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OCR's Directive on Race-Conscious Policies in Higher Education

WRITTEN BY

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On February 14, the U.S. Department of Education Office for Civil Rights (DOE) issued a Dear Colleague Letter (DCL), which calls for educational institutions to immediately cease race-conscious practices in student programming, resources, and financial aid.

Citing the Supreme Court's decision in *Students for Fair Admissions, Inc. (SFFA) v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), the DCL purports to "clarify and reaffirm the nondiscrimination obligations of schools and other entities that receive federal financial assistance from the United States Department of Education," and explain the DOE's position on the "legal requirements" under Title VI of the Civil Rights Act of 1964, the Equal Protection Clause of the U.S. Constitution, and other relevant authorities. DCL at 1.

In *SFFA*, the Supreme Court found race-based admissions programs employed by two universities violated the Equal Protection Clause of the Fourteenth Amendment because they were race-based and failed to withstand strict scrutiny. 600 U.S. at 213, 230. Specifically, the Court held that the programs were unconstitutional because their means were insufficiently tailored to their ends,[1] reaffirming that "'outright racial balancing' is 'patently unconstitutional,'" *id.* at 223 (quoting *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 311 (2013)), and that achieving "meaningful representation and meaningful diversity," 600 U.S. at 221, and "remedying the effects of past societal discrimination," *id.* at 210 (quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 362 (1978)), are insufficient purposes to justify making admission decisions on the basis of race. 600 U.S. at 230.

The *SFFA* decision, however, did not prohibit all consideration of race in university admissions processes. Rather, the Court expressly stated:

nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. … A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual — not on the basis of race.

Id. at 230–31. However, the Supreme Court made clear that "universities may not simply establish through application essays or other means the regime we hold unlawful today. … [W]hat cannot be done directly cannot be done indirectly." The Supreme Court added that "[t]he Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Id.* (citation omitted).

The DCL broadly interprets the *SFFA* decision to mean that "[i]f an educational institution treats a person of one race differently than it treats another person because of that person's race, the educational institution violates the law." DCL at 2. This interpretation extends the *SFFA* ruling beyond admissions to encompass all facets of academic and campus life, including "hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life." *Id.*

Moreover, the DCL emphasizes that schools may not use proxies to make decisions based on race, reinforcing the principle that race-based decision-making, whether direct or indirect, is unlawful. *See id.* at 2–3. The DCL elaborates on this by explaining that even programs that appear neutral on their face may be motivated by racial considerations. *Id.* Thus, "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." *Id.* at 2–3. The DCL further states that any race-neutral policy which could serve as a proxy for racial consideration, such as eliminating standardized test score requirements to achieve racial diversity, is unlawful. *Id.* at 3. Finally, and perhaps most significantly, the DCL broadly proclaims that "[o]ther programs discriminate in less direct, but equally insidious, ways. DEI programs, for example, frequently preference 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." *Id.*

The DCL states that DOE will issue "legal guidance … in due course" and will "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 [February 14, 2025], including antidiscrimination requirements that are a condition of receiving federal funding." *Id.*

Implications for Educational Institutions

Although the DCL itself does not have the force of law,[2] it has raised significant concerns in the higher education community. It makes sweeping assertions that go well beyond the holdings in the *SFFA* decision, and effectively asserts that any DEI initiative may be found unlawful. It also threatens consequences including the loss of federal funding if the DOE's interpretation is not followed.

The DCL appears designed to push the envelope on the scope of Title VI, perhaps in the belief that some institutions may simply take the most conservative approach to pulling back on even likely legal DEI programs to avoid the risks of an investigation. It should be noted that Title VI requires that the government first give an institution the opportunity to come into compliance before revoking federal funding, and schools are entitled to due process before any such decision is made. But the threat of an investigation and being required to prove a position, perhaps in court, can itself be daunting.

Each higher education institution will need to conduct its own assessment to determine a path forward in light of the threatened actions outlined in the DCL. Schools should start by conducting a thorough assessment and inventory of policies, procedures, and programs that may contain preferences based upon race, color, or national origin. This analysis is fact-specific and should be governed by the institution's strategic plan, tolerance for risk, and the importance of the policy, procedure, and program in question. There is no one-size-fits-all approach.

However, schools are well served to create a risk matrix that identifies each policy, procedure, or program that may be considered race-based, the application of such policy, procedure or program by the institution during the academic year, and the risk that the policy, procedure, or program could be considered to violate the DOE's interpretation of the law if not modified (*i.e*, high, medium, low). The matrix should be created by or under the direction of the institution's general counsel or institution's outside counsel so that legal issues and legal advice can be considered as part of the assessment. A sample template for a risk matrix is below:

Policy/Program/Procedure	**Application by the Institution (Significant, Moderate, Immaterial)**	**Risk Level (High, Medium, Low)**	**Ability to Modify**	**Modified Language**
Admissions Policy				
XYZ Scholarship				

The goal of the risk matrix is to have a careful assessment to mitigate the risk of a DOE investigation or legal challenges. Where an institution lands on whether to eliminate, keep in place, or modify a policy, procedure, or program, will depend on factors particular to each institution.

In assessing policies, procedures, and programs, some recent cases provide guidance on what could constitute an impermissible preference and what likely does not. While it is unclear how the OCR will interpret the law, programs which are open to all, regardless of race, color, or national origin, are generally considered acceptable under the law, provided that any decisions concerning same are not being made on the basis of race. As noted above, the Supreme Court in *SFFA* made clear that a benefit or award can be made available by a university based on a student's demonstrated experiences as an individual, and not based on a membership in a particular racial group. 600 U.S. at 230–31 ("A benefit offered to a student who overcame racial discrimination … must be tied ***to that student's*** courage and determination . . . [or their] unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual — not on the basis of race.") (emphasis in original).

Following *SFFA*, the Eleventh Circuit in *American Alliance for Equal Rights v. Fearless Fund Mgmt.*, LLC, 103 F.4th 765, 769 (11th Cir. 2024), addressed an "entrepreneurship funding competition ***open only*** to businesses owned by black women." While the competition at issue was unlawfully discriminatory because it was open only to Black females, the Court noted it was not per se unlawful for the defendant to pursue a "'commitment' to the '[b]lack women-owned' business community," which it likened to protected speech. *Id.* at 779 (citing *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023)). A funding program that is open to all applicants, irrespective or race, but is based on a demonstrated commitment to a cause or a community, would, consistent with *SFFA*, be permissible.

The *SFFA* and *American Alliance for Equal Rights* decisions support the conclusion that DEI initiatives are not per se unlawful. What is unlawful is making admission, employment, or other decisions based upon a person's race, color, or ethnicity or based upon a facially neutral criterion which is, in fact, a proxy for race, color, or ethnicity. If admission or other opportunities are open to all qualified persons, regardless of race, color, or ethnicity — both in word and in fact — current case law suggests that these opportunities are not unlawful discrimination in violation of Title VI, provided that decisions concerning same are not made on the basis of race.

There also is hope that additional guidance will be provided in the future as some of the statements in the DCL raise substantial First Amendment questions, including some issues that were recently addressed in the District of Maryland's recent decision in *Nat'l Ass'n of Diversity Officers in Higher Educ., et al. v. Trump*, No. 1:25-CV-00333-ABA, 2025 WL 573764, 2025 U.S. Dist. LEXIS 31747 (D. Md. Feb. 21, 2025). In *Nat'l Ass'n of Diversity Officers in Higher Educ.*, the District of Maryland entered a preliminary injunction blocking enforcement of Presidential executive orders that sought to eliminate DEI programs. *See id.* at 2025 WL 573764 at *2, 2025 U.S. Dist. LEXIS 31747 at *4. The District of Maryland found, among other things, that certain provisions in the executive orders are likely vague and violate the First Amendment by chilling the exercise of free speech by private sector members because they "threaten[] to initiate enforcement actions against Plaintiffs (in the form of civil compliance investigations) for engaging in protected speech." *Id.* at 2025 WL 573764 at *23, 2025 U.S. Dist. LEXIS 31747 at *69–70.

If you have questions or need assistance with conducting an inventory and assessment of your policies, procedures, and programs, Troutman Pepper Locke's deep bench of higher education attorneys are available to assist.

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[1] The *SFFA* Court found the programs at issue were not time-limited, failed to define measurable and attainable goals, and employed racial stereotyping. 600 U.S. at 230.

[2] *See, e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (holding federal agency's interpretation in opinion letter, similar to interpretations in policy statements, agency manuals, and enforcement guidelines, lacked the force of law); *Csutoras v. Paradise High Sch.*, 12 F. 4th 960, 968 (9th Cir. 2021); *J.M. v. Dep't of Educ., State of Haw.*, 224 F. Supp. 3d 1071, 1086 (D. Haw., 2016).

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