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on behalf of our nation's public schools

To: Technology Transformation Services, General Services Administration
via <http://www.regulations.gov>

From: National School Attorneys Association

Re: Information Collection 3090-0290, System for Award Management Registration
Requirements for Financial Assistance Recipients;
Docket No. 2026-0001; Sequence No. 2

Date: March 28, 2026

Comment of the National School Attorneys Association (NSAA)

On behalf of its nearly 1,000 members, attorneys representing public K–12 school districts nationwide, the National School Attorneys Association (“NSAA”) submits this comment on the General Services Administration (“GSA”)’s proposed amendments to the Financial Assistance General Representations and Certifications (Information Collection 3090-0290, “the certifications” or “the proposed revisions”).

NSAA is an independent, non-partisan, self-governed organization of attorneys who represent the nation's K-12 public schools. Our members include school attorneys who work for state school boards associations, as in-house for school districts, or as outside counsel in private practice representing schools across the country.

As school lawyers, our members do not have a political or social agenda. Their job is to represent the interests of the school systems they serve – school systems whose governing officials reflect views on each end of the political and social spectrum, and everywhere in between. NSAA’s founding members built our organization on the recognition that a unified, non-political, independent organization of attorneys for school districts of all shapes and sizes is essential to the development and support of exemplary school attorneys. We trust that you will agree that the significant, broadly applicable, practical concerns we identify in our comment merit GSA’s significant attention as it finalizes the certifications, particularly considering the wide-ranging interests we represent.

Proposed Changes

As noted in the Supplementary Information, 91 Fed. Reg. 3726, applicants for and recipients of federal financial assistance must maintain an active registration in the System for Award Management (SAM) and agree to the Financial Assistance General Representations and

Certifications (the “certifications”). GSA’s proposed revisions¹ would modify the certifications to align with updated executive branch guidance, including Department of Justice’s “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination” and Executive Order 14173.

Specifically, GSA’s addition of the language in **bold** below, along with the Supporting Statement, suggests that recipients would be certifying to be bound -- ahead of any grant, award, or direct appropriation -- by existing or future Executive branch guidance and executive orders containing the administration’s interpretation of legal requirements on certain civil rights issues.

As the duly authorized representative of the [ORGANIZATION NAME], I certify that [ORGANIZATION NAME]:

....

(5) Will comply with the U.S. Constitution, all Federal laws, and relevant Executive **branch** guidance in promoting the freedom of speech and religious liberty in the administration of federally- funded programs (See 2 C.F.R. § 200.300 Statutory and national policy requirements and 2 C.F.R. § 200.303 Internal controls);

(6) Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs (See Titles VI and VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and 2 C.F.R. § 200.303 Internal controls). Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs. Entities that receive federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race or color. Examples of practices that may violate applicable Federal anti-discrimination laws include:

(i) Granting preferential treatment based on race or color, such as race-based scholarships or programs, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity, including through the use of “cultural competence” requirements, “overcoming obstacles” narratives, or “diversity statements;”

(ii) Segregation based on race or color, such as race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility;

¹ Supporting Statement: 3090-0290 -- System for Award Management Registration Requirements for Financial Assistance Recipients – DRAFT, <https://www.regulations.gov/document/GSA-GSA-2026-0001-0007>.



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- (iii) Other unlawful use of race or color as criteria, such as race-based “diverse slate” policies in hiring, race-based selection for contracts, or race-based program participation or resource allocation;
 - (iv) Training programs that stereotype, exclude, or single out individuals based on protected characteristics or create a hostile environment; or
 - (v) Retaliation by taking adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws. Protected activities include raising concerns or filing complaints about, or objecting to or refusing to participate in, discriminatory programs, trainings, or policies;
- (7) Will not knowingly bring or attempt to bring to the United States, transport, conceal, harbor, shield, hire, or recruit for a fee an illegal alien; and will not induce an alien to enter or reside in the United States with reckless disregard of the fact that the alien is illegal (See 8 U.S.C. § 1324 and 2 C.F.R. § 200.303 Internal controls);
- (8) Will not fund, subsidize, or facilitate violence, terrorism, or other illegal activities that threaten public safety or national security (See 2 CFR 200.303 Internal controls)²

Concerns

NSAA members are concerned that the proposed revisions would expose public school districts to significant legal and operational risk. As drafted, the proposed language would require recipients to certify compliance not only with the U.S. Constitution and federal statutes, but also with “relevant Executive branch guidance” regarding the freedom of speech and religious liberty and “relevant executive orders” addressing discrimination based on race or color, including interpretations of legal standards that remain unsettled in federal courts. If made final, the proposed new certifications would expand the enforcement and litigation exposure associated with federal financial assistance by asking recipients to assure compliance not with the law, but with any interpretation of the law provided by any agency in this or a future administration.

NSAA cautions that this approach places school districts at higher risk for enforcement actions and suits in four ways.

² *Id.*

Certifying Compliance with Interpretations of Unsettled Legal Standards

First, the proposal effectively requires recipients to certify prospective compliance with executive interpretations of evolving legal standards. Unlike statutes and binding judicial precedent, executive orders and agency guidance change from one administration to the next and are subject to challenge and eventual invalidation in federal courts. Moreover, it is not clear from the added language to what extent the federal government is asking school district recipients of federal funds to certify compliance with future “executive orders,” which are directives from the President of the United States that manage operations of the federal government, and do not create individual rights based on which people can file lawsuits. The Supporting Statement specifically notes that the proposed changes are intended to align with Executive Order 14173, then in item (6) requires a recipient to certify that it will comply with “relevant executive orders prohibiting unlawful discrimination on the basis of race or color.”

The proposed version of item (5) asks recipients to acknowledge compliance with the U.S. Constitution, Federal laws, “and relevant Executive branch guidance in promoting the freedom of speech and religious liberty.” By adding the word “branch,” NSAA presumes that the government is signaling inclusion of all executive agencies and offices. This new word creates confusion because, for many years, school attorneys have understood item (5) to refer to the *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, which Congress requires the Department of Education to issue regularly. 20 U.S.C.A. § 7904. The guidance first must be reviewed by the Office of Legal Counsel of the Department of Justice for verification that the guidance represents the current state of the law, and school districts must “certify in writing to the State educational agency involved that no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools, as detailed in the guidance.” 20 U.S.C.A. § 7904(a) and (b). Congress clearly authorizes and directs agency enforcement in this area by directing the Secretary of Education to secure compliance with the statute to ensure that “no policy of the local educational agency prevents, or otherwise denies participation in, constitutionally protected prayer in public elementary schools and secondary schools.” *Id.*

Indeed, the Department of Education issued new guidance on free speech and religious liberty in schools just days after these proposed certifications were posted for public comment. *Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools*, available at <https://www.ed.gov/media/document/2026-guidance-constitutionally-protected-prayer-and-religious-expression-public-elementary-and-secondary-schools-113182.pdf>. That guidance superseded and replaced the Department’s 2023 *Guidance* on the same topic under the Biden Administration. The guidance assists school attorneys and school districts as they examine their own policies to consider new Supreme Court precedent on the balance of Free Exercise and Establishment Clause concerns in public schools and the administration’s enforcement interpretations of those rights under the new rulings.

It is not clear, however, whether the addition of “branch” to “Executive branch guidance” refers to non-regulatory guidance not otherwise required by Congress, issued by an agency whether or not that agency has enforcement authority over public schools. The new word suggests a more expansive category of guidance to which recipients are bound, and leaves schools guessing about what “guidance” to which they are committing to be bound.

New item (6) creates a separate avenue of confusion by requiring recipients to attest to compliance with “relevant executive orders” prohibiting illegal discrimination on the basis of race or color, and then explaining that programs labeled “diversity, equity, inclusion,” and “accessibility” programs are discriminatory. This interpretation, and federal agency activity resulting from Executive Order 14173, is at the center of litigation in several federal courts.³ Schools and their attorneys simply do not know right now whether the current administration’s interpretation that many DEI-type programs impermissibly discriminate on the basis of race or color, or the manner in which that interpretation has been applied to school funding, will survive court challenges, and in what form. Requiring advance certification to “executive orders” that touch on this unsettled area of law as a condition of receipt of federal funding creates uncertainty and increases the risk of enforcement actions, even where recipients act in good faith to comply with existing law.⁴

³ See, e.g., *National Association of Diversity Officers in Higher Education v. Trump*, 167 F.4th 86 (4th Cir. 2026)(city and association unlikely to succeed on challenge to provision instructing agencies to include in every grant award term requiring recipient to certify that it would not operate programs promoting DEI, as violating the Free Speech Clause); *American Federation of Teachers v. U.S. Department of Education*, 796 F.Supp.3d 66 (D. Md. Aug. 14, 2025)(Department of Education’s Dear Colleague Letter explaining government’s positions regarding DEI principles and federal antidiscrimination law, and Department’s requirement that states and school districts affirmatively certify their compliance with those interpretations or risk loss of federal funding, failed to comply with APA’s notice-and-comment procedures, were arbitrary and capricious, and exceeded statutory authority); *San Francisco Unified S.D. v. AmeriCorps*, 789 F.Supp.3d 716 (N.D. Cal. June 18, 2025)(school district and city had substantial likelihood of success on claim that directive and new grant conditions including certification that programs did not include activities promoting DEI were in excess of agency’s statutory authority in violation of Administrative Procedure Act); *National Association for the Advancement of Colored People v. U.S. Dept. of Education*, No. 25-cv-1120 (D.D.C. filed April 14, 2025)(enjoining Department of Education from implementing and enforcing certification under which state educational agencies were required to certify compliance with letter addressing DEI programs or lose federal funding; threatening serious penalties such as termination of federal funding, breach of contract suits brought by the Department of Justice, and liability under the False Claims Act, for schools’ failure to comply with vaguely-defined prohibitions on DEI initiatives, without sufficiently defining the conduct that might trigger liability, violated the Fifth Amendment’s prohibition on vagueness).

⁴ If, during the prior administration, school districts had been required to certify compliance with executive orders and guidance on transgender athlete participation in sex-segregated athletics, many would have faced a dilemma. In numerous states, existing law required a different approach, while courts were and remain divided on whether federal law requires or permits athletics eligibility rules based on biological sex or gender identity. When this administration began, they would have had to certify compliance with the opposite interpretation. See U.S. Department of Justice, “Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination,” July 29, 2025, p.6 (“Likewise, permitting males to compete in women’s athletic events almost invariably denies women equal opportunity by eroding competitive fairness.”).

Ambiguous Terms

Second, the proposed language introduces significant ambiguity. The certifications reference practices that “may violate” federal anti-discrimination laws without clearly defining the scope of prohibited conduct. For example, it is not clear whether a “race-based training” includes training that focuses on race-related topics or incorporates personal experiences or both. It is not clear whether “[t]raining programs that . . . create a hostile environment” refers to the legal liability standard under Title VII for workplace hostile environment, or a more colloquial understanding of the phrase. It is not clear whether “[r]etaliation” against employees, participants or employees “because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws,” refers to activities protected by the First Amendment, other federal law, or the administration’s interpretation of the same. It is also unclear whether “retaliation” against “protected” activities related to *promoting* DEI practices also would be prohibited. The proposed certifications would require recipients to adhere to this, or any future, administration’s interpretation of Title VI, which may or may not be consistent established law, and make failing to do so a breach of contract punishable by loss of funds, civil liability under the FCA, and even criminal liability under the federal false statements law.

Proposed item (7) introduces additional ambiguity unique to public schools, which under *Plyler v. Doe*, 457 U.S. 202 (1982), must educate undocumented students, including transporting, providing meals, and accompanying educational and related services. NSAA interprets item (7) to apply to contexts outside of public schools, but the risk that school officials could be subject to enforcement action or criminal prosecution remains a concern.

The lack of clarity described above is particularly problematic under Spending Clause principles articulated by the Supreme Court. “[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). If Congress conditions the receipt of federal funds on compliance with certain conditions, it “must do so unambiguously ..., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), quoting *Pennhurst*, 451 U.S. at 17. By offering only examples of conduct that “may” violate the law, and by effectively binding funding recipients to this and any future administration’s evolving interpretations of unsettled legal standards, the proposed revisions fail to provide the clear notice required under the Spending Clause.

Increased Litigation Exposure

Third, the proposal increases school districts’ litigation exposure. The addition of broad certification requirements, combined with GSA’s inclusion of False Claims Act requirements, invites claims against funding recipients premised on alleged noncompliance with unclear or

evolving standards. Public school districts operate under comprehensive state statutory and regulatory frameworks, and many school districts will be faced with state law or directives that directly conflict with Executive branch interpretations of federal laws. Absent clear limits or safe harbors, the proposed certifications could place districts in the untenable position of facing liability under federal law for complying with state mandates.

The proposal also specifically calls out potential False Claims Act liability and asks recipients to acknowledge the potential for severe criminal and civil liabilities if they provide “false, fictitious, or fraudulent information.” Given the vagueness of the certification itself, it seems difficult-to-impossible for recipients to certify with confidence that they can meet the required standards. In fact, recipients might be coerced to certify that they will comply with standards that have not yet been issued and risk potential civil or criminal penalties if they cannot. Even meritless claims would impose substantial administrative and financial burdens on school districts, which will be forced to provide an expensive defense in federal tribunals.

New Certifications Likely to Be Challenged

Finally, the proposed revisions are likely to generate court challenges and inconsistent judicial outcomes, which school districts will be forced to track as they reassess their own certification compliance. Courts have already issued preliminary injunctions related to similar funding conditions tied to Executive Order 14173.⁵ Requiring recipients to navigate shifting legal requirements across jurisdictions would further complicate compliance and could delay or jeopardize critical funding.

Recommendations

For these reasons, NSAA urges GSA not to adopt the proposed additions to items (5) through (8). The existing certification framework appropriately requires compliance with applicable law, which recipients are already obligated to follow.

⁵ See, e.g., *King County v. Turner*, 785 F. Supp. 3d 863 (W.D. Wash. 2025)(Enjoining HUD, DOT, and FTA from imposing or enforcing new grant conditions with respect to counties, cities, and local transportation agencies, who were likely to prevail on merits of their claim that imposition of new funding conditions listed in Executive Order on grants that they had been conditionally awarded violated Administrative Procedure Act); *Seattle v. Trump*, 808 F.Supp.3d 1204 (W.D. Wash. 2025)(Enjoining Attorney General, Department of Justice, and other agencies and officials from implementing and enforcing portions of Executive Order 14173 against city requiring the grant recipient to certify that compliance with anti-discrimination laws is material to the government's payment decisions and that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws; city had substantial likelihood of success on merits of claim that executive order was contrary to Separation of Powers doctrine of the Constitution and in excess of statutory authority in violation of Administrative Procedure Act); *RICADV v. Kennedy*, 2025 WL 2988705 (D.R.I. Oct. 23, 2025)(enjoining HHS and HUD from requiring recipients, in order to receive additional grant funds, to agree to new grant conditions to compel compliance with executive orders aimed at eliminating programs perceived as promoting DEI and other topics).

In the alternative, NSAA recommends GSA:

- Remove requirements that recipients certify compliance with executive orders and executive branch guidance;
- Eliminate or revise illustrative examples that may encompass legally permissible programs;
- Clarify the scope of the certifications by including explicit limitations consistent with constitutional protections and governing Supreme Court precedent. State clearly that nothing in the certification should be interpreted to prohibit constitutionally protected speech; and
- In item (7), add language to ensure that school districts are not deemed in violation for fulfilling their legal obligation to educate undocumented students under *Plyler v. Doe*, 457 U.S. 202 (1982), such as: “Public school districts shall not be deemed in violation of this certification solely for enrolling, transporting, or providing educational or related services to undocumented students or their families.”

Conclusion

Public school districts require clear, stable, and legally grounded conditions on federal funding. The proposed revisions, as drafted, introduce ambiguity, increase litigation risk, and create potential conflicts with existing legal obligations. NSAA respectfully urges GSA to revise the proposal as recommended above.

NSAA appreciates the opportunity to submit these comments and would welcome the opportunity to provide additional information.

Sincerely,

Sonja H. Trainor

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