



Federal Update for Higher Education February 13, 2026



Reminders

- This information is good as of right now. In an hour, it might not be. Stay tuned for new Executive Orders (EOs) and judicial or legislative responses.
- The political aspects of this are undeniable, but our first priority is simple: clarity.
- Remember not to lose the forest for the trees. What is the big picture? That will help guide our next steps.

Disclaimers

- We are not giving you legal advice
- Consult with competent legal counsel regarding specific situations
- You will receive slides for today's presentation after we've concluded
- No, we aren't recording this – because we expect things to shift quickly

Agenda

- Quick Hits
- OCR Updates from ED
- DEI guidance status
- Harvard update
- IPEDS
- Marijuana EO
- Title IV Proposed Regulations
- EEOC guidance withdrawal
- New DOL letters

Quick Hits

- Team updates
 - New firm name: Bricker Graydon Wyatt LLP
 - New email addresses @bricker.com
 - Same great team plus Heather Clingerman (OH), Kristin Scaduto (NH), and Sharon Gold (KY)!
 - Erin Butcher is now a Partner!
- Fall 2025 Unified Agenda of Regulatory and Deregulatory Actions has not yet been released
 - "Spring" agenda was released September 4, 2025...

OCR Updates from ED

- Continued focus on narrow issues – transgender athletes, Title VI
 - In 2025, OCR did not enter into any resolution agreements for K-12 sexual harassment or sexual assault
- Continue to see Title VI resolution agreements (2025):
 - Howard County Public Schools (MD)
 - Emory University
- In January 2025, OCR under President Biden released guidance on remediating a Hostile Environment under Title VI and highlighting outcomes from resolution agreements
 - Formally rescinded by Trump Administration in January 2026

Little v. Hecox

- Supreme Court heard oral arguments on January 13, 2026
- Challenge of a law passed in 2020 (Fairness in Women's Sports Act) which barred transgender females from competing on female athletic teams in public schools.
- Lindsay Hecox, transgender female athlete who wanted to join the Boise State University women's cross-country team but could not, sued alongside a high school athlete identified as a Jane Doe
- The District Court granted a preliminary injunction blocking the law
- The US Court of Appeals for the 9th circuit affirmed the injunction as it applied to Hecox but remanded back to district court

DEI Guidance Status

- American Federation of Teachers v. U.S. Department of Education
 - In January, the Trump Administration withdrew its appeal to the U.S. Court of Appeals for the 4th Circuit defending its anti DEI DCL issued in 2025. ("Ending Illegal Discrimination and Restoring Merit Based Opportunity")
 - The DCL cited *SFFA v. Harvard*, banning race conscious admissions, as a reason to pare back other DEI initiatives. While the appeal was withdrawn, the existing legal precedent cited in the DCL has not changed
- National Association of Diversity Officers in Higher Education v. Trump
 - 2 EO at issue (*Ending Radical Government DEI Programs and Preferencing/Ending Illegal Discrimination and Restoring Merit-Based Opportunity*)
 - Recent Court of Appeals decision vacated district court injunction allowing the executive orders to be enforced once again

Harvard Update

- Government sought to freeze **\$2 billion+** in federal research funding, largely targeting **HHS**.
- Federal district court ruled in favor of Harvard in September.
- Government originally demanded \$200 million settlement amount, similar to Columbia.
- After reportedly dropping the payment as condition of settlement, the government announced the next day that it was demanding \$1 billion+.

President & Fellows of Harvard Coll. v. United States Dep't of Health & Hum. Servs.

- The ruling, issued in September 2025, granted a permanent injunction against similar funding restrictions. The court held that the government cannot condition funding on the censorship of disfavored views.
- Judge Allison D. Burroughs ruled that the government used allegations of misconduct as a "**smokescreen**" for an "**ideologically-motivated assault**" on the university.

Grant Termination Litigation, 2025-2026 (1 of 2)

National Ass'n of Diversity Officers in Higher Education, et al. (4th Cir., Feb. 9, 2026).

- Lawsuit challenging Executive Orders which (1) ended DEI programs—and contracts that facilitate them—in the federal government, and (2) requiring all grant recipients to confirm compliance with antidiscrimination laws. Orders contain distinct "certification" and "enforcement" provisions.
- Resulted in cancelation of travel, conferences for plaintiffs using federal funds.
- Plaintiffs claim that the orders violate First Amendment expression and Fifth Amendment due process based on vagueness.

Grant Termination Litigation, 2025-2026 (2 of 2)

National Ass'n of Diversity Officers in Higher Education, et al. (4th Cir., Feb. 9, 2026).

- Fifth Amendment claim: Executive Orders at issue are not any more vague than others (such as government initiatives pursuing "excellence.").
 - President also has discretion to determine funding for policy priorities, within bounds of Congressional appropriation.
- First Amendment claim: Certification only verifies compliance with civil rights laws; 1A does not allow violation of them.
 - Ripeness issue for the purpose of determining the EO to facially invalid.

Concurring opinions by Chief Judge Diaz, Judge Rushing

IPEDS Update

- Integrated Postsecondary Education Data System - surveys conducted by ED's National Center for Education Statistics
- Reporting is required under the Higher Education Act
- Admissions and Consumer Transparency Supplement data required to be submitted by **March 18th**
- Requires the submission of multiple years of student-level disaggregated data on applicants, admissions, enrollment going back to 2019-2020
- Consider working with legal counsel to review data for potential statistical issues under privilege

FERPA Update (1 of 2)

- February 5, 2026 DCL
 - ED is conducting investigation into the provision of information to the National Student Clearinghouse, which was used by the Institute for Democracy and Higher Education (at Tufts University) to conduct the NSLVE.
 - "Any IHE that utilizes [National Study of Learning, Voting, and Engagement] data released in 2026 could be at risk of being found in violation of FERPA."
 - According to ED, schools are disclosing directory information. NSLVE then matches that information with non-directory information about voting history to create a de-identified data set.
 - "This type of data matching creates records that cannot be disclosed without students' consent and is where FERPA concerns are at their zenith."
 - ED says studies exception doesn't apply

FERPA Update (2 of 2)

- February 5, 2026 DCL
 - "There are a number of enforcement options available to the Department when an IHE is not in voluntary compliance with FERPA, including withholding further payments, issuing a cease-and-desist order, and recovering funds."

Reminder: Spring 2025 Regulatory Agenda indicated that ED intends to issue rules that will, in part, address "the complaint and investigation procedures and remedies that apply to the Department's enforcement of FERPA."

Marijuana EO (1 of 2)

- Executive Order – December 18, 2025
 - Orders DOJ to take steps to finish out the rulemaking process to reschedule marijuana to Schedule III
 - Hearing was supposed to happen in January 2025 but was postponed
 - The White House will work with Congress to better regulate CBD products
 - The White House will work on a regulatory framework for hemp-derived cannabinoid products
- None of this has happened yet

Marijuana EO (2 of 2)

- If and when marijuana is reclassified as Schedule III:
 - Drug Free Schools and Communities Act still applies – must still prohibit possession, distribution, and use on campus and in your activities
 - May be easier to conduct research on campus
 - May make it easier for marijuana dispensaries to function (banking, taxes, etc.)
 - More dispensaries --> more employment --> more degree programs?
 - May make it easier for employees with disabilities to request reasonable accommodations for medical marijuana usage

Title IV Proposed Regulations

- NPRM submitted on January 30, 2026 - "Reimagining and Improving Student Education" - 91 FR 4254
- Intended to implement changes from the One Big Beautiful Bill Act last summer
 - Establishes new loan limits for graduate students, professional* students, and parents
 - Higher loan limits for professional students (\$200k vs. \$100k)
 - Nurses, social workers, and physician associates are submitting comments because they were not included in the higher limits
 - Phasing out the Graduate PLUS program
- **Comments due by March 2nd** – 5k+ comments already submitted

*Denotation as "professional" is not meant to be a value judgment per ED

EEOC Harassment Guidance Withdrawal

- January 22, 2026, the EEOC voted 2-1 to rescind its 2024 Enforcement Guidance on Harassment in the Workplace.
- Comes on the heels of a May 2025 Texas court ruling vacating portions of the Guidance that concerned the definition of sex as it related to harassment.
- The current EEOC Chair disagreed with the portions of the Guidance that stated that harassment could include: 1) denying access to a bathroom that is consistent with an individual's gender identity, and 2) repeated use of a pronoun differing from a person's gender identity.
- Rather than revise or remove portions of the Guidance, the Commission rescinded it in full.
- The EEOC Chair, in her press release, said that “Federal employment laws against discrimination, harassment, and retaliation, and Supreme Court precedent interpreting those laws, remain firmly in place. The EEOC is committed to evenhanded enforcement of these laws. The agency will continue to be dedicated to preventing and remedying unlawful workplace harassment.”

New DOL Letters (1 of 6)

- On January 5, 2026, the DOL released six Opinion Letters, 2 concerning the Family and Medical Leave Act (FMLA) and the remaining 4 concerning the Fair Labor Standards Act (FLSA).
- **FMLA 2026-1: How a school [or business or University] closure of less than a full week impacts the amount of leave a school employee uses under the FMLA.**
 - What happens if an employee is taking intermittent leave of less than a full week and the day of her leave, the University is closed for snow or a holiday? **The employer cannot deduct FMLA leave for that day.**
 - "For example, if an eligible employee needs FMLA leave each Tuesday afternoon for physical therapy, but the school is closed all day on Tuesday due to inclement weather and the employee is not required to report for duty, the employer school should not deduct time for that day from the employee's FMLA entitlement."

New DOL Letters (2 of 6)

- What happens when the University closes for less than a full week for snow or holiday and the employee is supposed to take FMLA leave that entire week? **The employer can deduct the entire week for FMLA entitlement.**
 - "In other words, if the employee was on FMLA leave for Monday through Friday of a week, but the school is closed on Tuesday, the employee would use a full week of FMLA leave despite not being required to report to work on Tuesday. "
- What happens when the University closes for an entire week and the employee is not expected to come to work that week and he is taking FMLA that week? **The employer cannot deduct any FMLA time that week.**

New DOL Letters (3 of 6)

- **FMLA 2026-02: Whether FMLA leave may be used for time spent traveling to or from medical appointments, including where an employee provided the employer with medical certification from a health care provider that confirms the employee's need for the appointment, but the certification does not address travel to or from the appointment.** Yes, the leave is protected, may be counted as FMLA leave, and the certification does not have to state that travel is necessary. However, time spent on personal detours from the medical appointment are not covered or chargeable to FMLA leave.

New DOL Letters (4 of 6)

- **FLSA 2026-1: Whether an employee’s role meets the criteria for the learned professional exemption under section 13(a)(1) of the FLSA, and, if so, whether an employer is nevertheless permitted to reclassify the employee as non-exempt.** Despite the fact that the writer, who was a LCSW, had her supervisory duties taken away, she still met the learned professional exemption as to her duties because she was still performing work requiring actual knowledge, including clinical assessments, psychosocial evaluations, treatment plans, and treatment document. The Opinion did not address whether she would have met the salary basis test because the employer chose to change her pay to hourly and she did not include the amount of pay. The Opinion stated that her employer can classify her as nonexempt if it so chooses. If an employer classifies an exempt worker as non-exempt, then the employer needs to comply with minimum wage and overtime requirements.

New DOL Letters (5 of 6)

- **FLSA 2026-02: Whether section 7(e) of the FLSA permits an employer to exclude certain bonus payments from an employee's regular rate of pay.** Reaffirmed that non-discretionary bonuses must be included in the employee's regular rate for purposes of calculating their overtime rate. The writer stated that the bonus plan "rewards an employee's punctuality, attendance, consistency in completing daily safety tasks, driving safety, compliance with traffic laws, proper attire, and performance efficiency." Therefore, the employer did not have any discretion as to amount because the bonus was calculated using a predetermined plan to incentivize certain work performance.

New DOL Letters (6 of 6)

- **FLSA 2026-03: Whether a union and employer can enter into a collective bargaining agreement that mandates a 15-minute “roll call” prior to each scheduled shift but excludes that time when calculating overtime premiums under the FLSA.** Mandatory pre shift activities, such as a 15-minute roll call, where the employee must be on employer's premises or at a designated work site at a specific time, is compensable. Unions cannot contract around the FLSA requirements.

Upcoming Free Webinars

- Informal Resolution – Feb. 26th at 1:00 ET
- Athletics Hot Topics – March 6th at 12:00 ET
- Transferrable Skills for Title IX and Title VI Investigators – March 26th at 1:00 ET
- Hot Topics at the Intersection of Higher Ed and Copyright – April 8th at 12:00 ET
- Legal History of Title IX – April 23rd at 12:00 ET
- Title IX Litigation Update – May 28th at 1:00 ET

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Thank You



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