

Texas Attorney General Takes Aim at DEI With New Opinion Letter: 6 Steps For K-12 Private Schools To Consider

Insights

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Texas's Attorney General just issued a sweeping 74-page Opinion that calls into question the legality of many Diversity, Equity, and Inclusion (DEI) initiatives across the state in both public and private sectors, including k-12 private schools. The already hotly debated Opinion, released on Monday, attempts to dismantle DEI under a number state and federal non-discrimination laws applicable to private schools in both employment and enrollment contexts. While AG Opinions are not legally binding on courts, they are often highly influential and persuasive when it comes to investigations and litigation. This Insight will provide an overview of the Opinion and offer practical steps you can take now.

Main Thrust of Opinion: Strict Prohibition of DEI Duties for Public K-12 Schools

A few months ago, the Texas Legislature enacted an amendment to the Texas Education Code that prohibits public school districts from assigning or permitting "DEI duties." The statute defines DEI duties to include:

- Influencing hiring or employment decisions based on race, sex, color, or ethnicity;
- Encouraging unequal treatment or granting special advantages to individuals based on these protected characteristics, except where expressly permitted;
- Creating or implementing policies or procedures that explicitly reference these characteristics, subject to exceptions; and
- Requiring, requesting, or favoring individuals on the basis of a DEI statement.

School districts may not assign these responsibilities and must take affirmative steps to prevent employees, contractors, or volunteers from performing them.

This week's AG Opinion frames these prohibitions as part of a broader constitutional mandate for color-blindness and equal treatment, rejecting any form of race- or sex-based preference or benefit in public education. **The Attorney General's analysis suggests that any public K-12 school program or policy that gives preference, benefit, or differential treatment based on race or sex is likely unconstitutional unless it is narrowly tailored to remedy specific, proven instances of past**

discrimination. In fact, the Attorney General's Office has sued multiple Texas public schools for alleged illegal DEI actions.

This follows the blockbuster 2023 Supreme Court decision that severely restricted higher educational institutions from using race or ethnicity as part of their admissions process, curbing the practice of using race-conscious principles during admissions for higher education institutions across the country.

The Opinion also discusses other statutory and regulatory frameworks that have used race or sex as a basis for preferences in education, such as programs targeting minority and female students for scholarships, internships, or special benefits. These are also deemed presumptively unconstitutional unless they meet strict scrutiny.

Implications for Private K-12 Schools

The Opinion doesn't stop with the public sector but also discusses how private sector DEI practices may create liability under federal and state anti-discrimination laws such as Title VII, Section 1981, and the Texas Commission on Human Rights Act (TCHRA).

Employment Practices

Any hiring, promotion, or compensation policy that gives preference or imposes requirements based on race, sex, or other protected characteristics may violate Title VII and the TCHRA, according to the Opinion. Diversity hiring goals, quotas, or requirements for DEI statements in employment applications are specifically called out as potential sources of liability.

The Opinion notes that both Title VII and the TCHRA prohibit employers from discriminating in any manner against an individual in connection with compensation or the terms, conditions, or privileges of employment because of race, color, sex, and other categories. This covers both hiring and firing decisions and internal programs, including employee resource groups, affinity groups, mentoring, and training programs, if they treat employees differently based on protected characteristics.

In addition to these statutes, Section 1981 of the Civil Rights Act of 1866 provides a separate and powerful federal cause of action that prohibits intentional racial discrimination in the making and enforcement of contracts. For private K-12 schools, this means that employment contracts, independent contractor agreements, and other contractual relationships with staff and faculty are all covered. If a school's DEI initiative results in a person being denied employment, promotion, or contract renewal because of race, or if certain opportunities are reserved for individuals of a particular race, the Opinion states that the school may face liability under Section 1981.

Student Admissions and Scholarships

While Title VII does not apply to student admissions, Section 1981 prohibits racial discrimination in the making and enforcement of contracts, which can include enrollment contracts. Race-based preferences in admissions, scholarships, or other benefits may be subject to legal challenge under the Opinion. Again, the SCOTUS decision from 2023 that severely curtailed the use of race or ethnicity during higher education school admissions could also come into play here given the efforts to expand the scope of the holding to other aspects of the educational experience.

DEI Training and Affinity Groups

DEI training programs or affinity groups that are segregated by race or other protected class, or that create a hostile environment for any protected group, may also create liability under anti-discrimination laws according to the Opinion. It explains that race-based training programs may give rise to a hostile work environment under Title VII when they are implemented as official policy and accompanied by ongoing stereotyping or express or implied expectations of discriminatory treatment.

Supplier Diversity and Commercial Relationships

The Opinion also warns that DEI initiatives that shape contracting efforts to the pursuit of diverse representation face liability under Section 1981. This could include vendor selection criteria that preferentially favor minority- or women-owned businesses, or fixed numerical targets or spending commitments for “diverse” suppliers.

6 Practical Steps for Private Schools

Given the sensitivity of the topic, and the attention that is sure to be placed on K-12 private schools under the Opinion, we suggest you consider the following six steps.

1. Position Your School

Your school’s Board of Trustees and Head of School should work together to optimally position your school according to its mission, values and risk tolerance in light of potentially heightened focus on private school DEI initiatives. For some schools, this will require little work. Others may need take a closer look at everything from DEI statements and programs to endowments and financial aid awards.

2. Review and Revise Policies

Examine all DEI-related policies, hiring and admissions practices, and employee and student programs and groups to ensure they do not give preference or impose illegal requirements based on protected characteristics. This includes reviewing job postings, application forms, internal training materials, and programs.

3. Focus on Inclusion, Not Preference

Consider shifting from demographic-based preferences to broader inclusion efforts that do not single out or favor any group. For example, rather than setting quotas or targets for specific groups, focus on creating a welcoming environment for all students and staff.

4. Train Staff on Legal Compliance

Ensure that all staff involved in hiring, admissions, and student life are trained on the requirements of federal and state anti-discrimination laws. Make sure they understand the risks associated with DEI initiatives that use protected characteristics as a basis for decision-making.

5. Consult Legal Counsel

Before implementing or continuing any DEI initiative, consult with your FP counsel to assess risk and ensure compliance with the latest legal developments. This is especially important given the rapidly evolving legal landscape in this area.

6. Monitor Legal Developments

Stay informed about ongoing litigation and regulatory changes at both the state and federal level, as these may further impact the legality of DEI initiatives in private schools. The best way to accomplish this is by making sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information directly to your inbox.

Conclusion

Please consult your Fisher Phillips attorney, the authors of this Insight, any attorney on our [Education Team](#), or any attorney in our [Texas offices](#) to obtain practical advice and guidance on how to navigate this new Opinion. You'll also want to make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information

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