

SCHOOL DEI PROGRAMS FEEL THE IMPACT AS COURTS CONTINUE TO DEFINE BOUNDARIES: 3 KEY TAKEAWAYS FROM A RECENT RULING

Insights
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We're starting to see courts define the boundaries of permissible DEI programs in the aftermath of last year's SCOTUS decision limiting "race conscious" programs such as affirmative action in college admissions. For example, a recent federal appeals court decision cast a wider net over which types of programs may run afoul of the law. Specifically, the court blocked a business from providing certain grants solely to Black women business owners, finding that the program likely violated a federal law against race discrimination. While the decision involved a venture capital firm, it highlights the scrutiny placed on Diversity, Equity, and Inclusion programs and may cause concern for schools that provide affirmative action opportunities. Furthermore, it serves as a reminder to review your scholarships and other inclusion programs to ensure they comply with federal equal rights law. Here's are the three key takeaways for schools as you adapt your DEI programs.

1. Program Aimed to Bridge the Gap for Black Women

The Supreme Court's [decision last year on affirmative action programs](#) highlights the legal risks of race-based admissions processes, and the 11th Circuit Court of Appeals' June 3 ruling in [the Fearless Fund case](#) broadens the scope of which types of programs may violate the law. Here's what happened in the 11th Circuit case:

- Fearless Fund provides grants to Black women for their businesses to bridge the gap in venture capital funding for women of color.

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- Only Black women who are United States citizens were eligible to enter the contest.
- An organization called the American Alliance for Equal Rights — which is dedicated to ending racial preferences — sued Fearless Fund claiming its grant criteria violated federal equal rights law.
- The specific federal law provides that everyone has the same right to make and enforce contracts regardless of race.
- This law has been interpreted to protect *all* races, not just members of minority groups.
- It applies to private and public organizations alike, including independent schools, regardless of whether the school receives federal financial assistance.
- Fearless Fund argued that the grant contest is not a contract and instead constitutes a “remedial program” aimed at bridging the funding gap for Black women created by race discrimination.
- The firm also argued that the contest was protected by the First Amendment’s right to free speech.

2. Court Focused on Exclusion of Non-Black Participants

The 11th Circuit temporarily blocked Fearless Fund from continuing its contest while the lawsuit plays out, finding that the firm likely discriminated against non-Black individuals by refusing to allow them to participate in the grant contest. The court highlighted the following key points:

- **The contest is likely a contract** because participants agreed to follow program rules and waive certain legal claims against Fearless Fund in exchange for a chance to win money and other benefits.
- **An exception to antidiscrimination statutes for remedial programs probably doesn’t apply.** The 11th Circuit noted that Fearless Fund’s grant program creates an absolute bar to the advancement of non-Black business owners.
- **The First Amendment likely doesn’t protect the contest.** The 11th Circuit said, while the First Amendment’s right to free speech may protect *advocating* race discrimination, it does not protect *practicing* race discrimination.

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3. Impact on School Scholarships and Other Programs

The applicable law prohibits race discrimination in contracts for all organizations and businesses, including K-12 schools. Therefore, it's important for all schools – particularly those in Alabama, Florida, and Georgia, which make up the 11th Circuit – to consider how the ruling will affect scholarships, financial aid, and other programs that may exclude groups based on race, even if the programs seek to address or remediate race discrimination.

Here are three key questions to consider:

1. Does the program include a race-based component?
2. Does the program ask for something in exchange for entrance or acceptance, such as a monetary commitment, a release of legal claims, or an agreement to complete certain actions, which may make it a contract?
3. Does the program exclude groups based on race or does the program give preference to groups based on race?

Notably, the 11th Circuit's decision stops short of scrapping all programs aimed at bridging gaps created by race discrimination. Regardless, schools should take care to scrutinize any program or process that uses race as a factor and consider whether the same goals can be achieved by a different method.

Want to learn more? [Click here for the six things you should do to comply with Supreme Court's affirmative action ruling and six things you can do to boost diversity in your student population.](#)

Conclusion

Please consult your Fisher Phillips attorney, the authors of this Insight, or any attorney on our [Education Team](#) to obtain practical advice and guidance on how to adapt your school's programs in light of recent legal trends. We will continue to monitor the latest developments and provide updates as warranted, so be sure to subscribe to [Fisher Phillips' Insight System](#) to gather the most up-to-date information.