

What Are the Answers You Need about the Department of Education's FAQs and Dear Colleague Letter?

By Monica H. Khetarpal & Chloe C. Carpentier

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Transcript

INTRO

The Department of Education has rolled out guidance on how it plans to enforce President Trump's recent EOs regarding "unlawful DEI." Although the guidance provides education institutions with some information regarding how to comply, many questions remain unanswered.

On this episode of We get work®, we discuss the most common issues raised in the new DOE FAQ document and Dear Colleague Letter and explain what proactive actions higher education institutions can take right now and why.

Our hosts today are co-leader of our Higher Education group Monica Khetarpal, principal in Jackson Lewis' Chicago office and Chloe Carpentier, associate in the firm's Cincinnati office and member of the group.

Monica and Chloe, the question on everyone's mind today is: what do employers and administrators in higher education institutions need to know to comply with new DOE guidance, and how does that impact my organization?

CONTENT

Monica H. Khetarpal

Principal, Chicago

Welcome everybody to the next installment of Jackson Lewis' higher education podcast series. In this one, we are going to talk about the FAQs, the Frequently Asked Questions, that the Department of Labor issued a few days ago, which followed up with what we call the 'Valentine's Day Dear Colleague Letter' that came out earlier in February.

My name is Monica Khetarpal. I am a principal in Jackson-Lewis' Chicago office, and I also serve as co-chair of our Higher Education group. With me is Chloe, who I will let introduce herself as well.

Chloe C. Carpentier

Associate, Cincinnati

Hi, my name is Chloe Carpentier, and I'm an associate in Jackson Lewis' Cincinnati office. I am a member of the Higher Education group.

Khetarpal

Chloe, I hear you have a bunch of questions for me, and I'm really hoping I'm able to answer them. The information's coming out fast and furious.

Carpentier

I am hoping to keep you as busy as this administration is keeping us. Monica, could you just tell us a little bit about the Dear Colleague Letter that came out on Valentine's Day?

Khetarpal

The Dear Colleague Letter focused on Title VI, which prohibits race, color and national origin discrimination for institutions receiving certain types of federal funding. So, it didn't focus on the gender identity issues that we had previously seen coming out of the Administration. It mentioned a whole variety of things that have to do with higher ed, like admissions, financial aid, scholarships, prizes, discipline, housing and graduation ceremonies. Then, on the employment side, hiring, training, promotion, et cetera. It talked about programs that the administration considers what they call 'smuggling in racial stereotypes' and a number of specific practices that they are deeming to be 'unlawful DEI' in violation of Title VI. That was really where the focus was.

Carpentier

Was there any concern from higher education institutions, in general, when this letter came out? What were the thoughts and concerns about the letter?

Khetarpal

The letter said that additional guidance would be coming out. It also suggested that certain enforcement actions may be taken within approximately 14 days, so that brought us to February 28th or March 1st. This FAQ sheet is one of the things that came out as a result. So, a lot of schools were taking stock of where they stand on DEI issues, generally across both the employment and student sides, to see if they were compliant and that their practices aligned with applicable law.

Carpentier

Was, ultimately, the FAQ that came out on March 1st helpful?

Khetarpal

Yes, I'd say so. This isn't new. The first Trump administration actually issued FAQs on occasion as well. It was helpful because there did seem to be a little bit of tension between the law in some respects and the Dear Colleague Letter. This definitely offered a little bit more information there.

Carpentier

In the FAQ, did you see any themes? Was there anything that really stood out to you?

Khetarpal

There are a couple of things, and they do go deeper than in the Dear Colleague Letter, so that was helpful. As in all things legal, there are still plenty of gray areas. That's why we have jobs, right, Chloe?

One thing that struck us, which is not really surprising, is that there is a theme that everything is very case-specific. The Department is really going to look at each individual instance, the facts of each individual program, policy or situation, and make a determination as to whether Title VI was violated under those circumstances.

There were certain things that were definitely unlawful, and this is pulled from the language of the FAQ. Some things that they consider segregation---different housing, programs or graduation ceremonies where people are separated out even voluntarily by race or national origin. Then, there were things they called 'veiled discriminatory practices.' Finally, there was definitely an emphasis on First Amendment speech issues.

Carpentier

It sounds to me like there is some stuff in there that has been the standard for a long time and then some new stuff.

Khetarpal

Yes, that's fair.

Carpentier

With that being said, something that's new after the *Students for Fair Admissions v. Harvard* decision is what the FAQ is calling the 'essay loophole.' Could you talk to me about that?

Khetarpal

It is not really surprising that they addressed this in the FAQs because there did seem to be some tension between the *Students for Fair Admissions* decision and the Dear Colleague Letter. *Students for Fair Admissions* said, "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." That's what's called the essay loophole, according to the FAQ. Then, on the other hand, the Dear Colleague Letter seemed a little critical of using

essays. It said, “a school may not use students' personal essays, writing samples, or participation in extracurriculars or other cues as a means of determining or predicting a student's race and favoring or disfavoring such students.”

On the one hand, you have *Students for Fair Admissions* saying that maybe you should consider essays. Then, the Dear Colleague Letter says, on a very surface level, no to the essays. So, which one is it? Obviously, that was an oversimplification, but there are some gray areas.

The FAQ says that you can't craft essay prompts in a way that requires applicants to disclose their race. Also, you can't hold interviews just to visually determine an applicant's race. Those are pretty direct ways of using those things as a tool to make a decision based on race, which is unlawful. The FAQ then goes on to say, “schools can credit what is unique about the individual in overcoming adversity or hardship, but never the person's race.” So, there's still some gray area left here. What if an applicant's race is fundamental to what makes them unique? What if their race or national origin is the adversity or hardship they had to overcome? So, these are gray areas, which means it's still going to be a fact-specific inquiry.

Carpentier

Moving on from admissions because there was a lot in this FAQ. Could you touch on any regulations or any guidance on how teachers are conducting classrooms and what they can and can't teach? Did it touch on that at all?

Khetarpal

On a basic level, there are certain concepts like the First Amendment, especially in terms of public schools, but also this concept of academic freedom, which means that the government and institutions should not interfere with the substance of what faculty and teachers teach and research. There is some guidance that says that the Department of Education itself cannot interfere with the curriculum, but we do see some threads in this FAQ that again lead to more gray areas.

One thing is the FAQ calls out social-emotional learning and culturally responsive teaching as potential areas where protected categories under Title VII may be implicated. The FAQ does say that it depends on, again, the specific facts, but those are areas of curriculum that schools should be taking a harder look at.

Then, there's also the First Amendment issue. So, as far as curriculum goes, there is a specific carve out in the FAQ for First Amendment issues and for the prohibitions on the Department of Education from exercising control over curriculum. It also says that the First Amendment and those curricular protections don't relieve schools of their Title VI obligations. Now, that's true, but you also sense tension there.

The first Trump administration's Department of Education also looked at those curriculum issues. So, this is not new, but we do see an increased focus here. We may see content-based challenges, maybe litigation, depending on how the Department of Education takes action. The fact that those topics were called out here means that the Department is probably going to be looking into it more.

Carpentier

Speaking of something else that is at the forefront of education is being at school and then seeing a protest go on or partaking in a protest. It looks like the FAQ touched on that a little bit.

Khetarpal

Not just the FAQs, some of you may have seen what President Trump posted on March 4th via Truth Social. It specifically talked about protests on campus, and you can take that to mean that this is on the administration's mind. Given that and what's in the FAQs, we can expect to see some action from the Department of Education on it.

It is harkening back to those campus protests regarding the war in Gaza and how those congressional hearings went last year. The FAQ says schools can't discriminate in how they discipline or sanction students in response to complaints or harassment. In other words, say there's a protest, and the students on the other side complain that the protest constitutes unlawful harassment based on their race or national origin. It doesn't matter what side of the spectrum they are; the discipline or sanctions, if it is harassment, need to be the same. That is the law and absolutely correct, but you can see how there could be gray areas there.

Overall, it does show the focus. Our recommendation is that schools really reassess how they deal with issues that trigger free speech. There will probably be more investigations. You could probably expect the Department of Education to take pretty expansive views on the case law as suggested by this FAQ.

Carpentier

If a school has any questions, they can reach out to a Jackson Lewis attorney for more advice.

Khetarpal

Yes, they can. We are deep in it every day.

Carpentier

Tailing off of that, we've talked about a lot that has changed or how we're seeing this administration change its approach to attempting to regulate schools. With that being said, what's still okay?

Khetarpal

The one thing that it does still say is that educational and historical observances are okay, which is helpful because there have been questions about whether schools, employers and institutions across the board can celebrate Black History Month, Women's History Month, International Holocaust Remembrance Day, Pride and things like that. What the FAQ says, and this is consistent with Attorney General Bondi's memos that came out last month, is it is fine as long as those celebrations are celebrating or recognizing historical events or contributions to a field or promoting awareness of those historical events or contributions.

Those celebrations would be a problem if they discouraged students or employees of a certain race, national origin or ethnicity from participating or somehow created a hostile environment based on race, national origin or ethnicity.

Carpentier

Let's get down to the nuts and bolts of the FAQ. If I were in a school administration, what should I know, and what would I want to know?

Khetarpal

There is some relatively structured guidance here as to how they're viewing things and how they'll proceed procedurally. One thing that the FAQ says is that the Department of Education is looking for "different types of circumstantial evidence that, taken together, raise an inference of discriminatory intent." That harkens back to Title VII's "convincing mosaic" standard.

They also say they will apply a three-step test to decide if any particular practice is unlawful. First, they will ask, did a school treat a student or group of students of a particular race differently from a similarly situated student or group of students of other races? Second, if so, can the school provide a legitimate, nondiscriminatory reason for the different treatment that isn't pretextual? Pretextual has historically been construed as an intentionally false statement, something that isn't true. Number three, finally, if the school is unable to offer a legitimate, nondiscriminatory reason, or if the offered reason is found to be pretextual or cover for discrimination, OCR will conclude that unlawful discrimination has occurred. That is the three-step test.

Then, there are some particular things that they called out as well.

Carpentier

What are some of those particular things? If I remember correctly, it was specifically for universities.

Khetarpal

This is all specific for universities, and it's interesting because a lot of this language focuses on students. However, we may see the same theories applied to employee populations at schools.

There were six things that were called out that they are really going to take a look at. First, whether members of a particular race are treated differently than similarly situated students of other races, which is pulling again from a very classic discrimination standard under many areas of the law. The second is the historical background or administrative history of the policy or decision. For example, and this is just speculation on my part, the Dear Colleague Letter referenced the use of standardized tests as a proxy or a means to build out a more racially diverse student body. Maybe you'd look at it and say, well, those standardized tests actually were leftover from COVID. So, the historical intent or practice was actually a COVID-safe protocol and not an intent to change the makeup of the student body, just as an example.

Number three was whether there was a departure from normal procedures in making the policy or decision. Number four was whether there was a pattern regarding policies or decisions towards members of a particular race. Number five is that they'll look at statistics that may demonstrate a pattern of a policy or decision having a greater impact on members of a particular race. Number six is whether the school was aware of or could foresee the effect of the policy or decision on members of a particular race.

With those last two, schools should really think about whether a disparate impact theory could also be applied to their practices as opposed to just a disparate treatment theory.

Carpentier

The disparate impact theory in the education context is new, right?

Khetarpal

It is somewhat new. There are certain areas where disparate impact can be applied. For example, it is definitely under Title VII and Title VI, and it can be applied by administrative agencies, but there is no private cause of action. So, it's complicated. Like all things, you're sensing a theme here.

Carpentier

It depends, right?

Khetarpal

Yes. Three years of law school, and that's what we came back with---it depends.

Carpentier

Now, what happens if the administration comes to a university and says, okay, we've decided that there's a problem?

Khetarpal

According to the FAQs, they are going to contact the school first to see if they'll enter into a voluntary resolution agreement. So, specific remedial actions will be laid out, and a monitoring plan will be created for the implementation of those actions. If the school refuses, it may result in "OCR initiating enforcement or referring the case to the DOJ."

Now, it's interesting because it doesn't mention the revocation of funding. That's probably because it's really not easy to revoke funding. It's a long process, but that's always floating out there.

One thing that's really interesting is that the Case Processing Manual was updated in February 2025. So, just last month, and we're in the process of digesting it, but that could impact the process that they apply to revoke funding. It does have some specific mentions that mirror some of the topics that were addressed in the Dear Colleague Letter and FAQs. So, stay tuned for more on any changes to that Case Processing Manual. We'll be on top of that as well.

Carpentier

To end with a different type of question, the Dear Colleague Letter and the FAQ, are those laws?

Khetarpal

No, they're actually not laws. Good question. They are guidance, and they reflect what the Department of Education's interpretation of laws will be and the types of enforcement actions that they will take. They are not actually laws, and they are not actually binding.

In many other areas, we have seen litigation against some of the Administration's actions and even temporary restraining orders that have been issued, for example, against one of the Executive Orders recently. There is not a whole lot of specific litigation about the Dear Colleague Letter or about the FAQ because there's a standing problem--- they are not actually enforceable in and of themselves as law. We'll just have to see how the Department of Education rolls out its investigations and enforcement actions based on what we have read so far.

Carpentier

With that being said, stay tuned for our next episode.

Khetarpal

Yes, we will continue to do this. We're planning to roll out a higher education and sometimes K-12-specific podcast at least every couple of weeks. So, check in and stay tuned.

OUTRO

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