

MacArthur's Approach to Pursuing Racial Justice in Compliance with Anti-Discrimination Laws

Updated June 2025

TO: Our Grantees Focused on Racial Justice Efforts

The Foundation's mission is to help build a more just, verdant, and peaceful world and we join with you in the pursuit of racial justice. This updated paper addresses significant developments since our original memorandum and how we can work together to identify and address potential legal risks arising from your proposal in the dramatically changed legal and regulatory context.

Our approach remains collaborative and solution-oriented to allow grants to proceed in a legally compliant way. Do not hesitate to reach out to the persons identified at the end of this memorandum if you have concerns or questions.

The Changed Context

Executive Order Rescissions and New Federal Policies

On January 20, 2025, President Trump rescinded multiple Biden administration executive orders expressing the federal government's commitment to racial equity and racial justice through Executive Order 14148 ("Initial Rescissions of Harmful Executive Orders and Actions"). This executive order rescinded 67 Executive Orders and 11 Presidential Memoranda from the Biden administration, with extensive focus on policies related to diversity, equity, and inclusion.

Key rescinded orders affecting our work include:

- Executive Order 13985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government)
- Executive Order 14091, which had institutionalized Biden's racial equity initiatives and established the White House Office on Equity
- Executive Order 14031 (Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders)

The Trump administration issued additional executive orders, including "Ending Radical And Wasteful Government DEI Programs And Preferencing," which mandates federal agencies eliminate all diversity, equity, inclusion, and accessibility (DEIA) positions and offices by March 20, 2025.

Department of Education Enforcement Actions

On February 14, 2025, the U.S. Department of Education's Office for Civil Rights released a "Dear Colleague" Letter directing educational institutions receiving federal funds to cease using race preferences and stereotypes in admissions, hiring, promotion, scholarships, prizes, administrative support, sanctions, discipline, and other programs and activities. The Department began assessing compliance within 14 days of the letter's issuance, with institutions facing potential loss of federal funding for non-compliance.

The Dear Colleague Letter represents a significant shift in the Department's interpretation of antidiscrimination laws as they pertain to diversity, equity and inclusion (DEI) initiatives in education, seeking to greatly expand the application of the Supreme Court's 2023 decision in Students for Fair Admissions (SFFA) to other significant aspects of an educational institution's operations.

Continuing Legal Challenges

The Supreme Court's 2023 decision in Students for Fair Admissions v. Harvard continues to embolden conservative organizations to challenge racial equity programs. Recent developments include:

Notable Court Cases:

- In the Eleventh Circuit's Fearless decision, the court ruled that a grant program limited to Black women business owners violated Section 1981, even though it aimed to remediate discrimination. The program was permanently shut down following settlement in September 2024
- The National Education Association filed a federal challenge in February 2025 against the Department of Education's Dear Colleague Letter, alleging violations of due process and the First Amendment

- Multiple law firms received threat letters from American Alliance for Equal Rights (AAER) regarding their diversity fellowship programs, with some firms canceling programs and others facing lawsuits under Section 1981

Supreme Court Developments: The Supreme Court granted certiorari in *Ames v. Ohio Department of Youth Services* to decide whether plaintiffs asserting "reverse discrimination" claims under Title VII must show "background circumstances" supporting the inference that the defendant discriminates against majority groups. This decision could significantly impact DEI initiatives.

Enhanced Legal Risks and Analysis

Section 1981 Enforcement Expansion

The Eleventh Circuit's interpretation in the *Fearless* case demonstrates that Section 1981 applies to private nonprofit grant programs, finding that such programs constitute "contracts" when they involve a bargained-for exchange of value (including publicity rights, liability limits, and arbitration agreements). The Supreme Court's 2020 decision in *Comcast Corp. v. National Association of African American-Owned Media* requires plaintiffs to meet the more stringent "but-for" causation standard throughout Section 1981 lawsuits, but this higher standard has not deterred continued challenges.

Title VI Implications for Educational Grantees

The Department of Education's aggressive interpretation of Title VI now prohibits educational institutions from using race in "decisions pertaining to admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic and campus life". This substantially increases risks for grants to educational institutions.

Federal Funding Risk Assessment

Given the current administration's stated intentions to review and potentially terminate funding for organizations engaged in DEI activities, grantees receiving any federal funding face heightened scrutiny and potential funding cuts.

Updated Risk Assessment Questions

To help us determine how best we can support your work in this changed environment, please address the following enhanced questions:

Core Program Structure Questions

- Does the project being funded by MacArthur limit eligibility for any activities or benefits to persons of only some races or ethnicities or exclude persons of a particular race or ethnicity?
- Does the project give priority to persons of only some races or ethnicities when awarding funds or support, selecting participants, or providing other benefits?
- Does your organization describe its work using terms such as "diversity," "equity," "inclusion," "racial justice," "environmental justice," or similar terminology that might trigger regulatory scrutiny?

Federal Funding and Educational Institution Questions *(NEW)*

- Does your organization or project receive any federal funding, including grants, contracts, or student aid?
- If you are an educational institution, do you receive federal financial assistance under Title VI?
- Have you received any communications from federal agencies regarding compliance with anti-discrimination laws since January 2025?

Legal Counsel and Risk Mitigation Questions

- Has your organization received legal advice from counsel specializing in anti-discrimination laws within the past six months?
- Are you aware of the current Department of Education enforcement priorities and have you assessed your programs for compliance?
- Do you have access to specialized legal counsel who can advise on the structure of your activities under current law?

Contractual Relationship Assessment *(NEW)*

- Does your grant program or activity create contractual relationships with beneficiaries (including through application processes, terms of participation, publicity agreements, or other binding commitments)?
- Do participants provide any consideration (including personal information, publicity rights, participation commitments, or other forms of value) in exchange for benefits?

Available Legal Resources and Support

Enhanced Pro Bono Assistance

Given the elevated risk environment, we strongly recommend that all grantees focused on racial justice obtain specialized legal counsel. Pro bono legal assistance may be available through:

- The Lawyers Committee for Civil Rights Under the Law program
- Civil rights organizations with expertise in the current legal landscape
- Specialized DEI and civil rights legal practices

If you are unable to obtain pro bono assistance or need immediate legal guidance, please contact your program officer immediately to explore additional resources the Foundation may make available.

Privileged Legal Review Recommendation

We recommend conducting a privileged attorney-client review of all programs, materials, and activities to assess compliance risk in the current environment. This review should specifically address:

- Compliance with current Department of Education interpretations
- Section 1981 contractual relationship analysis
- Federal funding compliance requirements
- Risk mitigation strategies for continuing racial justice work

Foundation Commitment and Support

This heightened risk assessment is not intended to signal that we are stepping back from supporting racial justice. To the contrary, we remain committed to providing support for racial

justice efforts in compliance with law. However, the dramatically changed legal and regulatory environment requires enhanced due diligence and risk mitigation strategies.

We are prepared to:

- Provide additional legal resources and support for compliance review
- Work with grantees to restructure programs as necessary to continue advancing racial justice within legal parameters
- Advocate for our grantees facing regulatory challenges
- Connect grantees with specialized legal counsel and civil rights organizations

Immediate Action Items

Given the current enforcement environment, we recommend that grantees:

1. **Conduct immediate legal review** of all programs and materials with specialized counsel
2. **Assess federal funding relationships** and potential compliance obligations
3. **Review program descriptions and terminology** to ensure legal compliance
4. **Document program structure and participant relationships** to assess contractual elements
5. **Establish ongoing legal counsel relationships** for continued guidance

Contact Information

This is a rapidly evolving legal landscape requiring close collaboration and ongoing legal guidance. For questions about the legal issues and approach described here, please contact:

Joshua Mintz

Vice President, General Counsel, and Secretary

MacArthur Foundation

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For urgent legal compliance questions, please also contact your program officer immediately.

Other questions may be directed to your program officer.

This memorandum reflects legal and regulatory developments through June 2025. Given the rapidly changing enforcement environment, please consult with legal counsel and your program officer regularly for updates.