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New York State Attorney General Issues Guidance for Higher Education in Response to DEI Executive Action and Dear Colleague Letter.

March 7, 2025

On Wednesday, March 5, 2025, New York State Attorney General Letitia James joined the Attorneys General of Illinois, Massachusetts, California, Connecticut, Delaware, Maine, Maryland, Minnesota, New Jersey, Nevada, Oregon, Rhode Island, Vermont, and the District of Columbia in issuing **guidance** (the "Guidance") for educational institutions, in response to recent Executive Orders targeting DEI and the Office for Civil Rights' ("OCR") February 14, 2025 **Dear Colleague Letter** ("DCL"), and February 28, 2025 **Frequently Asked Questions** ("FAQ") document.

The Guidance advises educational institutions to "continue to foster diversity, equity, inclusion, and accessibility among their student bodies" and warns that any changes made to align with recent executive actions must conform with "their States' robust civil rights protections—which in many cases exceed federal civil rights protections…"

The Guidance underscores that the DCL and FAQ do not carry the force of law and challenges the reasoning underlying these executive actions in several ways.

First, the Guidance states that the DCL and FAQ misconstrue the U.S. Supreme Court's 2023 decision in ***Students for Fair Admissions v. Harvard*** (*SFFA*),[1] clarifying that the ruling applies specifically to admissions practices that consider an applicant's race as a "plus" factor. It emphasizes that, in *SFFA*, the Supreme Court explicitly stated that institutions may consider how race has shaped a student's experiences. However, the Attorneys General caution that institutions "can and should assume" that *SFFA* also extends to "a school's provision of a concrete benefit or opportunity to a *particular individual* based on that individual's race."

Second, the Guidance states, contrary to the DCL, that race-neutral polices designed to enhance diversity are not unlawful. Citing *SFFA*, the First Circuit,[2] and the Fourth Circuit,[3] the Guidance highlights that courts have upheld facially neutral policies that result in racial, socioeconomic, and geographical diversity under Title VI of the Civil Rights Act of 1964 ("Title VI") and the Equal Protection Clause of the Fourteenth Amendment. The Guidance highlights that the Supreme Court declined to review a Fourth Circuit case that upheld a race-neutral policy aimed to improve racial diversity and inclusion, allowing the ruling to stand. The Guidance advises that an institution "may choose to advance its educational goals by using a holistic review in admissions considering factors such as cultural competencies, income level, first generation to attend college, neighborhood or

community circumstances, disadvantages overcome, and the impact of an applicant's particular experiences on their academic achievement and on the perspectives they would bring to the school environment."

Third, the Guidance asserts that the DCL and FAQ do not restrict classroom instruction or course offerings on topics such as race, sexual orientation, gender identity, disability, and religion. It further emphasizes that diversity, equity, and inclusion (DEI) initiatives are permissible when they "foster learning environments that provide *all* students an equal opportunity to learn and better prepare students to work in our diverse country and participate in our multicultural democracy." Accordingly, the Guidance states that institutions may continue collecting data on race, ethnicity, and other factors, provided the data is not used to grant individual students a plus factor or special advantage.

Finally, the Guidance affirms that institutions may "make special efforts to reach particular groups" when recruiting potential applicants, explaining that outreach programs remain lawful as long as they are open to all participants, regardless of race. The Guidance clarifies that institutions can offer such outreach and informational programs even if their content naturally appeals more to certain racial or demographic groups.

While the Guidance is designed to assist institutions in understanding their state and federal civil rights compliance obligations, ultimately, State Attorneys General do not determine how federal agencies choose to enforce federal civil rights laws.

Should you have any questions about the impact of the DCL, FAQ, or recent executive and state action on your institution's policies and practices, please contact Jennifer McLaughlin (**jmclaughlin@cullenllp.com**), Dina Vespia (**dvespia@cullenllp.com**), Michael DiSiena (**mdisiena@cullenllp.com**), Nicole Donatich (**ndonatich@cullenllp.com**), or Jordan Milite (**jmilite@cullenllp.com**).

This advisory provides a brief overview of the most significant changes in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

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Footnotes

[1] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

[2] *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.,* 89 F.4th 46, 62 (1st Cir. 2023), cert. denied, 145 S. Ct. 15 (2024) at 62.

[3] *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 885- 86 (4th Cir. 2023) (noting that the "desire to … improve racial diversity and inclusion by way of race-neutral measures" is "a practice that the Supreme Court has consistently declined to find constitutionally suspect"), cert. denied, 2024 WL 674659 (Feb. 20, 2024).

Practices

- Higher Education

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