

This document expresses policy that is inconsistent in many respects with Executive Order 13985 on Advancing Racial Equity and Support for Underserved Communities through the Federal Government and was issued without the review required under the Department's Rulemaking and Guidance Procedures, 85 Fed. Reg. 62597 (Oct. 5, 2020).

OCR Webinar: Racially Exclusive Practices and Title VI

January 19, 2021

<https://youtu.be/oXMD43fD1ug>

We have experienced significant strife in 2020 that has stirred the debate about racial discrimination and inequality in our nation. Each day, educators across the country strive to ensure that all students have equal access to a safe, nurturing, quality learning environment, free from discrimination. As school districts and leaders in the higher education community seek to bring awareness to these important issues, they must keep in mind the fundamental principles of federal civil rights laws and the legal principles that protect all students and staff from discrimination on the basis of race.

The mission of the Office for Civil Rights, or OCR, is to ensure equal access to education, and to promote educational excellence through the vigorous enforcement of civil rights laws. In this video, we will discuss discrimination on the basis of race, color, and national origin, which is prohibited by Title VI of the Civil Rights Act of 1964, and which we will refer to simply as, "Title VI."

Title VI states that "[n]o 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." We will often refer to the phrase "race, color, or national origin" by using the broad term "race."

Regulations promulgated under Title VI prohibit schools—from "treating an individual differently from others in determining whether she or he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition."

Title VI covers all of the operations of a school or college that receives financial assistance from the Department of Education.

In addition to being covered by Title VI, race discrimination is also prohibited by the U.S. Constitution. The 14th Amendment to the Constitution contains the Equal Protection Clause, which prohibits government entities from denying "any person within its jurisdiction the equal protection of the laws." Under Supreme Court precedent, any classification based on race is presumptively invalid unless the classification satisfies a "strict scrutiny" analysis. That standard permits racial classifications under the U.S. Constitution only if they are narrowly tailored and constitute the least restrictive means to further a compelling governmental interest. As part of this requirement, schools bear the "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."

Unfortunately, OCR is aware of recent concerning reports that schools across the country are discriminating on the basis of race in different ways. Sometimes, these reports have involved schools' purported efforts to promote diversity and equity among students, but are nevertheless prohibited because they violate Title VI. OCR offers this video to highlight how these and other examples may create Title VI violations.

First, a recipient's programs and activities must be open to all students, regardless of race. This extends to all aspects of a recipient's program or activity, including academics, housing, and extra-curricular activities. Schools may also not discourage members of any race from participating in any particular program or activity, or allow students or staff to be excluded from activities or denied the benefits of any service or opportunity, on the basis of race.

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Any program or activity designed to foster inclusion of any particular group protected under Title VI, must still be made open to all, and advertised as such.

For instance, schools may not designate certain housing or dormitories only for students of a specific race, or exclude students of a particular race or races from such housing.

Similarly, schools may not create designated "safe spaces" that admit or exclude individuals on the basis of race.

Also, since the Supreme Court's landmark 1954 decision in *Brown v. Board of Education*, schools have been barred from segregating students according to race in classes, seminars, lectures, trainings, athletics, clubs, orientations, award ceremonies, graduations, or other meetings. This includes, of course, segregation that occurs in a virtual or online format as well.

At the same time, schools also may not offer counseling, mentoring, liaisons, alumni networking, or similar assistance to students in a way that favors or excludes individuals on the basis of race.

Now let's discuss assignments and grading policies. Schools may not use race when administering their academic programs. For example, neither schools nor instructors may have students participate or complete assignments on the basis of their race, such as assigning different work to students, because of their race, or assigning certain grades to students on the basis of race. Schools are also not permitted to ask that certain students engage with the class in a specific manner, based on race. Similarly, it is improper to give students of a particular race extra time or resources, such as the use of notes or textbooks, to complete an assignment. Schools also may not grade students differently or apply different grading criteria to students based on race.

Third, schools may not treat student organizations differently based on the race of their members. For example, a school may not refuse to recognize a student organization based on the actual or perceived race of its members, nor may a school advertise that it will grant lower registration fees to organizations on the basis of race.

Fourth, OCR is aware that some schools may be considering prioritizing the return of students to school based on impermissible categories, such as race. A COVID-19 reopening plan—or any school policy—that prioritizes, otherwise gives preference to, or limits programs, supports or services to students based on their race, color, or national origin—regardless of how that plan is formulated—will generally violate Title VI.

Fifth, OCR recognizes schools must make local decisions that take into consideration the health, safety, and well-being of all their students and staff. Schools, however, may not use a student's race as a basis for either prioritizing students for receiving immunizations, or exempting students from vaccination or immunization requirements.

We also want to address the use of curriculum, training materials, or classes that are based on racial classifications or racial stereotypes of individuals solely based on their race. In some cases, these materials may violate Title VI because they could constitute racial harassment, or require teachers to engage in activities that result in different treatment of students on the basis of race.

One example that might violate Title VI is advocating a position that a particular race is collectively guilty of misconduct, or advocating a position that a particular race or something about that race is negative or evil. Title VI might also be violated if part of a curriculum instructs students that members of a particular race or racial identity pose specific dangers to other individuals, or if it advocates or forces

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members of certain races to deconstruct or confront their racial identities. For instance, a school may not advocate that students adopt specific beliefs based on their race, such as urging that white students be white without signing on to whiteness. These sorts of exercises would also be impermissible if used in the context of ascribing specific characteristics or qualities to all members of other races.

In the same vein, training which is designed to separate individuals by race, or pressure members of a certain race to repudiate or "recover from" their race, raises the same Title VI issues. This includes instructing members of a particular race or races that they must "re-wire" themselves, or segregating students or administrators in a professional development training into groups on the basis of race, or holding cabinet meetings that similarly segregate participants on the basis of race.

Similarly, a school may not establish or sponsor groups that limit participation based on race, such as a committee made up of staff or students that is only open to some individuals, based on their race.

It is important to remember that OCR has consistently reaffirmed that the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment. When evaluating whether Title VI's antidiscrimination protections threaten to chill the teaching of curricula that may offer great value to students, First Amendment caselaw takes into account a school's legitimate pedagogical interest in explaining and effectively and lawfully addressing racism.

Seventh, Title VI protects all persons from discrimination, including parents and guardians, students, and to a limited degree, employees. Thus, Title VI's protections against race discrimination extend to the hiring, promotion, and tenure practices of institutions.

For example, it is likely a violation of Title VI to require employees or interviewees of a certain race to acknowledge privilege based on their race or admit to participating in a form of racial supremacy.

Lastly, in exchange for federal financial student aid under Title IV of the Higher Education Act of 1965, institutions of higher education must submit assurances to the U.S. Department of Education that they comply with Title VI. Some institutions make material nondiscrimination and equal opportunity representations to students, parents, and consumers in the market for education certificates.

Yet in recent months, some institutions have contradicted these signed assurances and representations, and publicly stated that their educational programs are and for decades have in fact been racist. Some institutions have asserted that their curricula harbors, perpetuates, or is rooted in "systemic racism." At other institutions, administrators and faculty have stated that they are themselves in fact, racist—either in earnest, or perhaps in response to pressure from peers or school administrators. This purported racism has been the basis for institutions implanting race-based diversity measures for hiring, procurement, teaching, fellowship, and research funding.

OCR has concerns that these statements are episodes of hyperbolic virtue signaling. Moreover, OCR is particularly concerned that these admissions are being used as a pretext to discriminate against individuals on the basis of race in violation of Title VI. OCR stands ready to accept complaints from students or others alleging that a school has engaged in violations of Title VI as a means of remedying purported systemic racism.

The Department has serious concerns that some schools are carrying out their education programs and activities in a manner that treats students differently based on their race. While the Department is bound to adhere to the First Amendment's free speech protections, it is impermissible to assign students and individuals specific characteristics based solely on their race, and insist that members of specific racial

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groups act in accordance with those characteristics. Such treatment has no place in federally funded programs or activities, and is not protected by the First Amendment. OCR takes its obligation to ensure equal access to education seriously and will vigorously enforce Title VI for *all* students.

This video has provided an overview of many important issues. For more information about OCR and Title VI, please visit www.ed.gov/OCR.

If you believe that a recipient has violated Title VI or another law enforced by OCR, you may file a complaint with OCR online at o-c-r-ca-s-dot-ed-dot-gov. Please also view OCR's video on How to File a Complaint.

If you have questions, please send them to OPEN@ed.gov.