



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL

January 13, 2021

Thomas J. Perrelli
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via electronic mail

Re: 20 U.S.C. § 1094(c)(3)(B) Investigation of Princeton University

Dear Mr. Perrelli:

I write in response to your letter on behalf of Princeton University (“Princeton”) dated October 21, 2020, responding to the U.S. Department of Education’s (“Department”) Notice of Investigation dated September 16, 2020.

To begin with, we agree controlling authorities hold “Title VI [of the Civil Rights Act of 1964] itself directly reaches only instances of intentional discrimination.” *See* Letter from Thomas Perrelli, Counsel for Princeton University, to U.S. Dep’t of Educ. at 1 (Oct. 21, 2020). Your arguments and citations in support of this point are persuasive and sound. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); *see also Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 953-54 (9th Cir. 2020); *Issa v. Sch. Dist. of Lancaster*, 847 F.3d 121, 133 (3d Cir. 2017). Also, as you note in your letter, the United States Federal Commission on School Safety, chaired by Secretary Betsy DeVos and including the Departments of Justice, Health and Human Services, and Homeland Security, reached a similar conclusion. *See* Fed. Comm. on School Safety, [Final Report](#) at 72 (Dec. 18, 2018) (Title VI disparate impact “rests on a provision whose validity cannot be squared with the Supreme Court’s holdings”). Therefore, to the extent the Department’s regulations at 34 C.F.R. Part 100 purport to reach disparate impact and related theories, the Office of the General Counsel agrees they are *ultra vires*, without legal force or effect, and accordingly cannot be applied against your client.

The gravamen of Princeton’s response seems to be an alleged distinction between what you call “systemic racism,” including the “discrimination by conscious intention” referred to by President Eisgruber, on the one hand, *see* Letter from Christopher L. Eisgruber, President, Princeton Univ., to Members of the Princeton community, [University’s Efforts to Combat Systemic Racism](#) (Sept. 2, 2020), and unlawful discrimination, on the other. Apparently, this is the basis for the argument

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Princeton, though racist, does not discriminate. At a minimum, this is a remarkable non sequitur. It is possible, perhaps, to conjure circumstances under which a racist institution could truthfully make nondiscrimination assurances and representations. But the proposition that *no one* employed by a racist Princeton has engaged or is engaging in discrimination on ground of race or color in violation of Title VI begs for additional legal scrutiny by federal agencies and courts.¹

Recently, Harvard Law School Professor and Princeton Trustee Emeritus Randall Kennedy analyzed the July 2020 “ultimatum” delivered to President Eisgruber by Princeton professors, lecturers, and graduate students. (Preliminarily, the facts suggest President Eisgruber’s September 2, 2020 admissions were in appeasement of this ultimatum.) Professor Kennedy detailed over half a century of Princeton’s “special efforts to recruit, admit, and graduate African American and other minority students.” He said Princeton has long been “putting a thumb on the scale in favor of racial-minority [faculty] candidates.” He concluded:

Whatever wrongs universities have perpetrated or neglected to rectify are compounded when university authorities speak thoughtlessly or insincerely about matters that cut so deeply. When a substantial number of professors indict a university on charges of ‘systemic racism,’ the president of the university ought to state publicly whether or to what extent he or she agrees with the charge Minority students who take such indictments at face value – unaware of strategic hyperbole – become overwhelmed by unrealistic fears of encountering racist assessments that will unfairly limit their possibilities for advancement.

Kennedy, “[How Racist Are Universities, Really? Hyperbolic accusations do more harm than good](#),” *Chronicle of Higher Education* (Aug. 12, 2020).

The Department reasonably assumed President Eisgruber was speaking truthfully when he said Princeton is a racist institution that discriminates on ground of race, color, or national origin by “conscious intention.” But on the evidence, it seems he knowingly and intentionally spoke falsely, making a factually baseless ritual confession and not an empirically grounded description of campus reality.² This suggests, at best, deep cynicism. The damage done when an Ivy League university president uses fake claims of racism to signal “right think” and appease critics ought to be self-evident.

¹Princeton must always comply with civil rights laws as it seeks to purge “systemic racism” (however defined) by regulating thought, teaching, admissions, hiring, promotions, and other similar activity in its programs and activities. *See, e.g., Letter* from Eric Dreiband, Assistant Attorney General, U.S. Department of Justice, Civil Rights Division, to Peter S. Holmes, Esq., Seattle City Attorney (Aug. 26, 2020) (separate training based on race affecting the terms and conditions of employment for both white employees and employees who identify as black or “persons of color” may violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*). The Department’s Office for Civil Rights always stands ready to accept complaints from students or others alleging Princeton has violated Title VI.

²It is not clear whether President Eisgruber intended his claims of Princeton’s racism as foundation under 34 CFR 100.5(h) or (i) for implementation of race-, color-, or national origin-conscious

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Regardless, with the understanding Princeton has disavowed President Eigruber's statements claiming the institution has and does discriminate "by conscious intention" on ground of race or color, and has instead affirmed the accuracy of its nondiscrimination representations and assurances, the Department's Office of the General Counsel is closing its investigation. Please contact the Department's Chief Investigative Counsel, Paul R. Moore, if you have any questions.

Sincerely yours,

Reed
Rubinstein

Digitally signed by
Reed Rubinstein
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Reed D. Rubinstein
Principal Deputy General Counsel delegated
the authority and duties of the General Counsel

cc: Christopher McCaghren
Acting Assistant Secretary, Office of Postsecondary Education
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programs or activities. Our understanding is Princeton now affirms all the services and benefits of its programs or activities are fully and equally available to every racial or nationality group. Accordingly, Princeton's use of race-, color-, or national origin-conscious programs would be unlawful.