Federal EO Update for Higher Education
February 20, 2025

Bricker Graydon

Reminders

- This information is good as of now. In an hour, it might not be. Stay tuned for new Executive Orders (EOs) and judicial or legislative responses.
- The political aspects of this are undeniable, but our first priority is simple: clarity.
- Remember not to lose the forest for the trees. What is the big picture? That will help guide our next steps.

Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.
- No, we aren't recording this – because we expect things to shift quickly.

Agenda

- DEI and the Dear Colleague Letter
- COVID Vaccine "Coercion"
- Funding Freezes
- ICE Access to Schools
- DOGE Access to ED
- College Athletics Updates

Themes:

- What does this mean now?
- What does it tell us about what's coming next?
- What can/must you being doing now?

February 14, 2025 - DCL

- Dear Colleague Letter - "Title VI of the Civil Rights Act in Light of *Students for Fair Admissions v. Harvard*"
- January 21, 2025, EO "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" required joint guidance from ED and Attorney General within 120 days
    - This does not appear to be joint guidance, but the letter notes, "This letter provides notice of the Department's existing interpretation of federal law. Additional legal guidance will follow in due course."

DCL - "Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard" (1 of 5)

- Quick review of the Students for Fair Admissions decisions:
  - Harvard and UNC's admissions programs do not survive strict scrutiny.
  - Educational benefits of diversity, as articulated by Harvard and UNC, were "not sufficiently coherent for the purposes of strict scrutiny"
  - Applicants are allowed to discuss their race and race-based experiences in their applications
- Depts. of Education & Justice Guidance
  - Targeted recruitment & pathway programs are still lawful
  - "Holistic" application review is still lawful.
  - Demographic data collection is encouraged

DCL - "Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard" (2 of 5)

- "Although SFFA addressed admissions decisions, the Supreme Court's holding applies more broadly."
  - "Federal law thus prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, **scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life.**"
- Other key points:
  - Cautions against the use of "racial proxies"
  - Warns that *certain* DEI programs could "teach students that certain racial groups bear unique moral burdens that others do not," stigmatizing students from certain racial groups in a way that could "**deny students the ability to participate fully in the life of a school**."

DCL - "Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard" (3 of 5)

- Other key points:
  - Advises institutions to:
    - Ensure that their policies and actions comply with existing civil rights law
    - Cease all efforts to circumvent prohibitions on the use of race by relying on proxies or other indirect means to accomplish such ends; and
    - Cease all reliance on third-party contractors, clearinghouses, or aggregators that are being used by institutions in an effort to circumvent prohibited uses of race
  - "This letter provides notice of the Department's existing interpretation of federal law. Additional legal guidance will follow in due course."

DCL - "Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard" (4 of 5)

- Next steps – Focus Locally.
  - Remember: in SFFA, Chief Justice Roberts stated that "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," creating a limited carveout for race to be mentioned by applicants applying to universities.
  - Analyze your jurisdictional case law on the use of race-neutral criteria
    - E.g. *Coalition for TJ v. Fairfax County School Board (Fourth Circuit)*
      - TJ is a highly competitive admission based public school looking at: entrance examination, standardized test scores, GPA, etc.
      - In 2020 school introduced policy to grant priority to students coming from underrepresented middle schools (by enrollment) and low-income backgrounds who had engaged in community service or student leadership.
      - No consideration of race in policies; but some evidence at trial court level that County was seeking to increase Black and Hispanic enrollment.
      - Fourth Cir. Reversed lower court stating that: "the Board may have adopted the challenged admissions policy out of a desire to increase the rates of Black and Hispanic student enrollment at TJ—that is, to improve racial diversity and inclusion by way of race-neutral measures—***it was utilizing a practice that the Supreme Court has consistently declined to find constitutionally suspect***," namely race-neutral procedures.
      - *Supreme Court denied cert.*
  - DCL's prohibitions are broader than *SFFA.*

DCL - "Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard" (5 of 5)

- Next steps – Focus on Campus
  - DOE says enforcement begins February 28
  - Review your program and funding opportunities that use race as a factor for participation
    - Consider an attorney-client privileged analysis to determine what programs may be at risk
  - Consider the use of an "all-comers" policy for affinity-based or thematic programs:
    - Targeted mentorship/leadership development programs
    - Theme Housing (remember: the Fair Housing Act prohibitions on using race in providing housing applies to residence halls)
    - Student organizations
  - Community communications?
  - Keep an eye on the litigation
    - National Urban League complaint for injunctive relief – filed 2/19/25

COVID-19 Vaccine Mandates

- February 15, 2025 EO - "Keeping Education Accessible and Ending COVID-19 Vaccine Mandates in Schools"
  - Directs ED to issue "**guidelines**" to schools and IHEs "regarding those entities' legal obligations with respect to parental authority, religious freedom, disability accommodations, and equal protection under law, as relevant to coercive COVID-19 school mandates"
  - Within 90 days, ED + HHS must provide "a plan to end coercive COVID-19 school mandates, consistent with applicable law, and including, as appropriate, any proposed legislation" including through **discretionary grant** requirements and **preventing federal funds** from being provided to institutions "that are **non-compliant with the guidelines** issued" by ED

Funding Freezes

- On January 28, 2025, the Office of Management and Budget issued a memorandum purporting to temporarily pause all spending that may be implicated by EOs.
  - *National Council of Nonprofits v. Office of Management and Budget,* Case No. 1:25-cv-00239 (D.D.C.) - A TRO was issued blocking the pause, and the Motion for Preliminary Injunction is pending. Hearing scheduled for February 20, 2025 at 11:00 a.m.
  - *New York v. Donald J. Trump*, Case No. 1:25-cv-00039 (D.R.I.) - A TRO was issued blocking the pause. On February 10, the court found that the government was not complying with the TRO and ordered the government to "immediately restore frozen funding during the pendency of the TRO until the Court hears and decides the Preliminary Injunction request." Preliminary Injunction hearing Feb. 21.

DOGE Access to ED

- The newly-formed Department of Governmental Efficiency (DOGE) reportedly accessed confidential information, including information relating to federal student aid.
  - Multiple cases challenge DOGE's existence and actions
- *University of California Student Ass'n v. Carter*, Case No. 1:25-cv-00354 (D.D.C.) challenges DOGE access to ED information
  - TRO denied – harms are "entirely conjectural;" no evidence to infer that ED/DOGE will misuse or further disseminate confidential info
- *American Federation of Teachers v. Bessent*, Case No. 8:25-cv-00430 (D.Md.) also challenges DOGE access to ED information
  - Motion for TRO pending

ICE Access to Schools

- On January 20, 2025, the U.S. Department of Homeland Security issued a policy memo rescinds prior policy documents that prevented Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) from taking enforcement actions in or near schools
- *Denver Public Schools v. Noem*, Case No. 1:25-cv-00474 (D. Colo.) was filed on Feb. 12, 2025, challenging this memo from the perspective of schools.
  - TRO and Preliminary Injunction requested. Briefing to finish Feb. 28th.
- Two other cases have been filed challenging the memo from the perspective of churches.

College Athletics Updates

- February 12: U.S. Department of Education Launches Title IX Investigations into Two Athletic Associations
  - Minnesota State High School League (MSHSL) and the California Interscholastic Federation (CIF)
- *Tirrell et al v. Edelblut et al*, Case No. 1:24-cv-00251 (D.N.H.) challenges "Keeping Men out of Women's Sports" EO
- February 14: NLRB rescinds September 2021 memo on the rights of student-athletes under the NLRA GC 21-08
  - Backdrop of Congress trying to pass legislation that would deem student-athletes not employees
  - Unionization efforts abandoned before new administration

Upcoming Higher Ed Webinars

- Next Week Placeholder: 2/27/2025
- Free: Romanticizing of Stalking Behavior – 2/27/2025
- Free: Athletics Hot Topics – 3/13/2025
- Free: Employee Sexual Misconduct Cases – 3/27/2025
- Free: AI and Student Conduct on Campus – 4/10/2025
- Free: Sexual Misconduct Hearings – 4/24/2025
- Free: Title IX Litigation Update – 5/29/2025

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