

October 6, 2017

Seth P. Waxman

**By E-mail**

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John M. Gore, Acting Assistant Attorney General  
Civil Rights Division  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530

Dear Mr. Gore:

I write in response to your letter of September 20, 2017, notifying Harvard University that the Civil Rights Division has commenced a Title VI investigation of Harvard's undergraduate admissions practices. This letter memorializes the points made by my partner, Felicia Ellsworth, in her discussion earlier today with your colleague, Matthew Donnelly.

As a recipient of federal funding, Harvard is well aware of its obligations under Title VI and other statutory and regulatory requirements, takes those obligations seriously, complies with them, and cooperates with all reasonable efforts to audit its compliance. For the reasons Harvard explained when we met on September 11, and that we repeat below, the opening of an investigation in the current circumstances is, to our understanding, so outside ordinary practices that Harvard is obliged to clarify the authority and rationale for the Department's decision. In particular:

- As you know, the Department's Title VI regulations require it to "make a *prompt* investigation whenever a ... complaint ... indicates a possible failure to comply with" Title VI and the regulations. 28 C.F.R. § 42.107 (emphasis added). Yet, according to widespread media reports confirmed by the Department, the complaint to the Department that prompted this investigation is some two and half years old. It is exceptionally unusual for the Department to resurrect a complaint filed nearly two and a half years earlier.
- The Department's decision to launch an investigation now is even more unusual because, as you know, identical issues are being litigated in federal court. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass.). The federal action was filed nearly three years ago. Extensive fact discovery is now complete, and expert discovery is underway. As the Division's Title VI Investigation Procedures Manual observes, funding agencies commonly decline to investigate an administrative complaint where "[l]itigation has been filed raising the same

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allegations.”<sup>1</sup> That is why the Department of Education declined to investigate the same complaint that is the apparent basis for the Division’s current investigation.

- The Office for Civil Rights, within the Office of Justice Programs (OJP), is “[t]he principal office for receiving discrimination complaints against recipients of federal assistance from the Justice Department.”<sup>2</sup> It is unusual for the Civil Rights Division to investigate whether a recipient of OJP funding violated Title VI.

In light of the nature and timing of the Department’s actions, Harvard therefore asks for the Department’s responses to the following inquiries about the basis for the Division’s investigation:

1. Please identify the federal grants to Harvard University that in your view support the Department of Justice’s jurisdiction to investigate Harvard’s undergraduate admissions practices.
2. To the extent any of the grants originated from a component of the Department of Justice other than the Civil Rights Division, please identify the source of the Division’s authority to investigate Harvard’s compliance with conditions of that grant.
3. Your letter of September 20, 2017, states that “Harvard University signed contractual assurances agreeing to permit the Department to examine records and access other sources of information and facilities.” Please provide copies of any such assurances.
4. Your letter of September 20, 2017, states that the Department of Justice has received “complaints ... that Harvard University is discriminating against Asian Americans in its admissions.” Please provide a copy of each complaint; Harvard is willing to agree to receive these complaints with the names and identifying information of the complainants redacted.
5. Please provide a copy of the investigative case file for each complaint identified in response to question 4, including in particular copies of all external correspondence from the case file. Please also indicate whether a decision was previously made that any of the complaints did not warrant investigation.

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<sup>1</sup> U.S. Department of Justice, *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* (Sept. 1998).

<sup>2</sup> U.S. Department of Justice, *Protecting Against Race, Color, and National Origin Discrimination by Recipients of Federal Funds*, [https://www.justice.gov/sites/default/files/crt/legacy/2013/07/24/4yr\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2013/07/24/4yr_report.pdf); see also Office for Civil Rights, Office of Justice Programs, [https://ojp.gov/about/ocr/pdfs/OCR\\_TitleVI.pdf](https://ojp.gov/about/ocr/pdfs/OCR_TitleVI.pdf) (“The OCR is the principal DOJ office that enforces Title VI through the administrative process.”).

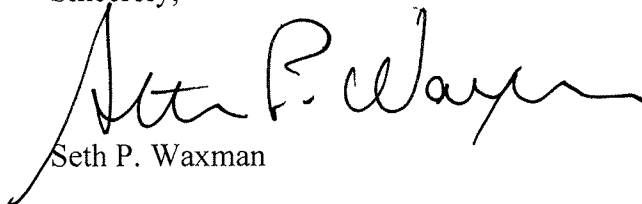
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6. The Division has in the past published a Title VI Investigation Procedures Manual that accompanied its Title VI Legal Manual. Please provide a copy of the operative Investigations Procedures Manual, if the September 1998 version is not the operative version.
7. Please provide copies of all written communications regarding Harvard University or the subject matter of this investigation, and agendas or calendar invitations for any meetings or telephone or video conferences regarding those topics, between the Civil Rights Division, or the offices of the Attorney General, Deputy Attorney General, or Associate Attorney General, and any of the following: Students for Fair Admissions, Inc.; its representatives, including its outside legal counsel; Edward Blum; the Project on Fair Representation; Roger Clegg; or the Center for Equal Opportunity.

In addition, I would appreciate your providing a proposal for how the Division intends to safeguard the confidentiality of the extremely sensitive information to which it has sought access—information like application files that contain deeply private information from high school students from across the country and beyond, and candid evaluations of those students. As you know, the Freedom of Information Act (FOIA) allows interested parties to request access to public records. In fact, the New York Times has already filed a lawsuit seeking access to records concerning the subject matter of this investigation, and Students for Fair Admissions (the plaintiff in the District of Massachusetts action) has filed a FOIA suit seeking records from the Department of Education. Harvard cannot agree to provide sensitive records to the Division under any conditions that could not guarantee their confidentiality.

As this letter reflects, Harvard believes that there are several issues to address before we turn to the production of any records, and we look forward to your responses to the points we have raised. My colleagues and I would be pleased to discuss these issues with any member of your team.

Sincerely,



Seth P. Waxman

Cc: Matthew Donnelly