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Overreaching and Misleading: An Analysis of the U.S. Department of Education's February 14, 2025 "Dear Colleague" Letter on Diversity, Equity and Inclusion Policies and Programs

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Introduction. The first weeks of the Trump Administration have been defined by efforts to upend and eviscerate decades-old systems, policies, and programs with the stroke of a Presidential pen. Nowhere has that effort been more visible than regarding diversity, equity and inclusion issues, which have become a major target of this Administration's first month in office, especially in the education context. That effort continued on February 14, 2025, with the issuance of a "Dear Colleague" letter from the Acting Assistant Secretary for Civil Rights in the U.S. Department of Education (USED).

This paper provides an analysis of the letter and suggestions for education leaders to consider.[1]

Analysis. The Acting Assistant Secretary's correspondence on behalf of the Office for Civil Rights ("OCR") of just over three pages purports to "clarify and reaffirm" the contours of federal nondiscrimination law under Title VI of the Civil Rights Act and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution on a wide range of issues affecting "schools and other entities that receive federal financial assistance from USED."[2] That correspondence, however, does the opposite—extending the law in ways that are overreaching, misleading, and (in some cases) just plain wrong.

The Acting Assistant Secretary, like the President, lacks the authority to change established federal constitutional and statutory principles and standards with the stroke of a pen. The role of the Executive Branch is to execute the laws enacted by Congress, with limited rulemaking authority in that context that usually requires adherence to formal processes and protocols—none of which have been followed here. The President and agencies also lack the authority to define what is and is not discrimination under the Constitution and existing federal statutes at odds with the Supreme Court's rulings.

Our analysis includes three overarching points.

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[1] The information included in this document is intended as broad, directional guidance; it does not constitute institution- or organization-specific legal advice. Before taking action, we encourage recipients of federal financial assistance to seek counsel.

[2] Title VI, like the Equal Protection Clause, prohibits discrimination against all persons based on race, color, and national origin, including in education. The law was enacted purposely to address long-standing discrimination against Black Americans; remarkably, the OCR letter expressly mentions in its opening rationale only claims of discrimination against "white and Asian students."

First, all efforts to advance diversity, equity and inclusion goals are not, as the Dear Colleague letter seems to suggest, categorically unlawful.

The most misleading, inaccurate impression created by the OCR letter is that any effort to consider and advance equity and diversity in education, including with regard to race or ethnicity, are unlawful.[3] In fact, what Title VI prohibits as discrimination is the conditioning of individual student benefits or opportunities based on race or ethnicity status, absent sufficient justification. It does not, in other words, prohibit "race-based decision making, *no matter the form*" (italics added) as the Acting Assistant Secretary suggests.[4]

Moreover, nothing in federal discrimination law forbids maintaining diversity, equity and inclusion as core to an institution's mission or including race- or gender- related topics as part of teaching, programming and training. To the contrary, any such prohibition would raise significant First Amendment issues, as well as questions about violating federal statutes barring "direction, supervision or control" by federal officials over curriculum, programs and materials of instruction and more. See "Consistent with Applicable Law": Critical Statutory Constraints on President Trump's Executive Order about K-12 Curricula (EducationCounsel, January 30, 2025).[5]

More broadly, many diversity, equity, and inclusion-related policies and programs remain fully consistent with clear federal legal constitutional and statutory standards and court rulings. In some cases, they are even required to satisfy legal obligations. For example, longstanding federal law in the K-12 context requires that schools "provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps," including by race. 20 U.S.C. § 6301. And, in higher education, among many actions that are fully consistent with federal law, are inclusive recruitment, mentoring, professional development, and pedagogy that are accessible, relatable, and effective for *all*

[3] Nor are they the same under all relevant state laws. A number of states have enacted restrictive policies regarding race, gender and "DEI" issues affecting their public institutions; others have enacted policies that bolster such efforts. In broad terms, states have general authority to establish policy aims for the institutions they support through taxpayer funding (within relevant federal constitutional limits). That policy authority does not extend to the federal government, which is by statute prohibited from dictating institutional and educational programs and curricular choices. See Every Student Succeeds Act, Section 8526A; General Education Provisions Act, Section 438; Department of Education Organization Act, Section 103.

[4] Indeed, longstanding federal law that is later cited in the letter establishes that the strict scrutiny inquiry relevant to any claim of race discrimination demands a probing, case-by-case and fact-based inquiry. "Context matters when reviewing race-based governmental action under the Equal Protection Clause. …Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race in that particular context." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

[5] Legal issues aside, the Acting Assistant Secretary appears to suggest without any historical foundation that discrimination claims can be lodged against educators because they teach the "false premise that the United States is built upon 'systemic and structural racism.'" One need look no further than a few of the cases that set standards of relevance for OCR federal enforcement to see examples that debunk this conclusion: *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (finding systemic elementary and secondary racial segregation in four states that "deprive[d] plaintiffs of the equal protection of the laws under the Fourteenth Amendment"); *United States v. Fordice*, 505 U.S. 717 (1992) (finding that Mississippi's higher education policy of de jure segregation continued until 1962, ending only by specific court order, and even then, recognizing that systemic segregation continued "largely intact" until 1974). The Acting Assistant Secretary's express recognition in his letter that remedying past discrimination is a compelling interest long recognized by federal courts further belies such blatant ahistorical claims. Indeed, the remedial interest was a principal basis for remedying claims of systemic racial discrimination in education.

students. These programs eliminate barriers that have impeded some students so that they can access opportunities and thrive, while enabling students who are already thriving to have opportunities to continue to do so, with fair opportunities for all.[6]

Finally, with respect to the use of (legally defined) race-neutral approaches, well-established federal nondiscrimination law interpreting constitutional principles establishes that policies designed to achieve diversity-related goals through race-neutral means remain lawful. As recently as in 2013, in fact, a seven-Justice majority of the U.S. Supreme Court in *Fisher v. University of Texas* set forth rigorous race-neutral procedures and protocols to guide college and university efforts advancing their mission-related diversity goals. (The Court's 2023 decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*) did not affect this ruling.)

The Acting Assistant Secretary's indictment (without citation) of "everyday training, programming and discipline" as perpetuating discriminatory practices under the diversity, equity and inclusion banner and as a "particular" development "of the last four years" is, therefore, flawed— not only because it again drapes the broad net of "illegal" over all diversity, equity and inclusion efforts, but also because it fails to recognize that such interests have grounded postsecondary and school district missions for decades, often with the explicit endorsement of federal law.

Second, the skewed and incomplete discussion of the U.S. Supreme Court's decision in *SFFA v. Harvard/UNC* (one of only two cases cited, at all) telegraphs the political taint of the letter. The letter recaps the Court's 2023 ruling in *SFFA v. Harvard/UNC*, which ruled that the consideration of an applicant's racial status to advance long-recognized diversity benefits was unlawful. That decision applied the Constitution's Equal Protection Clause and Title VI in the student admissions context, and likely has some applicability to scholarships and other programs where individual *student* benefits are conferred. But the *SFFA* ruling does not apply to different governing laws with different legal standards for different contexts like, e.g., Title VII governs the employment context. By its terms, *SFFA* concerned the higher education admissions context—not, as the Acting Assistant Secretary appears to claim, a ruling that swept all issues of hiring, training and programming within its ambit.

The incomplete analysis of the Dear Colleague letter's rendering of *SFFA* is further evident in:

- The recognition of "only two" recognized interests as legally compelling, without acknowledging the prospect of other compelling interests, including national defense interests that the Supreme Court specifically countenanced, see *SFFA* at n. 4.

- The letter's emphasis on what postsecondary application essays cannot include fails to mention, at all, the detailed framework provided by the Court regarding *permissible* race-related admissions practices, which include consideration of an individual applicant's skills, lessons learned, character, and aspirations from lived experience of any kind—including race-related experience.

- The failure to acknowledge that the *SFFA* Court majority recognized the diversity goals advanced by Harvard and UNC were "worthy" and "commendable" institutional mission-related goals, even if

[6] See Keith and Coleman, Navigating the Post-SFFA Landscape: Advancing Equity-Minded, Law-Attentive Priority Actions in Graduate, Undergraduate and Professional Higher Education (EducationCounsel, 2024).

insufficient to legally justify consideration of an applicant's racial status—in other words, the Court did not deem them illegal.

Third, the Acting Assistant Secretary's threat of imminent action—taking "appropriate measures to assess compliance with the [relevant laws] *based on the understanding embodied in this letter*" (emphasis added)—is significantly undercut by his recognition that this correspondence "does not have the force and effect of law and does not bind the public or create new legal standards." Indeed, while we cannot predict what OCR will do, it lacks the authority to alter federal law as enunciated by relevant federal courts—including the Supreme Court and binding federal circuit authorities throughout the United States.

So, in the end, recipients of federal funds are left facing threats of enforcement actions built upon vague edicts, devoid of the clear, context-specific principles specifically derived from established legal principles and rulings that would be needed for this letter to be actionable.

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Responsive Action. The President's DEI Executive Orders and the Dear Colleague letter place postsecondary institutions and K-12 schools and districts, as well as other recipients of federal funds, in a difficult position. The federal Equal Protection and Title VI legal standards that shape institutional, school, and other stakeholders' action around the country have not changed in the last month. But, the overarching political threats that color any assessment of legal risk certainly have. Thus, actions for education leaders to consider include:

- Avoid over- or under-reacting. It may take some time before the dust settles, including time to determine how best to advance important mission interests and time for federal courts to rule on challenges to the Executive Order and OCR guidance. If a court imposes a temporary restraining order or preliminary injunction on these policies, don't act as if they continue to apply when they don't. It can take time for a challenge to make its way through the federal courts, and a preliminary injunction usually applies until an issue is finally decided.

- Be clear on educational (and relevant program) mission aims, with a strong and authentic embrace of inclusion—fair access and opportunity—for all. Engage with legal counsel to evaluate your overall risk profile informed by legal baselines to decide how to remain committed to that mission and determine how to act on it. Be able to articulate the value and legality of your approach in case you are called upon to defend lawful, educationally sound policies and programs that align with your institutional mission.

- Assure that all policies and programs are up to date and aligned with the Supreme Court's SFFA ruling and relevant state laws. Review with a particular focus on any that include consideration of individuals' racial or ethnic status *as a factor in conferring educational benefits or opportunities to students*.

- Examine narratives associated with relevant policies and programs. Narrative reviews should seek to assure clarity regarding how relevant policies advance goals associated with inclusion of *all* talent, as well as their relationship with goals of excellence and innovation. This has often been implicit and understood by internal stakeholders but insufficiently spelled out for other critical audiences.