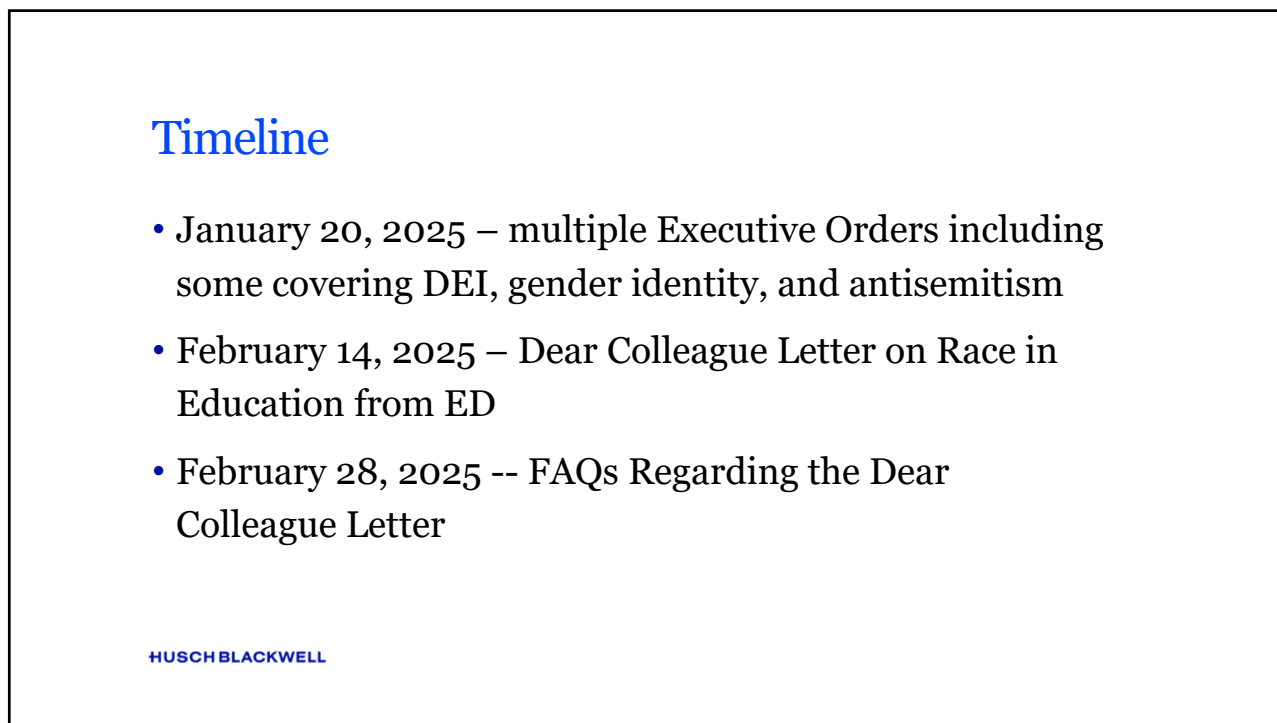




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## What is a Dear Colleague Letter?

- Advises institutions of how ED interprets and will apply relevant law
- Does not itself have the force and effect of law
- Does not bind ED in its discretionary enforcement authority
- Does not bind courts in determining the law in the context of a specific case



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## Can a Dear Colleague Letter be “wrong”?



- Assuming the legal issues raised in a DCL make their way into court, judges are the final arbiters of what the law means and may disagree with positions taken in a DCL
- Many ED enforcement actions do not make their way into court, and ED may rely on analysis in the DCL to drive investigations and resolution agreements

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## Can Dear Colleague Letters be challenged?

- Litigation is possible to challenge DCLs under the Administrative Procedures Act and U.S. Constitution
- There are “standing” challenges and other legal impediments separate from the “merits”
- A favorable outcome in a particular lawsuit could but does not necessarily mean national relief
- At least two lawsuits against the DCL have now been filed

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## What is the focus of this Dear Colleague Letter?

- Articulates ED's views on the use of race, color, and national origin in schools, colleges, and universities
- Implicates obligations under Title VI and the Equal Protection Clause
- Discusses the Supreme Court's decision in *Students for Fair Admissions (SFFA)* and ED's views of what *SFFA* means in admissions and other contexts

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## *SFFA* (2023)

- Applied Title VI and the Equal Protection Clause to admissions practices at Harvard and UNC
- Holds that the benefits of diversity cannot justify the use of race as an eligibility criteria in determining admissions
- Adopts several points of reasoning that may limit the use of race in other institutional contexts



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## What were the primary points from *SFFA*?

- The use of race, color, or national origin is always subject to “strict scrutiny”
- “Diversity” is too vague for meaningful judicial review
- Racial categories are underinclusive and overinclusive
- Racial categories inherently rely on race-stereotypes
- Using race in admissions is a zero sum; if used to help one person, it necessarily harms another
- No logical endpoint to the programs

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## Title VI

- No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
- 42 U.S.C. § 2000d
- Equal Protection Clause is viewed as co-extensive

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## What are some of the key points of the DCL?

- Institutions cannot use race in decisions pertaining to all manner of institutional programs, not just admissions
- Institutions may not segregate based on race, nor distribute benefits or burdens based on race
- Institutions cannot engage in programs that discriminate by stigmatizing based on race
- Institutions cannot adopt race-neutral programs that are, in fact, motivated by racial considerations

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What programs other than admissions are implicated by the DCL?

Admissions	Hiring	Promotion	Compensation
Financial aid	Scholarships	Prizes	Administrative support
Discipline	Housing	Graduation ceremonies	All other aspects of student, academic, campus life.

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What about admissions?

The DCL warns that institutions cannot avoid the direct effect of *SFFA* by using admissions essays and other cues as a proxy for race that is then used to favor or disfavor students based on race.



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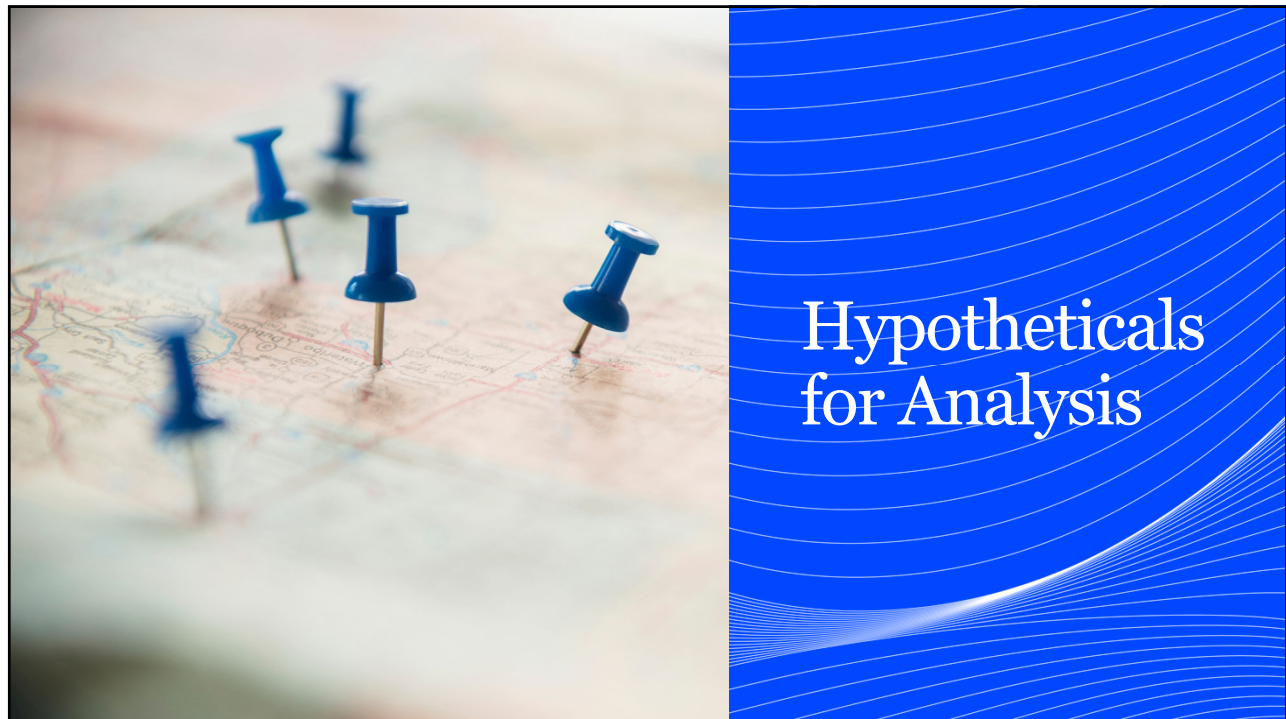
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## What are some additional key points from the FAQs?

- Explain that separating students based on race is discriminatory even if students are treated equally (relying on *Brown v. Board of Education* precedent)
- Explain what sorts of “DEI programs” might be discriminatory and how ED will assess
- Explain what it means to “stigmatize” based on race
- Explain that institutions cannot use race in procuring goods and services
- Explain how ED intends to evaluate whether race neutral programs are, in fact, motivated by racial considerations and therefore illegal in ED’s view
- Acknowledges that educational programming and observances of holidays and related programs are not inherently discriminatory

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**EXAMPLE:**

A regional public university has an open admissions policy and strives to recruit as many students as possible. The institution’s admission’s website contains the following statement: “The University welcomes all applicants. Persons from traditionally underrepresented groups, including racial and ethnic minorities, are welcomed and especially encouraged to apply.”



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**EXAMPLE:**

A private college with highly competitive admissions requires applicants to submit an admissions essay describing how they overcame significant adversity in life and how it has prepared them for success as a college student. While the college does not expressly ask applicants their race or ethnicity, when an essay reveals the applicant is a racial or ethnic minority or from a foreign country, an admissions reviewer adds a special flag to the file. In practice, such flagged files are admitted at a much higher rate than non-flagged files.



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EXAMPLE:

Before *SFFA*, a private college offered special scholarships only available to racial and ethnic minorities. After *SFFA*, the private college eliminated all such scholarships but created new scholarships only for students who graduated from high schools in certain urban centers with high percentages of Latino students. The college never offered urban scholarships before, does not offer rural scholarships, and does not offer urban scholarships for several cities whose urban schools include high percentages of African Americans. An admissions working group tracks the racial identities of urban scholarship recipients and documents that 85% are Latino. The school’s president was an ardent public critic of *SFFA*.

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EXAMPLE:

Before *SFFA*, a public university offered several types of scholarships to students of various protected statuses. After *SFFA*, all such scholarships have been eliminated. The university offers new scholarships for students from urban schools, rural schools, Title I schools, and first-generation students. It also allocates more scholarships for students with financial need. The university does not track the race or ethnicity of the scholarship recipients but does track the overall racial and ethnic composition of its student body. The institution’s leadership did not take a public position in opposition to *SFFA*.

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**EXAMPLE:**

A business school at a public university accepts a gift from a benefactor to fund a fellowship called the “Women in Business Fellowship.” The fellowship includes a monetary stipend, special access to successful female alumni who are CEOs, and programming on skills such as networking. Only female business majors who have completed two years of study and have a 3.75 GPA or higher may apply. The business school operates other fellowship programs, with different elements, that are open to all students, irrespective of sex.



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**EXAMPLE:**

On graduation weekend, a public university allows certain student groups to host supplemental graduation ceremonies. For example, the Asian American Student Association hosts a reception for graduating Asian American students. The event is invitation only and takes place on campus in the student union. All students are allowed to attend the university’s main graduation ceremony at the stadium.



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EXAMPLE:

All first-year students at a private college are required to participate in a two-hour seminar that focuses on diversity, equity, and inclusion. The program is delivered lecture style in an auditorium. The seminar includes content on America’s history of discrimination, current forms of discrimination, and social and economic disparities resulting from discrimination. The course also includes content on avoiding microaggressions and supporting the use of chosen names and pronouns. The training does not target any particular race as being morally or ethically responsible for discrimination.

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EXAMPLE:

All first-year students at a private college are required to participate in a two-hour seminar that focuses on diversity, equity, and inclusion. The program is delivered in small groups. For one segment of the program, the facilitator separates white students onto one side of the room and non-white students on the other. White students are then required to express ways in which they benefit from privilege. Non-white students are, in turn, asked to express how they have experienced discrimination.

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**EXAMPLE:**

The mission of the university’s Multicultural Students’ Office is to support students who are racial and ethnic minorities, international students, and LGBTQ students. The Office provides free tutoring to students who identify as members of the beneficiary groups. If a student who does not identify as a member of the beneficiary groups asks for tutoring, the Office refers the student to the university’s Student Support Center, which has more limited tutoring support available to any student.



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**EXAMPLE:**

A public university offers majors in Asian Studies, African Studies, and Latin American Studies. Students petition the university to offer a European Studies major, but the institution declines. The institution also offers special programming on Martin Luther King Day, Holocaust Remembrance Day, and other selected holidays associated with racial or ethnic minority figures or groups. Any student is eligible to enroll in one of the majors or participate in the special programming.



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**EXAMPLE:**

A public university procures a range of goods and services from local and regional vendors. The university adopts a program that awards certain preferences to vendors that are at least 50% owned by women or racial or ethnic minorities. The institution tracks the number of women and minority-owned businesses that receive awards and sets internal quotas for how many awards should go to such vendors.



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