

# U.S. Department of Education's Guidance Clarifies Discriminatory Activities Subject to Investigation and Funding Consequences

by Nicole Engisch and Nisha Verma

Following its February 14, 2025, "Dear Colleague Letter,"<sup>[i]</sup> outlining DEI programs that could result in a loss of federal funding by February 28, 2025, the U.S. Department of Education, Office of Civil Rights (the "Department") issued FAQs <sup>[ii]</sup> that provided further context for the previous letter, and in some respects adjusted its view of what activities might result in a loss of funding ("FAQs").

See [Dorsey's eUpdate](#) on the February 14, 2025 letter (the "original letter").

The FAQs come after three teachers' organizations filed a lawsuit in federal court in Maryland seeking to enjoin the Department's actions under the original letter, arguing the letter is unconstitutionally vague and infringes on free speech rights.<sup>[iii]</sup> To date no injunction has been entered, although in a separate case, a federal court in Maryland previously enjoined portions of the administration's DEI orders.<sup>[iv]</sup>

## **The Department Outlines Which Types of Cultural Events It Believes Run Afoul of Title VI**

In its original letter, the Department painted DEI programs at educational institutions with a broad brush, stating that educational institutions have "toxically indoctrinated students" through DEI training, programming and discipline and through teaching that the country is based on "systemic and structural racism." Naturally, the original letter left open questions regarding longstanding cultural programs like Black History Month. The Department's FAQs address instances in which such cultural programs would not run afoul of its standards, but the FAQs leave the door open as to when such programs may be considered to create a hostile environment. The FAQs state that "programs focused on interests in particular cultures, heritages, and areas of the world would not in and of themselves violate Title VI, assuming they are open to all students regardless of race." Similarly, "educational, cultural, or historical observances—such as Black History Month,

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International Holocaust Remembrance Day, or similar events—that celebrate or recognize historical events and contributions, and promote awareness, so long as they do not engage in racial exclusion or discrimination” would also not violate Title VI. However, such programming could be illegal if it “discourages members of all races from attending, either by excluding or discouraging students of a particular race or races,” or “by creating hostile environments based on race for students who do participate.”

### **The Department Acknowledges Limitations on its Control Over Curricula, But Describes How a “Racially Hostile Environment” in an Academic Program Could Give Rise to a Title VI Claim**

The original letter also raised questions as to the Department’s ability to control the curriculum of educational institutions, particularly with respect to history and culture courses. It stated that certain programs “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 FAQs acknowledge that both the First Amendment and separate federal laws “prohibit the Department from exercising control over the content of school curricula.” The FAQs asserted, however, that some classroom instruction can result in a “racially hostile environment.” One example is “an elementary school that sponsors programming that acts to shame students of a particular race or ethnicity, accuse them of being oppressors in a racial hierarchy, ascribe to them less value as contributors to class discussions because of their race, or deliberately assign them intrinsic guilt based on the actions of their presumed ancestors or relatives in other areas of the world could create a racially hostile environment.” The FAQs noted, however, that the same discussions in a university would be less likely to create a hostile work environment. The FAQs then pointed to the types of “extreme practices” at a university that could constitute a hostile work environment under Title VI:

- “requiring students to participate in privilege walks;”
- “segregating them by race for presentations and discussions with guest speakers;”
- “pressuring them to participate in protests or take certain positions on racially charged issues;”
- “investigating or sanctioning them for dissenting on racially charged issues through DEI or similar university offices;”
- “mandating courses, orientation programs, or trainings that are designed to emphasize and focus on racial stereotypes;” and
- “assigning them coursework that requires them to identify by race and then complete tasks differentiated by race.”

### **The Department Provides a Framework for Finding That a Racially Neutral Policy Had a “Racially Discriminatory Purpose”**

The original letter also made clear the Department would target the use of “non-racial information” as a proxy for race, stating it would be unlawful “for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial

diversity.”

In the FAQs, the Department provided a framework for investigating whether “covert discrimination” underlies a given program or practice. It stated a “non-exhaustive list” would include:

- “whether members of a particular race were treated differently than similarly situated students of other races;”
- “the historical background or administrative history of the policy or decision;”
- “whether there was a departure from normal procedures in making the policy or decision;”
- “whether there was a pattern regarding policies or decisions towards members of a particular race;”
- “statistics demonstrating a pattern of the policy or decision having a greater impact on members of a particular race;” and
- “whether the school was aware of or could foresee the effect of the policy or decision on members of a particular race.”

The FAQs stated that a “school’s history and stated policy of using racial classifications and race-based policies to further DEI objectives, ‘equity,’ a racially-oriented vision of social justice, or similar goal” will also be probative. The letter further indicated it would rely on the oft-cited burden-shifting analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) in evaluating indirect evidence of intentional discrimination.

### **What is the Current Status of the Department’s Efforts?**

To date, the Department’s proposed efforts, including taking action to cease funding for institutions that it finds violate anti-discrimination laws, are continuing and are not subject to an injunction. Educational institutions should proceed with reviews of their DEI programs and policies pending further action from either the administration or the courts. As we previously recommended, that review should assess whether and to what extent an organization may continue to engage in practices that are consistent with anti-discrimination and other laws that have long been on the books.

[i] Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard (PDF), February 14, 2025

[ii] frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf

[iii] AFT-ASA-v-Dept-of-Education-et-al.pdf

[iv] National Association of Diversity Officers in Higher Education et al v. Trump et al, No. 1:2025cv00333 - Document 44 (D. Md. 2025) :: Justia