



Executive Orders on DEI: Implications for Higher Ed Grant Recipients Under Title VI

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Agenda and Objectives

- Requirements of DEI and Gender-Related Executive Orders (EOs) and Implications for Higher Ed – EO 14168, EO 14173, and EO 14281
- Programmatic Reviews in Higher Ed to ensure Compliance with the EOs Under Title VI
- Responses to Notices of Contract or Grant Terminations – Options
- Litigation Challenging EOs – Update and Prognostications
- Objective: Arm CUPA-HR with Information to Permit your Institutions to Navigate the EOs in a Time of Uncertainty



The DEI and Gender EOs

EO 14173: *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*

Revokes EO 11246, which long required non-discrimination and affirmative action for women and racial minorities by federal contractors and subcontractors

Mandates that “every contract or grant” award must include the recipient’s agreement that: “Its compliance in all respects with all applicable Federal anti-discrimination laws is **material** to the government’s payment decisions for purposes of” the federal **False Claims Act**.

Requires recipient to “**certify** that it does not *operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws*”

Provides no definition of DEI or DEI programs that violate Federal anti-discrimination laws

Gave AG and agency heads 120 days to “identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars” for investigation and civil enforcement action.

The DEI and Gender EOs

EO 14173: Ending Illegal Discrimination and Restoring Merit-Based Opportunity

Key “Applicable Federal anti-discrimination laws”

- Civil Rights Act of 1964
 - Titles VI, VII, and IX
- Section 1981 of the Civil Rights Act of 1866
 - Prohibits discrimination in contracting based on race
- US Constitution – Equal Protection Clause

Poll Question

Has your institution received the DEI certification requirement from any government agency yet?

- ☐ Yes
- ☐ No
- ☐ Maybe

The DEI and Gender EOs

EO 14168: Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government

“It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy: . . . ‘Sex’ shall refer to an individual's immutable biological classification as either male or female. ‘Sex’ is not a synonym for and does not include the concept of “gender identity.”

Directs federal agencies to issue Guidance to support this view.

Prohibits the use of federal funds “to promote gender ideology.”

Viability in doubt under *Bostock*.

The DEI and Gender EOs

EO 14281: *Restoring Equality of Opportunity and Meritocracy*

Declares it the policy of the US to “eliminate the use of disparate impact liability in all contexts to the maximum degree possible”

Describes DI liability as “hold[ing] that a near insurmountable presumption of unlawful discrimination exists where there are any differences in outcomes in certain circumstances among different races, sexes, or similar groups, even if there is no facially discriminatory policy or practice or discriminatory intent involved. ” Claims “disparate impact theory all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability”

Revokes Executive approval of certain Title VI regs and “deprioritizes enforcement of all statutes and regulations to the extent they include disparate-impact liability.”

Directs the AG to “repeal or amend the implementing regulations for Title VI . . . to the extent they contemplate disparate-impact liability” and review all pending enforcement matters and consider changing course where they rely on DI liability theories.

Comprehensive, Privileged Analyses of DEI Programs – Title VII and Section 1981

- Sourcing, recruiting and hiring
- Career development and inclusion programs
- Compensation programs
- Internal communications
- Titles and office names
- External communications
- Supplier diversity programs
- Scholarships, internship programs

Litigation challenging the EOs

EO 14173 (authorizing grant termination, certification req's, enforcement action for "unlawful DEI")

- Core provisions enjoined nationwide, but injunction stayed by 4th Cir. (*Nat'l Ass'n of Diversity Officers in Higher Education v. Trump* (D. Md.))
- More limited PI issued in *Chicago Women in Trades v. Trump* (N.D. Ill), enjoining DOL and others "in active concert or participation" with the DOL from applying the DEI certification provision to anyone, nationwide. Also has plaintiff-specific provisions barring grant termination FCA claims.
- Other challenges proceeding (*Shapiro v. DoI* (E.D. Pa.), *Nat'l Urban League v. Trump* (D.D.C.))

EO 14168 & 14187 (in re parts barring provision of funding to providers of gender-affirming healthcare)

- Multiple suits, resulting in PIs that vary in scope & effect. Whole government is barred from applying the provisions re gender-affirming care in some States, certain agencies barred from applying in others.
- Courts found that parts of these EOs likely violate the constitution (Separation of Powers, Spending Clause, Equal Protection Clause), various statutes. But nothing preventing government from demanding certifications that educational institutions do not promote "gender identify"

Litigation challenging EOs, Education-Related Government Actions

- ***California v. DoEd***: S.Ct. vacated a dct TRO barring withdrawal of federal funding for teacher training (TQP, Seed grants). Suggested grant withdrawals can only be challenged in CoFC under the Tucker Act. MTD for lack of JD pending on remand.
- ***American Fed'n of Teachers v. DoEd*** (D. Md.): Dct stayed effectiveness of 2/14 DCL that suggests a wide variety of teaching practices/programs violate Title VI (e.g., teaching about systemic and structural racism, race-conscious curricula). Ct. found the Ps are likely to succeed on merits, including b/c DCL establishes new rules without notice-and-comment.
- ***Southern Ed. Foundation v. DoEd*** (D.D.C.): Challenges DoEd's termination of grant under EO 14151 based on alleged illegal DEI. PI issued. DoEd must reinstate the plaintiff's grant award, is enjoined from terminating this grant. Court found P is likely to succeed on the merits of its APA claims, including b/c Dept. "provides no reasoned basis for the grant termination."
- ***Am. Ass'n of University Professors v. DOJ*** (S.D.N.Y.): Challenge to withholding of funding from Columbia University. Const. & APA claims. PI motion pending.
- ***Harvard v. HHS et al.*** (D.Mass): Alleges Admin violated Harvard's constitutional rights by freezing billions in federal funding. Expedited SJ briefing underway.

Poll Question

Has your institution participated, directly or indirectly (i.e., through an association) in litigation challenging Executive action re DEI/Gender?

- ☐ Yes
- ☐ No
- ☐ Maybe

Takeaways

- ✓ There is a lot of active litigation challenging parts or all of the DEI and gender EOs and other Executive actions regarding education. But...
- ✓ So far, lasting nationwide relief has been elusive despite findings of likely illegality.
- ✓ Affected institutions and groups have had more luck getting tailored relief, specific to certain grants or actions, or limited to certain plaintiffs and their funding.

Title VI of the Civil Rights Act of 1964

Prohibits discrimination based on race, color, or national origin (including Jewish identity) in all programs and activities receiving federal funding, including public and private colleges and universities.

- The federal government can sue under either an intentional discrimination (disparate treatment) theory, or a disparate impact theory.

Private parties may also sue under Title VI to challenge college and university programs and practices that allegedly discriminate on a prohibited basis.

- Private parties can proceed only under a disparate treatment theory.

Implications for DEI Initiatives

- Range of Options – Based Largely on Risk Tolerance
 - One end of the Spectrum - some colleges and universities have dismantled DEI programs, scrubbed their DEI-related websites, eliminated classes focused on cultural sensitivity, and cancelled events aimed at promoting diversity.
 - Other end of the Spectrum - others have maintained their existing policies and practices, with the view that such policies and practices fully comply with federal and state civil rights laws and the EOs do not change the legal landscape.
 - Middle Ground – others have modified some programs and practices, but not abandoned DEI and related initiatives

Implications for Admissions

- Examine existing admission practices to ensure compliance with Title VI of the Civil Rights Act and the Equal Protection Clause. Ensure that a student's race (including Jewish ethnicity), color, or national origin plays no role in individual admissions decisions.
- Although Title VI does not prohibit discrimination on the basis of sex, the Equal Protection Clause (which applies to all public schools) and Title IX (which applies to all educational programs that receive federal funding) prohibit discrimination on the basis of sex, including in admissions.
- Your college and university likely examined its admissions policies to remove all preferences based on race after the Supreme Court's 2023 decision in *SFFA v. President and Fellows of Harvard College*.

Title VI Implications that Flow from Title VII

- The government can use some alleged violations of Title VII (those based on race, color, or national origin) as a basis for withdrawing funding under Title VI.
- If a university has certified that it is in compliance with all federal civil rights laws but is later found to have violated Title VII, the government can bring an action under the False Claims Act and recover treble damages.
- Schools should make sure that existing employment practices comply with Title VII.
 - Ensure that no employment decisions are made, in whole or in part, based on race, color, religion, sex (including pregnancy), or national origin.
 - Review materials used in advertising employment opportunities, hiring, onboarding, and training to ensure compliance with federal and state civil rights laws. Even language emphasizing a commitment to “diversity” may draw scrutiny.

Risk Tolerance as the Touchstone

- The EOs **do not define “DEI”** or explain what they might consider to be “illegal DEI” above and beyond what existing federal law already prohibits. Some admissions practices arguably are consistent with existing federal law but may be viewed as “illegal” under the EOs. For example:
 - Taking active steps to connect with a broad range of prospective students from a variety of communities (low-income, rural, etc) to inform them about opportunities available at the university and to encourage them to apply.
 - Providing “pathways” or “pipeline” programs focused on increasing the number of college-ready students in local high schools.
 - Providing admissions preferences for first-generation college students, students from high-poverty neighborhoods, etc., so long as such programs do not consider any student’s race, color, national origin, or other prohibited characteristics.
 - Providing mentorships geared toward helping students from underrepresented backgrounds succeed.
 - Maintaining resources and offices geared toward supporting certain communities (Black Student Center, LGBTQI+ Student Center) to ensure that these students feel safe and included.

Implications for Existing Grants and Grant Writing

- . Audit existing federal grants and contracts to determine whether your school is receiving funding for research or programming that may violate the EO.
- . Evaluate templates and guidelines for grant writing and consider eliminating buzzwords that may unduly raise concerns, such as “diverse,” “equity,” or “inclusive.”
- . Review any DEI commitments required by grants, gifts and contracts with private funding sources to determine risk.

Implications for the Campus Community

- Ensure that school policies for dealing with allegations of discrimination and harassment are consistent with federal and state law.
- Ensure that all students know how to report discrimination, including harassment.
- Assure the campus community of the institution's commitment to equal opportunity and nondiscrimination.
- Educate the campus community regarding resources to support psychological safety and wellness for all students and employees.

State-Law Considerations

- At least seventeen States have banned DEI in higher education to some degree in public universities.
 - Alabama, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming.
- But other states continue to express support for DEI.
 - The Attorneys General of Massachusetts, Illinois, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and Vermont released guidance with best practices for entities who wish to continue to maintain DEI initiatives in workplaces.

Title IX and “Gender Ideology”

Title IX of the Civil Rights Act of 1964 prohibits sex-based discrimination in any educational program or activity receiving federal financial assistance.

- The Administration has sued the State of Maine under Title IX, arguing that its school athletics policy, which allows transgender girls to compete on girls’ athletics teams, violates Title IX.
- The Administration may also bring enforcement actions under Title IX to argue that school policies permitting transgender students to use restrooms consistent with their gender identity violate Title IX.
- If efforts to secure voluntary compliance under Title IX are unsuccessful, the government can take steps to terminate federal funding.
- Private parties may also sue under Title IX and can recover certain monetary damages.

Title IX and “Gender Ideology” continued...

- Many states ban transgender athletes from participating in school athletics consistent with their gender identity.
 - BUT, courts of appeals covering 13 states have held that transgender students must be permitted to participate in sports consistent with their gender identity under the Equal Protection Clause of the Constitution and/or Title IX. (Fourth and Ninth Circuits)
- Seven States ban transgender people from using restrooms consistent with their gender identity (Florida, Utah, Alabama, Mississippi, North Dakota, Ohio, Idaho).
 - But in seven other states (those within the jurisdiction of the federal Courts of Appeals for the Fourth and Seventh Circuits), schools are *required* to permit students to use restrooms matching their gender identity.
- In determining your course of action under Title IX with respect to transgender students, your college or university should consider applicable state and federal law and should weigh risks and benefits.

Document, Document, Document

- Document all steps that you've taken to ensure compliance – “due diligence” or “comfort memo” – attorney-client privilege overlay
- If you are retaining any policies that the Administration may consider to be “illegal DEI,” document why you believe the program is legal under all federal and state law.
- Remember that to show a violation of the False Claims Act, the government must show that the false certification was made **knowingly** or was in **reckless disregard** of the truth.
 - A good faith belief that your college or university is compliant with all applicable civil rights laws is a defense to liability under the FCA.
 - Documenting the steps you took to investigate and audit your programs and policies can go a long way toward demonstrating good faith and careful attention to compliance.

Responses to Notices of Contract or Grant Terminations

- Overview of Termination for Convenience
- Procedures and Best Practices
- Recovery Considerations
- Other Government Actions

Overview of Terminations for Convenience

- FAR Parts 49 and 52 give the government broad authority to terminate without cause
- Contractor's recovery:
 - costs incurred
 - profit on work performed
 - costs of preparing termination settlement proposal
 - continuing costs
 - subcontractor costs
- No-cost settlement instead of termination for convenience where...
 - Contractor amenable
 - No government property
 - No debts due the government
- For Grants—2 CFR 200.340 Termination: “if an award no longer effectuates the program goals or agency priorities”

Procedures and Best Practices

- Notice of Termination
- Contractor Obligations Upon Notice
 - Stop work
 - Notifications to subcontractors and employees
 - Inventory and disposal
 - Documentation
- Settlement proposal and inventory schedule due dates
- Partial Termination
 - Burden of proof
 - Price adjustment on unterminated portion

Recovery Considerations

Contracts

- Lost profits
- Expected overhead vs Unabsorbed overhead
- Negotiations and audits after termination proposal submission
- Appeal / CDA

Grants

- Administrative appeal
- APA appeal
 - Violating an injunction
 - Improper basis of termination

Poll Question

What government actions have you seen/experienced under your contracts/grants?

- Termination for convenience
- Scope change
- Stop Work
- All of the above
- None of the above

Other Government Actions

- **Changes & De-scopes**
 - Duty to proceed
 - No express government unilateral right for grants
- **Stop Work**
 - Defined periods under contracts
 - Weighing risks of pausing vs ending
 - Contractor right to terminate
- **Payment Issues**
 - No disputes clause for grants

Takeaways

- ✓ Promptly cease work upon termination notice
- ✓ Assess recoverable costs
- ✓ Document all communications
- ✓ Assess potential challenges to grant terminations
- ✓ Recognize other government actions and seek legal input

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