Department of Education Tosses Obama-Era Affirmative-Action Guidance in the Garbage

BY ARIEL G. SULLIVAN • JULY 23, 2018

Looks like the Department of Education has been busy again this month at the paper shredder. As part of the current administration's ongoing efforts to eradicate Obama-era guidance that it deems "unnecessary, outdated, inconsistent with existing law, or otherwise improper," seven guidance documents related to affirmative action have been rescinded:

1. December 2, 2011 Dear Colleague Letter Regarding the Use of Race by Educational Institutions.
2. 2011 Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education dated December 2, 2011.
3. 2011 Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools dated December 2, 2011.
4. September 27, 2013 Dear Colleague Letter on the Voluntary Use of Race to Achieve Diversity in Higher Education After *Fisher v. University of Texas at Austin* [Fisher I].
5. September 27, 2013 Questions and Answers About *Fisher v. University of Texas at Austin* [Fisher I].
6. May 6, 2014 Dear Colleague Letter on the Supreme Court Ruling in *Schuette v. Coalition to Defend Affirmative Action*.
7. September 30, 2016 Question and Answers About *Fisher v. University of Texas at Austin* [Fisher II].

While the rescission of these guidance documents does not change the current U.S. law on affirmative action—in Fisher II, the Supreme Court held that a public university could maintain a race-conscious admissions program that was narrowly-tailored to address diversity goals—it confirms that the current administration does not view affirmative action favorably. With the departure of Justice Anthony Kennedy (who wrote the majority opinion in Fisher II) from the Supreme Court, it seems that the future of affirmative action hangs in the balance.

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Client Tip: All educational institutions should stay apprised of the various Obama-era guidance documents that are being withdrawn by the current administration, and assess the impact on their current policies and procedures. While the recent rescission of the affirmative action-related guidance documents does not change the law in this area in the immediate sense, it serves as: (1) a reminder for public institutions to review any race-conscious admissions programs at regular intervals to ensure compliance with the standards reiterated by the Supreme Court in Fisher II; and (2) an indication that affirmative action may be eliminated if the issue is taken up by the newly-configured Supreme Court.

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