

# THE TRUTH ABOUT EXECUTIVE ORDERS AND LAWFUL DEI IN PENNSYLVANIA SCHOOLS AND COLLEGES

APRIL 23, 2025



# PRESENTERS

The logo for the Education Law Center features the words "EDUCATION" and "LAW CENTER" in a bold, sans-serif font. "EDUCATION" is in yellow and "LAW CENTER" is in white. They are set against a blue rectangular background, which is itself centered between two horizontal yellow bars.

**EDUCATION  
LAW CENTER**

Maura McNerney  
Legal Director

The logo for the ACLU of Pennsylvania. It features the letters "ACLU" in a large, bold, blue sans-serif font. Below this, the words "AMERICAN CIVIL LIBERTIES UNION" and "FOUNDATION" are written in a smaller, blue, all-caps sans-serif font. At the bottom, the word "Pennsylvania" is written in a red, serif font.

**ACLU**  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
Pennsylvania

Kirsten Hanlon  
Legal Fellow

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**ACLU**  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
Pennsylvania

Harold Jordan  
Nationwide Education  
Equity Coordinator

# AGENDA



Disclaimers

Why it matters

Federal Executive Actions

Supreme Court Ruling in *SFFA v. Harvard*

Continuing Legal Obligations

- Title VI & U.S. Constitution
- PA Constitution and PA Human Relations Act

DEI as a strategy and remedy

- Racial Discrimination
- Hostile environment

Action Items, Resources & Questions

# SCHOOLS ARE IN THE EQUITY BUSINESS

## What do we mean by equity?

All children obtain the resources and supports they deserve in order to develop to their full academic and social potential. Equity is the means to achieving equality.

Ensuring equity requires that all students are treated fairly regardless of their language, race or ethnicity, economic profile, gender, sexual identity, or disability status.

Today, many measures undertaken to support and ensure equitable education are at risk of being labeled “Illegal DEI.”

# FEDERAL LAW SUPPORTS EQUITABLE EDUCATION

Even in our “federated” system of education where most policy is made at the state and local levels, federal law mandates that the Education Department play a role in supporting and protecting **equitable** education.

- Title I: Supplementing local and state funding allocations with “financial assistance to school districts for children from low-income families. Its purpose is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps by allocating federal funds for education programs and services.” <https://nces.ed.gov/fastfacts/display.asp?id=158>
- IDEA: Supplementing school resources to help educate students with disabilities.
- In Higher Education Act: To expand access to college for those would not otherwise be able to attend.

# OTHER FEDERAL SUPPORTS FOR EQUITABLE EDUCATION

## Small targeted grant programs

- Such as grants for teacher training programs with the goal of addressing the inequitable distribution of trained/credentialed teachers.
- Other specialized grant programs that help schools address other barriers to equitable education.

## Civil Rights enforcement under the Civil Rights Act of 1964

- To help schools fulfill their obligations under Title VI by cultivating inclusion, remedying racially hostile environments, and avoiding unlawful disparate treatment of students.

# MYTHS ABOUT DEI

“Diversity, Equity and Inclusion” does not have a precise or uniform meaning. People mean very different things by DEI.

The Trump Ed Department has not defined DEI or identified what kinds of conduct or programs it would deem illegal under its “illegal DEI” directives or compliance protocols.

Anticipatory compliance with these directives would require over-compliance and over-correction, doing away with things that are very clearly legal under the law (both statutes and case law).

The intent is to strike fear into schools that some unnamed measure, program, or curriculum might cross the line causing them to lose funding.

# MISCHARACTERIZATION OF DEI

DEI does not consist of race-based preferences which exclude and mistreat one group over another based on race, color, or national origin.

Diversity, equity, inclusion, and accessibility policies and practices encompass a range of activities aimed at creating welcoming learning environments for all students and ensuring equitable opportunities.

DEI benefits all students including but not limited to Black and Brown students, children with disabilities, students of different religions and ethnic backgrounds, children impacted by poverty, those who are homeless or in foster care, and LGBTQ+ students.



# FEDERAL EXECUTIVE ACTIONS

# WHAT IS AN EXECUTIVE ORDER?

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EOs are directives from the President which explain how that administration plans to interpret and enforce the law.

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Executive orders cannot override statutes or case law interpreting those laws.

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Agencies are bound by executive orders in how they enforce existing laws, like Title VI. Courts are not bound.

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Any action the President directs the federal government to take must be based on an existing statute or a constitutional power of the President.

**AN EXECUTIVE ORDER IS NOT LAW.**

**An executive order that directs the executive/agency to act beyond what is allowed by statutes and executive powers is unconstitutional.**

# EXECUTIVE ORDER REGARDING DEI IN K-12 EDUCATION

## “Ending Radical Indoctrination in K-12 Schooling”

Denounces DEI as resulting in discrimination or adverse treatment

Defines “discriminatory equity ideology” whereby members of a race, color, sex, or national origin are disfavored and subjected to guilt, anguish, and distress for actions that happened in the past

Promotes “Patriotic Education” grounded in “unifying, inspiring, ennobling” characterization of America and its history.

Announces plans to cut funding to schools that support indoctrination, illegal DEI concepts in curricula or teacher training and re-establishment of commission on patriotic education

**NO LEGAL AUTHORITY FOR FED GOVT TO DICTATE K12 CURRICULUM**

# WHAT IS A DEAR COLLEAGUE LETTER (“DCL”)?

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**"Dear Colleague Letter" is a type of guidance often issued by federal agencies, including the U.S. Department of Education to communicate the agency's interpretation of laws and regulations and enforcement priorities.**

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**A DCL IS NOT LAW.**

**DCLs are not legally binding and cannot override statutes or case law interpreting the statutes at issue.  
DCLs cannot create new law.**

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**A DCL CANNOT IMPOSE  
LEGAL RESTRICTIONS THAT  
VIOLATE CONSTITUTIONAL  
RIGHTS**

**DCLs cannot impose legal restrictions that violate the constitutional rights of individuals.**

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# DEAR COLLEAGUE LETTER



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 14, 2025

Dear Colleague:

Discrimination on the basis of race, color, or national origin is illegal and morally reprehensible. Accordingly, I write to clarify and reaffirm the nondiscrimination obligations of schools and other entities that receive federal financial assistance from the United States Department of Education (Department).<sup>1</sup> This letter explains and reiterates existing legal requirements under Title VI of the Civil Rights Act of 1964,<sup>2</sup> the Equal Protection Clause of the United States Constitution, and other relevant authorities.<sup>3</sup>

Claims educational institutions have “toxically indoctrinated students with the false premise that the United States is built upon “systemic and structural racism” and advanced discriminatory policies.

Proponents have attempted to justify this “under the banner of ‘diversity, equity, and inclusion’ (“DEI”), “smuggling racial stereotypes and explicit race-consciousness into everyday training, programming, and discipline.”

If an educational institution treats a person of one race “differently than it treats another person because of that person’s race, the educational institution violates the law.”

Race-based decision-making is “impermissible.”

Treating students “differently on the basis of race to achieve nebulous goals such as diversity, racial balancing, social justice, or equity is illegal...”



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

**Frequently Asked Questions About Racial Preferences  
and Stereotypes Under Title VI of the Civil Rights Act**

This frequently asked questions document is intended to anticipate and answer questions that may be raised in response to the [Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard](#) issued by the U.S. Department of Education's Office for Civil Rights (OCR)<sup>1</sup> on February 14, 2025. This document seeks to provide helpful information about how the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("*Students v. Harvard*" or "*SFFA*"), applies to racial classifications, racial preferences, and racial stereotypes<sup>2</sup> as well as how OCR interprets the ruling in its enforcement of Title VI of the Civil Rights Act of 1964 and its implementing regulations.<sup>3</sup>


On March 1, 2025, OCR issued FAQs discussing its interpretation of the *SFFA v. Harvard* case while emphasizing that **“unlawful” DEI is determined on a case-by-case basis.**

*Whether an initiative constitutes unlawful discrimination does not turn solely on whether it is labeled “DEI” or uses terminology such as “diversity,” “equity,” or “inclusion.”*

*Schools may not operate policies or programs under any name that intentionally treat students differently based on race, engage in racial stereotyping, or create hostile environments for students of particular races.*

**FAQs recognize:**

- *Nothing in Title VI or its implementing regulations, authorizes a school to restrict rights otherwise protected by the First Amendment.*
- *School programs focused on a particular heritage, culture, or a celebration of Black History Month open to all would not be discriminatory*
- *The Department is prohibited from exercising control over the content of school curricula.*



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PRESS RELEASE

ED Requires K-12 School Districts to Certify Compliance with Title VI and Students v. Harvard as a Condition of Receiving Federal Financial Assistance

APRIL 3, 2025



UNITED STATES DEPARTMENT OF EDUCATION  
WASHINGTON, D.C. 20202

April 3, 2025

Reminder of Legal Obligations Undertaken in Exchange for Receiving Federal Financial Assistance and Request for Certification under Title VI and *SFFA v. Harvard*

**Requested Certification:**

On behalf of \_\_\_\_\_ [SEA/LEA], I acknowledge that I have received and reviewed this Reminder of Legal Obligations Undertaken in Exchange for Receiving Federal Financial Assistance and Request for Certification under Title VI and *SFFA v. Harvard*. I further acknowledge that compliance with the below and the assurances referred to, as well as this certification, constitute a material condition for the continued receipt of federal financial assistance, and therefore certify our compliance with the below legal obligations.

\_\_\_\_\_Signature

\_\_\_\_\_Date

\_\_\_\_\_Title and District or State

On April 3<sup>rd</sup> ED sent a “Request for Certification” directing SEAs to certify compliance with Title VI, stating that schools cannot use “DEI programs to discriminate against one group of Americans to favor another...”

SEAs respond in different ways (e.g., CA,IL, MA MI, NY, WA).

On April 9th PDE submitted its response, explaining that all Pennsylvania’s LEAs “have previously certified, on multiple occasions, that they comply and will continue to comply with Title VI.”

# OTHER EDUCATION-RELATED ANTI-DEI EXECUTIVE ACTIONS

**“End DEI Portal”** – Public portal launched for parents, teachers, students, community members to report DEI discrimination

**Anti-DEI Executive Orders** have been the basis for:

- Cancelling Education Department contracts
- Abruptly ending federal grant funding research
- Ending teacher prep grants
- Eliminating data collection
- Federal funding freezes

PRESS RELEASE

## U.S. Department of Education Launches “End DEI” Portal

U.S. Department of Education Launches “End DEI” Portal

FEBRUARY 27, 2025

WASHINGTON – Today, the U.S. Department of Education launched [EndDEI.Ed.Gov](#), a public portal for parents, students, teachers, and the broader community to submit reports of discrimination based on race or sex in publicly-funded K-12 schools.

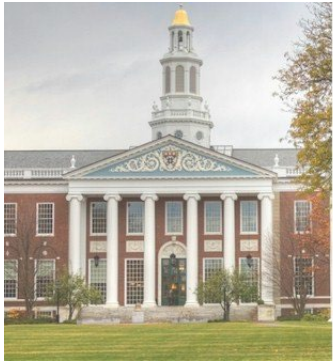
Over thirty lawsuits have been filed challenging multiple executive actions relating to education.



# LEGAL CHALLENGES

# SFFA Explained

*Students For Fair Admissions v. President and Fellows of Harvard College*  
*Students for Fair Admissions, Inc. v. University of North Carolina et al.*



**HARVARD**  
UNIVERSITY



- Both universities used race as one factor in a holistic admissions process
  - In compliance with 45 years of Supreme Court precedent
  - Other factors: athletic or artistic ability, legacy status, child of faculty, socioeconomic or geographic background
- Federal courts upheld these policies after extensive trials
- Supreme Court held that the policies violated Title VI and the Equal Protection Clause
  - The universities' practice of using racial identity as a formal admissions criterion failed strict scrutiny



**THE UNIVERSITY**  
*of* **NORTH CAROLINA**  
*at* **CHAPEL HILL**

# SFFA'S LIMITED CONTEXT

## Dear Colleague Letter

Under *SFFA*, federal law “prohibits covered entities from using race in decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life.”

## Limit 1: Higher Education Admissions

### Does not apply to K-12 schools

- Governed by another legal standard
  - *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (distinguishing use of race in higher ed admissions from K-12 school assignment plans)
- No right to postsecondary education
  - *Compare* Pa. Const. art. III, §14 (guaranteeing a right to “a thorough and efficient system of public education”)

### Does not apply to other education-related decisions

- Ex: hiring, scholarships, discipline, etc.

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## Limit 1: Higher Education Admissions

### Does not even apply to all IHEs

- *SFFA* Majority Opinion: stating that its holding does not apply to military academies because
  1. they were not a party to the cases,
  2. “**none of the courts below addressed the propriety of race-based admissions systems in that context,**” and
  3. there are “**potentially distinct interests that military academies may present.**”
- The same rationales apply to other IHEs (ex: HBCUs, religious institutions, vocational schools, etc.)

# SFFA'S LIMITED CONTEXT

## Dear Colleague Letter

Asserting that some facially race-neutral programs “are, in fact, motivated by racial considerations. And race-based decision-making, no matter the form, remains impermissible.”

## Limit 2: Facially Race-Based Classifications

Federal courts consistently reject the Department’s theory that race-conscious educational policies are unlawful after *SFFA*

- *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 879, 885-86 (4th Cir. 2023) (applying rational basis review to a race-neutral high school admissions policy)
- *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for the City of Bos.*, 89 F.4th 46, 59 (1<sup>st</sup> Cir. 2023) (same)
- *Sargent v. Sch. Dist. of Phila.*, No. CV 22-1509, 2024 WL 4476555, at \*19 (E.D. Pa. Oct. 11, 2024) (same).
- One of these courts found “no reason to conclude that [*SFFA*] changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles.” *Bos. Parent*, 89 F.4th at 61.

The Third Circuit explained that “the mere awareness or consideration of race should not be mistaken for discriminatory intent or for proof of an equal protection violation.”

- *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011)

# SFFA'S LIMITED CONTEXT

## Dear Colleague Letter

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## Limit 2: Facially Race-Based Classifications

Pre-SFFA Supreme Court *encouraged* Universities to consider race-conscious, facially race-neutral alternatives

- *Fisher v. Univ. of Tex.*, 570 U.S. 297, 312 (2013) (“[S]trict scrutiny imposes on the university the ultimate burden of demonstrating ... that available, workable race-neutral alternatives do not suffice.”)
- *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (same)
- *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring) (“race conscious” policies are permissible, including “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.”)

Justice Kavanaugh reaffirmed this approach in *SFFA*

- “[G]overnments and universities still “can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race” such as “race-neutral devices to increase [] accessibility of [] opportunities.”

# CONTINUING USE OF RACE EVEN IN *SFFA*'S LIMITED CONTEXT

## DEAR COLLEAGUE LETTER

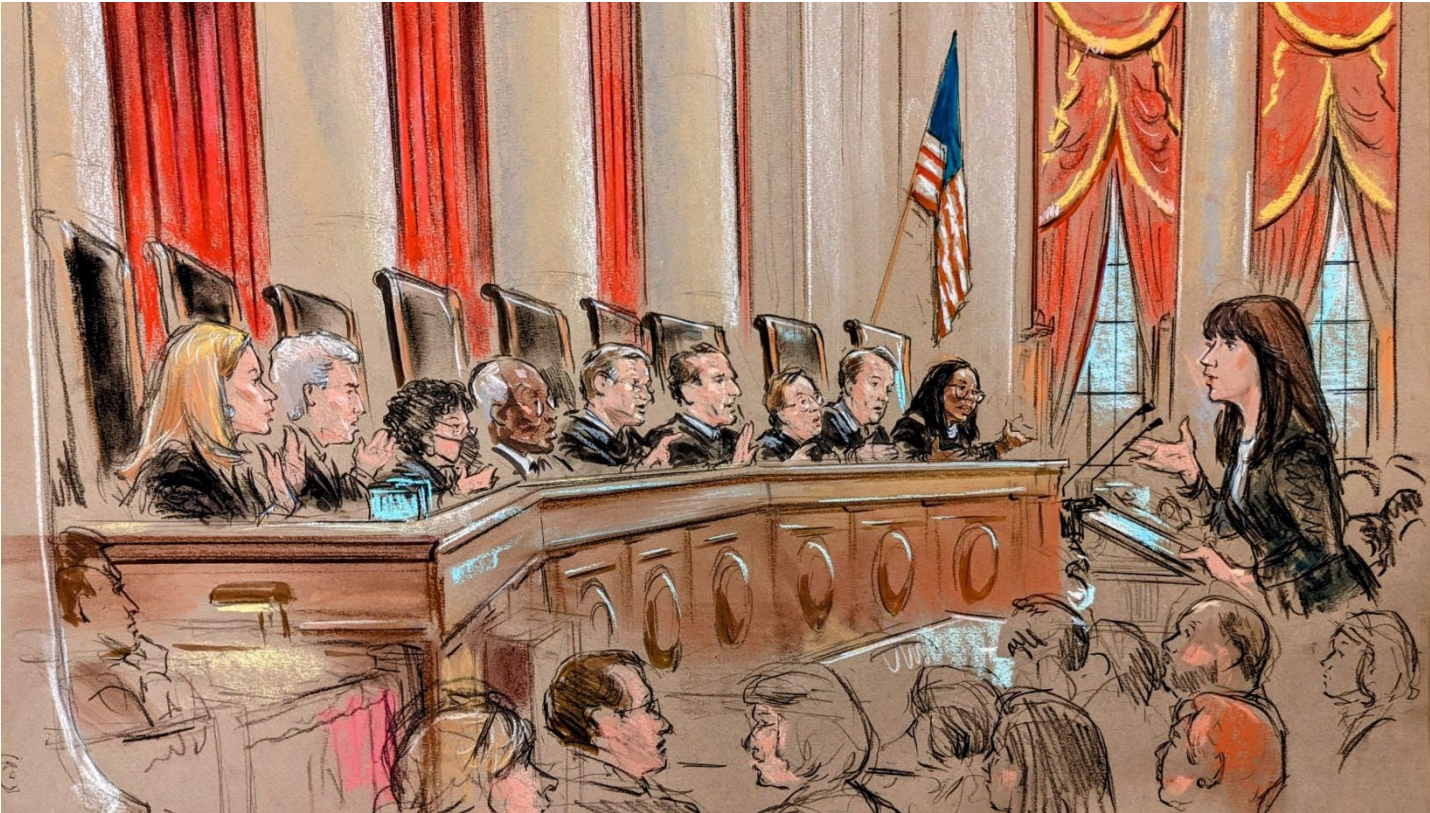
“[A] school may not use students’ personal essays, writing samples, participation in extracurriculars, or other cues as a means of determining or predicting a student’s race and favoring or disfavoring such students.”

## *SFFA* MAJORITY OPINION

- “[N]othing 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.”
- For example, “a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal” is acceptable if “tied to that student’s unique ability to contribute to the university.”
- Describing the educational benefits that the universities pursue through their holistic admissions process as “commendable goals” and “plainly worthy” interests



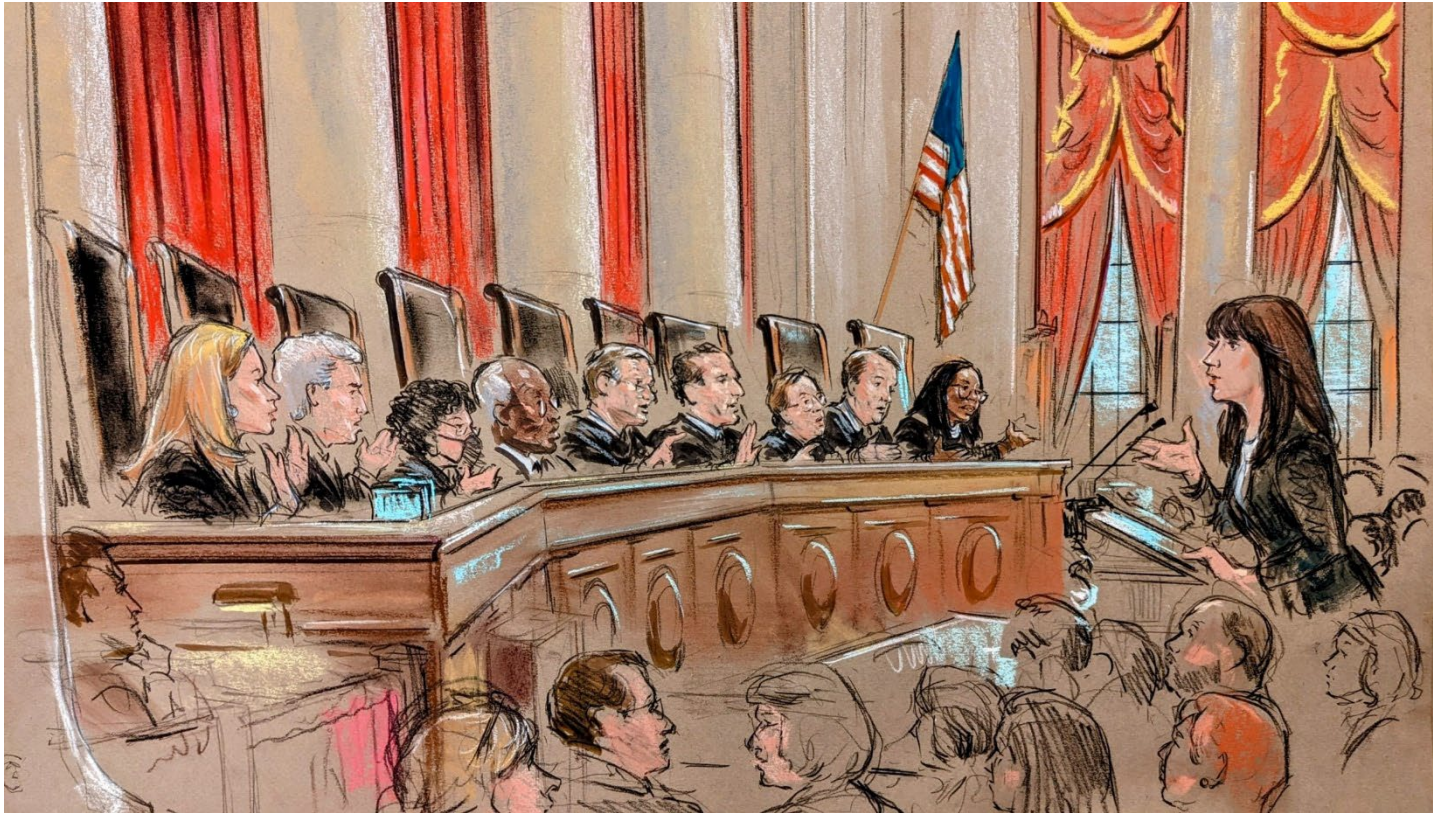
# SFFA ORAL ARGUMENT



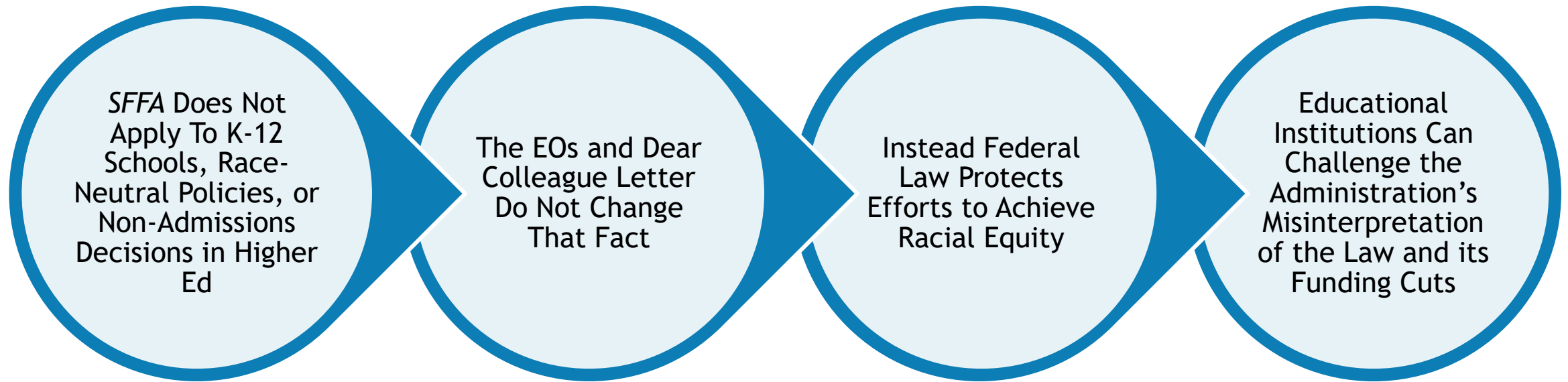
JUSTICE KAGAN: General, one of the through lines of the briefs in this case is -- I -- I think it's -- it's actually the first line of the Petitioner's brief or something like it -- is -- is essentially *Brown* compels the overruling of *Grutter*. And the Petitioners actually haven't given a whole lot of attention to that argument, but the idea is, and some of the questioning has reflected this -- this idea, is that, you know, we have this long and horrible history of racial discrimination, and, surely, that functions here to prevent racial classifications or to prevent race consciousness of the kind that Harvard and UNC are using. And I just thought I'd give you an opportunity to discuss what you think of that argument.



# SFFA ORAL ARGUMENT



GENERAL PRELOGAR: I think that argument is wrong in just about every respect. There is a world of difference between the situation this Court confronted in *Brown*, the separate but equal doctrine that was designed to exclude African Americans based on notions of racial inferiority and subjugate them, which, as this Court recognized, the school children affected their hearts and minds in a way unlikely ever to be undone, a world of difference between that and the university policies at issue in this case, which are not intended to exclude anyone on the basis of race or -- or even to benefit particular racial groups on the basis of race but, rather, are designed to bring individuals of all races together so that they can all learn together and benefit from that diverse educational environment. And I think it is profoundly ahistorical to say, as Petitioners do, that those situations are precisely equivalent, and it also trivializes the grievous moral and legal wrongs of state-sponsored segregation and the enormous harms that millions of Americans suffered under it.



# FEDERAL AGENCIES MUST FOLLOW PROCEDURAL STEPS TO *LEGALLY* CUT FUNDS FOR TITLE VI VIOLATIONS

The government may not cut off funds before

- conducting a program-by-program evaluation of the alleged violations;
- providing recipients with notice and “an opportunity for hearing”;
- determining that “compliance cannot be secured by voluntary means”;
- limiting any funding cut “to the particular program, or part thereof, in which . . . noncompliance has been . . . found”; and
- submitting a report explaining its actions to the relevant committees in Congress at least thirty days before any funds can be stopped.

*See* 42 U.S.C. § 2000d-1 (Title VI); *see also* 20 U.S.C. § 1682 (Title IX)



# FEDERAL GOVERNMENT APPEARS TO BE UNLAWFULLY CUTTING FEDERAL FUNDS

# LAWSUITS HAVE BEEN FILED TO CHALLENGE SOME OF THOSE CUTS

PRESS RELEASE

## DOJ, HHS, ED, and GSA Announce Initial Cancelation of Grants and Contracts to Columbia University Worth \$400 Million

Members of the Joint Task Force to Combat Anti-Semitism take swift action to protect Jewish students in response to inaction by Columbia University

MARCH 7, 2025

PRESS RELEASE

## U.S. Department of Education Cuts Over \$600 Million in Divisive Teacher Training Grants

U.S. Department of Education Cuts \$600 Million in Grants Used to Train Teachers and Education Agencies on Divisive Ideologies

FEBRUARY 17, 2025

The Joint Task Force to combat anti-Semitism is announcing a freeze on \$2.2 billion in multi-year grants and \$60M in multi-year contract value to Harvard University."

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

PRESIDENT AND FELLOWS OF  
HARVARD COLLEGE,

*Plaintiff,*

v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES;  
NATIONAL INSTITUTES OF HEALTH;  
ROBERT F. KENNEDY, JR., in his official  
capacity as Secretary of the United States  
Department of Health and Human Services;  
UNITED STATES DEPARTMENT OF  
JUSTICE; PAMELA J. BONDI, in her  
official capacity as Attorney General of the  
United States; UNITED STATES  
DEPARTMENT OF EDUCATION; LINDA  
M. MCMAHON, in her official capacity as  
Secretary of the United States Department of  
Education; UNITED STATES GENERAL  
SERVICES ADMINISTRATION;  
STEPHEN EHIKIAN, in his official capacity  
as Acting Administrator of the United States  
General Services Administration; UNITED  
STATES DEPARTMENT OF ENERGY;  
CHRISTOPHER A. WRIGHT, in his official  
capacity as Secretary of the United States  
Department of Energy; UNITED STATES  
NATIONAL SCIENCE FOUNDATION;  
SETHURAMAN PANCHANATHAN, in his  
official capacity as Director of the United  
States National Science Foundation; UNITED  
STATES DEPARTMENT OF DEFENSE;  
PETER B. HEGSETH, in his official capacity  
as Secretary of the United States Department  
of Defense; NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION; and  
JANET E. PETRO, in her official capacity  
as Acting Administrator of the National  
Aeronautics and Space Administration,

*Defendant.*

AMERICAN ASSOCIATION OF  
UNIVERSITY PROFESSORS—HARVARD  
FACULTY CHAPTER, and AMERICAN  
ASSOCIATION OF UNIVERSITY  
PROFESSORS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
JUSTICE, et al.

Defendants.

Case No. 25-10910

Case No. \_\_\_\_\_

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

Per Curiam

**SUPREME COURT OF THE UNITED STATES**

No. 24A910

DEPARTMENT OF EDUCATION, ET AL. v.  
CALIFORNIA, ET AL.

ON APPLICATION TO VACATE THE ORDER ISSUED BY THE  
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF  
MASSACHUSETTS

[April 4, 2025]

# CONSTITUTIONAL ISSUES AND CLAIMS

## Fifth Amendment

- Vagueness of “illegal DEI” and other terms violates due process

## First Amendment

- Academic freedom of higher education institutions
- Censorship of undefined “DEI programs” at all levels
- Students’ right to receive information

## Equal Protection (5A)

- *See NAACP v. Dept. of Educ.*: Title VI documents attempt to chill programs known to benefit Black students, impugn Black students’ qualifications, and teach history with concern for white students/to the detriment of Black students

## Tenth Amendment

- Usurps states’ traditional authority to govern school curriculum

## Administrative Procedure Act

- Contrary to constitutional rights / not in accordance with law
- Exceeding the agency’s statutory authority
- Arbitrary and capricious

# CURRICULUM IS STATE & LOCAL, NOT FEDERAL

**Federal government has no role in development of local curricula or related policies.**

Multiple federal statutes prohibit the U.S. Dep't of Education from “exercis[ing] any direction, supervision or control over the curriculum, program of instruction, administration or personnel of any educational institution... or over the selection or content of library resources, textbooks or other instructional materials.”



**Pennsylvania Constitution requires the General Assembly to “provide for the maintenance and support of a thorough and efficient system of public education...”**

- Curricula is essential element of constitutional mandate (Wm Penn SD v PDE, 2023)
- State Board of Ed adopts standards for subject areas
- PA School Code establishes the state requirements for school curricula
- Local school districts are authorized to implement state requirements
- PHRA prohibits discrimination in education

# CURRICULUM, LIBRARY BOOKS & CLASS DISCUSSIONS

Research shows inclusive curriculum and policies are effective methods to promote safety & well-being of students

## Legal Issues around curriculum, library books, and classroom discussions

- Free Speech
- Due Process - classroom censorship laws or policies are unconstitutional if so vague that people (e.g., teachers) cannot determine what is and is not prohibited.
- Title VI and PHRA - non-inclusive curriculum and policies may promote or exacerbate a hostile environment
- Free Exercise of Religion - *Mahmoud v. Taylor* (pending at U.S. Supreme Court)
- "Parental Rights" - substantive due process right under 14th Amendment

# ACLU LAWSUIT TO STOP ENFORCEMENT OF THE FEBRUARY 14<sup>TH</sup> DEAR COLLEAGUE LETTER

*Nat'l Educ. Ass'n., et al. v. Dept. of Educ., et al.*

## Claim 1: Void-for-Vagueness (Fifth Amendment)

- Failure to define “DEI programs” and how they unlawfully “discriminate” or “preference” students

## Claim 2: First Amendment

- Government-sponsored censorship of disfavored ideas about race and history

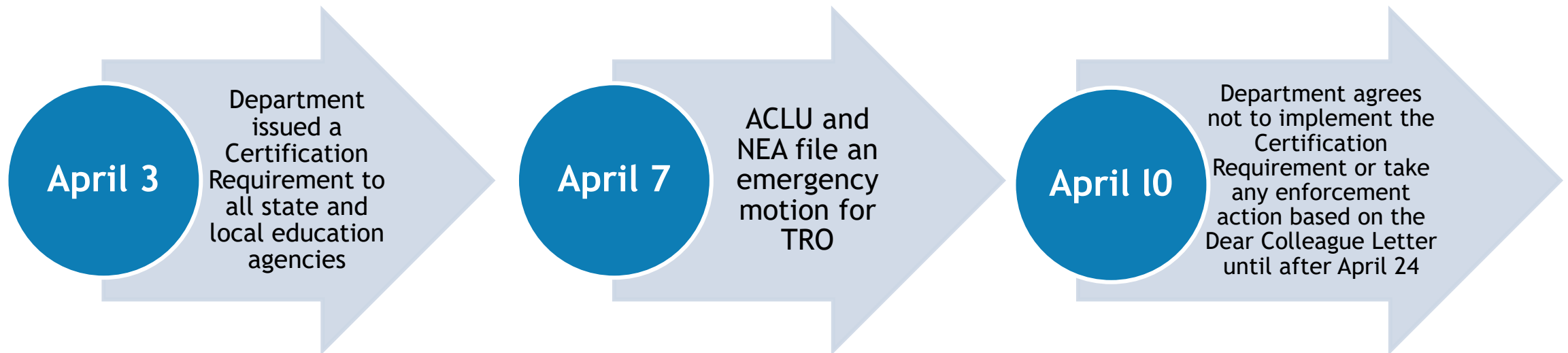
## Claims 3-7: Administrative Procedure Act

- The Department’s action violated constitutional rights, exceeded its statutory authority, unlawfully exercised control over local instruction, and failed to follow procedural requirements



# ACLU LAWSUIT TO STOP ENFORCEMENT OF THE FEBRUARY 14<sup>TH</sup> DEAR COLLEAGUE LETTER

*Nat'l Educ. Ass'n., et al. v. Dept. of Educ., et al.*



# CONTINUING LEGAL OBLIGATIONS

# CONTINUING OBLIGATIONS UNDER FEDERAL LAW

**U.S. Constitution:** Racial discrimination is prohibited by the Equal Protection Clause of the 14th Amendment. See *Brown v. Bd of Education*, 347 U.S. 483 (1954).

**Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7:** Prohibits discrimination by any program or activity receiving Federal financial assistance. Requires funding recipients with a history of racial discrimination to “take affirmative action to overcome the effects of prior discrimination.” 34 C.F.R. § 100.3(b)(6)(i).

**Equal Educational Opportunities Act of 1974 Section 1703(f):** Prohibits discrimination and deliberate segregation on the basis of race, color, and national origin. SEAs and LEAs must take action to overcome language barriers that impede English Learner (ELs) students from participating equally in state and district educational programs.

**Higher Education Act (“HEA”), 20 U.S.C. §§ 1001, et seq.:** “[T]here is a particular national interest in aiding those institutions of higher education that have historically served students who have been denied access to postsecondary education because of race or national origin and whose participation in the American system of higher education is in the Nation’s interest so that equality of access and quality of postsecondary education opportunities may be enhanced for all students.” 20 U.S.C. § 1051.

# TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

*No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d, et seq.; 34 C.F.R. § 100, et seq.*

- Applies to all education institutions that receive federal financial assistance (e.g., Pre-K, districts, charters, public and private colleges that receive federal funding)
- Prohibits discrimination based on actual or perceived race, color, and national origin, including characteristics of shared ancestry, ethnicity, citizenship or residency. This includes a country with a dominant religion or distinct religious identity.
- Protects all “persons” from discrimination regardless of citizenship status.

# TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

## *INCLUDES BOTH INTENTIONAL DISCRIMINATION AND DISPARATE IMPACT*

- **Intentional discrimination (private right of action):** Title VI bars intentional discrimination shown through: (1) direct evidence that policy expressly discriminates or (2) indirect evidence that discriminatory intent was more likely than not the motive - (a) facially neutral policy is applied differently based on race or (b) policy is applied evenhandedly but was motivated by discrimination and has racially discriminatory impact.
- **Disparate Impact (enforced by OCR/DOJ):** Neutral policy has disproportionate and adverse effect on individuals of a certain race, color, or national origin:
  - **Three-part analysis:** (1) whether an adverse outcome of the policy or practice disproportionately falls on a group based on race, color, or national origin; (2) whether policy is warranted by an “educational necessity” and (3) even if an educational necessity exists, whether no alternative policy could achieve the same goal with less discriminatory impact.
  - **Regulation: 87 34 C.F.R. § 100.3(b)(2) (2023):** Recipient may not utilize criteria or methods which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program for individuals of a particular race, color, or national origin.

# PENNSYLVANIA CONSTITUTION

Article I, Sections 26 and 29 guarantee that state and local governments cannot deny or abridge equal rights based on race or ethnicity. The provisions have been interpreted to provide an equivalent or greater level of equality than the U.S. Constitution.

***Art. I, sec. 26:*** Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

***Art. I, sec. 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.



# PA HUMAN RELATIONS ACT: STATE ANTI-DISCRIMINATION LAW

PHRA prohibits discrimination in public K-12 schools (public accommodations) on the basis of:

- Race
- Color
- Sex - includes gender identity/expression and sexual orientation
- Religion
- Ancestry
- National origin
- Handicap or disability



PHRA has been expanded over the years to specifically name and capture more types of unlawful discriminatory conduct such as **racial discrimination based on hair texture and protective hairstyle** e.g. braids, twists, and locs



# OCR'S USE OF DEI AS REMEDY

For years, OCR [resolution agreements](#) have included requiring remedies schools and colleges to implement DEI activities to rectify different treatment of students, provide remedial measures to address harassing conduct, assist in remedying other forms of discrimination on the basis of race, and foster a more positive and inclusive school climate.

## DEI activities identified as legally compliant include:

- DEI trainings;
- Instruction in or training on the impact of racism or systemic racism;
- Cultural competency training or other nondiscrimination trainings;
- Efforts to assess or improve school climate, including through creation of student, staff, or parent teams, use of community focus groups, or use of climate surveys;
- Student assemblies or programs focused on anti-harassment or anti-bullying;
- Investigations of, and issuance of reports re causes of racial disparities within a school;
- Use of specific words in school policies, programs, or activities, such as equity, discrimination, inclusion, diversity, systemic racism, or similar terms.



# DEI AS REMEDY IN CASELAW

[\*Milken v. Bradley\*](#), 433 U.S. 267, 267, 97 S. Ct. 2749, 2751, 53 L. Ed. 2d 745 (1977) (approving remedial plan re additional instruction, in-service teacher training, testing and counseling as remedies).

[\*Fisher v. Tucson Unified Sch. Dist.\*](#), No. CV-74-00090-TUC-DCB, 2020 WL 4013423, at \*1 (D. Ariz. July 16, 2020) (ordering hiring process, teacher diversity program, inclusive school environment initiatives etc. to achieve unitary status, showing district is no longer operating dual segregated system).

[Harassment and/or a hostile school environment cases](#): Injunctive relief includes:

implementation of anti-bullying training, education programs for school administrators, teachers, and students; adoption of policies and guidelines to address bullying; assignment of staff to monitor investigations, and data collection.

See e.g. [\*T.E. v. Pine Bush Central School District\*](#), No. 7:12-cv-2303-KMKPED (S.D.N.Y. Jan. 7, 2013) and [Settlement](#).

# KEEP CALM & CARRY ON SUPPORTING STUDENTS

## SCHOOLS

Consult your legal counsel  
Maintain nondiscrimination obligations

Explain state of issues;  
reassure students and families

Review ACLU-PA and ELC [letter guidance](#)

Monitor [trackers](#) for [status](#) of lawsuits challenging EOs

## PARENTS, COMMUNITY

Letter to school board & Sup't  
(see [sample](#))

Contact ELC & ACLU-PA with particular student concerns

PHRC [complaint](#)



# MORE QUESTIONS?

## EDUCATION LAW CENTER PA

215-238-6970 (Philadelphia) 412-258-2120 (Pittsburgh)  
intake@elc-pa.org

## ACLU OF PENNSYLVANIA

Intakes/Referrals (statewide): <https://complaints.aclupa.org/>  
info@aclupa.org

# ELC RESOURCES & CONTACT INFORMATION

Individual Requests For Assistance & Advice  
Call: 215-238-6970 (Philadelphia) 412-258-2120 (Pittsburgh)  
Email: [intake@elc-pa.org](mailto:intake@elc-pa.org)

ELC's webpage about Inclusive Schools & Honest Education  
<https://www.elc-pa.org/advocating-for-inclusive-schools-and-honest-education/>

## Collection of Fact Sheets and Back to School Guide

- |  |   |  |
|--|---|--|
| <input type="checkbox"/> Affirming & Safe Schools  | <input type="checkbox"/> Honest & Inclusive Schools   | <input type="checkbox"/> Students Experiencing Homelessness    |
| <input type="checkbox"/> Act 1: Accessing Supports | <input type="checkbox"/> Students with Disabilities   | <input type="checkbox"/> English Learners & Immigrant Students |
| <input type="checkbox"/> Enrollment                | <input type="checkbox"/> Early Childhood Education    | <input type="checkbox"/> School Funding                        |
| <input type="checkbox"/> School Discipline         | <input type="checkbox"/> KYR: Students in Care        | <input type="checkbox"/> LGBTQ & Nonbinary Students            |
| <input type="checkbox"/> Attendance & Truancy      | <input type="checkbox"/> Juvenile Justice Involvement |  |
| <input type="checkbox"/> Bullying & Harassment     |   |  |

**NEW:** ELC [Action Alert](#) and [Analysis](#): How Dismantling U.S. Dep't of Ed Endangers All PA Students