Guidance to Rhode Island Local Education Agencies, School Administrators and Educators

TO: **Local Education Agencies, School Administrators, and Educators**

FROM: **Peter F. Neronha, Attorney General**
Angélica Infante-Green, Rhode Island Commissioner of Elementary and Secondary Education

DATE: **February 28, 2025**

SUBJECT: **Ensuring a Safe and Inclusive Learning Environment for All Students**

The children of Rhode Island's public schools deserve a safe and inclusive learning environment – no matter who they are, what they look like, or where they come from. In recent weeks, actions taken by the Administration of President Donald Trump have raised concerns about Rhode Island's ability to deliver on that promise. In particular, the Executive Orders relating to diversity, equity, and inclusion ("DEI") and the rights of LGBTQ+ students as well as the U.S. Department of Education's February 14, 2025, letter ("the OCR Letter")[1] have prompted some school districts to ask whether they must change practices or procedures to comply with federal law. This Guidance aims to address these concerns based on our understanding of the current legal

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[1] The Executive Orders referenced by this Guidance include (1) the January 20, 2025, Order entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government" (available at https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government); (2) the January 20, 2025, Order entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing" (available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing); (3) the January 21, 2025 Order entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" (available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity); and (4) the January 29, 2025, Order entitled "Ending Radical Indoctrination in K-12 Schools (available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-indoctrination-in-k-12-schooling). The OCR letter can be found at https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

landscape. Importantly, we recognize that this landscape is evolving and we will endeavor to update this Guidance as necessary.

The Commissioner of the Rhode Island Department of Elementary and Secondary Education ("RIDE") has a duty to "interpret school law" and to "require the observance of all laws relating to elementary and secondary schools and education."[2] To that end, RIDE and the Office of the Attorney General ("OAG") recently issued guidance to schools concerning the protection of students' rights, regardless of their nationality or immigration status.[3] Today's joint Guidance by RIDE and the OAG reaffirms the State's commitment to providing an education that values every student's unique background and inherent dignity. It explains why the Executive Orders and OCR letter do not, at this time, require state and local education officials to implement any changes to school policies or practices that conform to existing state and federal laws.

As an initial matter and as discussed further below, last week, a federal court enjoined (that is, stopped) the Administration from enforcing certain provisions of two Executive Orders in question.[4] And while the courts continue to rule on the legal effect of the Administration's actions, any attempt by state or local officials to comply with important aspects of these Executive Orders or the OCR Letter would be premature and potentially contrary to state and federal law.

First, the legality and enforceability of the Executive Orders and the OCR Letter are dubious. Key terms invoked by these documents are left undefined, and the intended implications of their broad pronouncements on race, gender and sexuality, and DEI are far from clear. In addition, they purport to interpret and apply the U.S. Constitution independently from, and even in contravention of, current federal law as set forth by the federal courts. And to the extent they threaten to withhold federal funding, the Administration's actions overstep the authority of the Executive Branch. Based in part on such concerns, a federal judge has already issued a preliminary injunction prohibiting the Administration from enforcing certain provisions of two Executive Orders.[5] Specifically, the Administration is currently not allowed to withhold funding from organizations with DEI programming, condition future funding on the

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[2] *See* R.I. Gen. Laws §§ 16-60-6(9)(vii) and 9(viii).

[3] Guidance to Rhode Island Local Education Agencies, School Administrators, and Educators RE Ensuring a Safe and Secure Learning Environment for All Students (Jan. 27, 2025), https://riag.ecms.ri.gov/press-releases/attorney-general-neronha-and-commissioner-infante-green-issue-guidance-schools.

[4] Preliminary Injunction, *National Association of Diversity Officers in Higher Education, et al. v. Trump, et al.*, C.A. No. 1:25-cv-00333-ABA (D. Md.), ECF No. 45 (enjoining provisions in the orders entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity").

[5] Memorandum Opinion of Feb. 21, 2025, *National Ass'n of Diversity Officers in Higher Ed.*, ECF No. 44.

recipient's certification that it has no DEI programming, or bring enforcement actions premised on the certification requirement.[6] This recent federal court decision confirms that the Administration's actions against DEI programming stand, at best, on shaky legal ground.

Moreover, the OCR Letter is not by itself an enforcement mechanism.[7] Enforcement of Title VI of the Civil Rights Act of 1964[8] is governed by federal regulations that require the U.S. Department of Education ("ED") to take specific steps before taking enforcement actions. For example, the ED may not suspend, terminate, or refuse to grant or continue federal financial assistance until it has provided the recipient with notice of noncompliance, attempted to secure compliance through voluntary means, provided an opportunity for a hearing, made an express finding of noncompliance on the record, filed a written report with Congress, and waited 30 days after filing the report.[9] And when the ED's Office of Civil Rights investigates a potential civil rights violation, it follows a formal process.[10]

Second, the Executive Orders and the OCR Letter infringe upon the authority of state and local governments over the education of children. As the Supreme Court has affirmed, "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."[11] Thus, school officials should be wary of changing practices or policies in an attempt to comply with the Administration's statements when such changes could violate State laws and regulations protecting students from discrimination and promoting their success in the classroom.

For these reasons, and as discussed more fully below, the Administration's orders and statements related to the rights of undocumented immigrants, LGBTQ+ persons, and DEI programs should not lead state or local officials to take action at this time. We are confident that Rhode Island schools and RIDE are spending federal dollars in

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[6] Preliminary Injunction, *National Ass'n of Diversity Officers in Higher Ed.*, ECF No. 45.

[7] In fact, the OCR Letter itself states that it "does not have the force and effect of law and does not bind the public or create new legal standards." The OCR Letter at 1 n.3.

[8] 42 U.S.C.A. § 2000d et seq.

[9] *See* 6 C.F.R. § 21.13(c); *see also* 6 C.F.R. § 17.605 (adopting procedures under Title VI of the Civil Rights Act of 1964 at 6 C.F.R. part 12).

[10] *See* OCR Case Resolution and Investigation Manual (available at https://www.ed.gov/laws-and-policy/civil-rights-laws/file-complaint/ocr-case-resolution-and-investigation-manual-2010).

[11] *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

compliance with federal law,[12] and until the many questions about the constitutionality and effect of the Executive Orders and the OCR Letter are settled, Rhode Island will not be required to change its current practices.

1. The Executive Orders and the Rights of LGBTQ+ Students

On January 20, 2025, President Trump signed an executive order entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,"[13] which provided that "[i]t is the policy of the United States to recognize two sexes, male and female" and proclaimed that "sex" is not a synonym for and does not include 'gender identity.'" The Order also reinterpreted Supreme Court precedent to find no legal right to "gender identity-based access to single-sex spaces." It then directed federal agencies to "enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes," such as by reviewing grants to ensure federal funds "do not promote gender ideology," and rescinded various guidance documents supporting LGBTQ+ students. However, the Order did not and could not require state or local officials to take any action, and the implications for Rhode Islanders are far from apparent. Given this uncertainty, state officials should not change current policies or practices in response to the January 20, 2025 Order.

The Administration's interpretation of federal law with respect to gender identity is questionable in light of a recent decision by the U.S. Supreme Court holding that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." *Bostock v. Clayton County, Georgia.*[14] In a similar vein, the United States Court of Appeals for the First Circuit recently upheld a Massachusetts school's protocol requiring staff to use a student's requested name and gender pronouns within the school without notifying parents unless the student consents to such notification.[15] In so holding, the First Circuit affirmed a school's authority to "ensure a safe and inclusive school learning environment for students."[16]

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[12] To cite just two prominent examples, the ED has approved the state's plans under the Every Student Succeeds Act, 20 U.S.C.A. § 7871, as well as the Individuals with Disabilities Education Improvement Act, 20 U.S.C.A. § 1452.

[13] Available at https://www.whitehouse.gov/presidential-actions/2025/01/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal-government.

[14] 140 S.Ct. 1731, 1747 (2020); *see also United States v. Virginia*, 518 U.S. 515 (1996) ("'all gender-based classifications today' warrant 'heightened scrutiny'" and "[s]upposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

[15] *Foote v. Ludlow School Committee*, -- F.4th --, 2025 WL 520578, at *1 (1st Cir. Feb. 18, 2025).

[16] *Id.*

Likewise, the United States District Court for the District of New Hampshire blocked the enforcement of a New Hampshire law prohibiting transgender girls from participating in girls' sports, holding that *Bostock* applies to Title IX.[17] In addition, the federal court made clear that:

> [w]hile *Bostock* concerned Title VII, its analysis of the logical relationship between sex discrimination and transgender discrimination extends to other contexts. The First Circuit has 'recognized that the analytical framework for proving discriminatory treatment under Title VII is equally applicable to constitutional . . . claims.' *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896 (1st Cir. 1988) (quotation, brackets, and ellipsis omitted).[18]

Given such precedent, it is not surprising that the cited Executive Order and other recent Executive Orders are under legal challenge in federal courts throughout the country.[19]

Furthermore, the Administration cannot unilaterally suspend or rescind funding that Congress has appropriated for the use of Rhode Island schools. The United States District Court for the District of Rhode Island recently made this point abundantly clear while temporarily stopping a directive from the Office of Management and Budget suspending payment of federal funds on any agency activities "that may be implicated" by the Executive Orders. "Congress," the Court explained, "has not given the Executive limitless power to broadly and indefinitely pause all funds that it has expressly directed to specific recipients and purposes and therefore the Executive's actions violate the separation of powers."[20] Thus, it would be premature for local education agencies to take any action in response to the Executive Order until its legal validity is affirmed by the courts or ratified by Congress.

As to relevant state law, in 2001, Rhode Island became just the second state in the nation to include transgender people in its nondiscrimination law, which is

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[17] *See Tirrell v. Edelblut*, -- F.Supp.3d --, 2024 WL 4132435, at *15 (D.N.H., September 10, 2024).

[18] *Id.* at *9.

[19] As of the date of this writing, there are some ninety-three (93) such legal challenges pending, as per the litigation tracker maintained by *Just Security* (available at https://www.justsecurity.org/107087/tracker-litigation-legal-challenges-trump-administration).

[20] *State of New York, et al. v. Donald Trump, et al.*, C.A. No. 25-cv-39-JJM-PAS (D.R.I., January 31, 2025), slip op. at *5 (McConnell, C.J.); *see also National Council of Nonprofits, et al. v. Office of Management and Budget, et al.,* -- F.Supp.3d--, 2025 WL 368852, at *12 (D.D.C., February 3, 2025) (Alikhan, J.) (to same effect and holding that the Appropriations Clause of the Constitution gives Congress exclusive power over federal spending, citing U.S. Const. art. 1, § 9, cl. 7.).

applicable to "place[s] of public accommodation" and prohibits discrimination against any person "on account of race or color, religion, country of ancestral origin, disability, age, sex, sexual orientation, gender identity or expression."[21] Moreover, under Rhode Island law, "places of public accommodation" include "rest rooms"[22] and thus include bathrooms in public schools.[23]

In addition, the *Regulations Governing Protections for Students Rights to Be Free from Discrimination on the Basis of Sex, Gender, Sexual Orientation, Gender Identity or Gender Expression* (the "LGBTQ+ Regs.") promulgated by the Commissioner of Education have the force and effect of law[24] and provide that each local education agency must adopt a policy providing "a safe, supportive and non-discriminatory school environment" for transgender and gender non-conforming students that "is consistent with state and national best practices, guidance, and model policies."[25] Until a court holds otherwise, these state laws and regulation continue to govern.

2. The Executive Orders and OCR Letter Addressing DEI

The Administration has issued several executive orders in the past few weeks threatening to curtail DEI initiatives across the country. The January 20, 2025, Executive Order entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing" issued a mandate to all agencies, departments, and commissions to "terminate, to the maximum extent allowed by all, all DEI, DEIA . . . initiatives, or programs, [and] 'equity-related' grants or contracts."[26]

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[21] R.I. Gen. Laws § 11-24-2.

[22] R.I. Gen. Laws § 11-24-3(5).

[23] *See also* R.I. Gen. Laws § 28-5.1-7 ("[e]very state agency shall render service to the citizens of this state without discrimination based on various categories, including "sex, sexual orientation, gender identity or expression . . ."); and R.I. Gen. Laws § 42-72-15(q) ("Children's Bill of Rights" providing that "No child shall be discriminated against on the basis of . . . gender, sexual orientation, or gender identity or expression . . .").

[24] *See In re Advisory Opinion to the Governor*, 732 A.2d 55, 75 (R.I. 1999), citing, *inter alia*, *Lerner v. Gill*, 463 A.2d 1352, 1358 (R.I.1983) ("Regulations that are duly promulgated by an administrative agency . . . pursuant to a specific grant of legal authority to do so, are legislative rules that carry the force and effect of law and thus enjoy a presumption of validity.").

[25] 200-RICR-30-10-1.3.

[26] Available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-and-wasteful-government-dei-programs-and-preferencing.

Similarly, on January 21, 2025, the President signed an executive order entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity,"[27] which ordered the termination of all "discriminatory and illegal preferences," including federal mandates, policies, programs, and guidance. It further ordered all federal agencies to enforce all civil rights laws and "to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities."[28] It also required agencies to include in every contract and grant award "a term requiring [the recipient(s)] to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[29]

In addition, on January 29, 2025, the President signed an executive order entitled "Ending Radical Indoctrination in K-12 Schools,"[30] which provided that within ninety days, the Secretaries of Education, Defense, and Health and Human Services, shall provide an "Ending Indoctrination Strategy" to the President, containing a summary and analysis of, among other things:

> Each agency's process to prevent or rescind Federal funds, to the maximum extent consistent with applicable law, from being used by an ESA, SEA, LEA, elementary school, or secondary school to directly or indirectly support or subsidize the social transition of a minor student, including through school staff or teachers or through deliberately concealing the minor's social transition from the minor's parents.[31]

As with the January 20, 2025 Order regarding gender identity, these DEI Orders are vague, conflict with court precedent and state law, and may be unconstitutional. The Orders fail to adequately define DEI, making it difficult for state and local officials to comply, even assuming the Orders are legally enforceable. As noted above, the DEI Orders are currently being challenged in the federal courts.[32] Indeed, in one such challenge, a federal judge has already prohibited the Administration from enforcing the Orders to the extent they withhold funding from organizations with DEI programs and threaten enforcement action against such programs.[33] Additionally, as discussed above,

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[27] Available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity.

[28] *Id.*

[29] *Id.*

[30] Available at https://www.whitehouse.gov/presidential-actions/2025/01/ending-radical-indoctrination-in-k-12-schooling.

[31] *Id.*

[32] *See* note 19, *supra*.

[33] Preliminary Injunction, *National Ass'n of Diversity Officers in Higher Ed.*, ECF No. 45.

the President lacks the legal authority to unilaterally withhold funds that have been legally appropriated.[34] Moreover, Congress has repeatedly enacted legislation aimed at increasing diversity, including racial diversity, in education; this legislation cannot simply be overruled by an Executive Order.[35] And the Orders' interpretation of federal law is out of line with longstanding precedent by federal courts upholding diversity initiatives as long as they are narrowly tailored and do not impose quotas.[36]

The OCR Letter is similarly untethered from governing legal precedent. The OCR Letter purports to apply the Supreme Court's decision regarding affirmative action policies in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("SFFA"),[37] but in so doing, the letter goes far beyond the holding in that case. The holding in *SFFA* is limited to the consideration of race in the post-secondary admission process.[38] The holding did not, as the OCR Letter claims, apply "broadly" to provide "a framework for evaluating the use of race by state actors and entities covered by Title VI."[39]

Indeed, binding First Circuit authority rejects the OCR's interpretation. Six months after SFFA, the First Circuit held that the use of geography, family income, and GPA as selection criteria for a public-school admissions program was permissible, even though the criteria was intended to reduce racial disparities.[40] The First Circuit concluded that "in rejecting the universities' use of an applicant's race as a means to

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[34] *See* note 20, *supra*, and accompanying text.

[35] *See, e.g.*, the College Cost Reduction and Access Act, Pub. L. No. 110–84, 121 Stat. 784 (2007) (allocating $100 million to "increase the number of Hispanic and other low income students attaining degrees in the fields of science, technology, engineering, or mathematics"); Higher Education Opportunity Act, Pub. L. No. 110–315, 122 Stat. 3078 (creating numerous programs for promoting greater participation in higher education by members of racial minority groups).

[36] *See, e.g., Boston Parent Coalition for Academic Excellence Corp. v. School Committee for City of Boston*, 89 F.4th 46, 60 (1st Cir. 2023), *cert. denied*, 145 S. Ct. 15 (Dec 9, 2024) (permissible under the Equal Protection Clause to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition).

[37] 600 U.S. 181 (2023).

[38] *See* 600 U.S. at 230. Moreover, in the majority opinion, Chief Justice Roberts made repeated reference to *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003), where the Court held that universities were permitted to discriminate based on race in their admissions process in order to achieve alleged "educational benefits of diversity" as long as there were "reasonable durational limits" and their "deviation from the norm of equal treatment" must be "a temporary matter." *See, e.g., id.* at 227-228.

[39] *See* The OCR Letter, *supra* note 1, at 1.

[40] *See Boston Parent Coalition,* 89 F.4th at 61-62.

achieve a racially diverse student body" in SFFA, "three of the six justices in the majority—with no disagreement voiced by the three dissenters—separately stressed that universities can lawfully employ valid facially neutral selection criteria that tend towards the same result."[41]

The DEI policies adopted by the Ed. Council and RIDE[42] are consistent with applicable state and federal law.[43] Rhode Island law requires academic standards that are "designed to instill respect for the cultural, ethnic, and racial diversity of this state, and for the contributions made by diverse cultural, ethnic, and racial groups to the life of this state" as well as "[r]eflect sensitivity to impediments to learning, which may include issues related to, but not limited to, cultural, financial, emotional, health, and social factors."[44] Likewise, Rhode Island's Professional Educator Standards explicitly recognize that "[e]ffective educational leaders ensure equity of educational opportunity and culturally responsive practices to promote each student's academic success and social and emotional well-being" and task such leaders with "[s]afeguard[ing] and promot[ing] the values of democracy, individual freedom and responsibility, equity, social justice, community, and diversity."[45] Rhode Island also expects educational leaders to "[c]onfront and challenge institutional biases of student marginalization . . . and low expectations associated with race, socioeconomic status, culture and language,

[41] *Id.* at 60 (citing *SFFA*, 600 U.S. at 299–300 (Gorsuch, J., with Thomas, J., concurring) (recounting the argument that the universities "could obtain significant racial diversity without resorting to race-based admissions practices," and noting that "Harvard could nearly replicate [its] current racial composition without resorting to race-based practices" if it increased tips for "socioeconomically disadvantaged applicants" and eliminated tips for "children of donors, alumni, and faculty"); *see also SFFA*, 600 U.S. at 280 (Thomas, J., concurring) ("If an applicant has less financial means (because of generational inheritance or otherwise), then surely a university may take that into account."); *id.* at 317 (Kavanaugh, J., concurring) (universities "'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race'") (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526, (1989) (Scalia, J., concurring in the judgment)).

[42] *See, e.g.*, the State's Strategic Plan for Public Education: 2022-2027 at 11 (citing the identification and dismantling of "the root causes of institutional and structural inequities in its programming and services" as Priority No. 1).

[43] *See, e.g.*, R.I. Gen. Laws § 28-5.1-1(a)(1) ("Equal opportunity and affirmative action toward its achievement is the policy of all units of Rhode Island state government, including all public and quasi-public agencies, commissions, boards, and authorities, and in the classified, unclassified, and non-classified services of state employment."); R.I. Gen. Laws § 28-5.1-15 ("State agencies disbursing financial assistance, including, but not limited to, loans and grants, shall require recipient organizations and agencies to undertake affirmative action programs designed to eliminate patterns and practices of discrimination.").

[44] R.I. Gen. Laws § 16-22-30.

[45] 200 R.I. Code R. 20-20-1.3.3.

gender and sexual orientation, and disability or special status."[46] Unless instructed otherwise, Rhode Island educators must continue to advance the goals of diversity, equity, and inclusivity promoted by such standards.

Conclusion

Whether changes will have to be made to state and local policies applicable to elementary and secondary education to align with President Trump's recent Executive Orders and the OCR Letter remains uncertain. It will ultimately depend, however, upon the future action (or inaction) of the courts and Congress. Until such action is taken, making any changes would be ill-advised and may even be in violation of existing federal and state law. If you have any questions regarding this Guidance please email guidance@riag.ri.gov.

[46] *Id.*