

# HIGHER EDUCATION INFORMATION MEMO

FEBRUARY 3, 2023

## OCR Issues New Fact Sheet on Diversity and Inclusion Activities Under Title VI of the Civil Rights Act of 1964

On Jan. 31, 2023, the U.S. Department of Education's Office for Civil Rights (OCR) issued a [new fact sheet](#) interpreting Title VI of the Civil Rights Act of 1964, which prohibits discrimination in federally assisted programs and activities based upon race, color or national origin. OCR is charged with enforcement of Title VI in educational settings.<sup>1</sup>

The fact sheet emphasizes that a school or institution of higher education (IHE) violates Title VI if it intentionally treats people differently because of their race or creates or is responsible for a racially hostile environment. OCR explains that a hostile environment exists where there is conduct that is sufficiently severe, pervasive or persistent so as to impede an individual's ability to benefit from educational services or activities. Under this standard, educational institutions must effectively respond to incidents of race-based harassment, for example.

On the other hand, activities that are intended to "further objectives of diversity, equity, accessibility, and inclusion are not generally or categorically prohibited under Title VI," according to OCR. Indeed, in support of its position, OCR cites federal legislation that favors meaningful interaction among students of different racial and ethnic backgrounds at an early age and notes that President Biden recently pronounced that the nation's diversity, equity, accessibility and inclusion are among its greatest strengths.

Determining whether an activity or program of a school or IHE results in a prohibited activity under Title VI warrants a review of the totality of the circumstances. OCR specifies a number of examples which are not categorically prohibited under Title VI nor create a hostile environment based on race. OCR gives the following examples of permissible activities:

- diversity, equity and inclusion training;
- instruction in or training on the impact of racism or systemic racism;
- cultural competency training or other nondiscrimination trainings;
- efforts to assess or improve school climate, including through creation of student, staff, and/or parent teams, use of community focus groups or use of climate surveys;
- student assemblies or programs focused on antiharassment or antibullying;
- investigations of, and issuance of reports concerning the causes of, racial disparities within a school; or
- use of specific words in school policies, programs, or activities, such as equity, discrimination, inclusion, diversity, systemic racism or similar terms.

<sup>1</sup> This is the second fact sheet that OCR issued in January 2023 on Title VI. The [first fact sheet](#) focused on protection of students in religious groups that share common ancestry or characteristics with ethnic groups.

OCR further states that diversity, equity and inclusion activities, such as the examples cited above, may actually assist schools in resolving OCR investigations in order to remedy harassing behaviors or differential treatment of students by fostering “a more positive and inclusive school climate.”

As illustrated by this fact sheet, OCR’s position on Title VI in educational programs and activities stands in stark contrast to recent efforts in some states and localities to dismantle diversity, equity, and inclusion programming. For instance, Governor DeSantis of Florida just announced a proposal to overhaul the state’s higher education system that would eliminate diversity and equity programs<sup>2</sup> and there is a movement across the country in many states and localities to limit the ability to teach students about racism<sup>3</sup> through measures rejecting a certain conception of the academic and legal framework known as “Critical Race Theory.”<sup>4</sup>

Given the rapidly changing landscape at the state and local levels impacting curricula and programming around race coupled with OCR’s pronouncement that most diversity and inclusion activities are not facially violative of Title VI, educational institutions must be very cautious. Rolling out new curricula, planning new activities, developing policy and even issuing press releases in this area can require navigating an increasingly fraught legal and policy landscape. Educational leaders are encouraged to seek legal counsel on virtually all new and existing diversity, equity, and inclusion efforts they undertake.

If you have any questions about OCR’s fact sheet, contact [Sandra Casey](#), [Seth Gilbertson](#), [Lisa Feldman](#), any attorney in Bond’s [higher education practice](#) or the Bond attorney with whom you are regularly in contact.

<sup>2</sup> *DeSantis Takes On the Education Establishment, and Builds His Brand*, New York Times, January 31, 2023

<sup>3</sup> UCLA CRT Forward Tracking Project, <https://newsroom.ucla.edu/releases/ucla-law-launches-critical-race-theory-forward-project>

<sup>4</sup> <https://www.naacpldf.org/critical-race-theory-faq>

