

# What's Missing From Latest Gov't Claims Against Harvard

By **Denise Barnes and Audrey Anderson** (April 3, 2026)

The U.S. government recently took several additional steps in its civil rights enforcement efforts against Harvard University.

On March 20, the U.S. sued Harvard in the U.S. District Court for the District of Massachusetts for alleged violations of Title VI of the Civil Rights Act of 1964 and breach of contract for Harvard's allegedly insufficient attempts to address antisemitism against Harvard students.

On March 23, the U.S. Department of Education's Office for Civil Rights announced the launch of two new investigations into alleged continuing antisemitism and violations of Title VI in Harvard's student admissions programs. The Office for Civil Rights also announced that it had issued a letter notifying Harvard of impending enforcement action for its failure to provide requested information relating to its admissions process.

None of these actions by the government are surprising. The U.S. Department of Health and Human Services' Office for Civil Rights issued Harvard notice of violation under Title VI in July 2025, based on the university's alleged insufficient response to antisemitism. Pursuant to HHS regulations, failure to negotiate a resolution after such a finding results in referral to the DOJ for appropriate enforcement proceedings. Given the government's position that Harvard has failed to take adequate actions to address antisemitism on its campus, it is also no surprise that it would investigate a newly received complaint of antisemitism.

The announcement of a new investigation into Harvard's student admissions process is somewhat unusual, given that the investigation into Harvard's admissions program, which began in May 2025, is ongoing.

The notice of impending enforcement action is a doubling down of sorts in that it signals that the Department of Education is recommending that the DOJ bring an action to find Harvard in violation of Title VI solely for failure to provide the information that it seeks in its investigation of Harvard's admissions practices.

This is in addition to the lawsuit the government filed against Harvard last month seeking a federal court to order Harvard to provide DOE with that same information, and to which Harvard is not yet even required to respond.

## **FCA Omission**

But the most interesting thing in all of these latest efforts directed at Harvard is what is not included in the government's March 20 lawsuit. Remarkably, the complaint does not include a claim for violations of the federal False Claims Act.

The complaint does assert a breach of contract, alleging that when requesting a reimbursement on any of its grant agreements with HHS, Harvard certifies that it is "in



Audrey Anderson



Denise Barnes

compliance with all applicable laws," including Title VI. That certification, according to the complaint, also states that "HHS will rely upon this declaration and certification to determine whether to disburse funds," and that a false statement in the certification may subject the person certifying and the award recipient to civil and administrative penalties under the federal FCA.

This is notable because of all the efforts the government has made to publicize that its civil rights enforcement efforts will include use of the federal FCA.

### **Intersection With FCA and Executive Order No. 14173**

Readers may recall that on Jan. 21, 2025, in one of his first official acts, President Donald Trump issued Executive Order No. 14173 on ending alleged illegal discrimination, rescinding former President Lyndon B. Johnson's Executive Order No. 11246, which had imposed affirmative action obligations and nondiscrimination requirements on certain federal contractors.

The implications of this shift were profound. Under Executive Order No. 14173, instead of meeting the prior obligations imposed under Johnson's executive order, federal contracts and grants are now required to include a clause mandating that the contractor or grant recipient agree they are in compliance "with applicable Federal anti-discrimination laws."

Specifically, Trump's executive order notes that such a certification is a term "material to the government's payment decisions" for purposes of the FCA. As a result of this order, contractors and grant recipients are required to certify that they do "not operate any programs promoting [diversity, equity and inclusion] that violate any applicable Federal anti-discrimination laws."

This executive order had and continues to have far-reaching implications as it relates to federal contractors and grant recipients — namely, potential FCA liability should a contractor or grant recipient fail to comply. Also, many contractors and universities made substantial changes to their diversity policies in response to this order — in some instances dropping them altogether — notwithstanding the inherent challenges that the government would face in alleging an FCA case on this basis.

Since January 2025, higher education institutions and others have made significant efforts to ensure that they will be well positioned to defend against a claim brought under the FCA based on an alleged violation of Title VI given these announcements and efforts by the DOJ.

And yet, while the government appears to have had the opportunity to assert such a claim against Harvard — an institution for which it seems to have no compunction about taking enforcement action — they did not do so.

### **Implications of FCA Exclusion**

What does this mean?

It is hard to know just why the government has chosen this course. It may be that the remedies the government believes are available for a simple breach of contract claim are sufficient for its purposes. The complaint alleges that "Harvard is currently set to receive" more than \$2.6 billion under active grants from HHS alone, and requested more than \$953 million from HHS between Oct. 3, 2023, and Feb. 10, 2026.

Or it could be because the government realizes that Harvard would have robust defenses against any FCA claim, including falsity, materiality and scienter.

Surprisingly, the U.S. Supreme Court arguably made its most relevant pronouncement on FCA materiality in its 2025 decision in a non-FCA case, *Kousisis v. U.S.*<sup>[1]</sup> For context, *Kousisis* arose from a contract with the Pennsylvania Department of Transportation that required a portion of the work to be performed by a disadvantaged business enterprise and expressly provided that noncompliance would constitute a material breach.

The defendants allegedly misrepresented their compliance by subcontracting with a disadvantaged business enterprise that functioned only as a pass-through that performed no actual work on the project. Although the defendants completed the project, satisfied all other contractual requirements and were paid, the alleged misrepresentation related to their adherence to the disadvantaged-business-enterprise requirement.

In the *Kousisis* decision, Justice Clarence Thomas emphasized in his concurring opinion that trivial noncompliance does not implicate the "essence of the bargain." This discussion tracks the court's earlier guidance in the seminal FCA case, *Universal Health Services v. U.S. ex rel. Escobar*, a 2016 decision in which the court described the materiality standard as demanding and rigorous, and explained that a material misrepresentation is one that goes "to the very essence of the bargain."

Needless to say, the government faces significant exposure as to whether "promoting DEI that violates any applicable Federal anti-discrimination laws" goes to the very essence of the bargain for the various grants and contracts at issue.

Higher education institutions should still be very mindful of compliance with civil rights laws and aware that the DOJ has identified the FCA as an important tool to ensure compliance with these laws and as an enforcement priority. However, their failure to assert such a claim when they seemingly could have done so against Harvard may show less enthusiasm to execute on this effort — or better yet, more self-awareness as to the viability of such allegations — than originally indicated.

---

*Audrey J. Anderson is counsel at Bass Berry & Sims PLC.*

*Denise M. Barnes is a member at the firm. She previously served as a trial attorney within the U.S. Department of Justice's Civil Division Fraud Section.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] *Kousisis v. United States*, 605 U.S. \_\_\_\_ (2025).