

**Insights**

## **DEPARTMENT OF EDUCATION ISSUES DEAR COLLEAGUE LETTER AS STUDENT PROTESTS CONTINUE**

May 09, 2024

Colleges and universities around the country have been dealing with increasingly violent and contentious student protests in recent months. Many have had to deal with student, parent, faculty, donor, and public criticisms about their handling of these long-running protests and discipline meted out – or not – as a result of the protests. Numerous lawsuits and Department of Education complaints have been filed challenging institutions' responses. In light of the ongoing protests and resulting challenges facing institutions, the Department of Education issued new guidance on May 7, 2024, to remind institutions of their mandate under Title VI to promptly and comprehensively address discrimination on the basis of race, color or national origin on their campuses.

The May 7<sup>th</sup> Dear Colleague Letter provides reminders regarding institutions' obligations under Title VI, along with analyses of hypothetical situations. This alert provides high level takeaways from the Dear Colleague Letter about institutions' Title VI obligations, but reiterates, as did the Dear Colleague Letter, that each scenario must be evaluated individually and the institutional response tailored appropriately to address the particulars of the alleged discrimination.

The Dear Colleague Letter reminds institutions that:

- Title VI prohibits discrimination on the basis of race, color or national origin, which includes discrimination on the basis of being Jewish, Israeli, Palestinian, or Muslim.
- Nothing in Title VI or its implementing regulations should be read to permit or require an institution to restrict rights otherwise protected under the First Amendment, but the mere fact that discrimination involves a public setting or speech motivated by political or religious beliefs does not relieve an institution of its obligation to respond to prevent creating a hostile environment for a student or students.
- Institutions that fail to address promptly the existence of a hostile environment based on race, color, or national origin, once the institution has actual or constructive notice of the hostile environment, can constitute discrimination violating Title VI.

- A hostile environment can be created with unwelcome conduct based on race, color or national origin that, based on the totality of the circumstances, is subjectively and objectively offensive, and so severe and pervasive that it limits or denies a person's ability to participate in or benefit from an institution's education program or activity.
- The Department of Education's Office of Civil Rights (OCR) will look at context, nature, scope, frequency, duration and location of harassment, as well as the identity, number, age, and relationships of the people involved.
- Institutions may not treat students differently based on their race, color or national origin absent a legitimate, non-discriminatory reason for the decision to treat the student different from her peers.

Though BCLP highly recommends all institutions review the examples of how OCR would analyze particular scenarios that your institution may already be seeing on your campus, the following are key take-aways you can apply to limit legal exposure based on the guidance provided in the sample scenarios analyzed:

- Ensure that your staff and faculty, including all residential support personnel, are trained to understand their obligations to report complaints of discrimination, and that appropriate personnel are ready to take prompt action in response to allegations.
- Timely investigate reports of alleged harassment.
- An institution's remedy for a hostile environment that makes students feel unsafe because of their ancestry cannot be merely to tell those students to go home and take their classes remotely.
- When protests identify and/or target specific individuals because of their ancestry, or individual students experience targeting (e.g., a Muslim student having her hijab torn off her head or a Jewish student having his kippah removed from his head), disciplining the particular bad actor is not enough. Prompt and effective steps must be taken to end the harassment, prevent recurrence, and eliminate the hostile environment it created.
- Even if an institution takes steps to stop discriminatory behavior and discipline students for it, an institution can face repercussions if it fails to provide supportive measures, to put in place methods for monitoring future incidents, and to assess whether there might be a broader campus climate problem related to discriminatory harassment.
- Institutions must take steps to address the adverse impacts on students of protests on campus, even if the protestors are not students.

For more information on Title VI, the First Amendment, and other matters related to campus protests, please contact Sarah Hartley and Rachel Matteo-Boehm at BCLP.

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