THE BROOKINGS INSTITUTION

WEBINAR

WHAT DO EDUCATION LEADERS NEED TO KNOW ABOUT THE DEPARTMENT OF EDUCATION'S NEW GUIDANCE ON RACE AND CIVIL RIGHTS?

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PANEL DISCUSSION:

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PERERA: Good afternoon and thank you for joining us. I'm Rachel Perera, a fellow in the Brown Center on Education Policy at the Brookings Institution. We're here today to discuss a sweeping new guidance letter released by the U.S. Department of Education two weeks ago. The Dear Colleague letter published on February 14th gives public schools and colleges two weeks, that is until today, February 28th, to eliminate any race-conscious programs or risk losing federal funding.

We'll be hearing from four panelists with deep expertise in education and civil rights law and experience working with the U.S. Department of Education's Office for Civil Rights. Robert Kim is the executive director of the Education Law Center, a nonprofit organization whose mission is to support and advance public education and the rights of students nationwide. Robert also served as a deputy assistant secretary at the U.S. Department of Education during the Obama administration. Kimberly Jenkins is the Martha Lubin Karsh and Bruce, Bruce A. Karsh professor of law at the University of Virginia School of Law. She also serves as a professor at both the School of Education and Human Development and the Batten School of Leadership and Public Policy. Professor Robertson is also the founder and director of the Education Rights Institute. Dr. Liliana Garces is the Ken McIntyre Professor for Excellence in School Leadership at the University of Texas at Austin. She also serves as a professor of educational leadership and policy. As an education and legal scholar, Dr. Garces has represented the education community in the filing of legal briefs in the U.S. Supreme Court cases that have played consequential roles in interpreting law around race-conscious policies in education. Jackie Wernz is an attorney and principal of ECR Solutions. Jackie helped schools, colleges, and universities nationwide navigate complex civil rights and constitutional law issues and over the last two decades has served as a partner and education law firms. led civil rights compliance as a university administrator, and enforced federal civil rights law as an attorney at the U.S. Department of Education's Office for Civil Rights under the Obama and Trump administrations.

Before we get started, I will encourage those watching live to submit questions to our guests. You can submit those questions via email at events at brookings.edu or via X at brookingsgov using the hashtag title6dcl. That email address and hashtag also appear on the event webpage. With that, let's get started. So to kick us off, I would love to hear from each of you as experts in education law and civil rights law, what were your initial reactions to the February 14th Dear Colleague letter and what are some of your concerns as you're seeing how institutions are planning to respond? Bob, would love if you can start us off here.

KIM: Sure. Thank you for having me. I know we will soon get into the questions about the legality of this Dear Colleague letter, but I just want to start off by saying I reacted personally with quite a bit of dismay at seeing this guidance come out. It's, you know, really a sad day that when you see such a diminution of federal civil rights guidance being used in this particular way, which is such an important instrument for schools to. have important guidance around civil rights issues, and to see the politicization of civil rights law also is quite distressing. So, you know, really a sad day, I think, for American education. But it's not surprising, because we've known, we've seen this coming for quite a while. We know through not only other executive orders in the last three weeks that have come out, attacking diversity education, DEI principles. We've seen under Trump 1.0 that there were also executive orders that were attacking diversity and exhibiting hostility in this arena. And also we've seen that in the court system too in education law that there's been signs and including in the Supreme Court that there was a turning of its head of the 14th Amendment and of Title VI in ways that were not contemplated 30, 40 years ago. So here

we have a guidance that under the cloak of proscribing race discrimination is actually prescribing a number of things around student school life and operations in a bunch of different areas that we'll talk about, you know, ranging from admissions to scholarships to student supports to housing to even ceremonies and all other aspects of campus life. So it's very proscriptive under the mantle of snuffing anti-white DEI dogma. This guidance document is unfortunately instilling its own kind of brand of stifling orthodoxy on American schools. So I think what we have here is a government that purports to be hands-off that's extraordinarily hands-on. And what we'll talk about is the overreach here in terms of the law, the effects on speech and association, re-association on teaching and learning outside of the bounds of Title VI. And really, in my mind, quite unfollowable guidance. And so we need to get into that discussion. But unfortunately, the concern is on the chilling effect in the short term on schools, on how schools will react, and the impact on teachers and students in the short term.

PERERA: Thank you, Bob. Liliana, would love to hear from you.

GARCES: Yes, thank you for having me today. And as you mentioned, I'm basing my comments today on my expertise as an education researcher and a legal scholar. And I had a number of reactions. First, the content of the letter was a wide expansion of the ruling and the Students for Fair Admissions legal case, which was giving an interpretation of what the Equal Protection Clause required. The court was explicit in saying that the case applied to admissions in how race could come into play in those decisions, not to all the other areas that are covered by the letter. And the letter contradicts what the court's ruling said regarding how race could come into play in those decisions. The court prevented considerations that relied on a student's race, but it also that students' lived experience in relation to race could be part. of those decisions when that experience is relevant to the mission of a program. So it concerns me that the letter is defined, the court's ruling in that case, and that it goes far, very far into saying that even race-neutral efforts are not permissible. Those are efforts that don't consider race, but aim to achieve the goal of diversity. And those are arguments that they've been brought in other cases, they've been rejected by courts and the Supreme Court has let stand. And so those are pretty troubling elements about the letter.

But I would say my biggest concern is that the definition of discrimination in the letter turns the very notion of discrimination on its head. Ensuring equal protection under the law is to make sure that access and opportunity is available No matter. someone's race. And we don't want race to matter. But the question is how we get there how we achieve that goal. And we get there by being attentive to the barriers that exists because of someone's spatial background. That's how we ensure a fair system. But the letter saying that attending to those realities, that being race conscious in that way constitutes discrimination. It's saying to school that to schools to colleges, universities that they need to be blind to that reality. or face consequences, and that in itself is just plainly unconstitutional. The First Amendment protects institutions from having the government impose that ideology on them.

PERERA: Thank you. Jackie.

WERNZ: So I am coming at this from a practitioner's angle and very intimidating to be here in this room with so many great legal scholars. I am definitely not that, but so my approach or my response to this was probably a little different in that I immediately thought about the institutions that I work with or that I try to help support through various organizations and And as Bob mentioned, the chilling effect, because this is all so complicated and it's

presented in a way that would suggest the complete opposite. It's a four-page Dear Colleague letter. There is so much overreach here and so much wiggle room in the legal underpinnings, but the Dear Colleague letter would have administrators believe that this is just clear cut and that essentially. you basically can't consider diversity anymore at all. And a lot of the educational institutions that I've been hearing from, that's the reaction that people are having. And to me, as someone who really doesn't come at this from an advocacy angle one way or another, but is really just trying to help clients to comply with the law. I don't want anyone to feel that they don't have any options to do the kinds of work that they think are important for their students, whatever that may be, and I think that the real concern for me here is that. the suggestion is that this is open and shut and that, you know, people are going to overcorrect and that's going to have some of those impacts as mentioned already on members of their community, but also could lead people to get themselves into legal trouble on the other end of the spectrum if they are going too far.

PERERA: Thank you. And Kimberly.

ROBINSON: Yeah, so I had, my first reaction when I read this was that the letters clearly misrepresent the SFFA case and other Supreme Court case law and then what Title VI says. So we're going to get into all that later, as Bob noted. I have two principal concerns about the letter. First, too many educators don't understand what Title VI does and does not prohibit. and therefore the letter can cause confusion in that vacuum of knowledge and understanding. Title VI does apply to all the policies and procedures in a district. That includes everything from discipline, assigning students to give them talented classes or advanced placement classes, services for multilingual learners, as well as race, color, and national origin harassment. Because many teachers and district leaders are not given professional development on where and how it applies, they won't understand how this letter distorts what Title VI actually says. And this is actually one of the reasons why I launched the Education Rights Institute to 2023. University of Virginia School of Law, because I believe that Title VI wasn't nearly as widely understood or enforced as it should be. Simply put, educators will not, and leaders aren't gonna enforce what they don't know about or don't fully understand, especially in light of the plethora of responsibilities they have. And it's this lack of understanding of Title VI's broad applicability, as well as the very limited resources within the Office of Civil Rights. has meant that Title VI really hasn't been fully enforced under either Democratic or Republican administrations. And so it's important to understand that, that we need an increase in understanding of Title VI and what it does and doesn't apply for it to be fully effective. Second, I also worry, as many of my other panelists have said, that many districts and schools will take action to demand no efforts that advance equal education opportunity and create inclusive learning spaces, because this letter is telling them. Title VI says you have to do this. Title VI does not say that. And so reports are already emerging this happening. And I'm excited that this webinar could serve as a counterweight to those efforts. So on the legal points, I'll just wait for the rest of the discussion.

PERERA: Thank you. That was all really helpful. And I think it, as you all brought up, it would be great to talk more in depth about the legality of the February 14th Dear Colleague letter. And so I wanna start with what's perhaps the most important question. I think the one that's on a lot of educators and education administrators' minds. Can the Trump administration make good on the enforcement threats as outlined in the February 14th Dear Colleague letter? Bob, can you kick us off here?

KIM: Yeah, well, I think, unfortunately, the answer is, at least in the short term, we can expect that they can and will attempt to implement the guidance enforcing against this

guidance letter or consistent with the guidance letter. There is currently a pause in the OCR as to any Title VI enforcement. So, you know, as well as my understanding is Title IX enforcement as well. So this is impacting thousands of cases right now, both in evaluation and under investigation have been completely paused. But I believe, you know, the deadline is today for a supposed compliance with this guidance letter. And so we would expect that investigations would unpause under Title VI, and there'll be attempts to enforce. Now, they've opened up, as some of us have read, a DEI portal to try to get information around supposed violations in this area and perhaps other areas. So let's see what happens here in the short term. This is all, by the way, taking place amidst a larger backdrop of calls for dismantling the Department of Education for dispersing OCR into other agencies and just overall shrinking the government. So there's many larger impacts here around OCR activity moving forward. But we do expect that, you know, there will be some play here and attempt to move forward on it. You know, there's just a lot of complicating factors here. One is that there's a lot of normal business around Title VI and enforcement has nothing to do with necessarily these DEI-related efforts. They have to still respond to every complaint of race discrimination from students of all races, many variations of discrimination and harassment from students of all races, and so it'd be interesting to see how the DEI, this anti-DEI push is prioritized or not in in relation to those other cases, and the government cannot. unequally protect students, you know. And so if they do do that, we could expect to see some plays to have the entire department or agency under some court scrutiny for unequally protecting students. But let's see how it plays out. I do think that this will be held up in court. This policy quickly, I expect that courts will find it to be unlawful. But until that time, There will be some short-term efforts here, I believe, for there to be some OCR enforcement activity against it. And so what we want to get to is the point about schools not overreacting in the short term until it plays out in the courts and it's determined to be unlawful.

PERERA: That's helpful context. So let's dive in more specifically to Title VI and the affirmative action decision that were both mentioned in the opening remarks. Kimberly, let's start with Title VI. Can you tell us more about what Title VI says, what the regulations actually require, and explain how this guidance letter deviates from how Title VI regulations are traditionally or implemented?

ROBINSON: Yeah, I'd be happy to. So first, Title VI prohibits two types of discrimination as well as retaliation for filing any Title VI complaint or raising a Title VI issue. So first, Title VI prohibits disparate treatment. And this is prohibiting intentionally treating persons, people differently or otherwise knowingly causing them harm because of their actual or perceived race or color or national origin. This can be proven through direct evidence or circumstantial evidence. Second, Title VI also prohibits disparate impact discrimination. And that is assessed using a three-part test that courts developed. Basically, does a policy or practice have a disproportionate effect based on a student's race, color, or national origin? If a policy or practice has such an effect, is it justified by an educational necessity? That's basically a step that just says, look, is this policy or practice? demonstrably necessary to meet an educational goal. If it's not, the analysis stops there and it's unlawful under the disparate impact regulation. If there is, however, an educational necessity for the policy, can the district show there's not a less impactful policy or approach that can achieve the same goal? Basically, the goal here with that disparate impact regulation is that districts should achieve their educational goals while minimizing the adverse impact based on a student's race, color, or national origin.

So let's go to your second question, Rachel. How does this deviate from Title VI? It does so in several ways. So one of the things that the letter says is that Title VI prohibits race-

based decision-making no matter the form. This is simply untrue. An action is unlawful under Title VI if it violates a disparate treatment prohibition or disparate impact prohibition. The Supreme Court, as Liliana said, has reaffirmed repeatedly that pursuing a racial goal is permissible through means that do not deny a benefit or place a burden on an individual student's race. This means that many decisions that consider or assess race are lawful, despite what this letter says. The letter alleges that DEI efforts are unlawful and, quote, smuggle racial stereotypes and explicit race consciousness into everyday training, programming, and discipline. However, efforts to create a more diverse, equitable, and inclusive school district are lawful when they help to challenge and disrupt stereotypes and result in a learning environment where all students are valued and can thrive. It's important to understand that even when districts are planning training, programming or discipline, they can consider the impact on students of different races. It's just simply that they're not denying benefits for giving sort of preferential treatment on the basis of race, color, or national origin.

It also says that educational institutions can't separate or segregate students based on race, nor distribute benefits or burdens based on race. That's a quote from the letter. But it's important to understand to distinguish between two types of separation or segregation. One that says stay out unless you share our race or national origin. That's what we had with Jim Crow. That's when they said like put a sign on the door, do not come here if you're of a certain race. However, groups that uplift and celebrate a particular racial or ethnic group that don't create a hostile environment for other students are permissible as long as those are open to everyone. But exclusionary groups, yes, would have to satisfy strict scrutiny and that's very hard to do.

And finally, it's important to understand that there's a pretty extensive process to remove federal funds. So the letter says, institutions that don't do what we say in this letter face potential loss of funding. And I'm gonna go a little bit into the steps of just how that funding occurs in a future answer, but I just wanna note it's an extensive process. that takes a very long time, including a letter to Congress. You have to wait 30 days till after that. And so because of the various steps that are involved, it takes a long time for a district to ever have to give over their federal funds and it's exceedingly, exceedingly rare. So this is not the kind of situation where OCR is gonna knock on your door and say, write us a check for your federal funds. That is simply not what happens. And the other thing is, and I'll just end with this, it says, we'll do this that fail to comply consistent with applicable law. Well, applicable law is what we're explaining today, consistent with what the SFMA case said, not what they wish it said, is important for districts to understand.

PERERA: Thank you. And one follow-up question here that we've gotten some variations of in the pre-submitted questions. And how do Dear Colleague letters relate to the regulations? Can they change interpretations of regulations? How do those matter in legal proceedings?

ROBINSON: So essentially, Dear Colleagues letters helped to give notice to recipients of federal funds of how the agency is interpreting existing law. However, they are not binding, and they cannot contradict the law. And so here, the letter is contrary to applicable Supreme Court case law and long-standing interpretation of Title VI. And so they're not binding. And so districts are not bound by what a letter says.

WERNZ: If I could just say, I mean, there is a, I mean, there's a practical purpose to Dear Colleague letters. And that is that it is a signal to the community, this is how the department interprets these laws. So I don't, you know, it's not that it's not important at all.

It is something that schools should pay attention to what is in the letter, but I completely agree it can't change the law and what's. What's really confusing about all of this is that dear colleague letters were despised under the first Trump administration. They were something that the first Trump administration told us that the Obama administration, the Biden administration were using these tools in order to change the law without authority. And yet here we are now under this administration. It appears that they've decided, well, if you can't change them, join them. So. They're now using this tool in an effort to do things that previously they said were not appropriate.

PERERA: Thank you, Jackie, for that point. So the Dear Colleague letter invokes both the regulations of Title VI and the authority of the department to enforce Title VI and the recent Students for Fair Admissions decision from the Supreme Court as justification for releasing this new guidance. So Liliana, I would love to hear from you what does the Students for Fair Admissions decision actually say and how does that decision and precedent from that decision. deviate from how it's represented in the Dear Colleague letter.

GARCES: Yeah, so, you know, that was a decision that was looking at the constitutionality of race-conscious admissions in higher education, and the court was interpreting what the Equal Protection Clause required. And it said specifically that the methods, it was looking at the methods that institutions were using in their admissions processes to promote goals of diversity. and the court said that someone's racial status. could not be used as a determinative factor in those decisions. You can't give that kind of benefit just based on a student's race. And it said that, and here's where I'm just gonna turn to the words of the court itself. It said that nothing in the opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. So in other words, institutions can still consider how an applicant's lived experience in relation to race would contribute to the mission of the institution. And that ruling was very much about the means that institutions could use to achieve that goal of diversity. It was not placing restrictions on the goal of diversity itself, especially when that goal is rooted in a university's mission. And in fact, Chief Justice John Roberts, who authored the decision, called diversity, the diversity interests of institutions as worthy, as commendable. The decision didn't say, as the letter suggests, that you couldn't pursue those goals, particularly with policies that don't employ racial classifications. Those are arguments that have been brought in other cases. The lower courts have rejected them. And recently, the current Supreme Court had an opportunity to review those. determinations and then let those rulings stand. So when we understand how far of a departure from SFFA, the court's ruling, this letter really represents, I think we can see more clearly that it's not grounded in an interpretation of the decision. It's really trying to rewrite the decision itself, which it just does not have the authority to do.

PERERA: Thank you, that's a helpful clarification. We'd love to ask a follow-up question here and others feel free to jump in. One of the most common questions we got from the pre-submitted questions was around, asking very directly, can schools and colleges still promote DEI? Are DEI programs still allowed under federal law? Can schools have race-based affinity groups? We'd love to hear your all's thoughts on this and Liliana, if you can start us off.

GARCES: Sure. Let me just start by clarifying what we mean by diversity, equity, and inclusion programs. Because the acronym doesn't tell us what they are. The acronym just triggers misconceptions and confusion. And diversity is this commonly understood goal of having representation of different ideas, different perspectives, experiences in teams and

in classrooms, which research over many decades has. as shown, really help drive innovation, it promotes critical thinking skills, it reduces prejudice, it promotes, it breaks down stereotypes so that we can work together across our differences. And these are all really important benefits that institutions have long defended in legal cases because it's so foundational to their mission. But those benefits, they don't happen on their own. They require students engaging with one another across difference. And that's where inclusion promoting policies come in. Those are the supports that help all students contribute perspectives, ideas once they're on campus. It's the trainings that help faculty members like me have the skills to facilitate difficult conversations across race. There are the organizations that help students of color feel that, you know, that that belongs so that they can bring their full selves into the classroom and discussions and engage with their peers. You know, equity is related to those goals, but it's also uniquely distinct. Because equity is about making sure that access and opportunity and educational outcomes are not dependent on your race. And so in that way, equity is more foundational, more robust than diversity and inclusion. And under federal law, race-conscious efforts, efforts that attend to how race constrain opportunities are permissible. to advance each of those goals. And when it comes to advancing equity, they're necessary. They're necessary to make sure that access and opportunity are not constrained because of the color of your skin. And so the statement that being race-conscious somehow constitutes discrimination is just a construction. It's a constructed notion of discrimination that this letter is imposing on universities. But that's an intrusion that the First Amendment protects against.

KIM: And I just pick up on where Liliana left off with that, is I totally agree that there's a degree of vagueness and just a complete lack of clarity around what diversity, equity, and inclusion actually mean. And that will be, as we'll talk about, one of the legal challenges, a guidance that is so vague and over-broad as to be unfollowable is likely to run into legal problems really quickly. You know, the larger point here is, you know, by putting forward a guidance that purports to snuff out DEI, you can't go so far as to do the opposite, which is, let's just say the opposite of diversity, equity, and inclusion is uniformity, inequity, and exclusion. You can't do that because there are, Title VI does prohibit discrimination based on race. There needs to be efforts made to comply with the law, independent of this guidance, to prevent a hostile climate on your school campuses to promote equality in the programs for all students based on their race and other factors to prevent and address racial harassment that might be occurring on campuses at all levels. And there's also state laws and, of course, school policies that all prohibit discrimination, harassment, hostile climates, and so forth, and inequality. And so there's so much countervailing law and policy that makes it so that districts and schools should really be thinking about this. I think Jackie mentioned at the outset that there's other laws on the other side. There's policies that you don't want to go so far in striving to understand and comply with this guidance that you then run afoul of the actual law, whether it's federal law or... state law or your own policies. So I think we really need to temper our overreaction to this guidance with an understanding of, you know, district council, university council need to understand, be grounded in what the actual law requires them to do in what their policies say, consistent with the actual law to promote equal educational opportunity, prevent hostile climates. and create an environment that is welcoming and accepting of students regardless of their background. And so that is the real underpinning of these laws that you cannot overreact in a way that then is unlawful in the overreaction.

ROBINSON: And then Rachel, to end the, just put a pin in the affinity group point, because I feel like no one's mentioned that yet, but I did earlier. Yes, affinity groups are permissible that are open to everyone, but that may celebrate particular aspects of culture. Exclusionary affinity groups are unlikely to survive strict scrutiny. So it's important to

understand the difference between those that are open to everyone, but that may be celebratory of a particular culture and those that are excluded. visionary or that create a hostile environment on a campus, those latter should not permit it. But I do know that's something that's being discussed a lot now, so I just want to make sure.

PERERA: Thanks, Kimberly. So let's pivot to talk about what the threats are here. So the letter threatens institutions with the potential loss of federal funding if they fail to comply by February 28th or today. So if a school district or college decides not to comply, what comes next? What are the potential next steps? Kimberly, can you kick us off?

ROBINSON: Yeah. So first I want to just finish up on the point I was talking earlier about what the loss of federal funds that's threatened. So, as I mentioned, it's not the situation where OCR shows up your door and you have to write them a check for all of your federal funds, right? There are numerous steps that have to be taken. I just want to give people a sense of that because, again, lack of understanding of how this works. They have to notify a recipient that they're being investigated. they have to conduct an actual investigation, which includes things like site visits and interviews and reviewing data. They have to issue a letter of findings and propose resolution, and then the district can accept or reject that. Throughout all this process, they also have to offer mediation, and if it's not accepted and it can't be mediated, then they can go to issue a letter of impending enforcement action. This requires then a hearing and an express finding of non-compliance on the record. have to then file a report with Congress and you have to wait 30 days after filing that to report the revoking of funds. So this is, you can see that this is a very detailed and long process and so it's not something that's going to sort of sneak up on you. It's something that requires a long time.

In addition to my opening remarks, I mentioned that the Office of Civil Rights is a small office that is unfortunately historically underfunded. This is one of the reasons why. Title VI is under enforced, there aren't enough people to fully enforce it effectively. Districts also know that. And so the ability of a small office, especially one where that's experiencing a significant exodus, is unlikely to have the capacity to fully enforce it. It doesn't mean there won't be target enforcement to sort of send a message, but there will be. There are limitations to what they can do. In addition, school district council really have to be leading the way at this moment. They need to understand what Title VI says and what it doesn't say. And make sure that school leaders and teachers too, because right now there's a lot of misunderstanding out there. One of the things that the Education Rights Institute does is we offer reports and very short videos that help to explain this, that can be used for professional development, for leaders and educators. And those are available to help increase understanding of what Title VI does and does not say. And so I think that's really important at this moment because It's a lack of understanding that you can then put misinformation into to get people to sort of do what you want.

The other thing I think that's really important here is I think communities really need to think about engaging in a conversation about their core values. If equal educational opportunity is a core value of your district and your schools, then you need to have that conversation about what you're doing and how you're doing it in ways that make sure all students included in threatening. One of the things that the letter says is that white and Asian students are experiencing discrimination. Yes, for example, there's an increase in discrimination and harassment with students who are white due to a rise in anti-semitism. That is real and districts need to be addressing that. There also was an increase in discrimination against Asian students after the pandemic. That's also real. That needs to be addressed. They have an obligation under Title VI. to immediately investigate and

address harassment and take steps to prevent its recurrent. But let us not forget that as this letter centers the discrimination that's occurring against white and Asian students, African-American, Hispanic, and Native American students also experiencing that discrimination. And you have to address discrimination across the board to address the full scope of what's happening and comply with Title VI. So I'll just stop there for now.

PERERA: Thank you. That's really helpful. Jackie, I'd love to hear from you. And Bob, feel free to jump in too. We've gotten a lot of questions, and this is something I've also been curious about, and talking about this over the last few weeks around trying to really conceptualize what federal funding is on the line here. So for example, is student aid on the line? Is Title I money on the line? Is money for students with disabilities on the line? So can either of you give insight into what streams of funding? OCR can terminate when they're talking about threatening the withdrawal of federal funding.

WERNZ: Well, the answer is it's actually pretty short, which is they can come for all of your federal funding. I mean, this is called the nuclear option for a reason. It's recognized that if they take it, it would probably put most institutions out of business. And so I don't wanna underplay that, but I think what's really important is Is that funding really on the line? I mean, and I think Professor Robinson has laid out very clearly that there is a, a lengthy process that's required to be used here. It's incredibly difficult for me to see how an agency that currently is under a stop work order and having its staff cut, you know, probationary employees cut and other staff threatened. how that agency is going to be coming out and doing full scale enforcement at the level that would be necessary to make this, implement this type of change. So, but I mean, they have, the Trump administration has used some creative methods in the past to try to get around. its actual enforcement duties and so I wouldn't be surprised and I think we already are seeing some of those things. I mean for example in 2018 they went after certain magnet school funding in Chicago public schools and they did that mid-investigation through a grant renewal process that came from another part of the Department of Education. Now that went to court and it ended settling and those funds weren't taken away. But you know that was an example of the Trump administration I think trying to get creative to get around some of these requirements. They actually the Department of Education just updated last week the case processing manual for OCR and in doing so they made some tweaks in the rapid resolution process that. I can't decide if I'm reading too much Evil Genius into it or if it's maybe just grammatical changes, but I could see them trying to use some of their rapid resolution, early resolution might to push institutions to agree to make changes. But the key there is that the institution would have to agree. The only way for them to really cut off the funding is to go through that lengthy process that Professor Robinson described and so I've referred to this as regulation by intimidation. I think that's what's happening here and frankly I think it's working. I think a lot of people are cutting programs left and right. They're doing the dirty work for the administration for them. And so I think it's just really important to make sure we're grounded in the appropriate question which is okay yeah they can come for all your funding. Is that gonna happen? And you know, you've got to balance the risks on both sides.

GARCES: And if I may, you know, it can't be done for unconstitutional reasons. It cannot be done for unconstitutional reasons. There's a legal case pending that is challenging the constitutionality of this letter under the First Amendment, under the due process laws. I know Kimberly can say more about the case. And, you know, it's really important that we all understand the parameters of what the legal cases have said what the eco-protection clause says, what's outside the enforcement authority of OCR, the protections that exist for institutions under the First Amendment. But even with all of that legal understanding, this

letter can have that very practical effect. It instills fear. So educators abandon policies that remain lawful. This is a letter that is one of other factors in the ecology of our context right now. You have the executive orders. You have a host of law-based pressures that are contributing to a climate of suppression where educators just feel that pressure and they abandon efforts that promote fair access and opportunities out of fear that they may be at legal risk. And I'm a legal scholar, but I'm also an education researcher and I've seen that dynamic play out in my research. So much so I've been able to give it a name. I call it repressive legalism. right? When all these pressures from the environment make educators feel that they they can't engage in the work that remains lawful and essential to advancing their mission. So we need to understand the legal parameters. We will also need to attend to the fear because even if the guidance is struck down in the court, it will still have an effect if educators change policies out of out of fear.

WERNZ: One quite practical thing, don't ignore OCR if they come knocking. Because the one case where OCR has actually terminated funding successfully, went through the court system, was not about the substance. It was that the educational institution disagreed that OCR had the authority to enforce a particular thing. And they just said, we're not going to participate in this investigation. And they lost. So I would encourage people to participate in the investigation, make your case, but if you don't give in, they're going to have to go through the process.

ROBINSON: Yeah, and in terms of, I'll just clarify what this case is that is pending in the United States District Court for the District of Maryland in the Baltimore Division. It's the American Federation of Teachers, the American Sociological Association has sued the Department of Education as well as the Acting Assistant Secretary. And they are seeking to join this letter and there's three claims in the lawsuit. So first they said, as it was mentioned, it violates First Amendment rights to free speech and free association. It also alleges that it's unconsciously vague under the Fifth Amendment due process clause. And then finally, it violates the Administrative Procedure Act because it's arbitrary, capricious, it's an abuse of discretion, it's contrary to constitutional law. So we will see if there is an injunction. I imagine that will not be the only lawsuit that's issued. And certainly district council, if there is that long process plays out and you're facing a potential enforcement action, you certainly can shoot, sue at any point to say that this is unlawful. So that is certainly a tool that's available to district council. And so that's something to keep in mind. The other thing to keep in mind because DEI has come up quite a bit, there's clear federal law that says the federal government does not control, direct supervise or control things like curriculum, programs and materials of instruction. So that is outside the scope and purview of the federal government. And so it's important to the extent that people see what they're teaching and how they're engaging their students and the content of that. That is all not something that the federal government can tell you, you can teach this and you can't teach that. So Congress has been very clear on that. The department cannot rewrite that. That's why we have separation of powers. So that is still governing applicable federal.

KIM: And I think, just to add 10 seconds to that, I think, you know, it's also district and university councils should have some, feel some comfort that their courts have already acted in the realm of censorship. They've struck down a previous related Trump executive order around prohibiting the teaching of so-called divisive concepts several years ago. So, there's already precedent building through the federal court system. that actions and policies that are too vague, arbitrary, arguably impinged on First Amendment rights that prevent teaching and learning of important concepts that in many cases, teachers are required to teach. You know, at the K-12 level under state standards and the laws set forth by state legislatures, you are required to teach certain things. And so there's... Well,

already several cases that have been decided that express great concern at policies that are overreaching to such an extent that they impinge upon speech on association and also create such confusion that it's just impossible to know what the limits of the language is. Could it apply to literally everything? And so you see that in this guidance with the the prohibitions on not only words like social justice, you can't teach social justice, you can't teach about equity, obviously, and anything that could be a proxy to what we think we know is unlawful behavior, you can't do anything that could be a proxy for that either. So it's extraordinarily vague, extraordinarily broad, and so we do expect that several courts will get involved and eventually strike it out, we need to. get to that point first. And so I know that we'll talk about that and it's sort of in the Q&A. Well, there'll be a lot of questions about what to do in the media short term here.

PERERA: Yeah, and that brings us to the Q&A section. We did get a lot of pre-submitted questions and some questions submitted over the course of this event, and so I wanted to start with one question from Natalie at the Dignity in Schools campaign, and she's asking how these orders interact with the many state and local laws that require a race and disability lens. So, for example, there are state laws that require districts to look at discipline data for racial disparities and assess the potential causes. In the short term, can we confidently advise people to continue following existing state law as we wait for these court cases to resolve themselves? And feel free, anyone who has an answer to jump in.

KIM: Maybe, can I just start and say that I think there's going to be a lot of this variety of question around so many different programs and initiatives and sort of requirements at school. So I think, you know, and I'm curious what my co-panelists advise, but I think there's, you know, four basic things that we want to think about in terms of is it OK to keep doing X or Y? I mean, one is clearly we've all expressed don't overreach and act too hastily right now. I know there was a deadline today imposed sort of an arbitrary deadline. It's akin to reporting on what you've been doing to save your job in the next day. So there's a little bit of arbitrariness to that deadline, too. But I know that people are worried, but A, don't overreach and act too hastily. Two, I do think it is important, too, because this is a legal issue to get in contact with your school council. And then potentially also at the highest level, at the district level, at the state level. And if you are, your school's part of associations, professional associations, they can be helpful too, just to be in close contact with the lawyers that are responsible for working on this issue. Three is I think that there should be, schools should develop internally sort of a policy on the policy here and to go through a process of understanding, consistent with your own mission and values as Kimberly was mentioning, consistent with the facts and data around your own school system. and your own policies and the laws that you're subject to already, you know, state and federal, to come up with your internal ground game around how to react to this federal guidance. And then finally four is just to really stay abreast of the developments because they're going to be happening very quickly here on the legal side. And as you do that, it'll become more clear what states may be enjoined from taking part in this or to what extent there'll be an injunction here that frees up schools from under the guidance but then to support students and faculty in the meantime because they will be anxious. There will be a lot of effects on the climate in the short term so to really focus on that side as well because I think that it just creates a lot of agita and worry and we we don't want our students and our faculty to be suffering in the short term here.

WERNZ: Well, I hate to give the lawyerly answer here, but as the as a practicing attorney, I have to say, like, it does depend. It does depend on what the state law says. I mean, I think they're the frustrating thing about this process and the way that the Department of Education has chosen to handle this is that I actually think educational institutions could

have benefited from some guidance on how to structure programs and admissions programs and things in a way that would avoid and mitigate the risk of harm to certain other groups. There are certainly examples of programs that have been exclusionary or that have been involved stereotyping or that have involved giving funding to just, you know, one particular background of individual and not making it available, as Professor Robinson said, to all comers who want to celebrate this this particular area of diversity. There are examples of those things that have gone awry. But by making this blanket rule that, you know, you basically can't consider diversity ever under any circumstance, I think we've we've lost sight of how we should be thinking about these things. I think some people are, this is seen as like a yes or no. Are we going to comply with the order or are we not going to comply with the order? And I think the real answer of what the law actually allows and prevents is somewhere in between. And so that's where I think working with your council in order to think through those is going to be really important.

ROBINSON: Yeah, and I'll just, oh, go ahead. Oh,

GARCES: No, please go ahead, Kim.

ROBINSON: So I definitely agree with what Bob and Jackie are saying. I, you know, this is actually a moment where school district council can really be helping districts assess what they're doing in ways that could actually really strengthen education if they choose to consistently apply long-standing interpretation of Title VI, you know, because there's too much lack of awareness that's occurring within districts. And so into that, this has been dropped. And so I think that if we really step back and say, okay, what is dis-retreatment discrimination? Do we know what that is? Do our teachers know what that is? Do they know what they have to do if they see harassment occurring? A lot of that, the answer is no, right? And so because of that, I think it's a really, you know, I think the- What I would love to see because I really try to be an optimist in dealing with these kinds of issues is what I would love to see is an additional education of educators around what Title VI truly means, how it advances equal educational opportunity, what it prohibits, like these kind of exclusionary policies. Yes, absolutely. You cannot have a black student union that if a white student wants to join, you say no. That is not OK. That is discriminatory. You cannot address harassment against Black and Hispanic students and not against students who are being harassed because they're Jewish, because they have affiliate with Israel or with Palestine. You can't do that. And so I think if we could really meet this moment with advancing equal educational opportunity and interpreting Title VI in a way that truly protects and supports students, we could really turn this around to make schools stronger.

GARCES: Well, and, you know, with questions of promoting diversity and inclusion, we also need to ask the question, like, why are we asking institutions to change policies that promote cross racial understanding? Why would we ask institutions to do that? Why would we ask them to abandon policies that help us come together across our differences at this time? These are Policies and the goal of diversity, which the Supreme Court has in the past said, it is critical to the health of our democracy to maintain the doors to positions, the pathways to positions of power and influence open to all, regardless of race. Why is the government asking educators to discard any of those practices that also help their students succeed? And these are efforts that need to be expanded, not suppressed.

PERERA: Thank you. So it seemed like we only had time for one question. So we only have a few minutes left and we'd love to give you each an opportunity to offer some concluding thoughts. If there's one important takeaway you want audience members to

keep in mind coming out of this conversation, what would that be? So Jackie, why don't we start with you?

WERNZ: My biggest advice is to be explicit in the decisions that you're making. I think one thing I've seen from a lot of institutions is a little bit of head in the sand. We don't know what to do. And so we're just gonna maybe ignore this or we're not gonna think through it. We don't want to say something that suggests that we care about diversity because then they're gonna come back and they're gonna get us for it. And I just don't think that's the right approach here. I think you need to really, as I believe. Professor Robinson said earlier, you need to be looking at what your community's values are and, you know, figuring out how do we want to approach this in a really deliberate manner.

PERERA: Kimberly.

ROBINSON: So thanks, I can build off of what Jackie said. So yeah, I do believe that this is a moment that really, really challenges school district to see, you know, what are their core values and what are their aims. And, you know, I don't meet anyone in education who didn't go into it to help all students succeed, right? I mean, educators are some of our most dedicated servants in our nation. And so, this really calls upon... you know, addressing how we are going to advance equal educational opportunity in consistent ways. And I think it's worth having district council work more closely with school districts, leaders and principals and teachers to educate them about what Title VI says and what it doesn't say and what they are still permitted to do. They are free to teach. as they see fit. The curriculum is not controlled by the federal government. Affinity groups, permissible, that are not exclusionary. Addressing harassment, required, get on top of it. There's just so much that can be done here. And so my hope is that districts will seize the moment and really educate their staff and teachers about it in a way that advances equal education opportunity. And that would be truly just a wonderful way to respond in this moment. And if OCR does come knocking, you will have a record of what you've done. You'll have a record that shows what you've been doing. And so if it goes to, a letter goes to Congress about what your district is doing, you would be a shining example of advancing equal education opportunity and meeting the needs of all students. And that going up to Congress, do you think that they're not gonna notice and say, hey, We're going to have to cut off funds to this place that is helping all students thrive. You think that's going to stand? So I think you have to realize the checks and balances that are built into the system and leverage those, but you have to do it in an intentional way with Title VI and really look at how it applies. and I hope that people as they're doing this will look to the resources that the Education Rights Institute is creating. We're working really hard to add new ones because the moment requires them and so we are will continue to do that work and are starting to partner with districts in 2025 to help them so.

PERERA: Thank you. Liliana.

GARCES: Thank you. Yeah, I would say, you know, this, we need to recognize that the letter has instilled a lot of fear. And in that fear really thrives in an environment of isolation when you feel like you're scrambling to address this. And so it's important to understand that there's a lot of groups that are united in challenging the unconstitutionality of the letter. And you've also had close to 70 organizations in higher education are asking the department to rescind it in a letter led by American Council on Education. And these are all organizations, educators whose very mission is to advance the collective good, to advance the goals and values that we have in common, to really honor the humanity, the dignity of students and to ensure fair access and fair opportunity. And for all our students and all the

benefits that that brings to our society. The letter can't change that act. The letter can't change your values. The responses need to be grounded in our values and we need to step through the fear and into those values with our responses.

PERERA: Thank you, Liliana. Bob, do you want to close us out?

KIM: Yeah, sure. Just a quick backdrop here. This guidance is part of a larger effort by this administration to harm civil rights in many areas, not just around Title VI, but we've seen the immigration actions that have already happened across government. We see the actions against LGBTQ plus students and communities. We see issues affecting women and their rights as well. And so you know, backing up, we see a larger effort here going on. This guidance is arguably one facet of a larger picture. The Title VI was enacted in 1964, just 10 years after Brown v. Board of Education. The goal of this act was to remove the vestiges of segregation, which were 70 years only removed from de jure segregated schools. And so all of the vestiges of that, with unequal access to courses, to teachers... to the harassment and violence that's going on in schools racially, to unequal discipline policies, to barriers to admission. All of these are vestiges of segregation. We need to return to that civil rights enforcement to stamp out those vestiges. And I'm very sad that this one episode and chapter right now is a distraction from that. but I do am confident that we will return. to the mission to create equality under Title VI so that there is not discrimination based on race, national origin, or ethnicity in our schools in the future.

PERERA: Well, with that, I want to thank you all for your time and joining us today for this quick webinar. I personally will speak on behalf of those at Brookings, found this incredibly valuable to have this discussion in this moment. And thank you all who joined us live and for those who are watching on YouTube.

ROBINSON: Thanks for inviting us.

GARCES: Thanks for having us.