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Higher Education Alert

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Court declines to block federal contractor DEI clause, reads prohibition narrowly

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The ruling limits the DEI clause's reach to intentional discrimination, but covered contractors still face compliance duties and unresolved litigation risks.



What's the impact?

- The required DEI contract clause remains in effect for covered federal contracts and subcontracts.
- Importantly, the court read prohibited DEI activity narrowly: teaching, research, publications, and discussion of race or DEI do not alone violate the Executive Order 14398.
- The ruling is preliminary; APA claims and as-applied challenges remain, including enforcement that exceeds the clause's contract-specific scope.

On October 14, 2026 the US District Court for the District of Maryland declined to block the Trump administration's [March 26 Executive Order 14398 \(the "Order"\)](#), targeting DEI activities by federal contractors. Although the required contract clause remains in effect, the court interpreted the Order's central prohibition narrowly, finding that it targets intentional discrimination based

on race or ethnicity, not speech, teaching, or research about race and DEI. The decision offers important guidance for colleges and universities that hold federal contracts, but the litigation is ongoing and significant compliance questions remain.

Overview

In *National Association of Diversity Officers in Higher Education v. Trump*, No. 26-cv-1532-ABA (D. Md. Oct. 14, 2026), Judge Adam B. Abelson denied a motion for a preliminary injunction against the Order, and a stay of the Federal Acquisition Regulatory (FAR) Council's implementing memorandum.

THE DECISION IS SIGNIFICANT FOR THREE REASONS:

- / **The contract clause remains in effect.** The court did not block the Order or its implementation, and the FAR clause remains applicable to covered federal contracts and subcontracts.
- / **The court rejected an expansive reading of prohibited DEI activities.** It interpreted "disparate treatment based on race or ethnicity" as a legal term referring to intentional discrimination. Teaching, research, publications, and discussion of racial disparities do not, without more, constitute the prohibited conduct.
- / **The decision is not a final judgment.** The court addressed the plaintiffs' likelihood of success at the preliminary-injunction stage. It did not resolve the remaining Administrative Procedure Act (APA) issues or eliminate the possibility of future challenges to particular enforcement actions.

Executive Order 14398

The Order directs federal agencies to include a prescribed clause in covered contracts, contract-like instruments, and subcontracts. The FAR Council subsequently issued implementation guidance, including a directive to agencies to modify existing contracts by July 24, 2026.

The clause applies "[i]n connection with the performance of work under this contract." It requires contractors to refrain from "racially discriminatory DEI activities," defined as "disparate treatment based on race or ethnicity" in recruitment, employment, contracting, program participation, or the allocation or deployment of resources.

The Order also imposes compliance and enforcement obligations. Contractors must provide information and records as required by the contracting agency to verify compliance. The clause addresses subcontractor noncompliance, including reporting known or reasonably knowable violations, taking remedial steps directed by the contracting agency, and notifying the agency of

certain litigation challenging the clause. Noncompliance may result in suspension or termination of a contract and ineligibility for future federal contracts.

The Order also directs the attorney general to consider bringing actions under the False Claims Act (FCA) against contractors and subcontractors that violate the clause.

The court's decision

FIRST AMENDMENT: THE ORDER DOES NOT PROHIBIT DEI-RELATED EXPRESSION

The plaintiffs argued that the Order was unconstitutionally overbroad because its prohibition could reach protected speech and activity involving race, ethnicity, diversity, equity, and inclusion.

The court rejected that argument at this stage, relying on the established legal meaning of “disparate treatment.” In antidiscrimination law, disparate treatment refers to intentionally treating someone less favorably because of a protected characteristic. The court concluded that the Order must be read in accordance with that recognized meaning, rather than as a general prohibition on treating people differently or engaging in race-related activities.

The court specifically distinguished the prohibited conduct from expression about race. Studying diseases that disproportionately affect particular racial groups, teaching courses about race or DEI, conducting related research, and publishing materials about racial disparities do not, without more, constitute disparate treatment. The court also noted that merely discussing historical racial disparities could not justify terminating a contract under the Order.

The court’s reasoning rested on the language and context of the Order, not simply on the government’s representations during the litigation. It cautioned that an enforcement action based on protected speech or programs that do not constitute disparate treatment would be unauthorized by the Order and could violate the First Amendment as applied.

The court also rejected the plaintiffs’ related arguments that the Order discriminates against speech based on content or imposes unconstitutional conditions on federal contracting. It reasoned that there is no protected First Amendment interest in operating DEI programs that violate federal antidiscrimination law.

FIFTH AMENDMENT: THE CLAUSE IS NOT UNCONSTITUTIONALLY VAGUE

The plaintiffs also argued that the clause failed to explain whether it covered only work directly funded by a particular contract or all expression by a contractor.

The court disagreed. It read the phrase “[i]n connection with the performance of work under this contract” as limiting the provision to work performed for the government under the contract

containing the clause. The Order therefore does not authorize the government to prohibit protected speech outside the scope of that contract.

The court noted that enforcement against speech outside the contract's scope could amount to unconstitutional retaliation. As with the First Amendment claims, however, the court rejected the facial challenge and left open the possibility of challenges to particular enforcement actions purporting to apply the Order.

APA: THE COURT DID NOT RESOLVE THE REMAINING CLAIMS

The plaintiffs separately challenged the FAR Council's implementing memorandum under the APA, arguing, among other things, that it was arbitrary, capricious, and had been issued without required procedures. The court denied preliminary relief because the plaintiffs had not demonstrated a likelihood of success on their constitutional challenge to the memorandum or irreparable harm attributable to the memorandum itself, as distinct from the underlying Order.

The court did not decide whether the memorandum constitutes final agency action or whether the plaintiffs are likely to prevail on their remaining APA claims. The plaintiffs' separate argument challenging the president's authority to direct FCA enforcement was not a basis for the preliminary relief requested and was not decided.

Conclusion

The decision provides useful limits on the Order's reach, especially as it relates to DEI-related speech, teaching, or research. Notably, the decision is clear that, at least as far as the court is concerned, institutions need not eliminate teaching, scholarship, research, publications, or institutional discussion concerning race and DEI simply because those activities address racial disparities or seek to improve diversity and inclusion. The decision, however, does not eliminate the need to assess actual practices under applicable law and the terms of a particular contract.

For higher education institutions, the immediate priority is to understand which contracts are covered, evaluate practices that may involve disparate treatment in connection with contract work, and avoid conflating those practices with protected expression. Institutions should also prepare for continued litigation and potential enforcement, while recognizing that the court expressly left open challenges to enforcement that exceeds the Order's permissible scope.

Nixon Peabody's Higher Education team help institutions assess covered contracts, evaluate compliance obligations, and respond to evolving DEI enforcement risks. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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