

insights

TYPES NOT MAPPED YET February 24, 2025 | TTR not mapped yet | Lorrie Hargrove, Leah Northener, Tres Cleveland, Aaron D. Lacey

Nationwide Injunction Gives Institutions Reprieve From DEI Executive Orders But Not ED's DCL

Late Friday afternoon, a Maryland federal district court entered a nationwide [preliminary injunction](#) of key aspects of President Trump's two diversity, equity, and inclusion ("DEI") executive orders:

- Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, Executive Order of January 20, 2025, [90 Fed. Reg. 8339](#) (Jan. 29, 2025) (the "J20 Order"); and
- Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, Executive Order of January 21, 2025, [90 Fed. Reg. 8633](#) (Jan. 31, 2025) (the "J21 Order").

The Orders warned institutions failing to eliminate illegal DEI initiatives and programming that they could lose access to federal funds, an existential threat for most institutions of higher education. Understandably, in recent weeks administrators have been working overtime to determine what compliance with the Orders requires, balancing institutional mission and goals with the risk of funding withdrawal (we offered our own thoughts on this exercise in our [January 24 blog post](#)).

As you would expect, the district court's preliminary injunction has once again changed the calculus for institutions. Below, we provide a discussion of the complaint and decision, as well as brief thoughts regarding the limited impact on related Department of Education guidance.

The Complaint

Plaintiffs in the case include the National Association of Diversity Officers in Higher Education ("NADOHE"), which includes institutional members with endowments exceeding \$1 billion, and the American Association of University Professors ("AAUP"), which includes faculty and staff of institutions with endowments exceeding \$1 billion (collectively, the "Plaintiffs"). They sued President Trump, the Department of Education, and Denise Carter, in her official capacity as Acting Secretary of Education, among other government defendants (collectively, the "Government Defendants").

The February 3 complaint begins "[i]n the United States, there is no king," and goes on to challenge:

- the J20 Order's "**Termination Provision**," ordering agencies (including the Department of Education) to terminate "equity related" grants or contracts within 60 days of the J20 Order;
- the J21 Order's "**Certification Provision**," requiring the head of each agency (including the Secretary of Education) to include in every contract or grant award terms requiring the other contracting party to agree that its compliance with Federal anti-discrimination laws is material to the government's payment decisions and certifying that such contracting party does not operate any programs promoting DEI that violate Federal anti-discrimination laws; and
- the J21 Order's "**Enforcement Threat Provision**," requiring the Attorney General by May 21, 2025, to submit a report (the "Report") containing recommendations for enforcing Federal civil-rights laws and ending illegal discrimination and preferences, including DEI, and, among other things, requiring the Department of Education to identify up to nine potential civil compliance investigations of institutions of higher education with endowments over \$1 billion (collectively, the three challenged provisions are referred to as the "Challenged Provisions").

The complaint alleges that President Trump is “usurp[ing] Congress’s exclusive power of the purse” in enacting these provisions, and attempting to “silence those who disagree with him by threatening them with the loss of federal funds and other enforcement actions.”

The Complaint makes various constitution-based claims. It alleges that the J20 Order violates the Constitution’s **Spending Clause**, which vests spending powers exclusively in Congress’s hands, and does not empower the executive branch to terminate “equity-related” grants and contracts without express statutory authority. It also alleges that the Orders violate their **Fifth Amendment** due process clause for vagueness rights, given that the terms “DEI,” “DEIA,” “equity-related” and others are undefined, leaving Plaintiffs “in limbo” and allowing federal agencies to “make arbitrary decisions about whether grants are ‘equity-related.’”

The Complaint further alleges that the J21 Order violates the **First Amendment** by requiring institutions of higher education to “censor their own speech,” as the “only way NADOHE’s relevant institutional members can ensure they are *not* on the civil compliance investigation list would be to end *all* DEIA programs and cease voicing support for any DEIA principles . . . that could even possibly concern this administration.” Finally, it alleges that the J21 Order violates the **separation of powers** “enshrined in the Constitution,” which grants only Congress spending powers.

Ten days after filing their complaint, Plaintiffs filed a motion asking the Court to enter a preliminary injunction, enjoining Defendants other than the President from enforcing the Challenged Provisions of either Order (as a general matter, federal courts lack subject matter jurisdiction to “enjoin the President in the performance of his official duties.” *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501, 18 L.Ed. 437 (1866)).

The Preliminary Injunction Order

The Court held the hearing on the TRO/preliminary injunction motion less than a week after the motion was filed. Two days after the hearing, the Court granted the preliminary injunction motion in part, giving the Plaintiffs almost everything they requested.

The Court concluded that Plaintiffs “ha[d] established entitlement to a preliminary injunction on their First and Fifth Amendment claims,” as they had proven a likelihood of success on those claims. It found that Plaintiffs showed a likelihood of success on their claim that the Termination Provision violated the Fifth Amendment for two reasons: (1) the term “equity-related” grants or contracts is vague and “invites arbitrary or discriminatory enforcement;” and (2) the “vagueness offers insufficient notice to current grantees about whether and how they can adapt their conduct to avoid termination of their grants or contracts.”

The Court offered education-based examples to demonstrate the vagueness: “If an elementary school receives Department of Education funding for technology access, and a teacher uses a computer to teach the history of Jim Crow laws, does that risk the grant being deemed ‘equity-related’ and the school being stripped of funding? . . . If a university grant helps fund the salary of a staff person who then helps teach college students about sexual harassment and the language of consent, would the funding for that person’s salary be stripped as ‘equity-related?’”

The Court also concluded that Plaintiffs are likely to succeed on their claim that the Certification Provision violates the First Amendment “because on its face it constitutes a content-based restriction on the speech rights of federal contractors and grantees, and further because such restriction expands to all of those contractors’ and grantees’ work, whether funded by the government or not.” The Court states that the provision “seek[s] to leverage funding to regulate speech outside the contours of the program itself,” as its express language “demands that federal contractors and grantees essentially certify that there is no ‘DEI’ (whatever the executive branch decides that means) in *any* aspect of their functioning, regardless of whether the DEI-related activities occur outside the scope of the federal funding.”

The Court also concluded that Plaintiffs had proven a likelihood of success on the merits in showing the Certification Provision restricted and retaliated against contractors’ and grantees’ free speech rights even within the scope of the pertinent programs, because “if they refuse to comply with the Certification Provision and are unable to receive federal funding directly as a result of their noncompliance, their First Amendment protected speech is ‘a substantial or motivating factor in the termination.’”

Finally, the Court concluded that Plaintiffs were likely to succeed on their claim that the Enforcement Threat Provision violates the First Amendment because it threatens enforcement actions against Plaintiffs for engaging in protected speech. “The White House and Attorney General have made clear . . . that viewpoints and speech considered to be in favor of or supportive of DEI or DEIA are viewpoints the government wishes to punish and, apparently, attempt to extinguish.” Further, the Court states: “a content-based restriction on protected speech is presumptively unconstitutional.”

The Court also concludes that Plaintiffs have shown a likelihood of success on their due process vagueness challenge to the Enforcement Threat Provision, due to the lack of guidance as to what the new administration considers to constitute “illegal DEI discrimination and preferences,” “[p]romoting diversity,” and “illegal DEI and DEIA policies.” The Court observes that the Certification Provision puts government contractors and grantees “in a position to have to guess whether they are in compliance,” but the Enforcement Threat Provision “threaten[s] [them] with False Claims Act liability if they miss the mark.”

The Court found that the Plaintiffs proved that failure to enjoin the conduct would cause irreparable harm in four ways: threat of loss of funds, uncertainty regarding future operations, loss of reputation, and chilled speech.

Further, the Court concluded that NADOHE had presented evidence that “the Challenged Provisions threaten[ed] the livelihood of numerous of Plaintiffs’ members and NADOHE’s existence.” The Court found that the “balance of the equities” and the “public interest” also merited entering the injunction, as the Plaintiffs had shown that the Challenged Provisions “infringe[d] on core constitutional protections, and that the status quo must be maintained while Plaintiffs and the government litigate the claims asserted in the case.”

The Court made no ruling as to the merits of the Plaintiffs’ separation of powers/spending clause claims.

The “Preliminary Injunction” Order held that the Government Defendants other than the President, and any person in active concert or participation with them, shall not: (1) pause, freeze, impede, block, cancel, or terminate any awards, contracts or obligations, or change the terms of any such award, contract or obligation, on the basis of the Termination Provision; (2) require the requested certifications in the Certification Provision; or (3) bring any False Claims Act enforcement action, or other enforcement action, pursuant to the Enforcement Threat Provision. For “prudential and separation of powers reasons,” it did not enjoin the Enforcement Threat Provision’s directive that the Attorney General prepare the Report and engage in investigations. The order is a “nationwide” order, “including similarly situated non-parties within the scope of [its] injunction.”

Appeal Rights

The Government Defendants can appeal. Orders granting or denying preliminary injunctions are interlocutory orders that are immediately appealable. 28 U.S.C. § 1292(a)(1). Because the case includes the Government Defendants, a notice of appeal to the Fourth Circuit from Friday’s order is due within 60 days after the order. FRAP 4(a)(1)(B). That appeal deadline is May 20, 2025. The Government Defendants might also ask the district court, and then the Fourth Circuit, to stay the injunction while the appeal is pending. FRAP 8(a)(1) & (2).

Even if the Government Defendants do not appeal, the preliminary injunction is only that - preliminary. The parties still need to litigate their claims in district court, with the Government Defendants having an opportunity to prove to the Court with additional evidence that Plaintiffs do not succeed on the merits of their claims. That merits order could then be appealed.

The Department’s February 14 Dear Colleague Letter

This decision buys additional time for institutions of higher education to evaluate and determine their plan for complying with the J20 and J21 Orders. However, it does not enjoin the Attorney General from compiling the Report and investigating institutions, even while the injunction is in place and the appeal is pending.

Moreover, the injunction does not apply to the [Department’s February 14 Dear Colleague Letter](#), which relies upon the recent Supreme Court case *Students for Fair Admissions v. Harvard* (“*SFFA*”), and not the J20 or J21 Orders, as the basis of its authority. The DCL uses *SFFA* to threaten the federal funding of institutions that operate DEI programming or consider race in almost any institutional decision. This significantly expands the holding of *SFFA* – which confined itself to race-based admissions policies – and will likely make the DCL the subject of its own lawsuits. Until then, the DCL remains on the books and could be used as a method of enforcement against institutions.

Thompson Coburn’s [Higher Education](#) practice will continue to closely follow developments in the ever-changing DEI landscape. Institutions with questions regarding the preliminary injunction or the Department’s February 14 DCL are welcome to contact any of the attorneys listed below.

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