



Spring 2025 CLE Workshop · March 26 – 28, 2025

# Higher Education Discrimination Law

## Responding to Emerging Issues Under Title VI

**Christopher Lott**, *Deputy General Counsel*, Duke University (*Moderator*)

**Richard Anthony Baker**, *Executive Director for People, Equity, & Development*, Rice University

**Amy L. Piccola**, *Interim Associate General Counsel*, Dartmouth College

**Joshua W. B. Richards**, *Partner*, Saul Ewing LLP

# The Law

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d

# Rewind: Executive Order 13899 (12/11/2019)

“Anti-Semitic incidents have increased since 2013, and students, in particular, continue to face anti-Semitic harassment in schools and on university and college campuses.”

“While Title VI does not cover discrimination based on religion, individuals who face discrimination on the basis of race, color, or national origin do not lose protection under Title VI for also being a member of a group that shares common religious practices.  
**Discrimination against Jews may give rise to a Title VI violation when the discrimination is based on an individual's race, color, or national origin.**”

# Rewind: Q&A on EO 13899 (1/19/2021)

“The Executive Order reaffirms that Title VI protects Jews from anti-Semitic harassment or other discrimination if it is based on their race, color, or national origin, which can include discrimination **based on their shared ancestry or ethnic characteristics.**”

“An anti-Semitic incident does not violate Title VI merely because it is anti-Semitic, or because it involves an example of anti-Semitism contemplated by the IHRA. . . OCR, as required under the Executive Order, **will consider the IHRA definition in handling complaints of anti-Semitism**, and will continue to apply the Title VI statute, regulations, and established standards.”

# Executive Order 14188 (1/29/2025)

“This order **reaffirms** Executive Order 13899 and **directs additional measures** to advance the policy thereof in the wake of the Hamas terrorist attacks of October 7, 2023, against the people of Israel. These attacks unleashed an unprecedented wave of vile anti-Semitic discrimination, vandalism, and violence against our citizens, especially in our schools and on our campuses. Jewish students have faced an unrelenting barrage of discrimination; denial of access to campus common areas and facilities, including libraries and classrooms; and intimidation, harassment, and physical threats and assault.”

# Executive Order 14188 (1/29/25)

“It shall be the policy of the United States to combat anti-Semitism vigorously, using all available and appropriate legal tools, **to prosecute, remove, or otherwise hold to account** the perpetrators of unlawful anti-Semitic harassment and violence.”

- The Attorney General is encouraged to employ appropriate civil-rights enforcement authorities, such as 18 U.S.C. 241, to combat anti-Semitism
- ED to submit a report identifying civil and criminal authorities/actions that can combat anti-Semitism; analyze administrative complaints against/involving IHEs alleging campus antisemitism.
- The Secretaries of State, Education, and Homeland Security to make recommendations for familiarizing IHEs with the grounds for inadmissibility under 8 U.S.C. 1182(a)(3) so that such institutions may monitor for and report activities by alien students and staff relevant to those grounds and for ensuring that such reports about aliens lead, as appropriate and consistent with applicable law, to investigations and, if warranted, actions to remove such aliens.

# February/March 2025 Agency Activity

- Internal directive: promptly address alleged antisemitic discrimination
  - *“For the relatively few complaints actually resolved, the prior Administration’s Assistant Secretary signed off on toothless resolution agreements that provided little to no remedy for Jewish students to this day. The Trump Administration will not permit antisemitic protesters and antagonists to take over campus facilities and terrorize Jewish students and staff with impunity.”*
- Letter to all IHEs under investigation for Title VI violations relating to “antisemitic harassment and discrimination”
  - *“Americans watched in shock as mobs of campus malcontents erected encampments, occupied buildings, and spit on, threatened, assaulted, and blocked Jewish students from going to class or traveling about campus freely. . . . OCR will no longer tolerate these unlawful practices.”*

# February/March 2025 Agency Activity

- 5 directed investigations “buil[t] upon the foundational work of the House Committee on Education and the Workforce under then-Chairwoman Virginia Foxx”
- The Federal Task Force to Combat Anti-Semitism, a coordinated effort of DOJ, HHS, and OCR, announced that it will be visiting 10 university campuses that have experienced antisemitic incidents since October 2023.
- DOJ, HHS, ED, and GSA announce termination of \$400 Million in grants to Columbia University “due to the school’s [alleged] continued inaction in the face of persistent harassment of Jewish students.”



# OCR Resolutions: Key Takeaways

- Consider whether a Hostile Environment exists, regardless of availability of conduct processes
  - If yes, take measures to end the harassment, eliminate the HE and its effects, prevent the harassment from recurring
- Track totality of the circumstances in your program/activity
  - *“In OCR’s investigative experience, schools often respond to individual reports of harassment but fail to consider how the particular instance of harassment, either in and of itself, or in conjunction with other incidents of harassment, may contribute to a hostile environment.”* (March 10, 2025)
- Maintain a consistent and centralized, or effectively centralized, response
- Have and publicize procedures
  - How to file complaints; availability of supportive measures; investigation steps; notice of outcome to complainants and respondents

# February 14, 2025 DCL

“At its core, the test is simple: If an educational institution treats a person of one race differently than it treats another person because of that person’s race, the educational institution violates the law. **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.** Put simply, educational institutions may neither separate or segregate students based on race, nor distribute benefits or burdens based on race.”

# February 14, 2025 DCL

**“Relying on non-racial information as a proxy for race, and making decisions based on that information, violates the law”**

- “[A] school may not use students’ personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student’s race and favoring or disfavoring such students.”
- “It would . . . be unlawful for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity.”

# February 14, 2025 DCL

“The law is clear: treating students differently on the basis of race to achieve nebulous goals such as diversity, racial balancing, social justice, or equity is illegal under controlling Supreme Court precedent”

“DEI programs, for example, frequently preference certain racial groups and 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.”

# February 28, 2025 FAQs

- Requiring students to participate in privilege walks
- Segregating students by race for presentations and discussions with guest speakers
- Pressuring students to participate in protests or take certain positions on racially charged issues
- Investigating or sanctioning students 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
- Assigning students coursework that requires them to identify by race and then complete tasks differentiated by race

= Forms of school-on-student harassment that could create a hostile environment under Title VI.

# February 28, 2025 FAQs

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“[S]chools with 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.**

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Nor would educational, cultural, or historical observances—such as Black History Month, 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.**

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However, schools must consider whether any school programming **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.”

# Revocation of FFA

- Many steps between a complaint and revocation of federal financial assistance
  - *See generally* 34 C.F.R. 106.7
- Path begins with investigation
  - Not without its own costs (financial, human capital, reputational)
- At the conclusion, the institution has the option to come into voluntary compliance with the law (as interpreted by OCR)
- If that does not occur, only then can ED seek to terminate federal financial assistance
- The institution is entitled to a hearing with an ALJ and in internal appeal, and, if there is a finding of noncompliance, ED must present a written report to a Senate committee for its review
- Throughout process, ED is obliged to seek voluntary compliances
- Any decision to revoke funding may also be challenged in federal court



# Discussion



The background of the slide features a series of overlapping, stylized silhouettes of people's heads and shoulders in profile, facing right. The silhouettes are rendered in a variety of muted colors including olive green, terracotta, and deep red, creating a sense of a diverse group of individuals. The overall style is graphic and modern.

# Questions?

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