



NAVIGATING THE CURRENT DEI LEGAL LANDSCAPE: A WEBINAR FOR PHILANTHROPIC ORGANIZATIONS

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OUTLINE AND Q&A

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Below is an outline of issues covered and questions answered in a May 1, 2025 webinar sponsored by the Island Foundation, co-hosted by the Grantmakers Council of Rhode Island, the Connecticut Council for Philanthropy, the Maine Philanthropy Center, and Philanthropy Massachusetts, and presented by Eleanor Evans, Esq., a partner in the nonprofit practice at the Boston law firm Hemenway & Barnes LLP. For more information on the legal framework for analyzing DEI legal issues for philanthropic organizations and an recent legal developments, see the slides that accompany this outline.

This outline and the accompanying slides, which do not address state-specific legal issues, are provided solely for informational purposes and should not be construed as legal advice with respect to any particular situation. They are not intended to create a lawyer-client relationship. You should consult your legal counsel regarding your situation and any specific legal questions you may have.

WHAT STEPS SHOULD OUR ORGANIZATION TAKE TO NAVIGATE THE CURRENT DEI ENVIRONMENT?

- Keep your organization's mission, values and priorities front and center
- Identify race-based and other diversity equity and inclusion (DEI) programs and initiatives
 - Note the difference between those that address issues or communities vs. those that select or exclude individuals or organizations based on individuals' race, color, national origin, ancestry, or ethnicity
 - Risk is lower if don't use race, color, national origin, ancestry, or ethnicity to exclude individuals from DEI-focused programs/initiatives that provide concrete benefits to individuals
- Risk is higher if your organization receives federal funds as a federal grantee/subgrantee or as a federal contractor/subcontractor
- Determine your organization's risk tolerance

- If you decide it's needed, review terminology, but maintain your organization's commitment to principles of equity and inclusion
- Review grantmaking and employment policies and practices to identify areas where you might consider changes and steps to minimize risk in current environment
- Engage with grantees to discuss continued alignment and support for DEI work (however it's termed)
- Join with other organizations to speak out for the rule of law, due process, and the importance of civil society organizations

WHAT ARE SOME RISKS OF ENGAGING IN DEI INITIATIVES IN THE CURRENT ENVIRONMENT?

- **Losing federal funding**
 - Recipients of federal grants/subgrants and contracts/subcontracts have recently had federal funding suspended or terminated due to DEI initiatives and public-facing language
- **Getting sued** – Even if your organization wins, it will incur legal fees and other costs, and may face increased publicity
 - If your organization receives federal grants or loans:
 - Title VI of the Civil Rights Act of 1964 (Title VI) and the U.S. Supreme Court's 2023 *Students for Fair Admissions* decision
 - Title IX of the Education Amendments of 1972 (Title IX)
 - Federal False Claims Act – if your organization receives federal grants or contracts
 - Employment: Title VII of the Civil Rights Act of 1964 (Title VII) and state anti-discrimination law
 - Contracting: Section 1981 of the Civil Rights Act of 1866 (Section 1981)
 - Prohibits racial discrimination in contracting
 - Applies whether or not your organization receives federal grants or contracts
- **Undergoing a government investigation or audit**
 - Less likely to happen if your organization does not receive federal grants or contracts
 - So far, we have not seen IRS audits of 501(c)(3) organizations based on DEI initiatives
- **Having to alter or end DEI program in question as a result of one or more of the above**
- **Revocation of 501(c)(3) status**
 - The Trump administration has stated it intends to revoke Harvard University's 501(c)(3) status; it's not exactly clear on what grounds
 - So far, we have not seen attempts to revoke 501(c)(3) status of other organizations based on their DEI initiatives, however it is possible the administration could attempt to do so under the "illegality/public policy" doctrine described below and in the slides

WHAT LAWS APPLY?

- **For all organizations (whether receive federal funds or not):**
 - **Contracting: Section 1981: Prohibits racial discrimination in contracting by private and public parties; *does not prohibit discrimination on the basis of sex***
 - Whether an arrangement is a gift or a contract depends on state law

- A gift is a voluntary transfer of property without requiring any consideration in return (consideration means an exchange of value)
- Contracts generally require offer, acceptance and consideration or reliance (one party taking action in reliance based on the other party's promise, statement or actions)
 - It doesn't take much to form a contract
 - A contract does not need to be in writing; can be oral
 - Whether a contract exists depends on the facts and circumstances
- Moving away from grant agreements (contracts) to trust-based philanthropy with few, if any requirements (i.e., consideration), can be useful in demonstrating that a grant is a gift and not a contract and thereby addressing Section 1981 concerns
 - For general operating grants, you can send a transmittal letter with the grant stating that it is for general operating purposes and have the grantee acknowledge receipt
 - Generally need grant agreements for project-specific grants
- If your organization does not receive federal funds, consider structuring race-conscious grants, scholarships, and programs as gifts, with no (or as few as possible) strings attached, so as not to be considered contracts covered by Section 1981. For example, Could note in correspondence to grant or scholarship recipient that:
 - Grant or scholarship is a charitable gift and not a contract (not necessarily dispositive, however)
 - Recipient will not provide any services or anything else of value to your organization
 - Reporting from recipient, while welcome, is not required as a condition of receiving the funds
 - Could make participation in BIPOC leadership training program free of charge, have no requirements for selected participants
- **Employment: Title VII and state anti-discrimination law**
 - Prohibits discrimination in employment on the basis of race, color, national origin, sex and other characteristics.
 - Title VII applies to employers with 15 or more employees; state laws usually have lower thresholds (Massachusetts is 6)
- **State public accommodations law – if broader than federal law**
 - Federal law includes places such as restaurants, hotels, movie theaters
 - Massachusetts law, for example, is broader and includes child care centers, senior citizens centers, homeless shelters, food banks, and other social service establishments
- **Section 501(c)(3) of the Internal Revenue Code:**
 - **Section 501(c)(3) specifies criteria for nonprofits to qualify as tax-exempt 501(c)(3) organizations**
 - Must be organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purpose, or to foster national or international amateur sports competition (but only if no part of its activities

- involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals;
- No part of its net earnings may inure to the benefit of any private shareholder or individual;
- No substantial part of its activities may be carrying on propaganda, or otherwise attempting, to influence legislation [private foundations may not lobby at all]; and
- May not support or oppose candidates for public office.
- **Illegality/public policy doctrine: A charity that has an illegal purpose or engages in substantial illegal activities or actions that violate fundamental public policy (even if not necessarily illegal) can be denied 501(c)(3) status or have it revoked**
 - **1983 U.S. Supreme Court *Bob Jones University* decision**
 - Supreme Court upheld IRS revocation/denial of 501(c)(3) status of private, religious schools with racially discriminatory admissions policies – including prohibiting interracial dating and marriage – on the basis of their sincerely held religious beliefs
 - The Court held that “entitlement to tax exemption depends on meeting certain common law standards of charity – namely, that an **institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy**”
 - “The institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”
 - “A declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a **fundamental** public policy. But there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice.”
 - **“[R]acial discrimination in education violates a most fundamental national public policy”**
 - Cited authority from all three branches of federal government as evidencing a fundamental public policy against racial discrimination in education:
 - Supreme Court decisions starting with *Brown v. Board of Education*;
 - Titles IV and VI of the Civil Rights Act of 1964; and
 - Various executive orders
 - **Federal government’s power to revoke 501(c)(3) status**
 - Congress set the parameters for eligibility when it enacted section 501(c)(3); only Congress can change them. The executive branch does not have the authority to unilaterally limit what types of organizations are eligible for 501(c)(3) status
 - Per Internal Revenue Code section 7217, the President does not have the authority to direct the IRS to revoke a specific nonprofit’s 501(c)(3) status
 - The IRS does not have the authority to revoke a nonprofit’s 501(c)(3) status without following the required process, which includes the right to a court appeal

- The IRS does not have the authority to revoke a nonprofit's 501(c)(3) status for engaging in lawful activities, including those that promote diversity, equity and inclusion
- "Terrorist" and "Terrorist Supporting Organizations"
 - Under current Internal Revenue Code section 501(p) the tax-exempt status of an organization designated as a terrorist organization will be suspended while it is so designated. There is no administrative or judicial review of the suspension
 - H.R. 9495 (the "Nonprofit Killer Bill"), which introduced but not passed in the last session of Congress, would suspend the tax-exempt status of organizations designated as "terrorist supporting organizations" by the Secretary of the Treasury
 - An organization so designated could seek pre-designation review
 - It was recently included, but dropped, from the "One Big Beautiful Bill," but could be reintroduced
- **For organizations that receive federal grants and loans, the laws listed above, plus ...**
 - **Title VI of the Civil Rights Act of 1964: Prohibits organizations or programs that receive federal financial assistance from discriminating on the basis of race, color or national origin**
 - **Supreme Court decision *Students for Fair Admissions*:**
 - Can't use race as a "plus factor" in college admissions
 - But *can* consider applicant's discussion of how race affected their life, be it through discrimination, inspiration, or otherwise
 - Decision only addressed college admissions but **has implications in other contexts where decisions about provision of a concrete benefit or opportunity to a particular individual are made on the basis of that individual's race such as scholarships, restricted gifts and grants, race-conscious nonprofit programming**
 - **Title IX of the Education Amendments of 1972: Prohibits discrimination on the basis of sex in education or training programs receiving federal financial assistance**
 - Doesn't just apply to schools
 - **Generally, there are processes the federal government must follow before terminating federal grants or contracts**
 - Under federal contract law, there is less process for federal contractors, but still some
 - **Federal False Claims Act**
 - Applies to federal contractors as well as federal grant recipients
 - The False Claims Act imposes liability on individuals or companies that defraud the federal government by making materially false or fraudulent statements to influence the government to pay out. The statements must be material to the government's decision to make the payment
 - The "qui tam" provision in the False Claims Act allows individuals to file lawsuits on behalf of the government and potentially receive a portion of any recovered damages
 - False Claims Act violations can result in treble damages and significant penalties

- Of note – the U.S. Department of Justice indicated that it collected more than \$2.9B in settlements and judgments under the False Claims Act in the fiscal year ending Sept. 30, 2024, with more than \$2.4B coming from qui tam suits
- The U.S. Department of Justice recently established a “Civil Rights Fraud Initiative” that will use the False Claims Act to investigate and, as appropriate, pursue claims against any recipient of federal funds that knowingly violates federal civil rights laws
 - DOJ encourages the public to report instances of such discrimination to the appropriate federal authorities and anyone with knowledge of discrimination by federal funding recipients to consider filing a “qui tam” action under the False Claims Act
- **Executive Orders**
 - **Can’t make new law, can only direct federal agencies how to interpret, implement and enforce existing law**
 - **Executive Order (EO) 14173** January 2025: Prohibits DEIA initiatives in the federal government and directs federal agencies “to **enforce our longstanding civil-rights laws** and to **combat illegal private sector DEIA** preferences, mandates, policies, programs, and activities”
 - Does not define what the Trump administration deems discriminatory or illegal
 - **Requires federal agencies to include in all contracts and grant awards terms requiring contractors/grantees to:**
 - **Certify that they don’t operate any programs promoting DEI that violate any applicable federal anti-discrimination laws**
 - **Agree that their compliance with all applicable federal anti-discrimination laws is material to the government’s payment decisions for purposes of the federal False Claims Act, which permits suits by private parties as well as the federal government**
 - Several lawsuits challenging the Executive Order are currently pending

FUNDING / INITIATIVES FOR SPECIFIC DEMOGRAPHICS

- **Are there legal considerations we should keep in mind when DEI is central to our grant selection criteria, especially in programs that serve BIPOC or low-income youth?**
 - Yes, if grants are contracts and your organization makes grant decisions based on individuals’ race (either selecting/denying based on race or using race as a “plus” factor), there is a risk of being sued under Section 1981; if your organization receives federal funds, it could be sued under Title VI
 - Programs serving low-income youth are OK, if race is not a consideration
- **Do the Executive Orders pose any risks for foundations that provide stipends or fellowships specifically to increase representation in arts and cultural leadership?**
 - The orders themselves do not specifically pose additional risk, but if a foundation makes selection decisions on basis of race and the stipends/fellowships are contracts, it could be subject to legal claims under Section 1981
 - Doing so could also raise the foundation’s profile for an audit or other federal government investigation

- **Does a private grantmaking foundation that states in its guidelines that one of its priorities is making grants to promote DEI and BIPOC initiatives run afoul of any of the Executive Orders recently issued? If so, what is the potential legal exposure?**
 - It depends what the initiatives are and whether the grants could be considered contracts for purposes of Section 1981
 - If an initiative is to train community leaders on how to increase equity and reduce racism within their organizations and communities and participation is not limited by race, that's OK
 - However, if initiative is funding a concrete benefit to individuals, selection is done on the basis of race, and the funding is provided under a contract, the initiative and funding of it could be challenged under Section 1981, for example:
 - Scholarship or fellowship program limited to BIPOC individuals
 - Funding for grant or loan program limited to BIPOC-owned small businesses in a low-income neighborhood
 - Funding nonprofit BIPOC employees' professional development, but not that of other employees
- **Can we fund health programs that focus on certain demographics?**
 - For example:
 - Evidence-based health care intervention to reduce stroke in Black men
 - Grant to community prevention programs seeking to empower BIPOC and LGBTQ+ youth to make informed, healthy decisions about their sexual health
 - A privately funded nonprofit can fund such programs (although there could be some risk of a lawsuit under Section 1981 if the funding were to be considered a contract rather than a gift)
 - If the grantee's program is federally funded, its federal funding for the program may be terminated or withheld based on the Trump Administration's current priorities
- **Can we continue funding programs that are specifically for women and girls?**
 - Yes, provided that neither the funds being provided nor the programs being funded are part of a federally funded education or training program, your organization can fund programs specifically for women and girls, such as:
 - Funding nonprofits serving women and girls
 - Scholarships for women in STEM
- **What about scholarships for LGBTQ individuals?**
 - Privately funded scholarships for LGBTQ individuals that are not administered by a college or university receiving federal funds are not impacted by the Administration's recent actions.
- **Are there restrictions on funding programs on the basis of religion?**
 - Not under federal law, provided the programs being funded are not run by government agencies (which, under the First Amendment, cannot discriminate on the basis of religion).
 - Federal grantees should note that Title VI's protection from race, color, or national origin discrimination has been interpreted to extend to individuals who experience discrimination, including harassment, based on their actual or perceived:

- Shared ancestry or ethnic characteristics; or
- Citizenship or residency in a country with a dominant religion or distinct religious identity
- **Can we conduct or fund workplace DEI programs?**
 - Yes, as long as the programs do not exclude employees based on race or other protected characteristics. Examples:
 - Affinity group for BIPOC employees – should allow any employee who is interested to participate
 - DEI training for employees
 - For example, conducting training on topics such as inclusive leadership and disability awareness
 - Note, however, that recent guidance from the Equal Employment Opportunity Commission and the DOJ takes the position that, in some cases, employees could bring a hostile work environment under Title VII due to their employer’s workplace DEI training
 - See “Multi-State Guidance Concerning Diversity, Equity, Inclusion, and Accessibility Employment Initiatives” from blue state Attorneys General (including Massachusetts, Connecticut, Rhode Island and Maine)

<https://www.mass.gov/doc/multi-state-guidance-concerning-diversity-equity-inclusion-and-accessibility-employment-initiatives/download>

COMMUNICATION

- **How concerned do we need to be about using terms such as “equity” and “inclusion” in our materials, whether public-facing or internal?**
 - There is nothing illegal about a mission statement or other materials using terms “equity” and “inclusion” or incorporating DEI principles
 - However, recipients of federal funds, are having funding terminated or withheld based on their DEI activities and language
 - Organizations that don’t receive federal funds face less risk; nevertheless some are choosing to remove or tone down DEI language
 - It’s best to be consistent in external and internal communications
- **Are there any other words we can use to refer to this work that would not put us on the radar? How can we communicate grantmaking around DEIA while mitigating risk?**
 - There is a long list of words being scrubbed from federal agencies’ websites
 - There are no magic words to substitute
 - However, you can look news on what some universities or other organizations have done – for example, to rename their DEI offices – e.g., using language like focusing on belonging, pluralism, varied backgrounds, experiences, and perspectives, embracing the experiences of individuals, harnessing the power of our differences
- **It seems as though we have to choose words more carefully, especially on websites. Should we be “scrubbing” our websites of language? How deep down do we have to go? (e.g. all attachments, past publications, etc.)**
 - It depends on your organization’s level of risk (does it depend on federal funds, for example) and its risk tolerance

- **What specific language should be used when the funder wants to impact a specific demographic to receive services?**
 - It depends how the funder wants to impact the specific demographic – in other words, whether it wants to limit provision of a specific benefit to individuals based on race or to increase the number of people from that demographic applying for the benefit or program
 - If the former, there is more risk. If the organization selects people based on race, just changing externally facing language without changing selection criteria won't do much to reduce the risk
 - If the organization instead wants to increase the number of people from various backgrounds applying for the program, it should prioritize widescale recruitment efforts to attract a larger pool of applicants from a variety of backgrounds.
- **Some of our grants focus on BIPOC organizations and/ or organizations that serve women and girls. How should we publicize our programs in the current environment?**
 - Assuming your organization does not receive federal funds (and possibly even if it does)
 - Making grants to organizations serving women and girls is OK
 - Risk associated with making grants to BIPOC-led organizations, where being BIPOC-led (board and/or management) is a criterion for selection
 - Can reduce risk by structuring grant as much as possible to not be a contract
 - Grants to organizations working on issues affecting BIPOC communities where your organization does not award grants based on individuals' race are fine

GRANT APPLICATIONS AND DATA COLLECTION

- **Should our grant application ask nonprofits applying to tell us about their DEI practices?**
 - Grant applicants may be less likely to want to provide that information in the current climate. You could ask about anti-discrimination policies and practices instead.
- **How can a funder request/collect demographic data from grantees?**
 - If your organization wants to request/collect demographic data including race (for example, to learn about who the program is serving and how to structure future outreach to potential applicants), it's best to do so either after the grantees/program participants have been selected or in a way that those responsible for reviewing and selecting the grantees/program participants do not see it until after selections are made

FEDERAL GRANTEES AND CONTRACTORS

- **How might Executive Orders on DEI impact foundations that support youth-focused arts programs run by public institutions, like public schools or city agencies?**
 - Your organization should check with the public institution grantees to see how they are responding to the Executive Orders and other developments in federal law and what programs they are comfortable running.

- **Is there any difference in how we should handle DEI programs if our organization is a federal contractor (such as an insurance company or consulting firm) as opposed to a federal grantee?**
 - No. Note, however, that there are differences in the laws that apply to federal contractors versus those that apply to federal grantees, including the procedural protections in cases of termination.
- **If our organization (which does not receive federal funds) provides funding to an organization that does and that organization becomes subject to funding termination or investigation by the federal government or has been notified that its 501(c)(3) status could be revoked, could our organization face increased risk?**
 - Merely funding the other organization is unlikely to create increased risk for your organization
- **How can we support grantees who have already or may in the future lose government funding?**
 - Ask grantees what their highest priorities are
 - Fund legal challenges
 - Coordinate with other funders
 - Speak out
 - If your organization is not a private foundation, lobby to preserve funding in federal budget and for additional funding in state budget

RESTRICTED FUNDS

- **What should we do if a fund agreement with a donor requires that the fund be used for BIPOC or BIPOC-led organizations? What if the fund agreement merely indicates a preference?**
 - Restricted funds must be used for their intended, restricted purposes
 - Whether and how restrictions must/may be modified depends on various factors, including:
 - Gift terms
 - Whether donor is alive or (in the case of foundation grants) extant
 - Size and age of restricted fund (in Massachusetts)
 - If gift language is flexible enough, may be able to administer the funds without regard to race without external approval (document internally, e.g., via board vote and/or internal memo)
 - Otherwise:
 - If donor is alive/extant, obtain their consent
 - If donor consent can't be obtained, modification by court (or in Mass. for certain small, older funds, by the Attorney General) is required
 - To obtain modification, the organization must demonstrate that:
 - The restriction is unlawful, impracticable, impossible to achieve, or Wasteful; and
 - The proposed modification of the restriction will be made in a manner consistent with the donor's intent expressed in the gift instrument

REVOCATION OF 501(c)(3) STATUS

- **If an organization that we typically fund is being targeted for revocation or receives notice its 501(c)(3) status has been revoked, how should we handle grantmaking to them?**
 - If the IRS has revoked the 501(c)(3) status of a grantee and if:
 - Your organization is a private foundation, it can still make grants to the grantee for charitable purposes, provided it does so subject to an expenditure responsibility agreement and exercises expenditure responsibility over the grant
 - Your organization is a public charity, it can still make grants to the grantee for charitable purposes. It should do so subject to an agreement that requires the grantee to use the funds for charitable purposes.
 - If your organization knows that the grantee is being targeted for revocation, but the IRS has not yet issued a notice of revocation, it is a good idea to proceed as outlined above