EDUCATION LAW CENTER | ANALYSIS

DIVERSITY, EQUITY, & INCLUSION: LAWFUL DEI IN PUBLIC K-12 SCHOOLS

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Since January 2025, the federal administration has issued multiple executive orders and new federal guidance and rescinded prior guidance seeking to dismantle and eliminate Diversity, Equity, & Inclusion (DEI) initiatives across federal agencies and contractors, and in federally funded entities, including PreK-12 public schools.

This analysis addresses assertions that DEI is prohibited by federal law or was rendered unconstitutional by the U.S. Supreme Court's ruling in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) ("SFFA"). The analysis also explains the continuing obligations of public schools to ensure safe, affirming, and inclusive school environments, to give all students equal access to learning, and to remedy racial discrimination under both federal and state laws.

WHAT IS DEI?

Diversity, equity, inclusion, and accessibility ("DEIA" or "DEI") policies and practices in public schools refer to a range of activities that seek to create inclusive learning environments where students from all backgrounds, identities, and abilities feel welcomed and respected, and they have equal opportunities to succeed, regardless of race, ethnicity, gender, socioeconomic status, or disability. These efforts benefit all students by fostering learning environments where all students are valued. Research shows that this results in improved academic outcomes and increased critical thinking skills, and it prepares all students for a diverse world, allowing children to learn from different perspectives, which promotes positive social and work interactions.[1] DEI ensures equitable opportunities that benefit all students, including Black and Brown students, children with disabilities, students of different religions and ethnic backgrounds, children impacted by poverty, those who are experiencing homelessness or in the foster care system, and LGBTQ+ students.

Deeply rooted in the Civil Rights Act of 1964,[2] DEI practices help schools fulfill their obligations to eliminate discrimination on the basis of race, color, religion, sex, or national origin in public accommodations, public education, and federally assisted programs. DEI policies and practices root out individual bias, reduce and remedy discrimination and promote diversity. They can remedy racial inequities, including avoiding the unlawful disparate treatment of students.[3]

WHAT IS TITLE VI? HOW DOES IT RELATE TO DEI?

Ten years after the landmark decision in *Brown v. Board of Education,*[4] Congress enacted Title VI of the Civil Rights Act of 1964 ("Title VI") to address persistent issues of racial segregation and discrimination. Title VI provides that "[n]o 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." [5] Title VI prohibits discrimination based on actual or perceived race, color, and national origin, including characteristics of shared ancestry, ethnicity, citizenship or residency (including a country with a dominant religion or distinct religious identity).[6]

Title VI applies to institutions that receive federal financial assistance, including preK-12 public schools (districts and charters) and public and private colleges that receive federal funding.[7] Regulations promulgated under Title VI expressly require that funding recipients with a history of racial discrimination "take affirmative action to overcome the effects of prior discrimination."[8] Moreover, "[e]ven in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."[9]

At its core, Title VI was designed to ensure that educational institutions fulfill their responsibilities to provide equitable educational opportunities for all students by addressing and remedying discrimination, including harassment.[10] Since its enactment more than 60 years ago, Title VI has protected students against discrimination. Evidence-based DEI programs and practices have been employed by the Office of Civil Rights and encouraged by states as critical tools to combat discrimination, remedy racially hostile environments, and fulfill essential obligations under Title VI.[11]

TITLE VI PROTECTS AGAINST INTENTIONAL DISCRIMINATION AND POLICIES THAT DISPARATELY IMPACT STUDENTS

Title VI bars intentional discrimination, which may be shown through: (1) direct evidence of intentional discrimination or (2) indirect evidence that discriminatory intent was more likely than not the motive, where (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.[12] Intentional discrimination can trigger a private right of action, meaning that individuals who have been intentionally discriminated against can file a complaint in federal court themselves.

In *Lau v. Nichols,* the Supreme Court held that a policy that disparately affects a protected class can constitute discrimination, even if the discrimination was unintentional.[13] However, the court later limited the scope of Title VI's private enforcement, holding that a private right of action exists only in cases of intentional discrimination, not in cases of unintentional discrimination with a discriminatory effect.[14] The *Sandoval* majority also acknowledged but did not directly address whether policies with a disparate impact might still be barred by regulations issued under the rulemaking grant found in Section 602 of Title VI.[15] Section 602 directs agencies to promulgate regulations "to effectuate" the antidiscrimination portion of Section 601 "consistent with

achievement of the objectives of the statute."[16] Pursuant to this directive, federal funding agencies, including the U.S. Department of Education, have issued rules and guidance under Title VI prohibiting disparate-impact discrimination and have employed DEI in Office of Civil Rights resolutions.[17]

THE ADMINISTRATION'S "ANTI-DEI" EXECUTIVE ORDERS

On January 29, 2025, President Trump signed an Executive Order (EO) titled "Ending Radical Indoctrination in K-12 Schooling."[18] This EO, for the first time, describes DEI as "discriminatory equity ideology," whereby members of a race, color, sex, or national origin (*e.g.*, white students) are disfavored and subjected to guilt, anguish, and distress for actions that happened in the past.[19] The EO denounces DEI as "illegal" without defining it and focuses on alleged harm and discrimination against white people. The EO also promotes "Patriotic Education" grounded in a "unifying, inspiring, ennobling" characterization of America and its history. This EO specifically announced plans to cut funding to schools that support indoctrination or "illegal" DEI concepts in curricula or teacher training.[20]

It's important to note that an EO is not law, but rather a directive from the president that explains how an administration plans to interpret and enforce the law.[21] EOs cannot override statutes or case law interpreting those laws.[22] Although federal executive agencies are bound by EOs with regard to how they enforce existing laws, such as Title VI, the courts are not bound by EOs. Moreover, EOs can be — and have been — challenged in federal court because any action the president directs federal agencies to undertake through an EO must be based on an existing statute or the president's own constitutional power.[23] For more information on EOs, see ELC's "Analysis on Executive Orders."

ANTI-DEI "DEAR COLLEAGUE" LETTER AND OTHER GUIDANCE

On February 14, 2025, the Office for Civil Rights, part of the U.S. Department of Education, issued new guidance stating that preK-12 schools are prohibited from engaging in diversity, equity and inclusion practices on the grounds that they are illegal and racially discriminatory.[24] The "Dear Colleague" Letter (DCL) specifically threatened to cut federal funding from state educational agencies and school districts for noncompliance with this interpretation.[25]

As acknowledged in a footnote, the DCL (like an EO) "does not have the force and effect of law."[26] Rather, a Dear Colleague Letter is a type of guidance issued by a federal agency to communicate an agency's interpretation of laws, regulations, and enforcement policies.[27] DCLs are not legally binding and cannot override statutes or case law. Like other agency guidance and EOs, DCLs cannot create new law or impose legal restrictions that violate the constitutional rights of individuals.[28]

On March 1, 2025, the U.S. Education Department issued FAQs following up on the DCL.[29] The FAQs similarly stated that DEI was discriminatory and illegal but notably also recognized that: (1) nothing in Title VI or its implementing regulations authorizes a school to restrict rights otherwise protected by the Constitution, such as the First Amendment; (2) school programs that are focused on a

particular heritage or culture, such as Black History Month, and open to all are not discriminatory; and (3) the Department of Education is prohibited from controlling school curricula.[30]

The Dear Colleague Letter and the FAQ reversed the prior administration's positions on DEI, including how it should be used to address school discipline, by advising schools to eliminate discipline protocols rooted in DEI on the ground that they are discriminatory against white students. This position was expanded on in an April Executive Order titled "Reinstating Commonsense School Discipline Policy,"[31] which contradicts recognized research that Black, Latino, and Native American students are disciplined more frequently and more harshly than white and Asian students for the same behavior, much to their detriment.[32]

Thereafter, on April 3, the department directed state educational agencies to certify compliance with Title VI by obtaining confirmation of compliance from school districts and charter schools.[33] States responded to this directive in different ways.[34] Pennsylvania's Department of Education responded simply by explaining that all Pennsylvania local educational agencies "have previously certified, on multiple occasions, that they comply and will continue to comply with Title VI."[35]

THE SUPREME COURT'S HOLDING IN *SFFA* CASE DOES NOT SUPPORT ANTI-DEI MEASURES

The DCL and FAQ issued by the administration and other guidance rely heavily on a broad interpretation of the Supreme Court's ruling in *Students for Fair Admissions v. Harvard* (*SFFA*) to claim that all DEI policies and any efforts to treat a person of one race differently than a person of another race violate federal law. As legal scholars have explained in detail, the administration's interpretation of *SFFA* is overbroad and faulty. The EOs and guidance on DEI are constitutionally suspect, and DEI remains lawful.[36]

First, the administration's DCL states that *SFFA* prohibits the use of race in any context, including in hiring, promotion, compensation, financial aid, scholarships, administrative support, discipline, graduation ceremonies, and "all other aspects of student, academic, and campus life."[37] In contrast, the *SFFA* ruling is far more limited — beginning with the fact that it was limited to the college admissions context and the use of race under the circumstances presented. In that case, the court struck down the practice of using an applicant's racial identity as a formal criterion in the college admissions decision processes of two schools on the grounds that the policy was not narrowly tailored to a compelling state interest and the diversity goals espoused were not measurable.[38] The *SFFA* decision stands in stark contrast to prior Supreme Court precedent recognizing the educational benefits of diversity as a compelling government interest.[39] Nonetheless, the Court's ruling did not call for the elimination of all diversity, equity, inclusion, and accessibility policies and practices at all and the court made clear that the ruling was limited. For example, the majority in *SFFA* specifically recognized that its holding did not apply to all institutions of higher education, such as military academies, because the propriety of race-based admissions in that context raised "potentially distinct interests" that may require a different analysis.[40]

Second, although the DCL and FAQ assert that it is "impermissible" to consider race as a factor in decision-making, no matter the form, the Supreme Court in *SFFA* expressly recognized that race may be considered: "Nothing 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."[41] The Court also expressly acknowledged that diversity is a "commendable" goal.[42] Moreover, as the Third Circuit has observed, "the mere awareness or consideration of race should not be mistaken for discriminatory intent or for proof of an equal protection violation."[43]

Third, the *SFFA* decision is limited only to facially race-based classifications in higher education admissions.[44] Federal courts have routinely rejected the administration's theory that *all* race-conscious educational policies are unlawful post-*SFFA*.[45] As one court explained, there is "no reason to conclude that [*SFFA*] changed the law governing the constitutionality of facially neutral, valid secondary education admissions policies under equal protection principles."[46] Justice Brett Kavanaugh reaffirmed this in his concurrence in *SFFA,* stating that "governments 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." Pre-*SFFA* Supreme Court rulings also encouraged universities to consider race-conscious, facially race-neutral alternatives.[47] The Supreme Court has also consistently recognized that remedying the effects of past intentional discrimination continues to be a compelling interest that may justify a race-based policy under the strict scrutiny test.[48]

In sum, *SFFA* does not apply to K-12 schools, race-neutral policies, or non-admissions decisions in the college context. Neither the DCL and FAQs, nor the administration's EOs change these facts.

THE ADMINISTRATION'S ANTI-DEI DIRECTIVES, GUIDANCE, AND THREATENED ACTIONS ARE CURRENTLY UNENFORCEABLE

Three separate federal district courts have issued injunctions to block enforcement of the DCL and other administration policies on the grounds that the directives to schools are illegal, unconstitutional, and unenforceable. Specifically, these courts held that the DCL, the FAQs, and the April 3 directive to certify compliance with Title VI:

- Violated due process under the Fifth Amendment due to the vagueness of "illegal DEI" and other terms;
- Allows censorship of undefined "DEI programs" and undermines students' right to receive information under the First Amendment;
- Contravenes the right of states and local educational agencies to determine curriculum under the 10th Amendment and in accordance with federal statutes; and
- Violates the Administrative Procedures Act (APA) by contravening constitutional rights, not being in accordance with law (including the Supreme Court's holding in *SFFA*), and exceeding the Education Department's statutory authority.[49]

On April 24, 2025, a federal court enjoined the Education Department from "enforcing and/or implementing" the DCL, the FAQs, the "End DEI" Portal,[50] the April 3 certification of compliance with Title VI against the plaintiff National Education Association (NEA), et al., its members, and any entity that employs, contracts with, or works with its members.[51] Because this decision affects NEA members working in schools across the country, the Education Department has issued a formal notification on the DCL, FAQs, and April 3 letter stating that it "will not take any enforcement action, or otherwise implement, the February 28, 2025, Dear Colleague Letter, associated FAQs, the End DEI Portal, or the certification requirement until further notice." [52] The Portal has also been marked as historical and is not currently active.

In the NEA case, a U.S. district court in New Hampshire held in part that the DCL violated legal prohibitions against the federal government interfering with local school curricula.[53] This court also stated emphatically of the DCL: "[t]hough it purports to be grounded in existing law, the Letter fails to explain how or why existing law requires banning" DEI from school curricula.[54] In another case, a District of Columbia federal court similarly blocked the DCL, finding in part that because the DCL threatened schools with drastic funding losses for "failure to comply with vaguely defined prohibitions on DEI initiatives," it violated the Fifth Amendment's prohibition of vagueness.[55]

A federal district court in the District of Maryland likewise blocked the enforcement of the DCL (but declined to rule on the certification requirement), holding in part that "Title VI and *SFFA* have never been interpreted to preclude teaching about concepts relating to race."[56] More recently, in August 2025, on consideration of motions for summary judgment, this court declared both the DCL and April 3 certification requirement to be unlawful and held that they must be vacated pursuant to the APA. As Judge Stephanie Gallagher (a Trump appointee) explained in her ruling: "The government did not merely remind educators that discrimination is illegal: it initiated a sea change in how the Department of Education regulates educational practices and classroom conduct, causing millions of educators to reasonably fear that their lawful, and even beneficial, speech might cause them or their schools to be punished. The law does not countenance the government's hasty and summary treatment of these significant issues."[57]

Although two of these orders are temporary injunctions and those cases continue to proceed, it is critical to recognize that courts have intervened to enjoin enforcement of the administration's anti-DEI directives and guidance and that these rulings block their enforcement nationwide.

THE ADMINISTRATION CANNOT LEGALLY CUT FEDERAL FUNDS BASED ON ALLEGED VIOLATIONS OF TITLE VI

Even if the DCL were not currently blocked by several federal courts, states and school districts face little risk of immediately losing federal funding. Federal agencies must follow statutorily prescribed procedural steps to legally cut funds for Title VI violations. Before cutting off funds, the government must: (1) conduct a program-by-program evaluation of the alleged violations; (2) provide notice and an opportunity for hearing; (3) determine that compliance cannot be secured by voluntary means; (4) limit any cuts to only those particular programs in which noncompliance has been found; and (5) submit a report to the relevant committees in Congress at least 30 days before the funds are halted.[58]

As a result, notwithstanding being enjoined by the courts, the DCL and other directives do not alter schools' legal obligations, nor do they subject schools to a loss of funding without the opportunity to defend school policies.

THE ADMINISTRATION IS PROHIBITED FROM DETERMINING STATE AND LOCAL SCHOOL CURRICULUM

The federal government is not legally authorized to make curriculum decisions; rather, controlling curriculum and educational content lies entirely within the purview of state and local decision-making. This prohibition ensures that states and local school districts retain authority over their educational programs, curricula, administration, and personnel, protecting the principle that primary responsibility for education rests at the state and local levels.

Multiple federal statutes prohibit the U.S. Department 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."[59] The Pennsylvania Constitution also requires that the General Assembly "provide for the maintenance and support of a thorough and efficient system of public education."[60] State and local educational agencies, regardless of recent federal action, continue to possess the right to design the curriculum that teachers teach and students learn.

OFFICE FOR CIVIL RIGHTS: SELECTIVE ENFORCEMENT AND IMPACT OF REDUCTIONS IN STAFF

Although Title VI remains in full force and effect as described above, the administration has created significant barriers to using the Office for Civil Rights (OCR) to vindicate claims of racial, sex, and disability discrimination.

Congress established OCR with the mandate to effectively carry out the nation's civil rights laws in education, which includes enforcing federal statutes prohibiting discrimination on the basis of race, sex, and disability.[61] With respect to racial discrimination, the Department is required to "make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with" Title VI.[62] If the Department determines that there has been noncompliance with Title VI, it must "inform the recipient [of federal funding]" and resolve the matter by informal means.[63] If the action cannot be resolved, compliance may be affected by the suspension or termination of or refusal to grant or continue federal financial assistance or by any other means authorized by law.[64] OCR may take such remedial action as deemed necessary to overcome the effects of the discrimination.[65]

OCR is historically one of the government's largest enforcers of the Civil Rights Act of 1964. Its investigators follow a process to determine whether complaints from the public meet governing legal criteria for a civil rights claim, then carry out investigations methodically and in a neutral manner. For years, OCR has also issued resolution agreements that include DEI policies and practices to combat discrimination in schools and colleges. These remedies seek to foster positive and inclusive school climates free from discrimination, remedy racial disproportionality in school discipline, and reduce bullying and harassment, among other goals. OCR resolutions have included requirements to revise school discipline policies that result in discrimination, add new DEI

programs, establish a stakeholder equity committee, and hiring expert consultants to implement nondiscriminatory discipline practices, undertake data analysis, implement research-based discipline strategies, and conduct implicit bias training.[66]

In contrast to this history, the administration is now selectively cherry-picking cases and refusing to consider certain claims, including race-based claims asserted by Black and Brown families, while targeting claims involving transgender athletes, for example, for investigation to achieve an anti-trans agenda. In addition, the administration has drastically reduced OCR staffing — eliminating seven of 12 OCR regional offices and laying off half the staff.[67]

These actions have been challenged through litigation.[68] On June 18, a federal judge issued a preliminary injunction to temporarily restore OCR to its status quo, directing the Education Department to reinstate all laid-off OCR employees. The judge said the layoffs and shuttering of seven regional offices had rendered the remaining staff "incapable of addressing the vast majority of OCR complaints, especially since the Department of Justice's Civil Rights Division is undergoing its own downsizing."[69] The court expressly held that OCR had "abdicated its enforcement duties" and that the statute did not authorize the office to "selectively enforce complaints that come into the OCR that it prefers; the statute requires that the OCR investigate *all* complaints alleging violations of federal civil rights laws prohibiting race, sex, and disability-based discrimination."[70]

The administration is now complying with this directive while the appeal to the U.S. Circuit Court of Appeals for the First Circuit is pending.[71]

PENNSYLVANIA HUMAN RELATIONS ACT CONTINUES TO PROTECT AGAINST DISCRIMINATION

Pennsylvania's Constitution guarantees that state and local governments cannot deny or abridge equal rights based on rights or ethnicity.[72] The Pennsylvania Human Relations Act ("PHRA") expands these protections by prohibiting discrimination in public K-12 schools.[73] Discrimination on the basis of race, color, sex (including gender identity/expression and sexual orientation), religion, ancestry, national origin, and disability are barred.[74] The 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 hairstyles.[75]

The Pennsylvania Human Rights Commission ("PHRC") reaffirmed its commitment to enforcing Pennsylvania's anti-discrimination laws in the wake of the Dear Colleague letter and the federal administration's EO.[76] In January, the PHRC stated: "Regardless of what happens nationally, Pennsylvanians can be assured that under Pennsylvanian laws, they are protected. Pennsylvania was founded on the principles of tolerance and peace. It will remain a welcoming place for people of all backgrounds and lifestyles."[77] As such, the PHRA continues to be a crucial anti-discrimination protection regardless of recent federal action. For information, see ELC's "Fact Sheet on How to File a PHRC Complaint."

THE IMPORTANCE OF PROTECTING STUDENTS FROM DISCRIMINATION

Despite the recent actions by the administration, state and local education agencies have continuing legal obligations to protect their students from discrimination. The U.S. Constitution,[78]

Title VI,[79] and the Equal Educational Opportunities Act of 1974[80] all prohibit discrimination in schools, as does the Pennsylvania Constitution and the PHRA.[81] The administration's EOs and currently unenforceable DCL, FAQs, and certification letter do not change these obligations. Schools can and must support students and protect them from discrimination, including promoting inclusive classroom environments and undertaking proactive and remedial anti-discrimination measures, including DEI, knowing that these obligations continue and that such measures benefit all students to learn and thrive in school.

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[1] Kamalumpundi V, Neikirk K, Kamin Mukaz D, Vue Z, Vue N, Perales S, Hinton A. *Diversity, equity, and inclusion in a polarized world: Navigating challenges and opportunities in STEMM*. Mol Biol Cell. 2024 Nov 1;35(11):vo2. doi: 10.1091/mbc.E24-06-0264. PMID: 39373728; PMCID: PMC11617101 (collecting research) available at https://pmc.ncbi.nlm.nih.gov/articles/PMC11617101/.

[2] 42 U.S.C. § 1971 et seq. (2006).

[3] The concept of DEI is exemplified in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) where the court held that racial segregation deprived Black students of the equal protection of the laws guaranteed by the Fourteenth Amendment and ordered segregated schools to transition to a racially integrated system of public education with all deliberate speed, including calling for the immediate admission of Black children to schools previously attended by white students only. *See also Grutter v. Bollinger*, 539 U.S. 306 (2003) (race-based admissions policies upheld as narrowly tailored to serve compelling state interest of obtaining a diverse student body and did not violate the Equal Protection Clause).

[4] *Brown v. Bd of Ed*, 347 U.S. 483.

[5] 42 U.S.C. § 2000d.

[6] *Id*. See Know Your Rights: Title VI and Religion, U.S. Dept. of Education, Office of Civil Rights (2017), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/know-rights-201701-religious-disc.pdf.

[7] 28 CFR § 42.102 (c).

[8] 34 C.F.R. § 100.3(b)(6)(i).

[9] 34 C.F.R. § 100.3(b)(6)(ii).

[10] See Racial Incidents and Harassment Against Students, Fed. Reg. Vol. 59, No. 47, Dept. of Education, Office for Civil Rights (1994), https://www.ed.gov/laws-and-policy/civil-rights-laws/harassment-bullying-and-retaliation/racial-incidents-and-harassment-against-students.

[11] See *e.g.*, Diversity, Equity and Inclusion (DEI) in Massachusetts Public Schools: A Legal and Practical Guide for Implementing Principles of Diversity, Equity and Inclusion in Public School Settings (Oct. 2023)(discussing obligations and OCR DEI Fact Sheet: Diversity & Inclusion Activities Under Title VI, U.S. DEPARTMENT OF EDUCATION-OFFICE OF CIVIL RIGHTS (Jan. 2023), https://lawyersforcivilrights.org/wp-content/uploads/2023/10/Guidance-on-DEI-in-Massachusetts-Public-Schools-2023.pdf.

[12] *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). In the absence of direct evidence of intentional discrimination, Title VI claims are subject to the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Astaraee v. Villanova Univ.*, 509 F. Supp. 3d 265, 270 (E.D. Pa. 2020). See also *Lewis v. Ascension Par. Sch. Bd.*, 662 F.3d 343, 349 (5th Cir. 2011) (remanding case for factual determination regarding whether school board acted with a racially discriminatory motive in developing student assignment plan).

[13] *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that failure to provide English-language instruction to limited English proficient students violated Title VI because the school district discriminated against students based on national origin even if the discrimination was unintentional).
[14] *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001)
[15] *Id*, 532 U.S. at 280-81 (noting that "five Justices in *Guardians* voiced the view" that "regulations promulgated under [Section] 602 of Title VI may proscribe activities that have a disparate impact on racial groups"); *see also Alexander v. Choate*, 469 U.S. 287, 294 (1985) (noting that "the Court held [in *Lau*] that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI in this case").
[16] 42 U.S.C. § 2000d-1.
[17] 34 C.F.R. Part 100; see OCR Case Resolutions: Race, Color, and National Origin Discrimination, https://www.ed.gov/laws-and-policy/civil-rights-laws/race-color-and-national-origin-discrimination/case-resolutions-race-color-and-national-origin-discrimination.
[18] Exec. Order No. 14190, 90 Fed. Reg. 8853 (Jan. 29, 2025).
[19] *Id.*
[20] *Id.*
[21] American Bar Association, *What Is an Executive Order?*, 2021, https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/.
[22] *Id.*
[23] American Bar Association, *General FAQs on Executive Orders*, 2021, https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders/.
[24] Letter from Craig Trainor, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard (Feb. 14, 2025) ("DCL"), marked no longer enforceable, https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.
[25] *Id.* at 4.
[26] *Id.* at 1 n.3.
[27] Educ. Rts. Inst., *Understanding the February 14, 2025 Dear Colleague Letter from the Office for Civil Rights Regarding Title VI and Race Discrimination in Schools*, UNIV. OF VA. (March 2025), https://www.law.virginia.edu/sites/default/files/documents/understanding-dear-colleague-letter.pdf.
[28] *Id.*
[29] US Dep't of Educ., Office for Civil Rights, Frequently Asked Questions About Racial Preferences and Stereotypes Under Title VI of the Civil Rights Act (March 1, 2025), https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf.
[30] *Id.* at 6.
[31] Executive Order 14280 90 FR 17533 (April 23, 3025).
[32] Darling-Hammond, S., & Ho, E. (2024). No Matter How You Slice It, Black Students Are Punished More: The Persistence and Pervasiveness of Discipline Disparities. *AERA Open*, *10*. https://doi.org/10.1177/23328584241293411 (Original work published 2024); Leung-Gagné, M., McCombs, J., Scott, C., & Losen, D. J. (2022). Pushed out: Trends and disparities in out-of-school suspension. Learning Policy Institute. https://doi.org/10.54300/235.277
[33] Press Release, US Dep't of Educ., ED Requires K-12 School Districts to Certify Compliance with Title VI and Students v. Harvard as a Condition of Receiving Federal Financial Assistance (Apr. 3, 2025).
[34] For example, New York, Minnesota, Illinois and Wisconsin refused to comply with the directive, challenging it as unauthorized, unlawful and unconstitutionally vague. Vermont, Missouri, and Montana sent a single certification on behalf of all of its school districts. NPR, *With federal funding on the line, school leaders weigh Trump DEI order* April 17, 2025, https://www.npr.org/2025/04/17/nx-s1-5361196/trump-dei-school-leaders-response.
[35] Letter from Angela P. Fitterer, Exec. Deputy Sec'y of Educ., Pa. Dep't of Educ., to US Dep't of Educ., Off. of C.R. (Apr. 9, 2025), https://www.pa.gov/content/dam/copapwp-pagov/en/education/documents/schools/grants-and-funding/pde%20response%20to%20ocr%20on%20title%20vi.pdf.
[36] See *e.g.*, Memorandum To: Colleagues, University Offices of General Counsel, and University Leaders Re: *DEI Programs Are Lawful Under Federal Civil Rights Laws and Supreme Court Precedent* (February 20, 2025), https://race.usc.edu/wp-content/uploads/2025/02/Law-Professors-DEI-Executive-Orders-Memo.pdf.
[37] DCL at p.2. Note 24, supra.
[38] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214-18 (2023).

[39] *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 314 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).
[40] *Students for Fair Admissions,* 600 U.S. at 213, n.4.
[41] *Students for Fair Admissions*, 600 U.S. at 230.
[42] *Id.* at 214.
[43] *Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).
[44] *Id.* at 317 (Kavanaugh, J., concurring); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (distinguishing use of race in higher education admissions from K-12 school assignment plans).
[45] *See e.g., 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 (1st Cir. 2023) (same); *Sargent v. Sch. Dist. of Phila.*, No. CV 22-1509, 2024 WL 4476555, at *19 (E.D. Pa. Oct. 11, 2024).
[46] *Bos. Parent Coal. for Acad. Excellence*, 89 F.4th at 59.
[47] See *e.g.*, *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").
[48] See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 702, 127 S. Ct. 2738, 2742, 168 L. Ed. 2d 508 (2007) citing *Freeman v. Pitts,* 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992).
[49] See *Nat'l Educ. Ass'n v. United States Dep't of Educ.*, 779 F. Supp. 3d 149 (D.N.H. 2025) ("*NEA v. Dept. of Ed*"); *Nat'l Ass'n for Advancement of Colored People v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 53 (D.D.C. 2025) ("*NAACP v. Dept. of Ed*"); *Am. Fed'n of Tchrs. v. Dep't of Educ.*, 779 F. Supp. 3d 584, 610 (D. Md. 2025) ("*AFT v. Dept. of Ed*").
[50] "U.S. Department of Education Launches 'End DEI' Portal" marked as historical and no longer maintained (February 27, 2025), https://www.ed.gov/about/news/press-release/us-department-of-education-launches-end-dei-portal
[51] *NEA v. Dept. of Ed,* 779 F. Supp. 3d at 172 (DCL violated the Administrative Procedures Act because it is 'not in accordance with law,' 5 U.S.C. § 706(2)(A), insofar as various provisions of federal law prohibit the Department from directing or controlling schools' curricula").
[52] See ED's notification in red on DCL at p. 1, Note 24, supra.
[53] *NEA v. Dept. of Ed*, 779 F. Supp at 198.
[54] *Id.*
[55] *NAACP v. Dep't of Educ.*, 779 F. Supp. 3d at 66 ("[T]he certification requirement threatens serious consequences for schools' failure to comply with vaguely-defined prohibitions on DEI initiatives. Those consequences include the termination of federal funding, breach of contract suits brought by the Department of Justice, and liability under the False Claims Act, 31 U.S.C. § 3729(a). The Court finds that threatening penalties under those legal provisions, without sufficiently defining the conduct that might trigger liability, violates the Fifth Amendment's prohibition on vagueness.").
[56] *AFT v. Dept. of Educ.*, 779 F. Supp. 3d at 610. The court separately noted that the new guidance contradicted prior guidance which instructed schools that race-neutral efforts to promote diversity and increase opportunity for all students were lawful. *Id.* at 617.
[57] *Am. Fed'n of Tchrs. v. Dep't of Educ.*, No. CV SAG-25-628, 2025 WL 2374697, at *34 (D. Md. Aug. 14, 2025).
[58] 42 U.S.C. § 2000d-1 (Title VI); *see also* 20 U.S.C. § 1682 (Title IX).
[59] *See* Department of Education Organization Act of 1979, 20 U.S.C. §§ 6301 et seq; General Education Provisions Act, 20 U.S.C. §§ 1221 et seq; *see also Milliken v. Bradley*, 418 U.S. 717, 742 (1974); *United States v. Lopez*, 514 U.S. 549, 566 (1995).
[60] Pa. Const. Art. III § 14.
[61] See 20 U.S.C. § 3413; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (race); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (sex), and Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* (disability); *see also* 34 C.F.R. Part 100; 34 C.F.R. Part 106; 28 C.F.R. § 35.171.
[62] 34 C.F.R. § 100.7(c).
[63] 34 C.F.R. § 100.7(d)(1).
[64] 34 C.F.R. § 100.8(a).
[65] 34 C.F.R. § 104.6(a)(1).
[66] *See e.g.*, Resolution Agreement OCR Case No. 09-14-5003 Victor Valley Union High School District (Aug. 15, 2022), https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/09145003-b.pdf; Resolution Agreement, Peoria

Unified School District OCR Case 08-22-1273 (Sept. 30, 2022), https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/08221273-b.pdf.

[67] See Jodi Cohen and Jennifer Smith Richards, Massive Layoffs at the Department of Education Erode Its Civil Rights Division, Propublica (March 12, 2025), https://www.propublica.org/article/education-department-civil-rights-division-eroded-by-massive-layoffs; Jennifer Smith Richards and Jodi Cohen, A Gutted Education Department's New Agenda: Roll Back Civil Rights Cases, Target Transgender Students, Propublica (May 2, 2025), https://www.propublica.org/article/education-department-civil-rights-donald-trump-discrimination.

[68] *See e.g.*, *Carter v. United States Dep't of Educ.*, No. CV 25-0744 (PLF), 2025 WL 1453562, at *8 (D.D.C. May 21, 2025) (denying preliminary injunction on ground that plaintiffs failed to offer sufficient evidence that OCR failed to perform its statutory and regulatory duties or would be unable to perform its duties and questioning whether actions qualified as final agency action); *Nat'l Ass'n for the Advancement of Colored People v. United States,* No. 8:25-CV-00965-JRR, 2025 WL 2402191, at *16 (D. Md. Aug. 19, 2025) (finding that Plaintiffs failed to make "a clear showing of likelihood of success.").

[69] *Victim Rts. L. Ctr. v. United States Dep't of Educ.*, No. CV 25-11042-MJJ, 2025 WL 1704311, at *5 (D. Mass. June 18, 2025), Appeal Filed, *Victim Rights Law Center, et al v. United States Department of Education, et* al., 1st Cir., August 14, 2025. The pending appeal is asserted on the basis of the Supreme Court's stay in *McMahon v. New York*, 145 S. Ct. 2643 (2025), which stayed two orders that had enjoined massive firings and dismantling of Education Department. The Supreme Court's order is unaccompanied by explanatory discussion. The district court also distinguished the holding in *Carter*, explaining: "Plaintiffs have provided a record which demonstrates that OCR is not investigating most complaints and have clearly demonstrated irreparable harm with respect to at least two students who are unable to return to public school because their complaints have been forestalled by the OCR." Id. at *11, n.5.

[70] *Id.* at *13.

[71] Naaz Modan, Education Department plans return of laid-off OCR staffers, K-12 Dive (Aug. 21, 2025), https://www.k12dive.com/news/education-department-plans-return-laid-off-staffers-civil-rights/758284/ (more than 260 civil rights staff cut as part of a March reduction in force will return in waves through November). See Note 69.

[72] 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").

[73] Pa. Human Relations Act, 43 P.S. § 955.

[74] *Id. See* 43 P.S. § 951 – 963.

[75] 16 Pa. Code § 41.204 and 41.207 (defining traits associated with race to include but are not limited to, hair texture and protective hairstyles, such as braids, locks and twists).

[76] Press Release, Pa. Hum. Rel. Comm'n., The PHRC releases statement affirming anti-discrimination protections in Pennsylvania (Jan. 25, 2025).

[77] *Id.*

[78] U.S. Const. amend. XIV, § 1; *Brown v. Bd. of Educ.*, 347 U.S. 483.

[79] 42 U.S.C. §§ 2000d-2000d-7; 34 C.F.R. § 100.3(b)(6)(i).

[80] 20 U.S.C. §§ 1703,1703(f).

[81] Pa. Const. Art. I §§ 1, 26, 28, 29; Pa. Human Relations Act, 43 P.S. § 955.