foreclosed the need for diversity as a sufficient justification to use race in the award of other institutional benefits. Moreover, the Supreme Court held that race can never be used by institutions to stereotype. We previously analyzed the *SFFA* decision in full here.

The department's recent DCL interprets *SFFA* broadly and describes the case (and the underlying laws it applied) as prohibiting an institution from treating a person "of one race differently than it treats another person because of that person's race." Thus, according to the DCL, Title VI and the Equal Protection

Clause prohibit colleges and universities 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." As the DCL puts it, "educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race."

Additionally, the DCL takes the position that facially neutral programs violate Title VI and the Equal Protection Clause when such facially neutral programs are in fact motivated by racial considerations, such as achieving a racial quota or racial balancing. Thus, says the DCL, if a school were to eliminate standardized testing (a facially neutral policy) *because* doing so would "achieve a desired racial balance or to increase racial diversity," such action would be prohibited discrimination under the law as construed by *SFFA*. Moreover, the DCL states that institutions may not use "personal essays, writing samples, participation in extracurriculars, or other cues" as a means of determining race and then favoring or disfavoring a student based on that determination.[1]

The DCL also articulates the view that institutional programs that "stigmatize" students based on racial groups are a form of discrimination that "deny students the ability to participate fully in the life of a school." Such stigmatizing programs could include "DEI programs, for example, [that] frequently preference certain racial groups and teach students that certain racial groups bear unique moral burdens that others do not."

The DCL conveys the department's intent to "vigorously" enforce its view of non-discrimination law in both K-12 and higher education settings and indicates the department's intent to "take appropriate measures to assess compliance…no later than 14 days" from the date of the DCL's issuance, which would be **February 28, 2025**. Just what those assessment efforts may entail is not clear, although, at a minimum, the department may audit publicly available information on institutions' programs, including content on public facing websites. The DCL notes at multiple points that compliance with antidiscrimination laws is a condition of receiving federal funding, which suggests the department will use the threat of a loss of federal funding as a tool to achieve compliance.

The letter closes by advising schools to ensure: (1) that their policies and actions comply with civil rights laws; (2) "cease all efforts to circumvent" civil rights laws by "relying on proxies or other indirect means to accomplish such ends"; and (3) cease arrangements with third-parties that "are being used by institutions in an effort to circumvent prohibited uses of race." The DCL also invites persons who "believe that a covered entity has unlawfully discriminated" to file a complaint with the department's Office for Civil Rights.

What this means to you

While many institutions embarked on an effort to eliminate the use of race, color, and national origin as admissions and scholarship eligibility criteria in the immediate wake of *SFFA*, the DCL indicates a heightened risk to institutions that continue to use race, color, and national origin as determinative factors in awarding other institutional benefits. Institutions should continue to consider compliance and litigation risk and assess potential alignment of institutional programs and practices with *SFFA*.

Webinar
March 6, 2025 | 12:00 pm CST

REGISTER NOW

To assist you, we will host a webinar to discuss the DCL and department enforcement efforts at 12:00 pm CST on March 6, 2025. Registration information is available here.

Contact us

For more information about the implications of the regulations for your institution, please contact any member of the Husch Blackwell Education team.

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[1] In *SFFA*, the Supreme Court indicated that institutions could consider "how race affected [an applicant's] life, be it through discrimination, inspiration, or otherwise." Synthesizing *SFFA's* teaching with the DCL, it appears a school can consider whether a person's life experiences—including experiences of discrimination—have led to certain characteristics, traits, or interests (such as resilience, a dedication to public service, etc.) that are desirable for an applicant. However, a school cannot use the content of an essay or similar document to discern an applicant's particular race (or minority vs. majority status) and then confer a preference or benefit deriving from race itself.