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US Department of Education Issues Dear Colleague Letter Interpreting *Students for Fair Admissions:* What Colleges and Universities Need to Know

The First 100 Days: Higher Education

Client Alerts

February 18, 2025
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On February 14, 2025, the US Department of Education's Office for Civil Rights (OCR) issued a Dear Colleague Letter about legal obligations for educational institutions under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the US Constitution, which prohibit race-based discrimination.[1] The Letter interprets the Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* (*SFFA*) as applying broadly to a wide range of campus programs beyond admissions, reversing the position of the Biden Administration in prior guidance.[2] This broad interpretation of *SFFA* is a preview of what we can expect from the guidance "regarding the measures and practices required to comply with [*SFFA*]," which the Attorney General and Secretary of Education have been directed to issue by May 21, 2025.[3] In this client alert, part of Jenner & Block's "First 100 Days" series, we unpack what the Letter means and provide recommended next steps for colleges and universities.

In its first month, the Trump administration has prioritized actions to roll back diversity, equity, and inclusion (DEI) initiatives. The Letter is the first colleges and universities have specifically heard from the Department of Education regarding how it intends to interpret *SFFA* in a way that facilitates this policy priority. The Letter particularly singles out "DEI programs" as violating this new, broad interpretation of *SFFA* on the grounds that they "frequently preference certain racial groups" and further "stigmatize students who belong to particular racial groups based on crude racial stereotypes," thus "deny[ing] students the ability to participate fully" in campus life.[4] These arguments illustrate the ways in which the Trump Administration plans to utilize *SFFA*. OCR summarizes its interpretation by stating, "[p]ut simply, educational institutions may neither separate nor segregate students based on race, nor distribute benefits or burdens based on race."[5] The Letter "provides notice" to institutions of its broad interpretation of *SFFA*, which it will rely on when

assessing compliance and initiating enforcement actions against institutions.[6] It informs institutions that it "intends to take appropriate measures . . . based on the understanding embodied in this letter beginning no later than 14 days" from the date the Letter was issued, i.e., February 28, 2025.[7]

Key Takeaways

The Letter could have far-reaching consequences for colleges and universities:

Expanding what constitutes discrimination under *SFFA*. The Letter characterizes *SFFA* as holding that different treatment automatically constitutes unlawful discrimination, even if no one is treated *worse* or *disadvantaged* on the basis of race.[8] The Supreme Court has not yet adopted that definition of discrimination. In doing so, the Letter suggests OCR will apply *SFFA*'s holding to *any* consideration of race in *any* college or university programming or initiative.

Extending reach of *SFFA* beyond admissions. The Letter interprets *SFFA*'s holding as reaching far beyond the specific admissions context that was the subject of the Supreme Court's decision. The Letter interprets *SFFA* to also apply to "hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life."[9]

Reaching beyond students. While the Letter references students, its intended reach appears broader. The inclusion of employment practices raises questions regarding the application of Title VI versus Title VII, the federal statute prohibiting discrimination in employment based on race and other protected traits.

Applying interpretation to institutions' use of third-party partners. In addition, the Letter advises institutions to "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."[10] That evinces an intent to prioritize institutions' many relationships with third-party partners in the Department of Education's enforcement efforts.

Disapproving of race-neutral means to promote racial diversity. The Letter suggests that race-neutral policies pursued to "increase racial diversity" are unlawful.[11] In doing so, the Letter provides an institution's decision to eliminate standardized testing as an example of "a proxy for race."[12] This position appears in tension with two recent cases involving selective secondary school admissions, courts have emphasized that it is permissible to employ race-neutral criteria as a means of promoting racial diversity.[13] When the Supreme Court denied certiorari in both cases,[14] Justices Thomas and Alito dissented (with Justice Gorsuch also suggesting his likely agreement with their position).[15]

Suggesting DEI programs create racially hostile environment. The Letter states that by "stigmatiz[ing] students who belong to particular racial groups based on crude racial stereotypes," DEI programs "deny students the ability to participate fully in the life of a school."[16] A denial of the opportunity to participate fully in an institution's educational environment is a required element for a hostile environment claim under Title VI.[17] But courts have not to date held that stigma constitutes such a denial. Instead, race-based harassment must significantly hinder a student's access to the educational services provided by the university to satisfy this requirement—a high bar.[18]

Implicating First Amendment rights. Finally, several aspects of the Letter pose issues related to free expression. For example, by suggesting that DEI programs that "teach students that certain racial groups bear unique moral burdens that others do not" constitutes unlawful discrimination, the Letter indicates that OCR may attempt to apply *SFFA* to the academic arena.[19]

What to Do Now

Colleges and universities must consider what compliance obligations they have with respect to this informal guidance, and how to approach any resulting obligations. Institutions should consider taking the following steps:

- **Identify campus programs that may be inconsistent with the Letter's interpretation of *SFFA*.** These include a wide range of programs on campus beyond the admissions selection process—such as "hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing [and] graduation ceremonies."[20] These also include relationships with third-party contractors, clearinghouses, or aggregators used by the institutions for programs that have a relationship to race.

- **Evaluate how the Letter's interpretation compares to existing case law and how it intersects with state and local law.** As noted above, the Letter's interpretation may depart from what the law permits in your jurisdiction, particularly with respect to race-neutral means of promoting racial diversity. It may also exceed or conflict with state and local antidiscrimination law. For example, a group of Democratic state attorneys general issued their own guidance last week as to the proper scope of President Trump's executive orders restricting DEI.[21] This guidance distinguishes *illegal* racial preferences in hiring and promotion from *legal* DEI initiatives, policies, and procedures aimed at *promoting* compliance with civil rights law, a very different approach than that taken by OCR in the Letter.[22]

- **Consider the potential impact on requested certifications that require institutions to state that they do not engage in illegal DEI, in accordance with President Trump's executive orders**. The executive order addressing DEI in the private sector directs all agencies to include in every federal contract and grant award: (1) A certification that the contractor or funding recipient "does not operate any programs promoting DEI that violate any applicable federal anti-

discrimination laws"; and (2) A term specifying that compliance with federal anti-discrimination laws is "material to the government's payment decisions" under the False Claims Act (FCA)—laying the groundwork for the government or private parties to pursue FCA claims against entities that engage in DEI programs that are deemed unlawful.[23] While the Letter is not legally binding, OCR's expansive view as to what constitutes impermissible DEI may have implications for institutions grappling with new certifications for federal grants and contracts, especially given that this executive order provides no definition of DEI.[24]

- **Consider whether to make modifications now or await further guidance**. The Secretary of Education and Attorney General have until May 21, 2025, to issue their joint guidance under the executive order addressing DEI in the private sector.[25] Institutions need to weigh the extent to which they will amend programs or policies now based on the Letter.

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Footnotes

[1] US Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Letter) (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

[2] US Dep't of Educ., Office for Civil Rights & US Dep't of Justice, Civil Rights Div., Dear Colleague Letter (Aug. 14, 2023); US Dep't of Educ., Office of Civil Rights & US Dep't of Just., Civil Rights Div., Questions and Answers Regarding the Supreme Court's Decision in *Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina* (Aug. 14, 2023).

[3] Ending Illegal Discrimination and Enforcing Merit-Based Opportunity, Sec. 5 (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.

[4] Letter at 3.

[5] *Id.* at 2.

[6] *Id.* at 3.

[7] *Id.* at 3.

[8] *Id.* at 2.

[9] *Id.* at 2.

[10] *Id.* at 3.

[11] *Id.*

[12] *Id.*

[13] *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46 (1st Cir. 2023), *cert. denied*, 145 S. Ct. 15 (2024); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 218 L. Ed. 2d 71 (Feb. 20, 2024).

[14] *See Bos. Parent Coal.*, 145 S. Ct. 15 (2024); *Coal. for TJ.*, 218 L. Ed. 2d 71 (2024).

[15] *Bos. Parent Coal.*, 145 S. Ct. at 15 (Gorsuch, J., statement respecting the denial of certiorari).

[16] *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.,* 526 U.S. 629, 650-51, 54 (1999).

[17] *See Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 699 (4th Cir. 2007) (citing *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650-51, 54 (1999)).

[18] Letter at 3.

[19] *Id.* at 2.

[20] Offices of State Att'ys Gen., Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives (Feb. 13, 2025), https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download.

[21] *Id.* at 1.

[22] Ending Illegal Discrimination and Enforcing Merit-Based Opportunity, Sec. 3(b)(iv).

[23] *Id.*

[24] *Id.* Sec. 5.

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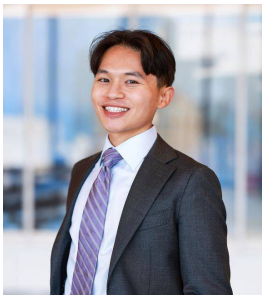

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