March 12, 2025

Via email

To all Pennsylvania School District Superintendents, Charter School CEOs and Executive Directors of Intermediate Units

Re: Pennsylvania Public Schools' Rights and Responsibilities in Response to U.S. Dept. of Education's Dear Colleague Letter

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Dear Superintendent / CEO / Executive Director:

On February 14, 2025, the U.S. Department of Education ("Department") issued a Dear Colleague Letter ("Letter"), which together misrepresents federal law and impermissibly seeks to interfere with state and local education policies.[1]

In addition to misstating the law, the Letter seeks to undermine the legitimate time-honored work of educators to ensure that schools meet the diverse needs of all children. Principles of "equity" are enshrined in the major federal education laws that have been passed since the mid-1960s, including the Elementary and Secondary Education Act (now known as Every Student Succeeds Act), 20 U.S.C. §§ 6301, et seq., the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, et seq., the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(a), Section 504 of The Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Equal Education Opportunities Act of 1974, 20 U.S.C. §§ 1701, et seq. At their core, these laws task public schools with meeting the educational needs of *all* students so they all can fully participate in and benefit from schooling. Implementing measures to ensure that students from all racial and ethnic backgrounds can participate in, and benefit from, public schools is consistent with federal law.

We write to counter the Letter's exaggerated claims about the Department's authority to override state laws and local school policies, clarify what the Supreme Court actually decided in *Students for Fair Admissions v. Harvard* ("*SFFA*"),[2] and highlight the absence of any legal authority to force schools to alter curricula or abandon important policies

[1] On March 1, 2025, the Department issued Frequently Asked Questions (FAQs) relating to Letter which similarly misrepresented the law. *See* U.S. Dep't of Educ., *Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act* (Feb. 28, 2025), available at https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf. The FAQs document does not alter the analysis we present in this letter.

[2] 601 U.S. 181 (2023).

that promote diversity, equity, inclusion and accessibility in accordance with a school's obligations under current federal law.

Although the Letter purports to "reiterate[] existing legal requirements," it instead grossly overstates the scope of the Supreme Court's decision in *SFFA* and flouts long-standing civil rights protections that neither the Department nor the President has authority to overrule. The Department's blanket threats to enforce a skewed and incorrect interpretation of nondiscrimination laws ignore the various ways that schools may *lawfully* implement race-conscious policies and curricula, and must remain steadfast in combating illegal discrimination and preventing a hostile school environment for students based on race.

We hope this guidance will help clarify that the Department lacks legal authority to abruptly deny funding, and will clarify the risks associated with anticipatory efforts to comply with the Department's clear misstatements of the law. We urge you to continue supporting policies that are designed to meet the diverse needs of students. We would gladly speak further with districts facing challenges to their efforts to promote racial equity.

I. The Dear Colleague Letter Is Not Enforceable.

The Letter does not, and cannot, alter school officials' rights and obligations under existing federal or state law. Although the Department seeks to impose new obligations through the Letter, it lacks the legal authority to do so without following proper procedure or in a way that violates constitutional rights.[3] The Letter appears to acknowledge this fact (at n.3), conceding that its "guidance does not have the force and effect of law and does not bind the public or create new legal standards."

Despite that concession, the Letter nonetheless threatens "to take appropriate measures to assess compliance" and suggests that educational institutions that fail to comply with the Department's misguided interpretation of the law "may, consistent with applicable law, face potential loss of federal funding." Letter, at 3-4. But the Letter omits critical context.

The phrase, "appropriate measures," presumably refers to reviews and/or investigations initiated by the Department's Office of Civil Rights.[4] It fails to mention, however, that such actions may *only* result in curtailing or canceling federal funds, if at all, after a full administrative hearing, an opportunity to challenge such action, and a determination that compliance with the law (not the Letter) cannot be reached voluntarily.[5] The Letter acknowledges, as it must, that the Department has to proceed "consistent with applicable law," and thus cannot withhold funds before exhausting the statutorily required procedure to protect educational institutions' due process rights.[6] Consequently, school districts are entitled to a pre-deprivation hearing, at which point they could defend their actions or rectify any identified legal violations and avoid penalty.

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[3] *See* Nat'l Educ. Assoc., *Advisory Regarding U.S. Department of Education's February 14, 2025 Dear Colleague Letter* (2025) (attached) (hereinafter "NEA Advisory"), at 3; Complaint, *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, No. 1:25-cv-00091 (D.N.H. Mar. 5, 2025).
[4] *See id.*, at 1.
[5] *Id.*; *see also* 42 U.S.C. § 2000d-1.
[6] *See id.*; *see also* Congressional Research Reports, *Federal Financial Assistance and Civil Rights Requirements* 16 (May 18, 2022), available at https://crsreports.congress.gov/product/pdf/R/R47109.

Ultimately, the Letter's guidance cannot alter schools' legal obligations, nor subject schools to loss of federal funding without the opportunity to defend their policies. We therefore agree with the position outlined in the enclosed National Education Association ("NEA") advisory: "the Department's Letter should be seen for what it is, a groundless threat to review initiatives at the K-12 and post-secondary level for compliance with a view of the law that is not sustainable. Efforts to teach inclusively and to ensure curriculum and school communities are representative of all students are lawful and beyond the reach of the Department to review and interfere with."[7]

II. Establishing Curriculum Is a State and Local Matter.

School curriculum and instruction are the responsibility of state and local authorities, not the federal government.[8] Indeed, federal statutes, including the Department of Education Organization Act, Every Student Succeeds Act, and General Education Provisions Act,[9] prohibit the Department from "exercis[ing] any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school or school system . . . or over the selection or content of library resources, textbooks or other instructional materials."[10] The federal government, by design and more importantly by law, plays no role in the development of local curricula or related policies. The Department has no authority to prevent schools from teaching about race and race-related topics, and any attempt by the federal government to prevent these discussions would not only violate multiple federal laws and impinge on state rights but also raise First Amendment concerns.[11]

Conversely, the Pennsylvania Constitution requires the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const. art. III, §14. Curricula and extracurricular activities are "an essential element" of the state constitutional mandate.[12] The Pennsylvania Public School Code establishes mandates for school curricula, empowers the State Board of Education to adopt policies and principles to govern education in the Commonwealth, and authorizes local school districts to implement those policies in local public schools.[13]

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[7] *See* NEA Advisory, at 6.
[8] U.S. Dep't of Educ., *Federal Role in Education* (last reviewed March 2, 2025), https://www.ed.gov/about/ed-overview/federal-role-in-education#:~:text=Role%20in%20Education-,Overview,requirements%20for%20enrollment%20and%20graduation ("Education is primarily a State and local responsibility in the United States.").
[9] *See* NEA Advisory (citing the Department of Education Organization Act of 1979, 20 U.S.C. §§ 3401, et seq.; Every Student Succeeds Act ("ESSA"), 20 U.S.C. §§ 6301 et seq; and General Education Provisions Act, 20 U.S.C. §§ 1221, et seq.).
[10] *Id.* at 2 (quoting 20 U.S.C. § 3403 and noting that these limits are reiterated throughout the ESSA); *see also*, *e.g.*, *Milliken v. Bradley,* 418 U.S. 717, 742 (1974); *United States v. Lopez*, 514 U.S. 549, 566 (1995).
[11] *See e.g.*, *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump,* No. 1:25-CV-00333-ABA, 2025 WL 573764, at *13 (D. Md. Feb. 21, 2025) (finding plaintiffs established entitlement to a preliminary injunction in action challenging Executive Orders relating to DEI programs in part due to impermissible restrictions on protected speech).
[12] *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 294 A.3d 537, 911-16 (Pa. Commw. Ct. 2023).
[13] *See generally* The Public School Code of 1949, 24 P.S. §§ 1-101 et seq.; *see also* 22 Pa. Code §§ 1.1 et seq. (collecting the education regulations promulgated by the State Board of Education)

Moreover, Pennsylvania law expressly prohibits discrimination in educational settings on the basis of race, color, national origin, and other protected characteristics.[14] And the Pennsylvania Human Relations Act authorizes the State Department of Education to recommend a "multicultural education program" for students to promote cultural understanding and appreciation and to further good will among all persons, without regard to race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability."[15]

These explicit statutory and constitutional *restrictions* on federal interference with education and *grants of authority and responsibility* to state and local entities set the foundation for equitable education law in the Commonwealth. Neither the President, via an executive order, nor the Department, via guidance letter or otherwise, have the legal authority to override this established legal infrastructure. Therefore, schools are not obliged to, and should not, preemptively censor or alter curriculum or eliminate school programming in response to the Department's threat.

III. The Dear Colleague Letter Misstates the Law.

The Letter's "interpretation of federal law" is a disingenuous effort to extend the U.S. Supreme Court's decision in *SFFA* beyond its limited scope, which considered only university student admissions. The Court's language speaks for itself and is the definitive authority—not agency guidance or wishful thinking about what an agency would have preferred the decision to say.[16] For this reason, the ACLU, on behalf of the National Education Association and its affiliate, sued the Department on March 5, 2025, requesting that a federal court declare unlawful the Letter's attempt to redefine the law and prevent the enforcement or implementation of its erroneous interpretation.[17]

The Court in *SFFA* held only that colleges' practice of using racial identity as a formal admissions criterion violated the Fourteenth Amendment's Equal Protection Clause and Title VI because the admissions policies were not narrowly tailored to achieve the colleges' interests in obtaining the educational benefits that flow from a racially diverse student body.[18] The decision applies only to the college admissions context. Contrary to the Letter's insinuation, *SFFA* has *nothing* to do with "hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of

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[14] Pa. Human Relations Act, 43 P.S. § 955; *see also* Pa. Const. Art. I, §29 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual."). PHRA regulations broadly define race discrimination, 16 Pa Code 41.207, and further specify protection from discrimination on the basis of ethnic characteristics and traits associated with race, including but not limited to hair texture and protective hairstyles. 16 Pa Code 41.204.

[15] 43 P.S. § 958.

[16] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *see also SFFA*, 600 U.S. at 198 n.2 ("[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.").

[17] *See* Complaint, *Nat'l Educ. Ass'n v. U.S. Dep't of Educ.*, No. 1:25-cv-00091 (D.N.H. Mar. 5, 2025) (hereinafter "ACLU Complaint").

[18] *SSFA*, 600 U.S. at 230.

student, academic, and campus life" at any educational institution. Letter, at 2. The decision did not in any manner address programs to ensure educational equity.

Moreover, *SFFA* is limited to policies that use "racial classifications," meaning policies that classify and treat individuals differently based on race. The Department attempts, however, without any basis in the text of the Court's opinion, to extend *SFFA* to educational policies that are facially race-neutral. Letter, at 2. But *SFFA* itself recognized that colleges could lawfully consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[19] And lower federal courts have rejected cases asserting the Department's theory that race-conscious educational policies are unlawful after *SFFA*—including one case arising in this Commonwealth.[20] Contrary to the Department's claim that it would be unlawful for an educational institution to eliminate standardized testing to increase racial diversity, *see* Letter, at 3, the courts have consistently upheld public school districts' admissions policies for magnet schools and acknowledged that school officials' awareness of race "should not be mistaken for racially discriminatory intent or proof of an equal protection violation."[21]

The Letter's assertion (at p.2) that *SFFA* "applies more broadly" to require schools to alter or eliminate all "DEI programs" (at p. 3), a vague term they do not define, [22] is dishonest and contrary to established law. *SFFA* does not impact any of these important areas of school administration and curriculum. Existing law permits policies that recognize race or celebrate diversity, and the Department has no authority to withhold federal funding based on the mere fact that schools implement such policies.[23] The Department's assertion flouts long-established jurisprudence and directly contradicts the *SFFA* Court's characterization of the pursuit of diversity-related interests as "worthy" and "commendable."[24] Teaching students about the role of race in history and literature, allowing affinity groups that are open to all students, and proudly promoting a commitment to diversity, equity and inclusion do not involve "racial classifications"

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[19] *SFFA*, 600 U.S. at 230; *see also* NEA Advisory, at 3-4 n.3.

[20] *See*, *e.g.*, *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for the City of Bos*., 89 F.4th 46, 61 (1st Cir. 2023) ("[W]e find no reason to conclude that *Students for Fair Admissions* changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles."); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 879 (4th Cir. 2023) (applying rational basis review to a race-neutral high school admissions policy where there was insufficient proof of discriminatory intent and disparate impact); *Sargent v. Sch. Dist. of Philadelphia*, No. CV 22-1509, 2024 WL 4476555, at *19 (E.D. Pa. Oct. 11, 2024) (same).

[21] *Sargent*, 2024 WL 4476555, at *14; *see also id.* at *16 ("[N]o reasonable jury would find that simply because the School District conducted an 'equity lens' review and implemented a zip code preference thereafter, the zip code preference must have been implemented *because* it would benefit any specific racial group"); *Bos. Parent Coal.*, 89 F.4th at 59 (rejecting the plaintiffs' argument that "any change in the racial composition of admitted students is unconstitutional if the change was intended"); *Coal. for TJ*, 68 F.4th at 885-86 (concluding that the plaintiffs' "proxy" argument is "wholly insufficient from which to infer constitutionally impermissible intent").

[22] *See* ACLU Complaint, at 36-37 (asserting that the Letter is impermissibly vague in violation of the Fifth Amendment).

[23] *See* NEA Advisory, at 4 (listing examples of permissible educational policies related to instruction about racism, cultural celebrations, affinity groups, and mission statements that recognize the importance of diversity).

[24] *SFFA*, 600 U.S. at 214-15, 317.

and are all measures schools can take consistent with federal law and Supreme Court precedent.[25]

IV. Most Initiatives that Promote Racial Equity Remain Lawful.

The Letter disparages programs to promote racial equity as "insidious" and "stigmatiz[ing]," and asserts that efforts to educate students about systemic racism "toxically indoctrinate[s]" them. Letter, at 2. These statements may reflect the policy preferences of current Department leadership, but they are divorced from legal standards and evidence-based education principles.[26]

Efforts to improve racial equity, reduce the racial achievement gap, address inequities in access to educational resources, or celebrate racial, ethnic, and cultural diversity are not inherently discriminatory under the standards discussed above.[27] Instead, an "established body of research affirms" that "a culturally responsive and racially inclusive education benefits all students—and is the most effective pedagogical approach."[28] Culturally inclusive education is not only associated with enhanced critical thinking skills, improved GPAs, test scores, and attendance rates, it prepares students for citizenship and participation in the global marketplace.[29] Schools do not violate the Equal Protection Clause and Title VI by implementing a racially inclusive pedagogical approach, but failing to protect students from race-based discrimination or harassment can expose districts to liability under state and federal law. Likewise, restricting discussion of topics related to diversity, equity and inclusion raises serious First Amendment concerns.[30] Indeed, those districts that opt for openly hostile policies in a misguided attempt at compliance with the Letter or unlawful executive pronouncements may create exposure under both Pennsylvania state law and existing federal law.

By way of just one example, the Equal Access Act ("EAA")[31] requires public secondary schools to provide access to school facilities and benefits on equal terms to all students who want to form non-curricular student groups. Once a school allows a single non-curricular group, it creates a limited public forum for all such groups and any efforts to restrict a particular group's access to the forum are limited by both the Equal Access Act and First Amendment. Just like schools must

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[25] *See generally* Legal Defense Fund, Lawyers' Committee for Civil Rights Under Law, Asian Americans Advancing Justice – AAJC, American Civil Liberties Union, LatinoJustice PRLDEF, and Asian American Legal Defense and Educational Fund, *Affirmative Action in Higher Education: The Racial Justice Landscape After the SFFA Cases* (Oct. 2, 2023), available at https://assets.aclu.org/live/uploads/2023/10/2023_09_29-Report.pdf.

[26] *See* ACLU Complaint, at 9-10 (noting that these assertions are not "supported by reference to ED investigations and findings, court cases, data sets, scholarly research, or the agency's own explained reasoning").

[27] *See, e.g., Ibanez v. Albermarle County Sch. Bd.*, 897 S.E.2d 300 (Va. App. 2024) (rejecting a challenge to a school district's anti-racism policy—based on concerns that teaching about the existence of racial and religious distinctions would make "students feel 'uncomfortable,' 'confused and upset'"—since that policy did not treat any students differently based on their race).

[28] *See* NEA Advisory, at 5-6 ("[D]ozens of research studies have established that a culturally responsive curriculum benefits all students.").

[29] *Id.*

[30] *Id.*; *see also* ACLU Complaint, at 37-30 (alleging that the Letter violates the First Amendment); *Loc. 8027 v. Edelblut*, No. 21-CV-1077-PB, 2024 WL 2722254, at *17 (D.N.H. May 28, 2024) (concluding that state statutes prohibiting teaching banned concepts are unconstitutionally vague and risk chilling teachers' speech).

[31] 20 U.S.C. § 4071.

allow groups dedicated to Christianity or the Bible,[32] they must also allow groups dedicated to the interests of Black, LGBTQIA+ and other students on an equal basis, so long as group membership is open to all. Accordingly, any school district that relies on the guidance to cancel existing affinity groups, based on race or otherwise, may give rise to violations of the EAA and First Amendment, and the Letter will provide no defense.

Nothing in *SFFA* limits affinity groups or many other valuable policies and practices that foster inclusion and promote good pedagogy. Neither *SFFA* nor any other law requires schools to alter curriculum, purge library stacks, curtail crucial anti-discrimination/harassment/bullying protections, or to abandon proclamations, commitments and programs promoting diversity, equity and inclusion. On the other hand, doing so may open the door to actionable discrimination, inviting civil rights lawsuits firmly grounded in decades-old legal protections, whether under Titles IV, VI, VII or IX or the U.S. Constitution.[33]

CONCLUSION

Thank you for your important work to ensure that all Pennsylvania children receive the "thorough and efficient" public education guaranteed by the Pennsylvania Constitution and protected by Pennsylvania nondiscrimination laws. If your district would like to discuss your district's policies or our letter in greater detail, please contact info@aclupa.org.

Respectfully,

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[32] *See, e.g., Bd. of Educ. v. Mergens,* 496 U.S. 226, 236 (1990).
[33] *See* 42 U.S.C. §§601 et seq.; 42 U.S.C. §§ 2000d et seq.; 42 U.S.C. §§ 2000e et. seq.; 20 U.S.C. §§1681 et. seq.