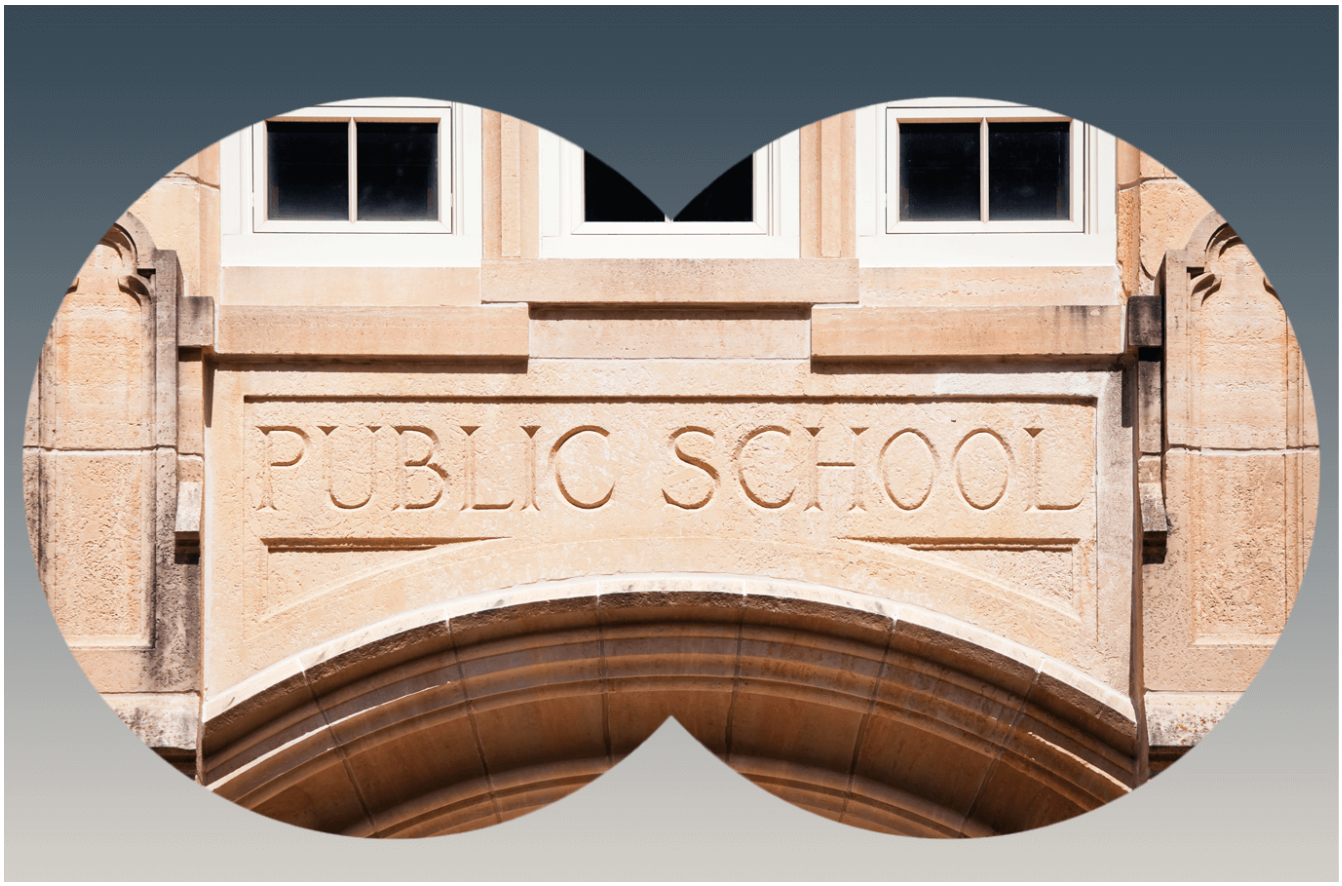
Education Next

FEATURE

Trump's Civil Rights Agenda Comes for Public Schools

After intense scrutiny of higher education, federal government sets sights on K–12

By R. Shep Melnick



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On August 15, the Department of Education announced it would begin proceedings to cut millions of dollars of federal aid to five Virginia school districts that had refused to comply with its guidelines on transgender students' access to sex-segregated facilities. At about the same time, it opened investigations of the Baltimore City Public Schools and four districts in Kansas, charging that they, too, had violated Title IX of the Education Amendments of 1972 by providing biological boys access to girls' facilities and athletic teams.

Leaders of K–12 schools might have thought that the Trump administration's intense focus on higher education would insulate them from similar attacks. But they are starting to see that the administration's reinterpretation of civil rights law, combined with its willingness—even eagerness—to terminate federal funding, will hit public elementary and secondary schools as well.

By mid-August, the Trump Department of Education had initiated 130 investigations of colleges and

universities, but only 30 investigations of K–12 schools. Almost all the former focused on antisemitism, racial preferences, and that amorphous entity called "DEI." Almost all the latter involved transgender issues. Although the assignment of transgender students to sex-segregated facilities and sports teams is a highly contentious political issue, it involves relatively few students and remains peripheral to the basic structure and operation of public schools. This will soon change: Guidance documents issued by the Departments of Justice and Education indicate that federal regulators will challenge the way public school districts assign students to schools, discipline them, and provide instruction on race- and sex-related issues.

The Transgender Agenda

Although the Trump team came into office promising to "deconstruct the administrative state," abolish the Department of Education, and return power to state and local school systems, it has acted with unprecedented aggressiveness to establish and enforce a new set of civil rights rules. The transgender issue offers a window into its playbook. Ironically, it builds on initiatives of the Obama and Biden administrations, turbocharging them with a willingness to do what no other administration has done over the past half century: cut off federal funds to educational institutions.

Before 2014 the federal government had virtually nothing to say about the treatment of transgender students and employees. Indeed, few people knew what the term meant or had thought about how transgender individuals should be assigned to bathrooms, dorms, or sports teams. That changed between 2014 and 2016, when the Obama administration announced that Title IX and Title VII of the 1964 Civil Rights Act not only prohibit discrimination against transgender employees but require transgender students to be assigned to sex-segregated facilities on the basis of their "gender identity" rather than their physiological, chromosomal, or hormonal sex.

These novel policies were not established through the rulemaking process required by the federal Administrative Procedure Act but rather announced in unilateral "Dear Colleague Letters" (DCLs). Several federal judges agreed with this interpretation of Title IX, even though that law explicitly prohibits "sex" discrimination, and the term "gender identity" was created for the specific purpose of distinguishing it from "sex." Suddenly transgender issues became a matter of federal policy and intense partisanship.

The first Trump administration rescinded the Obama administration's transgender guidance documents but otherwise ignored the issue. Meanwhile, the Supreme Court decided in *Bostock v. Clayton County* (2020) that Title VII prohibits employers from discriminating against transgender employees. The Court made clear that it was not addressing the key issue in most Title IX controversies—that is, how to assign students to sex-segregated facilities when such segregation is authorized by law. That hot-button issue remained in the hands of state and local education officials and private educational institutions.

The incoming Biden administration placed the transgender issue high on its list of priorities. After President Biden issued an executive order on "Preventing and Combatting Discrimination on the Basis of Sexual Orientation and Gender Identity," several departments adopted policies expanding coverage of gender-affirming care and prohibiting any form of discrimination against transgender individuals. In 2024 the

Department of Education issued regulations that (among many other things) required schools to assign students to sex-segregated facilities on the basis of their gender identity. Enforcement of these regulations was promptly enjoined by several federal courts.

The Trump campaign realized that this was a winning political issue. Its "Kamala is for they/them, President Trump is for you" ad drew such a powerful response that Trump 2.0 eagerly shifted strategy, issuing executive orders on "Defending Women from Gender Ideology Extremism and Restoring Truth to the Federal Government" and "Keeping Men out of Women's Sports." The administration threatened to withhold all education funding to the state of Maine if it did not reverse its policies on who could play on girls' interscholastic sports teams. It withheld funds from the University of Pennsylvania until that school stripped the swimmer Lia Thomas of her awards and records, apologized to those Thomas swam against, and prohibited male-to-female transgender athletes from competing on women's teams.

It is not unreasonable to believe that allowing athletes such as Lia Thomas to compete against those without a Y chromosome and higher testosterone levels is unfair to women. Conversely, transgender athletes contend that the Trump guidelines are unfair to them. The fact remains that *Title IX itself says nothing about how schools must assign students to the handful of sex-segregated facilities and programs that it explicitly authorizes*. Yet once the issue was placed on the national agenda, nearly everyone came to assume it required a national solution.

Faced with the potential loss of significant federal funding, some school districts will follow UPenn's example and accede to the administration's demands. A few others might adopt the stance of Maine Governor Janet Mills: "See you in court." On this issue, though, the lower courts are deeply divided. Some have held that both Title IX and the Constitution require that schools respect students' claims about their gender identity. Several others have rejected the argument that Title IX prohibits discrimination based on gender identity.

Eventually, the Supreme Court will have to resolve this dispute. It is unlikely that five justices on the current court will agree with the Biden administration's assertion that Title IX *requires* schools to assign students to sex-segregated facilities based on their gender identity. But it is nearly as unlikely that it will agree with the Trump administration that Title IX requires assignment based on biological sex alone. The demise of "Chevron deference" combined with the Court's new "major question doctrine" reduces the possibility that the current administration will win this one.

It could take years for the Supreme Court to resolve the issue. In the meantime, school officials will contend with both conflicting judicial decisions and the threat of federal investigations and funding terminations. This brings us to the most novel feature of Trump 2.0's civil rights strategy: its willingness to cut off federal funds to educational institutions.

Rebirth of the Funding Cut-Off

All predecessors to the Trump administration were exceedingly reluctant to terminate federal funding to educational institutions. The current administration, it seems, relishes the opportunity. Until 2025 the federal government had not terminated funds to enforce Title VI since the height of southern school de-

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After Lia Thomas (left), a transgender swimmer on the University of Pennsylvania's women's team, won competitions and beat school records in 2022, her teammate Paula Scanlan spoke out against it as a Title IX violation. The Trump administration agreed and withheld federal funding from UPenn as leverage in its quest to recalibrate civil rights laws.

segregation in the late 1960s. Even then, it had applied the sanction only against the most recalcitrant rural school districts. With one minor exception, the Department has never cut off funding to enforce Title IX. It has instead relied on the threat of private suits and lengthy investigations to drive schools to the bargaining table. The Trump administration, in contrast, has unilaterally withheld billions of dollars in federal funding and threatened to deny future grants and contracts as well.

Previous administrations shied away from funding cut-offs for two reasons. First, civil rights statutes provide extensive procedural protections for recipients of federal funds. The funding agency must first engage in negotiations with the recipient, proceeding further only once it determines that "compliance cannot be secured by voluntary means." Termination must be based on an "express finding on the record, after opportunity for hearing, of a failure to comply" with federal law. The recipient can then seek judicial review of the termination. In addition, the agency must report all terminations to the appropriate House and Senate committees. They cannot become effective until thirty days after the filing of these reports.

When it first withheld funds from Harvard, Columbia, and other schools, the Trump administration

dealt with these inconvenient procedures by ignoring them. Challenged in court, government lawyers took the startling position that the administration had not acted under Title VI to punish Harvard for tolerating antisemitism but under its inherent executive authority to cancel grants and contract for any reason it saw fit. It is unlikely that federal judges will condone this dangerous assertion of executive power, and the administration's lawyers have seemed to back away from it.

Instead, the civil rights offices in the departments of Education, Justice, and Health and Human Services have begun to follow the procedures outlined in Titles VI and IX, launching brief investigations and quickly announcing their verdicts. Knowing what federal regulators are likely to conclude and that they are willing to pull the trigger on funding cut-offs, schools have strong incentives to reach an agreement with them.

The second and even stronger reason for avoiding funding cut-offs was that regulators considered them counterproductive. Former cabinet Secretary Joseph Califano, who presided over the predecessor to the Department of Education, likened the practice to "opting for decapitation instead of plastic surgery to eliminate facial disfiguration." The U.S. Commission on Civil Rights identified the central dilemma: "Although funding termination may serve as an effective deterrent to recipients, it may leave the victim of discrimination without a remedy. Funding termination may eliminate the benefits sought by the victim."

But if the goal is in fact to "decapitate" or at least wound disfavored schools, or to find a back-door method to impound education funds, this dilemma disappears. Termination becomes an end in itself, not just a means for inducing compliance with civil rights law. Invoking civil rights is just one of the many ways the Trump administration has sought to attack prominent universities.

The politics of cutting off funds to public K–12 schools is somewhat different. When federal money disappears, state and local governments often must pick up the slack. This can generate significant political opposition. For example, when the administration withheld $9 billion in education aid this summer, the backlash from elected officials forced a quick reversal.

The political response is likely to be different when cuts are targeted at deep blue cities, especially those in blue states. These are the school districts most likely to defy the Trump administration's dictates. Complaints from Democratic mayors, governors, and members of Congress will fall on deaf ears. Many in the Trump administration like nothing better than saving money by punishing their political enemies.

Race: The Perennial Issue

The civil rights issue most likely to dominate the second Trump administration is not gender identity or antisemitism, but race. The combination of the Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* (*SFFA*) and its 2007 decision in *Parents Involved in Community Schools* offer firm legal grounds for the administration's demand that schools eliminate racial and sex preferences in all aspects of schooling—most importantly, how they assign students to particular schools—and that they ban courses and trainings that traffic in racial or gender "stereotypes."

Supreme Court decisions on racial preferences have always left plenty of room for further

interpretation. After recent court rulings on affirmative action, the Department of Education's Office for Civil Rights (OCR) under Obama and Biden issued Dear Colleague Letters seeking to minimize their impact. For example, in 2011 the Obama administration issued a lengthy document entitled "Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools." Shortly after the Supreme Court decided *SFFA*, the Biden OCR released a 16-page document explaining how schools can continue to "develop curricula or engage in activities that promote racially inclusive school communities."

The first Trump Administration withdrew the Obama-era letters but left nothing in their place. The second Trump administration, in contrast, has issued multiple executive orders and DCLs expanding upon what the Supreme Court has held. These guidelines focused on two issues: (1) when non-racial factors are being used as a "proxy" for race; and (2) when schools' training and course content engage in prohibited racial "stereotyping" and "harassment."

In February 2025, the Department of Education released a DCL and lengthy "Frequently Asked Questions" document that went far beyond the *SFFA* opinion on both issues. The Department demonstrated its intention to enforce these guidelines aggressively. It created an "End DEI" website encouraging "students, parents, teachers, and the broader community" to report violations of its new rules and required every state and local education authority in the country to certify that they were complying with them. It warned that "continued use of illegal DEI practices may subject the individual or entity using such practices to serious consequences," including termination of funding, recovery of previous funding, and liability in False Claims Act cases brought by private citizens.

In lengthy and powerfully argued opinions, federal district court judges in Maryland and New Hampshire enjoined the Department from enforcing these mandates. The Maryland judge, Stephanie Gallagher—a Trump appointee—later vacated the February guidelines, finding them procedurally defective, a violation of the law prohibiting federal control of school curricula, and so vague as to have a chilling effect on constitutionally protected speech.

In late July, Attorney General Pam Bondi executed an end run around these court decisions. She issued a lengthy memo laying out "non-binding best practices" for complying with nondiscrimination law. These "suggestions" bore a striking resemblance to the mandates in the Department of Education's previous guidance. The memo's "non-binding" status was clearly designed to insulate it from judicial review. It served as a warning to schools about practices they should avoid if they want to steer clear of federal investigations and funding cut-offs. Judicial review would come only after much of the damage had been done to local school districts.

Racial preferences and proxies

In his majority opinion in *SFFA*, Chief Justice Roberts walked a fine line between prohibiting the use of racial preferences in admissions and allowing schools to consider the many ways race can influence applicants' opportunities, character, and trajectory. On one hand, he wrote that "nothing in this 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." On the other, he warned

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A memo issued by Attorney General Pam Bondi in July attempted to sidestep judicial decisions that found the administration's crusade against DEI unlawful. The memo's "non-binding best practices" resembled the Department of Education's original mandates.

that "universities may not simply establish through application essays or other means the regime we hold unlawful today. … [W]hat cannot be done directly cannot be done indirectly."

The Trump administration seems determined to prevent schools from circumventing the Supreme Court's anti–affirmative action rulings by "relying on non-racial information as a proxy for race, and making decisions based on that information." In its February DCL, the Department of Education claimed that "A school may not use students' personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student's race, and favoring or disfavoring such a student." With little explanation, it added the controversial claim that it would "be illegal for an educational institution to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity."

Attorney General Bondi's July memo went even further. Selection criteria used by a school for admissions, employment, or honors become "legally problematic" if they were "selected because they correlate with, replicate, or are used as a substitute for" race, sex, and other "protected characteristics"; or if they were "implemented with the intent to advantage or disadvantage individuals based on protected characteristics." In a statement of remarkable breadth, Bondi concluded, "Intent to influence demographic representation risks violating federal law." For example, scholarship programs cannot "target 'underserved geographic areas' or 'first-generation students' if the criteria are chosen to increase participation by specific

racial or sex-based groups."

The upshot is that the Justice and Education departments claim broad discretion to investigate and punish schools for any selection criteria regulators suspect has been used to advantage or disadvantage individuals based on their race or sex. Given the subjectivity of such determinations, schools are advised to base selection decisions on "specific, measurable skills and qualifications directly related to job performance or program participation."

In its agreements with individual colleges, the administration has insisted that "restoring merit-based opportunity" means basing admissions almost entirely on grades and test scores. That is why a recent executive order requires all selective colleges to release data on the race, grade point averages, and test scores of all admitted and rejected applicants. The message is clear: If a school admits Black or Hispanic students with lower grades or test scores than white or Asian students, it invites a lengthy investigation by the federal government, not to mention court suits brought by Edward Blum.

How fully the administration will cleave to these quantitative measures of meritocracy remains to be seen. In its April 11 letter to Harvard, it first required the school to "adopt and implement merit-based admissions policies," but then demanded that it "reform its recruitment, screening, and admissions of international students to prevent admitting students hostile to the American values and institutions inscribed in the U.S. Constitution and Declaration of Independence." Moreover, "every teaching unit found to lack viewpoint diversity must admit a critical mass of new students who will provide viewpoint diversity." Apparently, meritocracy has not totally displaced diversity; rather a new form of diversity has displaced the old.

The Trump administration's effort to uproot racial "proxies" and to instill its understanding of merit has at least three implications for K–12 schools. First and most obviously, it presents a challenge to school districts that want to create greater racial, ethnic, and income diversity in exam schools. Recent efforts to change admission criteria at famed schools such as Boston Latin School, Thomas Jefferson High School in northern Virginia, and Lowell High School in San Francisco were driven by complaints that the students they served were disproportionately white and Asian. So far, federal judges have ruled that criteria used to change the composition of exam schools are constitutional as long as they do not create hard-and-fast racial quotas—regardless of the motivation behind the change.

The Trump guidelines, though, make all such revisions suspect. In May the Department of Education initiated an investigation of Thomas Jefferson High School, alleging that the 2020 decision to substitute "holistic review" for test-based admissions was motivated by a desire to change the racial composition of the student body and thus a violation of Title VI. If, as the Department claims, it is illegal "to eliminate standardized testing to achieve a desired racial balance or to increase racial diversity," is it also illegal to reduce the weight given to those tests? Here again, it will take years for the courts to resolve this issue. In the meantime, the threat of federal investigations and funding cut-offs will weigh on school officials.

Second, the new guidelines on racial "proxies" invite challenges to the "controlled choice" plans used by some cities to assign students to schools. According to The Century Fund, about a hundred school

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Thomas Jefferson High School in Virginia, one of the nation's top exam schools, is being investigated by the Department of Education for allegedly using a "holistic review" of its applicants rather than strictly test scores.

districts in the country have sought to increase socioeconomic and racial diversity in their schools by giving parents the opportunity to rank their preferences for the schools their children will attend (the "choice" component), but honoring those requests only to the extent that they create greater demographic diversity (the "control" component).

Although The Century Fund applauds these initiatives, it concedes that lack of transparency is central to their success: "[S]ocioeconomic school integration is often a fragile political issue, limiting administrators desire to discuss the existence and success of assignment plans and other programs to promote integration." The report notes that "specific information about assignment plans" is "often inaccessible," and that "some district and charter leaders may believe it is in the best interest of their integration strategies to operate under the radar rather than attract attention that may subject them to renewed scrutiny."

It is quite likely that federal courts will find the Trump administration has gone well beyond Supreme Court jurisprudence in limiting efforts to promote either racial or socioeconomic diversity. But the government's ability to investigate "controlled choice" plans and to probe the extent to which they employ racial criteria will make it much harder for school officials to avoid political controversy.

Third, Trump's executive orders require federal agencies to revise the Biden administration's rules on school discipline and prohibit them from using the type of "disparate impact analysis" on which those rules

were based. The implications of these directives are hard to anticipate. It is likely that schools that have complied with Obama and Biden commands to reduce out-of-school punishments and to eliminate rules that disproportionately affected minority students will be pressured to reinstate their previous disciplinary practices. Schools that had modified their tracking procedures to reduce socioeconomic or racial segregation could also face the threat of federal investigations—possibly (and ironically) on the grounds that they have had a "disparate impact" on white and Asian students. Teachers disturbed by lax discipline could use the threat of federal intervention to force changes in school policy, as could parents dissatisfied with the abandonment of advanced classes. Regardless of the outcome of federal investigations or lawsuits, the publicity created by federal intervention can be politically decisive.

The Attack on DEI

The Trump administration has also relied upon the Court's *SFFA* opinion to justify its campaign against all manifestations of "Diversity, Equity, and Inclusion" programs. Trump's executive orders on "Ending Radical and Wasteful Government DEI Programs and Preferences" and "Ending Radical Indoctrination in K–12 Schooling" not only prohibit "discriminatory equity ideology" (defined as "an ideology that treats individuals as members of preferred or disfavored groups, rather than as individuals, and minimizes agency, merit, and capability in favor of immoral generalizations"), but also require public elementary and secondary schools to provide a "patriotic education" ("an accurate, honest, unifying, inspiring, and ennobling characterization of American's founding and foundational principles" that explains "how the United States has admirably grown closer to its noble principles throughout its history" and offers a "celebration of America's greatness").

Just as the Obama and Biden administrations sought to eliminate "rape culture" on college campuses and create what they envisioned as a culture of racial, ethnic, and sexual tolerance in America's schools, the Trump administration is seeking to recreate a culture of reverence for traditional American values. What they share is a commitment to using vague non-discrimination statutes to evade the explicit statutory ban on federal control of the curriculum of the nation's schools.

Following the "colorblind" logic of *SFFA*, the Departments of Justice and Education have determined that schools violate Title VI and Title IX when they "organize programs, activities, or resources—such as training sessions—in a way that separates or restricts access based on race, sex, or other protected characteristics." This not only prohibits the practice of restricting courses, programs, benefits, or training to students of a particular race, ethnic group, or sex, but also grouping students along these lines within courses or training: no race-based "privilege walks" or "safe spaces" limited to minority students or women. Identifying and ending such activities will no doubt be a major topic of federal investigations. Here they are on relatively solid legal ground.

More legally dubious is the administration's effort to go beyond such segregation and exclusion to regulating the content of schools' courses and trainings. Their rationale is that the Supreme Court has read civil rights statutes to prohibit racial and sex "stereotyping" that creates a "hostile environment." According to the Attorney General's July memo, "Unlawful DEI training programs are those that—through their content, structure, or implementation—stereotype, exclude, or disadvantage individuals based on protected

characteristics or create a hostile environment." This includes trainings that promote sentiments "such as 'all white people are inherently privileged,' 'toxic masculinity,' etc.'" In its February DCL, the Department of Education maintained that DEI programs frequently "teach students that certain racial groups bear unique moral burdens that others do not." These programs "stigmatize students who belong to particular racial groups based on crude racial stereotypes. Consequently, they deny students the ability to participate fully in the life of a school." That DCL also suggested that schools promoting "the false premise that the United States is bult upon 'systemic and structural racism'" have "toxically indoctrinated students," and thus violated civil rights law.

The Department of Education acknowledges that federal law "prohibits the Department from exercising control over the content of school curricula," and that rules against stereotyping and harassment can raise First Amendment concerns. But it insists that "the First Amendment rights of students, faculty, and staff, and the curricular prerogatives of state and local school agencies do not relieve schools of their Title VI obligations not to create hostile environments through race-based policies and stereotypes." Here it relies on three decades of court decisions and administrative guidelines specifying what constitutes racial and sexual harassment sufficiently serious to create a "hostile environment" that prevents students from benefiting from their education.

Although two federal courts have ruled that the Department's attack on DEI exceeded its statutory authority and raised serious First Amendment issues, the administration seems poised to apply its expansive reading of Title VI in an ad hoc way that makes timely judicial review almost impossible in most cases. Policymaking through individualized investigations, negotiations, and settlements is nothing new in this policy realm, but it has become more dangerous than ever.

From Deconstruct to Reconstruct

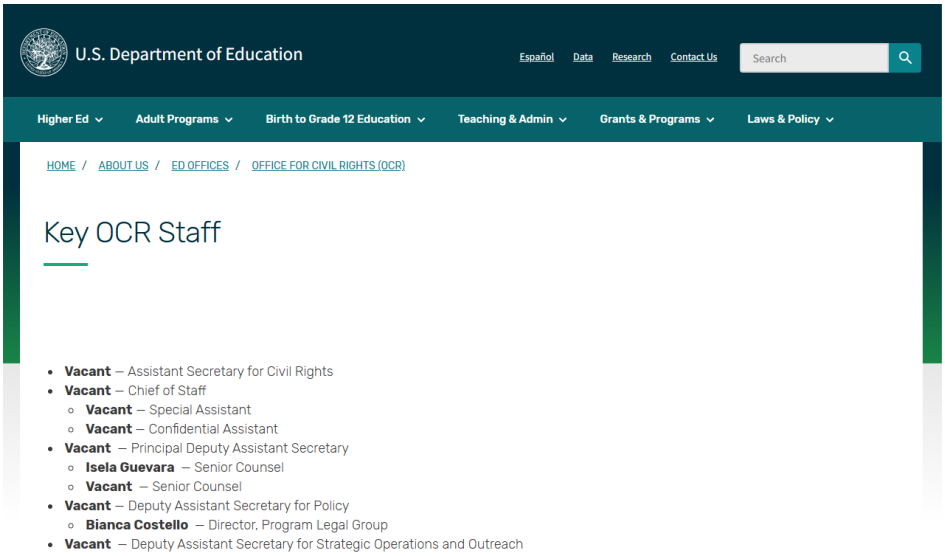
How does all of this fit with the Trump administration's promises to eliminate the Department of Education and turn power back to state and local school officials? While it is unlikely that Congress will enact legislation to abolish the Department, the current administration is draining it of employees and cancelling many of its grants and contracts.

Earlier this year the number of employees in the department's Office for Civil Rights was cut in half, and many of its regional offices closed. Although some of these civil servants will return to work as a result of a court order, it is doubtful OCR will be able to investigate the thousands of complaints it receives every year—the primary criterion by which the agency has been evaluated for nearly 50 years—to say nothing of enforcing its expansive new guidelines. OCR remains in limbo; no one knows what new understanding of its central mission will emerge. If an Assistant Secretary for Civil Rights is ever confirmed by the Senate, she will face a daunting rebuilding challenge.

At this point it appears that the Civil Rights Division within the Department of Justice has become the hub of civil rights policy for education. Will that unit expand to conduct the hundreds if not thousands of investigations required to impose its ambitious policies? Will it be willing to devote the resources needed to promulgate Administrative Procedure Act rules that will remain in place after the current administration

leaves office? Here, too, uncertainty reigns.

In the realm of education, as in so many other areas of public policy, the Trump administration has operated through ad hoc, often ad hominem assertions of power. It has destroyed or weakened many institutions it sees as aiding its enemies. The big question is whether it will be able to build new institutions that carry its policies into the future.



With numerous political appointments still vacant at the ED's Office of Civil Rights, plus the overall reduction in force at the agency since Donald Trump reassumed the presidency, the administration's calls for more civil rights investigations in public schools will be challenging to carry out.

Trump 2.0 has laid out many broad policy objectives in education. The extent to which it succeeds in putting them into practice will depend not only on court rulings, congressional cooperation, and the extent of resistance from a diverse educational complex, but also how shrewdly it can construct a civil rights bureaucracy capable of moving 6,000 institutions of higher learning and 13,000 public school districts in the direction it wants. It has three and a half years to revise a civil rights regime that was over half a century in the making.

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