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# **The Federal Update for May 10, 2024**

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

Date: May 10, 2024

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## Legislation and Guidance

### ED Releases Guidance on Discrimination Under Title VI

In a Dear Colleague letter this week, the U.S. Department of Education’s Office for Civil Rights (ED OCR) reminded schools of their responsibility to ensure nondiscrimination protections for students under Title VI of the Civil Rights Act of 1964. Title VI prohibits discrimination based on race, color, or national origin, which includes shared ancestry or ethnic characteristics. ED OCR notes that it has seen an increase in complaints alleging discrimination based on shared ancestry and ethnic characteristics, including instances of antisemitism. The letter states that ED is vigorously enforcing Title VI protections and is providing guidance to schools on their legal requirements to respond to reports of discrimination.

The letter first addresses the intersection between Title VI compliance and compliance with First Amendment speech protections. ED OCR says that this guidance letter does not require schools to restrict protected speech, but that discrimination may include speech in a public setting. Schools are still required to respond to the speech if it meets the definition of harassment and creates a hostile environment, as outlined in the letter. And while speech about the policies and practices of a country are considered protected speech, if the speech includes discriminatory comments about people from that country, ED OCR says that schools must then respond appropriately.

The letter outlines two ways that ED OCR evaluates if schools have violated Title VI: (1) hostile environment and (2) different treatment. Schools are required to respond to the existence of any hostile environment, including harassment based on race, color, or national origin that is “so severe or pervasive that it limits or denies a person’s ability to participate in or benefit from a school’s education program or activity.” If a school had or should have known about the hostile environment, they must take steps to end the harassment, eliminate effects of the harassment, and prevent it from reoccurring. The letter clarifies that the harassment does not have to target one person to constitute a hostile environment, and one isolated incident is typically not considered a Title VI violation.

ED also considers whether the school treated students differently based on their race, color, or national origin, such as subjecting students to different rules based on these characteristics. ED OCR makes a fact-specific determination, including whether there was a nondiscriminatory reason for different treatment and whether the school was actually motivated by discriminatory intent when treating students differently. The letter also includes nine hypothetical situations that may result in ED OCR action under Title VI.

The letter comes as Congress has held a number of hearings in recent weeks on antisemitism on college campuses and at K-12 schools. In a hearing this week, lawmakers expressed concerns that ED is not sufficiently addressing the increase in antisemitism in schools and not responding to instances of antisemitism promptly enough. ED OCR released its Dear Colleague letter that same day, and Secretary of Education Miguel Cardona requested more funding from Congress for OCR, so that additional investigators can be hired to address the rise in civil rights complaints.

[The full Dear Colleague letter can be found here](https://www.whitehouse.gov/wp-content/uploads/2024/05/colleague-202405-shared-ancestry.pdf).

Author: BTW

### New Title IX Rules Face Extensive Litigation

Since the final Title IX regulations were published in the *Federal Register* late last month, various States and interest groups have filed at least four lawsuits challenging the authority of the U.S. Department of Education (ED) to draft and implement them.

The latest challenge is a lawsuit from attorneys general in six States – Kentucky, Tennessee, Indiana, Ohio, Virginia, and West Virginia – filed in the Eastern District of Kentucky. In their brief, the litigants argue that the new regulations are “arbitrary and capricious” and beyond the scope of ED’s authority under the U.S. Constitution. They also argue that the updated regulations disadvantage women because of their accommodations of students who are transgender.

Another lawsuit, filed in the Western District of Louisiana by that State’s Attorney General, echoes the concern about harms against women and girls and states that the regulations would also harm First Amendment free speech protections.

The Texas Attorney General sued ED over the regulations in the Northern District of Texas, taking issue specifically with the expansion of the definition of “sex” to include gender identity. The suit argues that ED does not have the authority to promulgate this definition, that it will disadvantage girls and women by allowing transgender students to participate in female-oriented organizations and enter women’s locker rooms and restrooms.

Finally, a lawsuit filed in the Northern District of Alabama by Alabama, Florida, Georgia, and South Carolina, along with a number of conservative advocacy organizations, argues the new regulations create numerous issues, including violations of Free Speech rights and parent authority, administrative authority under the U.S. Constitution, and existing Title IX protections. They argue that the legal authority upon which the regulations are based – the Supreme Court’s decision in the employment law case *Bostock v. Clayton County* – should not apply to the context of education.

Several States – including Florida, Louisiana, Montana, Oklahoma, South Carolina, and Texas – have instructed their districts to disregard the new Title IX rule and to follow contravening State laws while the litigation progresses. ED told reporters that it does not comment on pending litigation, but that States that ignore federal regulations could lose access to federal funds. In a hearing before the House Committee on Education and the Workforce this week, Secretary of Education Miguel Cardona defended the regulations and the threat to withhold funds, saying that the law does not permit schools and districts to choose which students’ rights to protect.

Litigation in all these cases could be protracted, and different results in different federal circuit courts could result in uneven enforcement of the regulations, likely forcing the U.S. Supreme Court to take up the case.

Author: JCM

## News

### ED Announces Funding to Increase FAFSA Completion

The U.S. Department of Education announced this week that it will provide $50 million to the Educational Credit Management Corporation (ECMC) – an organization that guarantees federal student loans and helps with student loan administration – in order to assist with increasing the number of students who apply for federal financial aid through the Free Application for Federal Student Aid (FAFSA).

ECMC will be responsible for distributing the $50 million to financial aid organizations that can assist with increasing FAFSA completion rates, which may include adding staffing to provide support to students in filling out the FAFSA and holding local events to assist students and families with completing and submitting the FAFSA, among other activities. ECMC has been involved in other recent ED FAFSA initiatives which were implemented in response to the rocky rollout of the new FAFSA at the beginning of this year.

Students have until June 30, 2025 to complete the FAFSA for the 2024-2025 school year, but some States have deadlines for State aid sooner than that. Fewer students have completed the 2024-2025 FAFSA so far, when compared with data from the prior financial aid year.

Resources:

Juan Perez Jr., “Education Department pushes new program to boost student aid applications,” *Politico*, May 6, 2024.

Kara Arundel, “Education Department boosts FAFSA outreach efforts to close completion gap,” *Higher Ed Dive,* May 6, 2024.

Author: KSC

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