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*Mis*guidance

Analyzing the U.S. Department of Justice's 7/29/25 Civil Rights Guidance

EXECUTIVE SUMMARY

On 07/29/25, the U.S. Department of Justice (DOJ) issued non-binding guidance relevant to all recipients of federal funds on how the Trump Administration interprets federal antidiscrimination laws, including as applied to efforts to advance diversity, equity, and inclusion. **While some portions of DOJ's guidance reflect current law, others misstate or overreach, creating a real risk of chilling lawful practices designed to ensure equal opportunity for all.** (This is an executive summary of our full analysis focused on education.)

Efforts to expand educational opportunities, remove barriers to high-quality education, and create inclusive education environments that enable success for all students *are fully aligned* with our nation's civil rights laws and our historic national commitment to equal opportunity for all, including those who are thriving *and* those who lack equal access or face heightened barriers. Yet DOJ's guidance creates new risks for higher education, K-12, early education, and other child-serving systems that have been or might be subject to the Administration's unprecedented enforcement actions.

To help leaders navigate these challenges, ***Mis*guidance** (click here) first situates DOJ's guidance within the broader context of the Administration's focus on halting efforts to advance diversity, equity, and inclusion. It then outlines the following four cross-cutting flaws in the guidance, highlighting along the way where DOJ's examples of "unlawful" and "best" practices do more to obscure the law than to clarify it:

- **Delegitimizing Efforts to Address Discrimination:** DOJ's guidance advises federal funding recipients to avoid considering race, sex, or other protected traits in performance metrics—discouraging lawful, court-endorsed uses of disaggregated data to identify and lower barriers. This risks freezing inequities in place and undermining the obligation under federal law to address discrimination.

- **Delegitimizing Federal Court-Endorsed Diversity, Equity & Inclusion Interests:** The guidance ignores that diversity remains a legitimate institutional value even following the Supreme Court's 2023 *SFFA v. Harvard* decision. For example, inclusive outreach and recruitment that advance those aims is permissible, but DOJ, with its narrowed focus on so-called "reverse discrimination," suggests it is not.

- **Delegitimizing Lawful Race-Neutral Means that Advance Diversity, Equity & Inclusion Goals:** Authentic, mission-aligned, race-neutral criteria (e.g., socioeconomic status, geography, first-gen status) are permissible, even if correlated with race. DOJ's treatment of these and other race-neutral means of advancing diversity, equity, and inclusion blurs correlation with unlawful intent, omits that both intent and impact are required for liability, and overstates the legal risk of acting with "mixed motives."

- **Misguiding the Field Through Misleading Examples:** Most of DOJ's examples of "unlawful practices" are only unlawful if the assumptions embedded in the hypotheticals are true. From staff training to student groups to incorporating "lived experience" into selection processes, the guidance fails to fully clarify for the field the range of lawful ways to pursue legitimate goals via these race-neutral means.

Ahistorical, inaccurate, and misleading—DOJ's guidance will most likely chill lawful activities creating equal opportunities for all. In this period of federal uncertainty and overreach, education leaders must not substitute the Administration's anti-"DEI" policy preferences for the actual law of the land.

Click here to access the full version of ***Mis*guidance**.

This analysis does not constitute legal advice.

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The United States Department of Justice (DOJ) issued a "Memorandum For All Federal Agencies" on 7/29/25 that provides non-binding guidance relevant to all recipients of federal funds on how the Trump Administration construes federal antidiscrimination laws,[i] including as applied to "Diversity, Equity, and Inclusion ('DEI') programs."[1] **DOJ continues the Administration's attempts to eliminate efforts to advance diversity, equity, and inclusion with guidance that at times misstates or overreaches on matters of law and at times offers obfuscations in ways that are likely to chill lawful policies and practices.**

To be clear, efforts to expand educational opportunities, remove barriers to high-quality education, and create inclusive education environments that enable success for all students are not intrinsically illegal and are often necessary. Many such efforts, including those that address racial gaps and barriers, are fully aligned with our nation's civil rights laws and our historic national commitment to equal opportunity for all. Yet DOJ's guidance creates new risks for higher education, K-12, early education, and other child-serving systems that have been or might be subject to the Administration's unprecedented enforcement actions, including coercive threats to federal funding that extend far beyond the relevant facts and laws at issue, as well as other violations of due process.[2]

Federal funding recipients—especially institutions of higher education (IHEs), state and local education agencies (SEAs and LEAs), and other organizations supporting students and children with federal funds—should understand the inaccurate and ambiguous aspects of DOJ's new guidance to avoid overreacting to it. Doing so might stymie their missions to provide high-quality education, research, and services to all, including those who are already thriving *and* those who lack equal access or face heightened barriers.

This analysis examines the DOJ guidance from three perspectives:

- The overall **FOREST**—situating the DOJ guidance within the context of other relevant Administration efforts to end work in education that advances diversity, equity, and inclusion
- Several **TREES**—identifying themes that cut across the guidance and contribute to its chilling effects
- Specific **BRANCHES**—providing analysis of how the DOJ guidance's specific examples of what the Administration considers to be illegal actually conflict with or obscure current federal law

This analysis does not constitute legal advice, so we encourage education leaders to consult legal counsel and critically examine the DOJ guidance before taking any action. Federal funding recipients should keep in mind that no federal guidance, including this one from DOJ, can change underlying law. DOJ acknowledges that its "non-binding" suggestions regarding "best practices" are not "mandatory requirements but rather practical recommendations to minimize the risk of violations." And, notably, in the thirteen examples of "unlawful" or "potentially unlawful" practices and nine examples of recommended "best practices," DOJ provides no supporting legal analysis or citations.[ii]

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[i] The guidance primarily addresses Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and the Equal Protection Clause of the Fourteenth Amendment.

[ii] This EducationCounsel analysis includes a number of footnotes (i, ii, iii, etc.) along with a longer set of endnotes (1, 2, 3, etc.) that provide legal citations and additional analysis of relevant federal court decisions.

The Forest: Upending Civil Rights Law

Our national civil rights legal infrastructure—constitutional amendments, federal laws, longstanding regulations, and court rulings interpreting them all—arose in response to historical and ongoing institutionalized discrimination against Black people, other people of color, women, members of the LGBTQ+ community, people with disabilities, English learners, immigrants, religious minorities, and other marginalized groups. Policy preferences and legal contours have changed over time, but since federal civil rights laws' origins, the federal government under both political parties has adhered to binding court precedent in its policy pronouncements. And it has, albeit in fits and starts, enforced and advanced civil rights laws in order to remove barriers and close gaps arising out of that history *and* to protect people from the effects of ongoing instances of discrimination.

But especially in the context of race and ethnicity,[iii] the Trump Administration's approach has mostly turned that traditional focus upside down. It generally treats efforts to remove barriers and use legal means to close gaps affecting people of color as a manifestation of discrimination. In this rendering of current law (which generally prohibits discrimination based on racial status with few narrow exceptions), DOJ portrays addressing so-called "reverse discrimination" as the primary aim of federal civil rights enforcement. Meanwhile, efforts to remove historical and current barriers for Black people and other marginalized groups—especially in the context of early, K-12, and higher education—are undermined by the Administration's interpretations of the very same federal laws originally designed to ensure their rights.

DOJ's guidance is the latest effort by the Administration to treat diversity as an illegitimate institutional goal and equity and inclusion as code words for discriminating against white people, when those values are instead about ensuring full and equal opportunity for all people. This "forest"-level view, clear throughout the DOJ guidance, is also visible in several other Administration actions in the education context,[iv] including:

- Executive Orders (EOs) such as "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," "Ending Radical Indoctrination in K-12 Schooling," and "Restoring Equality of Opportunity and Meritocracy," among others;

[iii] The Trump Administration's civil rights enforcement priorities are certainly not limited to race and ethnicity. Other major areas of focus in the first six months have included both shared ancestry discrimination—almost exclusively in the context of higher education institutions' handling of antisemitism on campus—and sex discrimination—almost exclusively in the context of transgender students' access to facilities and sports teams that align with their gender.

[iv] Click here for all of EducationCounsel's resources regarding the Trump Administration's actions affecting education, including a comprehensive *Executive Actions Chart*, which also includes updates on agency actions and litigation; an *Executive Actions Tracker*, which follows up on deadlines established in education Executive Orders; near-weekly "Alerts" providing initial analysis of the most significant developments; and several "Deep Dive" papers that explore key topics in greater depth. Some "Deep Dives" are particularly relevant to DOJ's new guidance on civil rights laws: *Wise Courage* summarizes the existing legal parameters underlying DOJ's guidance and provides a three-part framework for higher education institutions to pursue effective, legally defensible access and opportunities for all students and faculty. *Overreaching and Misleading* and *The Reality Behind the Rhetoric* unpack earlier guidance from the U.S. Department of Education's Office for Civil Rights on these same issues.

- Guidance by the Office for Civil Rights (OCR) in the U.S. Department of Education (USED) including a Dear Colleague Letter (DCL) and a follow-on Frequently Asked Questions (FAQ) document;
- USED's civil rights enforcement actions including an attempt to demand all SEAs and LEAs certify compliance with the DCL and FAQ, with a new emphasis on potential liability under the False Claims Act;[3] investigations of IHEs, SEAs, and LEAs for their efforts to advance diversity, equity, and inclusion; and a growing number of settlements with universities to resolve multi-agency investigations in part by committing not to pursue "DEI";
- Numerous terminations of grants and contracts directly or indirectly related to advancing or even merely studying issues related to these topics; and
- Parallel grant terminations, new certification requirements, and modified grant terms issued by other agencies, such as the National Science Foundation (NSF) and the National Institutes of Health (NIH),[v] that are advancing the Administration's anti-"DEI" priority in the context of federally-funded research, much of which takes place at IHEs.

Many of these actions are currently the subject of litigation in courts across the nation, with some preliminarily enjoined (e.g., OCR's guidance and certification). In fact, as of this writing, no federal court has endorsed the *substance* of the Trump Administration's anti-"DEI" policy pronouncements. To the contrary, those policies have been rejected by multiple federal courts in different federal circuits evaluating their merits.[4]

Contrary to the Administration's representations, educational and other institutions have the authority (and often the responsibility[5]) to take inclusive actions that ensure equal opportunity for all. This includes examining policies and practices that are causing a disparate impact to ensure that they are educationally justified and there are not equally effective strategies that would not cause such disparities. Those same institutions are entitled under governing law to promote equitable opportunity and advance the educational benefits of diversity so long as they do not do so in a manner that unjustifiably awards or denies an educational benefit or opportunity based on consideration of an individual's racial or ethnic status. Seeing the "forest" of the Administration's civil rights approach can help education leaders better understand the specific "trees" and "branches" that seek to halt many lawful efforts consistent with the traditional (and still essential) role for civil rights laws in our nation.

[v] NIH originally added similar terms as NSF but subsequently rescinded them pending "further Federal-wide guidance."

Trees & Branches: Reinterpreting the Law to Chill Lawful Activities

The core of DOJ's guidance is organized around four categories of practices the Administration believes are commonly taking place in "DEI" programs (including at the "encourage[ment]" of the federal government): "Granting Preferential Treatment Based on Protected Characteristics," "Prohibited Use of Proxies for Protected Characteristics," "Segregation Based on Protected Characteristics," and "Training Programs That Promote Discrimination or Hostile Environments." For each, DOJ first briefly explains (without any legal citations) how "DEI" programs can, in the Trump Administration's view, violate the law, and then lists examples of "unlawful" or "potentially unlawful" practices. The guidance concludes with the Administration's recommended "best practices." The analysis below is organized differently. We identify and unpack four important "trees"—the crosscutting themes that explain the guidance's most significant legal shortcomings. To illustrate how these operate, we also incorporate related "branches," drawn from DOJ's list of examples.

It is important to note that DOJ accurately recognizes in its "Race-Based Scholarships or Programs" example (section IV.A.2) that the U.S. Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. Harvard* ("*SFFA*")[6] likely extends beyond selection in higher education admissions to also apply to scholarships and fellowships that consider race in selection. As we wrote in *Wise Courage*:

> *[The* SFFA*] holding is limited in its contours in that it does not mean all DEI efforts are illegal. On the other hand, those contours are likely not so narrow as to only apply to admissions. Instead, the Court's reasoning in* SFFA *likely affects other student programs such as financial support, mentoring, and pathways if IHEs design these programs in ways that consider students' racial or ethnic status in determining who receives or is denied these benefits. It is important to note, however, there are often inclusive design options available to IHEs for these kinds of programs that can satisfy legal parameters post-SFFA. Indeed, these programs typically lend themselves to a larger array of defensible design options than are practical in the admissions context."*[7]

But too often, DOJ's guidance does more to obscure than to clarify. Even in the section discussing "race-based scholarships" highlighted above, DOJ uses overboard language to describe the certainty of extending *SFFA* to these other areas. Furthermore, the second and third examples of "unlawful practices" related to preferential treatment are incomplete and misleading.[vi]

As a result of the following four "trees" and their associated "branches," DOJ's guidance is more likely to chill lawful conduct than to prevent unlawful discrimination.

[vi] The second example in section IV.A—"Preferential Hiring or Promotion Practices"—makes no mention that, under some circumstances, employers may legally take *race-conscious remedial steps* in hiring or promotion to comply with Title VII of the Civil Rights Act of 1964. (See "Tree #2" below.) Additionally, the third example in this section—"Access to Facilities or Resources Based on Race or Ethnicity"—illustrates how misleadingly DOJ crafted its examples. (See "Tree #4" below.)

TREE #1—Deligitimizing Efforts to Address Discrimination

Throughout the guidance, DOJ fails to acknowledge the legitimate, lawful role that examining disaggregated data plays in policy and program design and implementation, especially to help identify, address, and not exacerbate discriminatory policies and practices. Instead, the guidance encourages or requires recipients of federal funds to make policy decisions divorced from any consideration of relevant racial data. In the guidance's concluding section on "best practices," DOJ recommends that institutions should "[f]ocus solely on nondiscriminatory performance metrics, such as program participation rates or academic outcomes, *without reference to race, sex, or other protected traits*" (emphasis added). Here is the federal government advising all recipients of federal funding to minimize "legal, financial, and reputational risks" by halting their consideration of disaggregated data.[vii]

Federal funding recipients should keep in mind that, in contrast to this "best practice," there is nothing unlawful about collecting and using disaggregated data to identify and address barriers to equal opportunity. To the contrary, multiple federal court authorities affirm the legitimacy (and at times obligation) of considering data regarding racial gaps to help identify barriers that can or must be addressed to assure equal opportunity for all.[viii]

The indisputable reality is that gaps and barriers regarding educational access and outcomes exist today, including based on "race, sex, or other protected traits," among other things. These gaps do not reflect human potential but more likely gaps in opportunities for maximizing it. Examining disparities caused by policies to determine if those policies serve a legitimate purpose or if there are effective alternatives that would cause lesser disparity is a key method for preventing discrimination. To ignore data describing these gaps—or worse, to preclude their mere examination—would, in the words of a recent federal appellate court, "freeze the status quo" and render existing racial disparities "an immutable quota." In sum, that court noted, any effort to bar consideration of racial disparities in policy design for the purpose of enhancing equal opportunity simply "has it backwards."[8]

DOJ's recommendation discourages responsible stewardship of federal funds. Examining data with careful attention to disparate impacts of all types is an essential tool not only for measuring *progress* toward lawful diversity, equity, and inclusion goals but also for identifying possible instances of unlawful *discrimination* against any group. Indeed, shutting down the use of disaggregated data is less likely to prevent unlawful discrimination than it is to lock in current inequities and mask future problems.[9]

[vii] This recommendation is the latest instance of the Administration shifting away from the use of disaggregated data. The 4/23/25 higher education accreditation EO similarly called on USED to "mandate that accreditors require member institutions to use data on program-level student outcomes to improve such outcomes, *without reference to race, ethnicity, or sex*" (emphasis added). That same day, President Trump issued two other EOs, about the disparate impact standard and school discipline policies, both of which raised concerns with the use of disaggregated data to identify and address discrimination.

[viii] See the second paragraph of endnote 9.

Additional Notes

- ***Admissions Data:*** On one hand, one of DOJ's "best practices" in the guidance is to stop using any disaggregated data to measure performance, and the President earlier this year made it his Administration's policy to completely reject the disparate impact standard used to root out hidden discrimination. On the other, via a new Presidential Memorandum issued on 8/7/25, the Administration will now examine *disaggregated data* to identify if college admissions programs are having a *disparate impact* on particular racial groups through "*hidden*" discrimination. The Administration has not, as of this writing, explained its contradictory approaches to the legitimacy of disaggregated data or the disparate impact theory.

- ***Title VII:*** Despite including Title VII, the primary federal law prohibiting discrimination in employment, among the civil rights laws covered by this guidance, DOJ fails to mention that Congress embedded the disparate impact theory of discrimination into Title VII itself in 1991.[10] Accordingly, employers with 15 or more employees must pay close attention to disaggregated data as part of their obligation under this federal law. (Note that in the next "tree" we discuss DOJ's other omission about Title VII.)

TREE #2—Deligitimizing Federal Court-Endorsed Diversity, Equity & Inclusion Interests

The DOJ guidance ignores what the Supreme Court said and did not say about a federally-funded institution's ability to legally pursue its interest in advancing the educational benefits of diversity. In its guidance about what it refers to as the "dangerous, demeaning, and immoral" practices taking place in the name of "DEI," DOJ is silent about the legitimate and lawful interests in diversity, equity, and inclusion that federal funding recipients may, and in some cases are obligated to, legally pursue. Even in *SFFA*, when the Court reversed course on whether the educational benefits of diversity are sufficiently "compelling" to legally justify considering a student's racial status in admissions, the Court did not outlaw diversity as a legitimate value or goal for federal funding recipients to pursue. To the contrary, it expressly characterized diversity-related interests as "commendable" and "plainly worthy" elements of an IHE's mission, which IHEs should continue to "define…as they see fit" within constitutional boundaries.[11] The ruling narrowed the means by which that diversity can be pursued, but it did not outlaw any such pursuit.

Despite all of this, a federal funding recipient reviewing DOJ's guidance is left with the strong impression that federal law treats the goal of advancing diversity—including but not limited to racial and ethnic diversity—as an illegitimate goal that should not be pursued. For example, in section IV.B.2, DOJ treats as "potentially unlawful" the following example of recruiting applicants via "Geographic or Institutional Targeting": "recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors." But decades of federal court decisions recognize that broadly inclusive policies and programs—even if they may include elements of targeting to reach a variety of populations—are lawful. In other words, institutions may legally engage in exactly this type of targeted outreach and recruitment activities to help build an inclusive candidate pool, which is distinct from decisions about who is interviewed or selected. The critical legal question regarding this topic, which DOJ completely omits in its example, is whether the outreach confers or withholds material benefits to any person based on their racial status.[12]

Additional Note

- ***Title VII:*** Another foundational aspect of Title VII that DOJ does not discuss is that the statute is an explicitly remedial statute. The Supreme Court has long held that an interest in remedying an employer's own actual or presumed discrimination (or its inadequate provision of equal employment opportunity) is legally sufficient to permit the use of some *race- and sex-conscious affirmative action* when necessary.[13] This omission is particularly problematic because DOJ's examples include many examples of "unlawful practices" related to employment including recruitment, hiring, promotion, etc. For example, in section IV.A.2, DOJ states that any prioritizing of "candidates from 'underrepresented groups'...where the preferred [groups] are determined on the basis of a protected characteristic like race" is unlawful. The guidance includes a passing reference to "very narrow exceptions" without clarifying for the field that one of those is actually a critical, longstanding foundation of Title VII's protections from discrimination in employment.

TREE #3—Deligitimizing Lawful Race-Neutral Means that Advance Diversity, Equity & Inclusion Goals

Decades of federal discrimination law affirm the legitimacy of pursuing mission-aligned, diversity-related goals through race-neutral means.[14] The Supreme Court's 2023 decision in *SFFA* did not address or alter those foundations.[15] Permissible criteria in the admissions context include, among others, authentic institutional interests in considering applicants' income, wealth, geography, and first-generation college-going.[16] Rather than affirm this body of well-settled law with guidance on how to abide by it, DOJ's guidance, examples, and recommended "best practices" about race-neutral criteria focus solely on "unlawful proxies" that are chosen "primarily" to "function as substitutes for explicit consideration of race, sex, or other protected characteristics" as part of an attempt to get around the *SFFA* ruling. Although the core point on using neutral criteria as proxies for those status considerations is accurate,[17] there are several problems with DOJ's legal analysis of this critical topic.

Contrary to the guidance's overall message, authentic race-neutral criteria are generally legal. Federal funding recipients, even including IHEs designing their admissions policies, can advance diversity, equity, and inclusion in many ways as part of their educational mission. This includes race-neutral criteria that are authentically aligned with the IHE's mission, pursued for their own sake, and not used as a proxy for race.[ix] Importantly, IHEs may use these criteria even if they are aware of—and even if they welcome—the fact that the criteria's inclusion might increase racial diversity.[18] Yet in its recommendation to "Scrutinize Neutral Criteria for Proxy Effects" (IV.E), DOJ seems to suggest to the field that authentically-selected, race-neutral criteria might become unlawful simply on the basis of the grantee discovering that the criteria are also correlated with race.

[ix] DOJ's recommendation to "Document Legitimate Rationales" (IV.E) states: "If using criteria in hiring, promotions, or selecting contracts that might correlate with protected characteristics, document clear, legitimate rationales unrelated to race, sex, or other protected characteristics. Ensure these rationales are consistently applied and are demonstrably related to legitimate, nondiscriminatory institutional objectives." This advice closely tracks parts of our *Wise Courage* framework.

Further, authentic race-neutral criteria derived from experiences and expertise, including where race-related, are permissible considerations in selection decisions. According to *SFFA*, selection processes in admissions decisions may incorporate questions about a person's qualities or competencies (i.e., skills, knowledge, character, inspirations, and aspirations) derived from their lived experiences. With the Supreme Court's approval, those experiences can be drawn from any part of a person's life, *even if related to race or ethnicity*.[19] Contrary to DOJ's suggestion, therefore, there is nothing unlawful about the use of student admissions essays (and likely similar selection processes) that focus on such experience-based competencies and interests, simply because some of the answers applicants supply involve race-related experiences. The same analysis should extend to other selection criteria mischaracterized by DOJ in its section IV.B.2 examples such as "cultural competence," "lived experience," "cross-cultural skills," "[how] cultural background informs their teaching," "obstacles they have overcome," and "diversity statement[s]."

The guidance accurately warns that some uses of these criteria can be inauthentic and thus unlawful, as the *SFFA* decision explained.[20] But DOJ's listing of all of these practices as "potentially unlawful proxies" without a full explanation of *SFFA*'s discussion of this very issue is, at best, misleading. In sum, guidance that fairly describes the relevant law would have elevated that these approaches are legal so long as the competencies and interests gained from a candidate's experiences are being valued individually rather than simply assumed to be true based on the candidate's racial or ethnic status.[21]

DOJ further mischaracterizes the state of the law in two ways. First, in its attack on the use of race-neutral means, DOJ discounts the role of racial impact in the well-settled elements of federal legal nondiscrimination standards, with the apparent (and false) premise that intent alone can be a sufficient basis for finding discrimination. But a neutral policy results in unlawful discrimination only where evidence indicates discriminatory intent *and* disparate impact. DOJ sometimes suggests a different version of the law, such as in section IV.B, where DOJ asserts that neutral criteria can "become legally problematic" if they are "implemented *with the intent* to advantage or disadvantage individuals based on protected characteristics" (emphasis added) without also referencing the need for an impact inquiry. Federal courts have consistently ruled that mere impact, without intent, is never enough to find discrimination, just as intent, without impact, is not enough either.[22] (Advocates in recent challenges to K-12 admissions policies attempted to eviscerate or eliminate the impact analysis in present law as a way to successfully assert their positions in reverse discrimination in cases. Those efforts were unsuccessful.[23])

Second, throughout the guidance, DOJ communicates, as if it is settled law, that race-neutral criteria cannot be relied upon if they are selected with so-called mixed motives for pursuing them.[x] Existing law, which is evolving, does not support such a blanket position. To the contrary, any supplemental interest in racial diversity should not render the selection of the race-neutral criterion unlawful where an interest in that criterion itself itis the principal motivating factor in the policy decision. At a minimum, existing law strongly suggests that mixed motives situations are permissible under federal law when: (i) the race-neutral criteria are authentic priorities that would be pursued regardless of racial diversity interests, (ii) the relevant policy is designed to achieve that priority, and (iii) its impact would be materially the same whether or not a racial interest was also involved.[24]

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[x] Our use of the "mixed motives" term refers to a situation where an institution authentically prioritizes a race-neutral criterion for its own sake (e.g., socio-economic or geographical diversity) with awareness of the fact that such criteria may enhance diversity aims—or with a desire to also enhance racial diversity aims.

* * *

Legal nuances aside, federal funding recipients will likely interpret this section of the guidance as indicating that many uses of race-neutral criteria are unlawful because they are also correlated with race. This is a particularly problematic mischaracterization of the law that educational leaders and institutions must not accept at face value. The reality is that DOJ's examples are only (potentially) unlawful if the assumptions embedded into the hypotheticals are true, namely that the criteria are being used as fig leaves to corruptly cover up intentional racial discrimination.[25] For example, in one of its "best practice" recommendations, DOJ states the following about commonly used (and generally lawful) race-neutral criteria: "Criteria like socioeconomic status, first-generation status, or geographic diversity must not be used *if* selected to prioritize individuals based on racial, sex-based, or other protected characteristics" (emphasis added). This is a true statement. But it also will likely have the effect of chilling the legal and valuable use of the criteria even in contexts where the "if selected…" part does *not* apply. The final "tree" delves further into this troublesome aspect of many of the DOJ's examples.

TREE #4—Misguiding the Field Through Misleading Examples

Many of DOJ's examples are likely to discourage lawful practices, not just those that may raise legal concerns. The examples are misleading most often because they do not make clear that the "unlawful" or "potentially unlawful" practice is only unlawful because of one aspect of the hypothetical or only if it is accompanied by a separate, fact-specific legal determination. In other words, the same hypothetical practice with a small tweak would be lawful. But DOJ's guidance does not *guide* the field to understanding how pivotal that aspect or legal determination is to the sustainability of the practice in question. Nor do the examples include details on how to undertake the policy or practice lawfully.

For example, in section IV.D, DOJ provides the following example of "Trainings That Promote Discrimination Based on Protected Characteristics":

> *A federally funded school district requires teachers to complete a DEI training that includes statements stereotyping individuals based on protected characteristics-such as "all white people are inherently privileged," "toxic masculinity," etc. Such trainings may violate Title VI or Title VII if they create a hostile environment or impose penalties for dissent in ways that result in discriminatory treatment.*

Although the guidance acknowledges that a cognizable claim requires a legal determination that the conduct in question "[c]reates an objectively hostile environment through severe or pervasive" conduct, this example gives the impression that even a couple of statements in a single training "may" violate federal law. DOJ does not help the reader understand that staff trainings are generally lawful, even ones that may speak about America's history of racial inequities, the concept of white privilege, techniques to reduce bias, or the impact of toxic masculinity. Like anything, of course, trainings about these topics can be poorly or even unlawfully designed or implemented. But DOJ's example encourages federal funding recipients to simply avoid such trainings altogether without providing specific guidance to the field about how to conduct them without creating a hostile environment for participants.[xi]

[xi] It is also important to note that it is permissible to focus on issues of race, ethnicity, or other protected characteristics when training employees or supporting other programming (e.g., college courses or centers, high

Similarly, in section IV.B.2., DOJ flags as potentially unlawful a university that "requires job applicants to demonstrate 'cultural competence'"...in ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications." The hypothetical is problematic because of the ambiguous, undefined portion that reads, "in ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications." As a result, readers may assume that asking applicants about cultural competence is an unlawful or at best legally risky thing to do. Yet as discussed above in "Tree #3," if institutions authentically value "cultural competence," then they may legally include it as part of their selection criteria for all candidates.

Because DOJ fails to clearly define and illustrate the "can do" and the "can't do" activities in these and several other examples, the guidance runs a high risk of chilling otherwise lawful practices. DOJ takes this same misleading approach to crafting additional examples, including the ones below and others mentioned throughout this analysis, which are all generally lawful unless designed in particularly problematic ways:[xii]

- **"Proxies" (IV.B.2) and "Focus on Skills and Qualifications" (IV.E)**: As discussed in "Tree 3" above, all of DOJ's examples of "unlawful proxies" can be lawful, including "cultural competence," "lived experience," "cross-cultural skills," "[how] cultural background informs their teaching," "obstacles they have overcome," and "diversity statement[s]." Similarly, legitimate race-neutral criteria such as "socioeconomic status, first-generation status, or geographic diversity" are presented in "best practices" as things to *avoid*, but they can be (and often are) used lawfully. Distinguishing lawful from unlawful depends on the authenticity of the race-neutral priority and the design of the policy or practice.
- **"Access to Facilities or Resources Based on Race or Ethnicity" (IV.A.2) and "Segregation in Facilities or Resources" (IV.C.2)**: These are unlawful only if racial status is a factor in who can participate (in DOJ's hypothetical, access is described as "exclusively" based on race) or, as DOJ warns, the facilities or resources in question meet the legal definition of a "hostile environment." Facilities or resources, such as study spaces, events, student groups, or other programs, that have a race-related theme or focus can be lawful if authentically open to all and if they do not create a hostile environment.
- **"Race-Based Training Sessions" (IV.C.2) and "Implicit Segregation Through Program Eligibility" (IV.C.2)**: As discussed above, trainings can be designed or implemented lawfully or unlawfully. It is possible to create race-focused small groups for training or design training sessions with a

school clubs, etc.). Offerings must be open to all—and of course avoid creating an objectively hostile environment—but the content focus of educational programming is protected by the First Amendment and its "special concern" for academic freedom. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose a straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation…. Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

[xii] The "Race-Based 'Diverse Slate' Policies in Hiring" and "Sex-Based Selection for Contracts" examples (IV.C.4) are beyond the scope of this analysis. Consult legal counsel to review compliance with federal laws in these areas.

particular group in mind, so long as employees are not excluded from the training opportunities on the basis of their racial status.[xiii]

Additional Notes

- ***Gender-Inclusive Facilities Policies:*** In the course of critiquing race-based "segregation" in section IV.C, DOJ points out that "sex-separate athletic competitions and intimate spaces" can be required by law. Despite a broad initial statement, the guidance focuses only on transgender women and the "necessary" steps that must be taken to prohibit their access to sports teams and facilities aligned with their gender. Like with the "mixed motives" scenario mentioned above, DOJ misrepresents as settled a legal question that the Supreme Court has not answered, and DOJ's position is at odds with at least two U.S. Circuit Courts of Appeals.[26]

- ***Responsibility for Third Parties:*** One of DOJ's recommendations is to "ensure federal funds do not support third-party programs that discriminate" in part by "requiring third parties to comply with federal law, and specify that federal funds cannot be used for programs that discriminate based on protected characteristics." This is mostly accurate, but the guidance fails to clarify for the field that it relates primarily to third parties working with direct recipients of federal financial assistance, where a direct recipient sub-contracts with a third party to perform part of their federally funded work under the award. The mere fact that an institution or school is a federal funding recipient does not subject to federal nondiscrimination law every third party the institution engages with (e.g., as part of outreach to build an inclusive applicant pool or for purchases of general goods and services). The Administration cannot lawfully unilaterally change award terms or related regulations.[27]

[xiii] The "Race-Based Training Sessions" example is one of the only places where DOJ provides a positive counterexample of what *is* lawful. But even in doing so, DOJ still leaves the reader with the wrong impression. As a counter to a "Black Faculty Caucus" or "White Ally Group" that "prohibit[s] individuals of other races from participating," DOJ offers a hypothetical "Faculty Academic Support Network" that is "open to all faculty interested" in the network's focus and that "avoids reliance on protected characteristics." The reason this counterexample is misleading is that DOJ's "Support Network" changes two variables from the original two examples: (1) the focus of the group no longer is related to race, and (2) participation is no longer exclusively based on race. This leaves the reader unsure whether both changes are required for the practice to be lawful or, if not, which of the two is the key aspect to change. As discussed above, the lawfulness of groups or training sessions like these turns on the second variable—whether participation is authentically open to all. Programming that has a subject-matter focused on issues related to race is permissible under current law.

CONCLUSION

In many consequential respects, DOJ's guidance is at odds with federal law as reflected in rulings by the Supreme Court and other federal courts. Further, with respect to its chosen focus on "DEI" programs, the guidance fails to provide the field with clarity around what is permissible under the law, which is distinct from the Administration's policy preferences. Ahistorical, inaccurate, and misleading—DOJ's guidance will most likely chill lawful activities designed to create equal opportunity for all.

Giving due attention to the accurate propositions in the guidance without being swayed by the many others that are plainly wrong or that mischaracterize undecided questions as settled law is a critical task for education leaders and lawyers. In this period of federal uncertainty and overreach, they must act with wise courage: Understand these distinctions. Pause where necessary to chart a path forward or to identify the best legal way to push back within an institution's or school's context and goals. But do not substitute the Administration's anti-"DEI" policy preferences for the actual law of the land.

ENDNOTES

[1] DOJ describes the scope of the guidance as "clarif[ying] the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices." It goes on to say that those practices "includ[e] those labeled as Diversity, Equity, and Inclusion ('DEI') programs" and, in a footnote, flags other names for such programs that include additional title words such as "Accessibility" or "Belonging." Despite the broad introductory language about "discriminatory practices," DOJ focuses its examples and recommendations exclusively on the context of "DEI" programs. Meanwhile, DOJ includes no definitions of "DEI," "DEI programs," or any of the individual concepts comprising the acronyms DOJ targets in this guidance (e.g., DEI, DEIA, DEIB). This reflects an ongoing pattern that has contributed to numerous federal court actions invalidating the Administration's anti-"DEI" guidance because of its failure to clearly define prohibited conduct (among other reasons). See endnote 4, below, for more.

[2] Although this analysis focuses primarily on *substantive* issues of which policies and practices comply with civil rights laws, EducationCounsel will soon publish a deeper examination of the Administration's approach to due process in its enforcement actions. In the meantime, it is worth noting some of the foundational *procedural* safeguards that the Administration appears to be violating: Federal nondiscrimination statutes like Title VI (and their legally binding regulations) require both specific facts to support credible compliance questions and significant due process for recipients of federal funds to resolve them. Even if a violation is found and not voluntarily resolved, Title VI's language limits any loss of federal funding to the specific program "or part thereof" where the violation is found to have occurred. It is unlawful to cut federal research funding, for example, without both a specific finding of a violation of Title VI (or other covered law) and a specific finding that the research project or projects whose funding is being cut was involved in the violation. Further, funding cuts are authorized only after the opportunity for an administrative hearing and appeal process, as well as provision of notice and a report to Congress. A funding recipient may also challenge any finding of a violation of law in federal court. 42 U.S.C. § 2000d-1; *see, e.g.*, 34 C.F.R. §§ 100.6(a), 100.7(d)(2), 100.8(c)-100.11. Even when the federal government satisfies the procedural requirements and finds a specific violation, after voluntary resolution fails, the "pinpoint" provision of the Civil Rights Restoration Act of 1987, which covers Title VI, limits the effect of any loss of federal funds to the program or part of the program where the specific violation occurred. *See Bd. of Pub. Instruction of Taylor Cnty., Fla. v. Finch*, 414 F.2d 1068, 1075 (5th Cir. 1969) ("The procedural limitations placed on the exercise of such power were designed to insure that termination would be 'pinpoint(ed)…to the situation where discriminatory practices prevail.'"). Our forthcoming analysis will identify additional recent violations of due process and other laws.

[3] On 5/19/25, DOJ announced the establishment of a Civil Rights Fraud Initiative, "which will utilize the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws." Attorney General Bondi explained the initiative's focus in the press release: "Institutions that take federal money only to allow anti-Semitism and *promote divisive DEI policies* are putting their access to federal funds at risk. This Department of Justice will not tolerate these *violations of civil rights*…" (emphasis added).

[4] Appeals are pending in these cases, so final decisions have not yet been rendered; but, at this point, there is a notable, near-universal agreement among federal judges considering the *substance* of challenges to the Administration's anti-"DEI" guidance and actions. Overall, in the context of preliminary injunctive relief sought in these cases (where the merits of plaintiff's claims are initially evaluated), courts have repeatedly found that: (i) the Administration fails to define the asserted prohibited "DEI" conduct with sufficient clarity, in violation of due process guarantees; (ii) the Administration's anti-"DEI" efforts likely violate First Amendment free expression guarantees that prohibit suppression of legitimate expression and viewpoints; and/or (iii) basic procedural rules have not been followed under the Administrative Procedures Act. *See Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 291-92 (D. Md. 2025), *opinion clarified*, 769 F. Supp. 3d 465 (D. Md. 2025) (ruling on anti-"DEI" EOs; appellate court allows enforcement of EOs pending merits ruling on appeal); *Nat'l Ass'n for Advancement of Colored People v. U.S. Dep't of Educ.,* 2025 WL 1196212, at *5 (D.D.C.) (ruling on requiring "DEI"-related certification of compliance; distinguishing written agency guidance as not subject to rulemaking requirements); *Am. Fed'n of Tchr. v.*

U.S. Dep't of Educ., 1:25-cv-00628 (D. Md.) (ruling on Dear Colleague Letter and certification requirement); *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, 2025 WL 1188160, at *29 (D.N.H. Apr. 24, 2025) (ruling on Dear Colleague Letter); *Am. Pub. Health Ass'n v. Nat'l Institutes of Health*, 2025 WL 1822487, at *21 (D. Mass. July 2, 2025) (ruling on federal funding denial based on Administration's anti-"DEI" and LGBTQ policy); *but see Nat'l Urban League v. Trump*, 2025 WL 1275613, at *3-4 (D.D.C.) (denying injunctive relief based on standing and because enforcement of EOs not challenged).

[5] For example, the purpose of Title I of the Every Student Succeeds Act (ESSA), the major federal law for K-12 education, is "to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." 20 U.S.C. § 6301. Other ESSA provisions related to statewide accountability systems and improving the lowest-performing schools depend on states and districts collecting and acting upon data disaggregated by race and other characteristics. The more recently-enacted and bipartisan CHIPS and Science Act of 2022, Public Law No. 117-167 (Aug. 9, 2022), mandates and funds, among other actions, the pursuit of diversity-, equity-, and inclusion-advancing efforts to increase the participation of minorities, women, people in rural communities, and other underrepresented groups in science education and the science workforce (both academic and business sectors), as well as a Chief Diversity Officer at NSF, to address the national imperative for a strong American computer chips industry.

[6] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

[7] *Wise Courage* and two of our prior publications provide more detailed articulations of the relevant post-*SFFA* legal parameters. *See* *Preliminary Guidance Regarding the U.S. Supreme Court's Decision in* SFFA v. Harvard (EducationCounsel, 2023); Keith and Coleman, *Navigating the Post-*SFFA *Landscape: Advancing Equity-Minded, Law-Attentive Priority Actions in Graduate, Undergraduate and Professional Higher Education* (EducationCounsel, 2024).

[8] *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for the City of Boston*, 89 F.4th 46, 58 (1st Cir. 2023), *cert. denied*, 145 S. Ct. 15 (2024); *see also Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 881 (4th Cir. 2023), *cert. denied*, 2024 WL 674659.

[9] Note also that education leaders should pay close attention to developments in the disparate impact standard for identifying discrimination under Title VI and other applicable laws. This longstanding standard prohibits policies and practices that have a significant, unjustified adverse impact based on race. In an EO issued on 4/23/25, "Restoring Equality of Opportunity and Meritocracy," President Trump asserted a new federal policy to "eliminate disparate-impact liability in all contexts to the maximum degree possible," taking the position that this is "to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." The EO directs the Attorney General to "initiate appropriate action to repeal or amend implementing regulations for Title VI of the Civil Rights Act of 1964 for all agencies to the extent they contemplate disparate-impact liability" and to end federal civil rights enforcement of such liability. (Note that Title VII includes a disparate impact standard in statute.) The EO likely represents a consequential development in antidiscrimination law that will ultimately be adjudicated in federal courts.

Whatever that outcome may be, education institutions and systems currently have the right and responsibility under federal law to identify and eliminate both intentional discrimination that may be revealed in part by evidence of impact and disparate impact discrimination that is avoidable and should be eliminated to assure fair access, opportunity, and experience for everyone in higher education. *See, e.g.*, 42 U.S.C. § 2000e–2(a) and 2(k)(1)(A) (Title VII disparate treatment and impact provisions); *Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009) (noting that "Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')" if the practice is not a business necessity or a less adversely impactful alternative is available but not used); 42 U.S.C. § 2000d (Title VI dictates: "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."); 42 U.S.C. § 2000d-1 (Title VI expressly authorizing and

directing agencies to promulgate rules "consistent with the achievement of the objectives of the statute authorizing the financial assistance"); 34 CFR § 100.3(b) (USED Title VI regulations prohibiting discrimination "directly" or by "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin"); *Alexander v. Sandoval*, 532 U.S. 275, 280-82, 281 n.1 (2001) (limiting a private right of action under Title VI to intentional discrimination but not invalidating disparate impact regulations).

[10] 42 U.S.C. § 2000e–2(k)(1)(A); *see also* What Is Disparate-Impact Discrimination? (Library of Congress, Aug. 11, 2025).

[11] *Students for Fair Admissions*, 600 U.S. at 214-215, 217. In addition to remedial interests that can justify the consideration of racial status, the *SFFA* majority also recognized that other legally compelling interests might exist, including higher education's "potentially distinct interests that military academies may present." *Id*. at 213, n 4.

[12] "Inclusive" recruitment activities, by definition, involve institutional efforts to expand the pool of qualified applicants but do not do so in ways that exclude individuals from eligibility or selection for the actual program or benefit. Absent such a denial of material educational benefits to some students and not others, the presence of race- and ethnicity consciousness (in program intent or design) has tended not to subject the program to strict scrutiny review. *See, e.g., Raso v. Lago*, 958 F. Supp. 686, 703 (D. Mass. 1997), *aff'd* 135 F.3d 11 (1st Cir. 1998), *cert. denied* 525 U.S. 811 (1998)); *see also Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25 (D.D.C. 1999); *Honadle v. Univ. of Vt. & State Agric. Coll.*, 56 F. Supp. 2d 419, 428-29 (D. Vt. 1999); *Shuford v. Ala. State Bd. of Educ.*, 897 F. Supp. 1535 (M.D. Ala. 1995). Note that, by contrast, federal courts that have addressed governmental rules regarding recruitment and outreach have tended to be more exacting in their analysis. *See MD/DC/DE Broads. Ass'n v. F.C.C.*, 236 F.3d 13, 20 (D.C. Cir. 2001); *Bowen Eng'g Corp. v. Vill. of Chammalion, Ill.*, 2003 WL 21525254, at *9 (N.D. Ill. July 2, 2003).

Potentially relevant factors in the analysis of these practices include the following:

- The extent to which recruitment or outreach practices are balanced—that is, if they include a focus on certain populations, there are corresponding practices that reach groups of individuals beyond the race, ethnicity, or gender focus of the particular practice.
- The extent to which recruitment and outreach efforts (including through the establishment of relationships with other institutions, participating in forums, and contacting professional organizations) do not "confer a benefit or impose a burden" on students based on race, ethnicity, or gender—but merely extend opportunities more broadly.
- The extent to which recruitment and outreach efforts merely articulate diversity-related goals, without more (i.e., without quotas).

See Burgoyne et al., *Handbook on Diversity and the Law: Navigating a Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education* (American Association for the Advancement of Science, 2010) at p. 65.

[13] Unless there is evidence of explicit intentional discrimination, remedial conditions must be evidenced by Court, statutory, and regulatory disparity measures that compare the percentage representation of a race or sex in an employer's relevant workforce with the same group's percentage representation in the available, qualified pool from which the employer could recruit for the position. (Generally, the measures are two or more standard deviations difference for presumed discrimination and something less than that but still substantial for inadequate equal employment opportunity, which the Supreme Court has called a "manifest imbalance." *See, e.g.*, *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979); *Johnson v. Transp. Agency*, 480 U.S. 616, 630-34 (1987).) Note that the comparison is not to general population or student body demographics, and the Court has emphasized the importance of avoiding undue burdens on those not benefiting from the affirmative action. *See, e.g.*, *id.* at 635-42.

[14] Justice Kavanaugh stated in his *SFFA* concurrence: "To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil

rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'" 600 U.S. at 317 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment)). Furthermore, the Court in multiple cases has embraced authentic mission-advancing neutral strategies that do not consider an individual student's racial status when conferring benefits. *See Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 298 (2013); *Fisher v. Univ. of Tex.*, 579 U.S. 365, 391 (2016); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (Kennedy, J., concurring). The Court in *SFFA* did not overrule *Grutter*, as the plaintiff had requested. Its ruling focused on what interests are legally compelling and what the design requirements are for narrow tailoring of the means used to achieve compelling interests—two requirements that must be met under any strict legal scrutiny to justify considering an individual's racial status when conferring material opportunities and benefits.

[15] In fact, when consideration of racial status in college admissions was a lawful practice before the 2023 *SFFA* decision, federal law *required* that IHEs examine and pursue race-neutral strategies like consideration of a student's income or first-generation status before considering their racial status. Notably, three Justices in the *SFFA* majority opinion concurred separately, each specifically recognizing the legal viability of achieving diversity goals through race-neutral means, including Justice Thomas, who recognized that universities may, as part of the admissions process, "surely…take…into account" the fact that an applicant "has less financial means." 600 U.S. at 280 (Thomas, J., concurring); *see also id.* at 299-300 (Gorsuch, J., with Thomas, J., concurring) (recognizing that Harvard could achieve "significant racial diversity" with policies focused on "socioeconomically disadvantaged applicants" and by eliminating preferences for "children of donors, alumni, and faculty"); *id.* at 317 (Kavanaugh, J., concurring) (observing that universities can "of course, act to undo the effects of past discrimination in many permissible ways that do not involve classifications by race").

[16] *See, e.g.*, Coleman, Keith and Webb, *The Playbook: Understanding the Role of Race Neutral Strategies in Advancing Higher Education Diversity Goals* (College Board, 2d ed., 2019) (detailing the legal landscape regarding race-neutral strategies as a foundation for a discussion of relevant criteria and models, including socioeconomic status, geography, first generation status, and experience associated with race).

[17] *Id.* at 9, 23 (emphasizing the importance of advancing authentic mission interests as part of policy and program design and citing to a 2003 USED OCR Case Resolution concluding that consideration of socioeconomic status by a school district was a legitimate educational goal and not an unlawful proxy, notwithstanding the fact that socioeconomic status correlated with race, which "was not absent from the district's consideration").

[18] *See Fisher*, 570 U.S. at 311-12.

[19] *Students for Fair Admissions*, 600 U.S. at 230-31 ("[N]othing 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…. A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university...the student must be treated based on his or her experiences as an individual—not on the basis of race.").

[20] The Supreme Court in *SFFA* distinguished, on the one hand, the *permissible* consideration of the skills, knowledge, and character qualities that an applicant may acquire through their "experiences as an individual" that may tie to experiences of "discrimination, inspiration, or otherwise" from, on the other hand, the *impermissible* consideration of an applicant "on the basis of [their] race." *Id.* In other words, according to the Court, "the touchstone of an individual's identity [must be with respect to] challenges bested, skills built, or lessons learned"—not the color of their skin. This critical distinction reinforces the imperative of not stereotyping or making assumptions about an individual based on racial status. Judgments must be made based on an applicant's specific lived experience. *Id.* at 231.

[21] *Id.*

[22] *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 244-52 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-68 (1977); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-67 (1979); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273-74 (1979).

[23] See endnote 8 above.

[24] *See generally Arlington Heights*, 429 U.S. 252 (1977); *Feeney*, 442 U.S. 256 (1979); Coleman, Palmer and Winnick, *Race-Neutral Policies in Higher Education: From Theory to Action* (College Board, 2008) (recognizing three standards that have been adopted by federal authorities: a "but for" standard and a "predominant factor" standard adopted by federal courts, and a "deliberate use" standard applied by USED's OCR).

[25] *Students for Fair Admissions*, 600 U.S. at 230-31 ("[U]niversities may not simply establish through application essays or other means the regime we hold unlawful today.").

[26] In *Bostock v. Clayton Cnty., Ga.*, 590 U.S. 644, 660 (2020), the Supreme Court held that discrimination because a person is "homosexual or transgender" is "sex" discrimination under Title VII, but the Court has not yet answered the same question as it relates to "sex-segregated bathrooms, locker rooms, and dress codes" under Title VII or generally for Title IX. The Courts of Appeals that have ruled on the Title IX question are split, with two Circuits ruling that Title IX entitles transgender students to access facilities that align with their gender, *see A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021), and one finding the opposite, *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022) (en banc).

[27] *See* 2 CFR 200.300-301; 2 CFR 200.328-332 (outlining comprehensive obligations of recipients of federal funding and their sub-recipients in complying with terms of federal awards and anti-discrimination laws). Federal regulations distinguish between obligations of sub-recipients and other subcontractors. Sub-recipients are essentially regulated as extensions of direct recipients of federal funding. Sub-recipients contrast significantly with other third party subcontractors. *See* 2 CFR 200.331 (differentiating between subrecipients and contractors). Third parties deemed sub-recipients are subject to clear and comprehensive compliance requirements of the award to the direct federal recipient, while other types of subcontractors are not. The requirements of other subcontractors whose work is less affiliated with federal funding or federally funded programs remain less direct.