

# PUBLICATION

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## DEI in Higher Education: Courts Push Back, Enforcement Pushes Forward

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Last year, higher education institutions were met with executive orders, a "Dear Colleague" letter, state and local legislation, and agency guidance that impacted their efforts related to diversity, equity, and inclusion (DEI). We have previously written about notable changes in prior articles. In response to the changes, some institutions audited their DEI efforts to ensure legal compliance. Over a year later, higher education institutions should reassess their DEI programs through not only a legal but also an enforcement risk lens. Given continued investigations and court rulings, proactive review of DEI programming with experienced counsel is critical to continuously mitigate exposure and limit costly missteps as the legal and regulatory landscape continues to develop.

### What's Changing and Why It Matters

Recent legal and regulatory developments continue to inform how higher education institutions should assess their DEI programs. While some courts have curtailed aspects of the federal government's DEI-related guidance and executive action, enforcement activity has not slowed. Institutions face a complex environment where legal outcomes remain unsettled, but investigations and compliance pressure persist.

Institutions must now navigate three core areas of risk exposure when considering DEI efforts:

- **Legal Risk:** Institutions should consider how likely a particular program or practice will be upheld by courts. Outcomes vary significantly depending on the nature of the program, specific facts and circumstances at issue, defenses presented, and the jurisdiction.
- **Enforcement Risk:** Even when a program may be legally defensible, institutions must assess the likelihood that their DEI efforts will trigger investigations, audits, or adverse publicity, each of which has the potential to carry substantial costs regardless of success in court.
- **Misinformation Risk:** Shifting executive policies, ongoing litigation, and uneven media coverage have created confusion about what activities are lawful. Misunderstanding current legal frameworks when analyzing DEI efforts can expose institutions to unnecessary risk and internal confusion and discord.

### What the Courts Have (and Have Not) Decided

Several lawsuits have relied on First and Fifth Amendment as well as procedural challenges to DEI-focused executive orders, the Dear Colleague Letter issued by the Department of Education (DOE), and other agency guidance and practices, particularly concerning the federal grant terminations and certification requirements. Courts have either reached mixed conclusions on these challenges or only reached procedural determinations, leaving substantive rights unresolved.

For example, on February 26, 2026, in *National Association of Diversity Officers in Higher Education, et. al., v. Donald J. Trump, et al.*, the United States Court of Appeals for the Fourth Circuit made a narrow decision that the termination provision in [Executive Order 14151](#) (EO) and the certification provision in [Executive Order 14173](#) were *facially* constitutional. While the Fourth Circuit vacated an injunction of the two provisions because

of its finding that the facial challenges were unlikely to succeed, the Court distinguished "as-applied" constitutional challenges, which focus on how a provision is enforced. As a result, the Court did not decide whether the executive orders and the current administration's interpretation of federal discrimination laws as it relates to DEI are correct and did not otherwise interpret what unlawful DEI is as referenced in the executive orders. Instead, the Court focused on the wording of the executive orders to find they were facially constitutional, refusing to "read subtext into the Provision's text." The Court explained that if the federal anti-discrimination law is misinterpreted as applied by this administration, affected parties can challenge those actions in specific enforcement actions. The Chief Judge wrote a concurrence to highlight that the Court was only deciding a facial challenge, "not the legality of termination of any particular DEI program." Judge Diaz encouraged those "disappointed by the outcome" to "Follow the law. Continue your critical work. Keep the faith. And depend on the Constitution, which remains a beacon amid the tumult."

In a separate opinion, in *American Federation of Teachers v. U.S. Department of Education*, the United States District Court for the District of Maryland enjoined the Dear Colleague letter issued by the DOE. This case challenged the February 14, 2025, Dear Colleague Letter (the Letter) and Certification Requirements that flowed from the EOs, largely based on procedural violations. The Letter explained the administration's position regarding DEI and federal antidiscrimination laws and the DOE's requirement that institutions certify their compliance with the DOE's interpretations. The District Court enjoined the Letter and its certification provision based on procedural and constitutional violations. In January 2026, the DOE stipulated to the dismissal of its appeal of the injunction, which leaves the District Court's ruling in place and blocks any further enforcement on the basis of the Letter. Despite these actions, there has not been a shift in enforcement, and federal agencies have continued investigations into alleged race-based programming that arguably flow from the guidance in the Letter, leaving an enforcement posture that appears to be mostly unchanged.

In short, current litigation outcomes have not immediately eliminated the risk of enforcement.

### Practical Takeaways for Higher Education Institutions

- **Do not assume that favorable court rulings eliminate all risk.** Investigations are ongoing and enforcement activity remains robust.
- **Avoid only relying on mitigating *legal* risk.** Courts have not shielded institutions from enforcement, and there are other risks to consider, including, for example, reputational, funding, and recruitment.
- **Risk assessment must be ongoing.** Misreading legal developments can create exposure not only legally, but also reputationally and operationally. It is important to continuously assess risk of various kinds.

The DEI regulatory environment remains fluid and higher education institutions are facing continued heightened scrutiny. It is even more essential that institutions maintain regular communication with experienced legal counsel to evaluate DEI program compliance from a holistic standpoint, anticipate and prepare for enforcement trends, and minimize legal, regulatory, and enforcement risk. While not the focus of this article, there are also financial, reputational, and people (employees, donors, students, etc.) risks that should also be considered before decisions are made. As litigation continues to work through the legal system, higher education institutions should remain vigilant and diligent about their priorities and risk assessments.

If you would like to discuss the DEI regulatory environment further and how this may affect your institution, please reach out to a member of Baker Donelson's [Higher Education](#) group.