LEGAL UPDATE FOR THE COLORADO LEAGUE OF CHARTER SCHOOLS
April 8, 2025
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Title: Update on Diversity, Equity, and Inclusion (DEI) Programs and Racial Discrimination

On April 3, 2025, the U.S. Department of Education sent a "Reminder of Legal Obligations" to state and local education agencies, requesting that they sign a certification that they are in compliance with federal law that prohibits discrimination on the basis of race, color, or national origin. Specifically, the certification request reminds public school leaders that the Equal Protection Clause and Title VI of the Civil Rights Act "prohibit race-based action, with only the narrowest of exceptions." The reminder states that "any violation of Title VI – including the use of Diversity, Equity, & Inclusion ('DEI') programs to advantage one's race over another – is impermissible." It threatens state and local education agencies with the loss of federal funding going forward, legal action by the Department of Justice to recover "previously received funds," and treble damages for violations of the False Claims Act for certifying an entity is in compliance when it is not.

Relatedly, just a month earlier, on March 1, the USDE released Frequently Asked Questions (found here) about "racial preferencing" – sometimes called "affirmative action." The FAQs are nine pages in length and answer fifteen questions about the USDE's interpretation of racial discrimination under the Equal Protection Clause and Title VI. They expand upon the "Dear Colleague letter" the USDE issued on February 14 (found here).

For the Reminder, FAQs, and Dear Colleague letter, the USDE rested its legal interpretation on the U.S. Supreme Court's 2023 decision called *Students for Fair Admissions v. Harvard*. In that case, the Supreme Court held that Harvard and the University of North Carolina violated the Equal Protection Clause and Title VI because they considered applicants' race when

making admissions decisions. In other words, the Supreme Court found that Harvard and UNC were implementing affirmative action programs that benefited black and Hispanic students but disadvantaged white and Asian students, and these programs violated the prohibition on racial discrimination by distinguishing among students based upon race.

In its recent publications, the USDE emphasized two principles arising from the *Harvard* case. First, "a school may never use a student's race as a 'stereotype or negative.' This means schools cannot assume that a person's race necessarily implies something about that person, including something about that person's perspective, background, experiences, or socioeconomic status." FAQ #3. Second, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* In addition, the USDE instructed that schools cannot separate students or employees into different groups based upon race, even if a school treats both groups equally. FAQ #7.

For Colorado charter schools, questions related to possible racial discrimination often arise in the context of DEI programs and enrollment preferences. As to DEI programs, the USDE stated that it would examine all relevant facts and circumstances related to such programs to determine if they cross the line into illegal racial discrimination, harassment, or stereotyping. *See* FAQs #8 & 9. For example, the USDE explained that "an elementary school that sponsors programming that acts to shame students of a particular race or ethnicity, accuse them of being oppressors in a racial hierarchy, ascribe to them less value as contributors to class discussions because of their race, or deliberately assign them intrinsic guilt based on the actions of their presumed ancestors or relatives in other areas of the world could create a racially hostile environment." FAQ #9.

Next, Colorado charter schools may not grant enrollment preferences to students based upon their race or ethnicity, even if certain racial or ethnic groups have historically suffered from societal discrimination. School may employ enrollment preferences for students based upon their socio-economic status or their need for special education services. *See* C.R.S. § 22-30.5-104(3)(a.5). However, schools should not use otherwise legal classifications as a proxy in order to try to smuggle in racial enrollment preferences. Such a practice could result in a finding of racial discrimination.

Finally, on February 26, 2025, the U.S. Supreme Court heard oral arguments in a lawsuit titled *Ames v. Ohio Department of Youth Services*, in which an employee of a state agency claimed she was discriminated against because she is straight when the employer preferred homosexual employees over her. The *Ames* case will likely decide whether a member of a majority group must meet a higher standard than that of minority groups when attempting to prove discrimination claims. Based upon the justices' questions at oral argument, it seems likely that the Supreme Court will decide that all groups must meet the same standard, regardless of whether they are in the majority or a minority. While *Ames* arises in the gay/straight context, it is widely believed this ruling will be applied in the racial context as well. The decision is expected at the end of June 2025.

In light of all these developments, what should Colorado charter schools do? First and foremost, evaluate your policies and practices to ensure they are not imposing benefits or burdens on students or employees *because of their race*. This may require an assessment of DEI policies to ensure that they do not explicitly or implicitly favor or denigrate any racial groups. Finally, you may also want to review enrollment, hiring, promotion, grading and all other policies to make sure they are race-neutral on their face and in their effect.