



KROKIDAS & BLUESTEIN LLP

CLIENT ALERT

United States Department of Education Issues Updated Guidance Regarding Title VI Protections Against Discrimination Based on Shared Ancestry and Ethnic Characteristics

On May 7, 2024, the United States Department of Education (“USDOE”) issued guidance regarding the application of Title VI of the Civil Rights Act of 1964 (“Title VI”), which prohibits discrimination based on race, color, and national origin, including shared ancestry or ethnic characteristics, by schools and other recipients of federal financial assistance, including pre-K, elementary, and secondary public charter and non-charter schools and school districts, as well as public and private colleges, universities, and other postsecondary institutions. This Title VI guidance, in the form of a Dear Colleague Letter (“Title VI DCL” or “DCL”) from USDOE’s Office for Civil Rights (“OCR”), does not create new legal standards, but instead clarifies existing legal requirements under Title VI and provides concrete examples of the application of Title VI to allegations of discrimination in schools, including discrimination against students and school community members who are or who are perceived to be, for example, Jewish, Israeli, Muslim, Arab, Sikh, South Asian, Hindu, or Palestinian.

The Title VI DCL clarifies that Title VI’s prohibition against discrimination based on race, color, and national origin includes harassment based on a person’s actual or perceived (i) shared ancestry or ethnic characteristics or (ii) citizenship or residency in a country with a dominant religion or distinct religious identity.¹

The DCL contains nine examples of complaints of alleged discrimination based on race, color, or national origin, including shared ancestry or ethnic characteristics, and explains when OCR would have reason to open certain complaints for investigation to determine whether a school violated Title VI. In addition, the DCL outlines two legal frameworks that OCR uses to determine if educational institutions engaged in discrimination that violates Title VI, as described below:

(1) Hostile Environment Analysis

- a. A hostile environment may exist when unwelcome conduct based on race, color, or national origin, including shared ancestry or ethnic characteristics, is subjectively and objectively offensive and is so severe or pervasive that it limits or

¹ The DCL notes that because Title VI does not expressly prohibit discrimination based solely upon religion, USDOE may refer complaints based only upon religious discrimination to the United States Department of Justice, which oversees enforcement of Title IV of the Civil Rights Act of 1964.

denies a person's ability to participate in or benefit from a school's education program(s) or activit(ies).

- b. Whether harassing conduct creates a hostile environment must be determined from the totality of the circumstances, including consideration of factors such as the context, nature, scope, frequency, duration, and location of the harassment, as well as the identity, number, age, and relationships of the persons involved.
- c. OCR could find that a school is in violation of Title VI if (1) a hostile environment based on race, color, or national origin exists; (2) the school had actual or constructive notice of the hostile environment; and (3) the school failed to take prompt and effective steps reasonably calculated to (i) end the harassment, (ii) eliminate any hostile environment and its effects, and (iii) prevent the harassment from recurring.

(2) Different Treatment Analysis

- a. To determine whether different treatment occurred in a manner that constitutes discriminatory conduct in violation of Title VI, OCR will consider the following in its analysis: (1) whether the school limited or denied educational services, benefits, or opportunities to an individual of a particular race, color, or national origin by treating them differently from a similarly situated individual or group of another race, color, or national origin; if so, (2) whether the school can provide a legitimate, nondiscriminatory basis for the different treatment; and, if such a basis is identified, (3) whether that basis is the true reason for the school's action(s) or merely a pretext for discrimination.

The Title VI DCL reminds schools that they must respond to alleged discriminatory conduct or harassment in a manner that does not restrict any rights protected by the First Amendment. For example, a school may respond to conduct involving speech by communicating its opposition to derogatory opinions, providing counseling and support services to school community members affected by the conduct, and taking steps to establish a welcoming and respectful school environment. Furthermore, the DCL notes that speech expressing views about a particular country's policies or practices is protected by the First Amendment and does not necessarily implicate federal civil rights laws. However, if such conduct is targeted at or infused with discriminatory conduct about individuals from or associated with a particular country, then it may implicate Title VI. OCR will analyze such conduct – as it does for all matters OCR investigates – on an individualized and fact-dependent basis.

If you have any questions about the Title VI DCL or about compliance with Title VI, please contact Bettina Toner (btoner@kb-law.com) or Eric Jordan (ejordan@kb-law.com).