

## Recent Executive Actions

### Expanding Federal Authority to Withhold Funds Over DEI Programs

On January 28th, the General Services Administration (GSA) published a [notice of a proposed revision](#) to government-wide pre-award registration requirements that would require current and potential recipients of federal funding through any agency to certify that they will not: engage in disfavored DEI programs; promote the “freedom of speech and religious liberty”; transport, conceal, harbor, or otherwise assist “illegal alien[s]”; or fund, subsidize, or facilitate “violence, terrorism, or other illegal activities that threaten public safety or national security.” The certification requirement not only would allow the government to deny federal funding to entities that do not agree to these conditions, but also opens up the possibility of criminal enforcement and civil liability under the False Claims Act for recipients who complete the certification and engage in activity that the Administration determines to violate one of the conditions. The notice is open for public comment until March 30th.



#### Legally Speaking...

This proposed certification raises a host of constitutional issues, including: viewpoint discrimination, compelled speech requirements, and infringements on religious freedom and free association in violation of the First Amendment; impermissibly vague restrictions on funding recipients in violation of the Fifth Amendment Due Process Clause; and the imposition of new conditions on federal funding not enacted by Congress in violation of the Spending Clause. Further, its anti-DEI provision relies on the Administration’s interpretation of Title VI as prohibiting programs and policies that seek to promote racial diversity and equity, which courts have consistently found to conflict with Title VI precedent. GSA’s decision to pursue a requirement with such significant effects on funding recipients through a revision to information collection requirement instead of a notice-and-comment rule may make it procedurally invalid under the Administrative Procedure Act (APA).

### Offloading ED Programs to HHS and State

On February 23rd, the Department of Education (ED) [announced](#) two new interagency agreements (IAAs) to further offload its required programs onto other agencies. The [Department of Health and Human Services](#) (HHS) will take over administration of multiple grant programs focused on school safety, student mental health, and supporting under-funded communities, including School Based Mental Health Grants and Full-Service Community Schools Grants. The [Department of State](#) (State) will take over enforcement of a Higher Education Act requirement that colleges and universities disclose foreign gifts of \$250,000 or more and accompanying management of the [foreign funding reporting portal](#).



#### Legally Speaking...

The Elementary and Secondary Education Act, Higher Education Act, and other laws explicitly assign ED responsibility for the programs moving to HHS and State and do not authorize ED to shift those obligations. Further, the FY 2026 appropriations act bans ED from transferring funds appropriated to carry out its statutory duties to other agencies. Transfers of ED funds to HHS or State to implement these latest IAAs would violate this restriction.

## Reaching Resolution Agreements with 31 Higher Ed Institutions

On February 19th, ED [announced](#) 31 resolution agreements with institutions of higher education (IHEs), in which ED found that the IHEs' partnerships with "The Ph.D. Project," a nonprofit that supports students of color pursuing doctoral degrees, violated Title VI and the IHEs agreed to terminate the partnerships. ED opened [investigations](#) into 45 IHEs for these partnerships last March based on its interpretation of Title VI as prohibiting disfavored DEI initiatives.



### Legally Speaking...

As numerous courts have already found, including in decisions by [New Hampshire](#) and [Maryland](#) district courts concerning ED's February 14, 2025 [Dear Colleague Letter](#), the Trump Administration's position that Title VI bans programs and policies promoting DEI does not square with the statutory text or Supreme Court precedent. The resolution agreements' determinations that the IHEs' partnerships with The Ph.D. Project violated Title VI are therefore likely unfounded.

## Litigation Updates

### NEA Victory: ED's Anti-DEI Guidance Permanently Blocked

On February 18th, a New Hampshire district court issued a [final judgment](#) in a [lawsuit](#) brought by NEA, ACLU, and other partners last year challenging ED's February 14, 2025 [Dear Colleague Letter](#) and subsequent Certification Requirement that sought to restrict DEI efforts in schools and higher education institutions nationwide. The court dismissed the case without prejudice after ED conceded in a joint stipulation that the letter and certification requirement are vacated and agreed not to enforce them. ED's concession follows a Maryland district court's [final judgment](#) invalidating the agency actions.

### SCOTUS Rejects Trump Administration's Tariffs

On February 20th, the U.S. Supreme Court ruled, in a [6-3 decision](#), that President Trump lacked power to impose sweeping tariffs under the International Emergency Economic Powers Act (IEEPA), the 1977 law the Administration cited to justify the policy. Chief Justice Roberts, joined by Justices Kagan, Sotomayor, Gorsuch, Barrett, and Jackson, held that IEEPA's grant of authority for the President to "regulate . . . importation" does not allow him to impose tariffs. Justices Kavanaugh, Alito, and Thomas dissented.

### California Sues ED Over Parental Notification Policy

On February 11th, California filed a [lawsuit](#) challenging ED's threat to withhold \$4.9 billion in federal education funding on the grounds that a state law prohibiting mandatory disclosure of students' gender identities violates the Family Educational Rights and Privacy Act (FERPA). ED has demanded that the state adopt a policy of affirmatively notifying parents of any changes to students' gender identities. The state argues that its law complies with FERPA and ED's threat to withhold funding violates the Constitution's Spending Clause and the APA. A California district court granted a [temporary restraining order](#) prohibiting ED from withholding funds until the merits of the motion are fully resolved.

### Appeals Court Allows Louisiana Ten Commandments Bill to Move Forward

On February 20th, the en banc 5th Circuit [vacated](#) a Louisiana district court's [preliminary injunction](#) blocking a state law that requires public schools to permanently display the Ten Commandments in every classroom. The unsigned opinion overturned a panel order denying the state's motion to stay the preliminary injunction. It held that the challenge to the law was premature because classrooms have not yet posted the Ten Commandments and the courts thus cannot decide whether the displays violate the First Amendment in context. NEA and the Arkansas Education Association have filed an [amicus brief](#) in a similar case challenging Arkansas' Ten Commandments law.