The Department of Justice's "Guidance for Recipients of Federal Funding on Unlawful Discrimination": What You Need to Know[1]

In another effort to carry out the Trump administration's anti-equity agenda, on July 29, 2025, the Department of Justice (DOJ) issued "Guidance for Recipients of Federal Funding on Unlawful Discrimination" (the Memo) to all federal agencies. The Memo claims to prohibit diversity, equity, inclusion, and accessibility efforts by organizations that receive federal funding, state and local governments, and public and private employers. While the Memo does not define diversity, equity, inclusion, and accessibility or the activities that fall within this definition, its clear aim is to discourage organizations from having affinity spaces and groups, engaging in broad recruiting, assisting first-generation and low-income students, and taking other lawful steps to ensure equal opportunity. From access to education and living-wage jobs to health care and affordable housing, the Memo could have a profound impact on everyone's life. As organizations consider how to respond, it's important to understand the facts about what organizations can do to ensure equal opportunity.

FACT: Courts, not federal agencies, have the final say on the meaning of federal statutes.

DOJ can draft memos and other guidance documents to explain to federal agencies and the public how it will interpret laws, including civil rights laws, and can use these legal interpretations to guide its enforcement actions. However, neither DOJ nor other federal agencies can create or change federal statutes. Courts, not agencies, ultimately interpret federal statutes. Agency interpretations — especially new or changed ones — cannot substitute for, or contradict, judicial interpretations.[2] Federal civil rights law remains unchanged.

FACT: DOJ cannot infringe on constitutional rights through guidance or enforcement actions.

Organizations and individuals have constitutional rights to free speech, freedom of association, and due process, among others. DOJ cannot use guidance or enforcement actions to unlawfully curtail constitutional rights. For example, organizations have a First Amendment right to support diversity, equity, inclusion, and accessibility and to recognize the existence of transgender people and advocate for their rights. While the U.S. Congress can limit funding for these activities in some circumstances, the government cannot prohibit organizations from promoting these concepts or advocating for these rights.[3] Courts have barred the Trump administration from requiring organizations to comply with similar directives that infringe on constitutional rights.[4]

FACT: Prior attempts to force organizations to follow false interpretations of federal civil rights laws have been blocked by courts.

The Trump administration previously made similar legal arguments in Department of Education Office for Civil Rights (ED OCR) guidance documents and demanded that state education agencies certify their compliance with the agency's views. On April 24, 2025, three federal courts in different parts of the country collectively blocked ED OCR from enforcing its guidance and the certification requirement in any way across the country.[5] The cases are still ongoing, but the orders are a significant win for the rule of law.

FACT: In order to find the best talent, institutions need to address unfair barriers that prevent qualified people from equitably competing.

America has yet to achieve its promise of a nation where talent and hard work are the only limits to what people can achieve. From pre-K-12 schools[6] to colleges and universities,[7] and employment[8] to small business development, Black, Latino, Asian American, and Indigenous people; women; LGBTQ+ people; and people with disabilities encounter barriers that are not the result of ability, but of access. Meaningful diversity, equity, inclusion, and accessibility programs help institutions better identify merit by leveling the playing field.

FACT: Initiatives such as anti-bias trainings, or affinity groups and spaces that are open to all, do not create hostile environments or constitute different treatment. Federal law also supports allowing transgender people to use spaces consistent with their gender.

Courts have rejected the idea that anti-bias trainings, initiatives, or other programs that discuss racism, bias, or the history of or experiences with discrimination create a hostile environment in the absence of evidence of discriminatory conduct.[9] In fact, such trainings are often necessary to ensure compliance with civil rights laws.[10] Spaces like Black student unions or Jewish student centers that are open to all students also generally do not raise civil rights concerns. Finally, federal civil rights laws do not ban transgender people's use of bathrooms, locker rooms, and other spaces consistent with their gender.[11]

FACT: Initiatives with equitable goals that do not make decisions based on race or gender, such as programs for first-generation students and broad recruitment efforts, are lawful.

The U.S. Supreme Court has repeatedly emphasized that institutions can take action to improve diversity and equal opportunity using initiatives that do not make decisions based on race or other protected characteristics, including in *Students for Fair Admissions (SFFA) v. Harvard* and *SFFA v. University of North Carolina (UNC)*.[12] As Justice Kennedy explained in his controlling concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, institutions should be permitted to use these strategies "with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races."[13] Courts have rejected recent challenges claiming that such efforts are unlawful.[14]

FACT: Schools and other entities may consider the impact of an individual's experience of race on their lives in evaluating candidates.

The U.S. Supreme Court was clear that its decision in *SFFA v. Harvard/UNC* — which focused specifically on the individual consideration of race in postsecondary admissions – did not prohibit "universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[15] In addition, an applicant's "cultural competence," "cross-cultural skills," or resilience in the face of obstacles are lawful considerations if they help organizations identify whether applicants of all backgrounds have the skills needed to thrive in educational environments and the workplace.

FACT: Courts have upheld programs that use race or gender in decision-making in order to remedy discrimination.

The U.S. Supreme Court has long held that the government can make decisions based on race or sex in some circumstances, such as to remedy "specific identified instances of past discrimination."[16] For example, in light of the well-documented, ongoing discrimination faced by small business owners of color and women small business owners, courts have upheld narrowly tailored programs that consider race and gender in order to overcome that discrimination.[17]

Above all, the Memo does not and cannot change the law. The underlying statutes, regulations, and caselaw define what constitutes discrimination – not this inaccurate and unsupported guidance. The Memo intentionally sows confusion through its many omissions and misrepresentations about legal obligations.

The Trump administration is seeking to take us backward as a nation by targeting federally-funded organizations, state and local governments, and public and private employers. Diversity, equity, inclusion, and accessibility are fundamental American values. We urge institutions to consult with counsel and continue to follow the law — not the Trump administration's inaccurate views.

For more information, please see the following resources:

- *Affirmative Action in Higher Education: The racial justice landscape after the SFFA cases* by LDF, ACLU, Asian Americans Advancing Justice—AAJC, Asian American Legal Defense and Education Fund, LatinoJustice PRLDEF, and the Lawyers' Committee for Civil Rights Under Law.
- *The Economic Imperative to Ensure Equal Opportunity: Guidance for Employers, Businesses, and Funders* by LDF.
- *Critical Points on Title VI and Response to the Department of Education*, *Investing in Racial Equity Through Charitable Grants and Services*, Advancing Equal Employment Opportunity, and additional resources from the Lawyers' Committee for Civil Rights Under Law.
- *Despite Attacks, Civil Rights Protections Endure* and *Safeguarding and Strengthening Diversity, Equity and Inclusion (DEI) Initiatives* by Democracy Forward.

[1] This FAQ is not intended to, and should not be understood to, provide legal advice. Specific programs, initiatives, or questions should be reviewed with counsel.
[2] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
[3] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 444 (2020).
[4] *See San Francisco A.I.D.S. Found. v. Trump,* No. 25-CV-01824-JST, 2025 WL 1621636 (N.D. Cal. June 9, 2025)*; Chi. Women in Trades v. Trump*, No. 1:25-cv-02005, 2025 WL 1114466 (N.D. Ill. Apr. 14, 2025).
[5] *Am. Fed. of Teachers v. U.S. Dep't of Educ.,* No. 1:25-cv-00628 (D. Md. Apr. 24, 2025); *Nat'l Educ. Assoc. v. U.S. Dep't of Educ.*, No. 1:25-cv-00091 (D.N.H. Apr. 24, 2025); *NAACP v. U.S. Dep't of Educ.*, No. 1:25-cv-01120 (D.D.C. Apr. 24, 2025).
[6] Roslyn A. Mickelson, School Integration and K-12 Outcomes: An Updated Quick Synthesis of the Social Science Evidence, Nati'l Coal. on Sch. Diversity (2016) https://eric.ed.gov/?id=ED571629.
[7] Jeremy Ashkenas, et al., *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago,* N.Y. TIMES (Aug. 24, 2017), https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html. The Supreme Court invalidated the University of North Carolina's affirmative action policy even though that institution admitted underrepresented students of color, including Black, Latinx, Hawaiian/Pacific Islander, and Native students, "at lower rates than their white and Asian American counterparts, and those with the highest grades and SAT scores [we]re denied twice as often as their white and Asian American peers." *Students for Fair Admissions v. University of North Carolina*, 567 F. Supp. 3d 580, 666-67 (M.D.N.C. 2021), *overruled by Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).
[8] Ashley Jardina, et al., *The Limits of Educational Attainment in Mitigating Occupational Segregation Between Black and White Workers,* Nat'l Bureau of Econ. Research (Aug. 2023), https://web.archive.org/web/20240926174412/https://www.nber.org/system/files/working_papers/w31641/w31641.pdf.
[9] *See, e.g.*, *Young v. Colorado Dep't of Corr.*, 94 F.4th 1242 (10th Cir. 2024); *Vavra v. Honeywell*, 106 F.4th 702 (7th Cir. 2024).
[10] *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (discussing affirmative defense to harassment liability available where, among other things, an employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" such as by informing employees of internal anti-harassment policies).
[11] *Cf. Karnoski v. Trump*, 926 F.3d 1180 (2019) (holding that intermediate scrutiny applies to classifications based on transgender status under the Equal Protection Clause).
[12] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,* 600 U.S. at 317 (Kavanaugh, concurring) (explaining "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" (citing *Croson*) (internal quotations omitted. *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009) (declining to "question an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made"); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 789 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (explaining that, when government officials utilize "mechanisms [that] are race conscious but do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race, . . . it is unlikely any of [these mechanisms] would demand strict scrutiny to be found permissible."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment) ("A State can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.") (internal quotation marks omitted); *see id.* at 507, 509 (plurality opinion of O'Connor, J.) (criticizing the defendant city for not attempting to address racial barriers through race-neutral means and stating "the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races").
[13] *Parents Involved in Community Schools,* 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).
[14] *See, e.g., Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 61 (1st Cir. 2023), *cert. denied*, No. 23-1137, 2024 WL 5036302 (U.S. Dec. 9, 2024); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023)*, cert. denied,* 218 L. Ed. 2d 71 (Feb. 20, 2024) (upholding race-neutral high school admissions policy that produced more equitable admissions outcomes).
[15] *Students for Fair Admissions,*, 600 U.S. at 230.
[16] *Id.* at 207.
[17] *Midwest Fence Corp. v. Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016); *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187 (9th Cir. 2013); *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005); *N. Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v.*

Minnesota Dept. of Transp., 345 F.3d 964 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (10th Cir. 2000).