

U.S. Department of Education Releases Dear Colleague Letter on Race and School Programming

September 6, 2023

In response to an increase in the number of complaints and requests for technical assistance received, the U.S. Department of Education's Office for Civil Rights ("OCR") released a [Dear Colleague Letter](#) (the "DCL") to offer practical guidance on circumstances under which institutions can develop programs and curricula or engage in activities that promote racially inclusive communities in a manner that is consistent with Title VI of the Civil Rights Act of 1964 ("Title VI").

All primary, secondary, and postsecondary institutions that receive federal financial assistance are required to comply with Title VI, which prohibits discrimination on the basis of race, color, or national origin. As noted in the DCL, educational institutions may violate Title VI if they: (i) separate students based on race, (ii) treat students or groups of students differently based on race, or (iii) create, encourage, accept, tolerate, or fail to correct a racially hostile educational environment. Further, while decisions on what curriculum and programming are offered, including choices regarding course materials, belong to educational institutions, OCR has authority to evaluate whether such choices violate the law.

The DCL begins with an overview of three legal standards used by OCR in investigating Title VI complaints:

- **Unlawful Express Racial Classifications** – Programs that treat students differently based on race are evaluated using "strict scrutiny review," which requires an institution to demonstrate that any use of a student's race is "narrowly tailored" to further a "compelling" interest.
- **Racially Discriminatory Application of Facially Neutral Policies** – OCR uses a three-step test to determine whether a facially neutral policy treats similarly situated students differently based on race. After determining that an institution treats a student or group of students differently from other similarly situated students based on race, OCR next asks whether the institution can articulate a legitimate, nondiscriminatory reason for the different treatment. If the answer to this question is "no," then OCR would determine that the institution has discriminated against the student based on race. If the answer is "yes," OCR then evaluates whether the articulated reason put forth by the institution is a pretext for discrimination, meaning it is not the true reason behind the institution's actions. If the answer is "yes," OCR could find that the institution has engaged in discrimination based on race in violation of Title VI.
- **Racial Harassment and Hostile Environment** – OCR defines a "hostile environment," in the context of Title VI, to mean any "unwelcome race-based conduct" that is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from an education program or activity. OCR may find a Title VI violation for a racially hostile environment if it determines (i) a racially hostile environment existed; (ii) the institution had actual or constructive notice of the hostile environment; and (iii) the institution failed to

take steps to end the harassment, eliminate any hostile environment and its residual effects, and prevent future recurrences. To determine whether a hostile environment exists, OCR will consider the “totality of the circumstances,” which takes into consideration multiple factors including the context, nature, scope, frequency, duration, and location of the race-based harassment, as well as the identity, number, age, and relationships of the persons involved. OCR will also evaluate an institution’s response to the alleged harassment by assessing whether the response was reasonable, timely, and effective.

The DCL also offers thirteen hypothetical scenarios to provide guidance on how OCR might consider complaints related to curriculum and academic programming, other school programming such as assemblies, focus groups or listening sessions, and extracurricular activities, programming, and organizations. Each hypothetical is followed by a statement as to whether OCR would have reason to open an investigation based on the complaint, with an explanation as to how the scenario described may or may not violate Title VI. The DCL qualifies, however, that the examples are intended to provide non-binding guidance to educational institutions, but do not predict the outcome of any specific complaint OCR may receive.

If you have questions about how OCR’s latest guidance may affect any of your institution’s programs, please contact Dina Vespia (dvespia@cullenllp.com), Deirdre Mitacek (dmitacek@cullenllp.com), or any member of our **Higher Education Practice Group**.

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.

Practices

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