What CAAs Need to Know About the Future of DEI Grantmaking

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Recent high profile court decisions energized a movement against diversity, equity, and inclusion (DEI) efforts, spurring activists to bring a range of challenges against DEI initiatives. The U.S. Supreme Court struck down race-based affirmative action in higher education in its 2023 Students for Fair Admissions (SFFA) decision. While SFFA addressed DEI in education, many of the post-SFFA challenges have happened outside of that context. In one such legal challenge, the U.S. Court of Appeals for the Eleventh Circuit (Eleventh Circuit) ruled against an organization operating a grant contest that awarded grants solely to Black women. Although the legal DEI landscape is in flux, Community Action Agencies (CAAs) can act now to hopefully continue the work that supports their diverse communities.

Legal Overview of Anti-Discrimination

The Equal Protection Clause of the 14th Amendment to the U.S. Constitution generally protects individuals against discrimination on the basis of race, gender, immigration status, and other classifications. In addition to this general constitutional protection, two major categories of anti-discrimination laws exist: those that apply in the employment context and those that apply to programs, i.e., the services and benefits an organization provides. This article focuses on anti-discrimination in the provision of programs.

One anti-discrimination law that applies to programs and directly to CAAs as federal grantees is Title VI of the Civil Rights Act of 1964 (Title VI). Title VI prohibits discrimination based on race, color, or national origin in programs or activities that receive federal financial assistance, meaning that CAAs are prohibited from discriminating in the provision of their federally-funded services based on such classifications. Section 1981 of the Civil Rights Act of 1866 (Section 1981) is another anti-discrimination law that applies to programs. While Section 1981 does not necessarily apply to all CAAs, it may influence the future of all anti-discrimination laws. Section 1981 prohibits racial discrimination in the making and enforcement of contracts.

The anti-discrimination law that solely applies to CAAs with respect to their role as employers is Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits employers from making adverse employment decisions based on protected categories and is enforced by the federal agency, the Equal Employment Opportunity Commission (EEOC). This article does not delve into the potential DEI changes in employment laws. It is also interesting to note that the EEOC's position under the outgoing administration is that the SFFA decision did not speak to anti-discrimination laws in the employment context.

SFFA: Sparking Affirmative Action and DEI Challenges

In the case *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023), the nonprofit organization Students for Fair Admissions filed lawsuits against Harvard College and the University of North Carolina (UNC) arguing that their race-based admissions programs violated Title VI and the Equal Protection Clause.

Many universities have affirmative action plans or practices which aim to improve opportunities for individuals who belong to minority groups. Harvard and UNC's admissions processes involved the consideration of race when reviewing applications to promote the benefits of diverse learning environments. By a 6-3 majority, the U.S. Supreme Court decided in favor of Students for Fair Admissions, finding the colleges' affirmative action plans to be in violation of the Equal Protection Clause and Title VI. The majority decided that university admissions programs must (1) further a compelling governmental interest and use race only as necessary to achieve that interest, (2) never use race as a stereotype or negative, and (3) at some point, they must end. Harvard and UNC's race-based admissions processes failed each of these criteria.

While the SFFA case only directly impacts higher education, Title VI broadly prohibits discrimination in all programs and activities receiving federal financial assistance, including grantees such as CAAs. It is possible that the logic applied to institutes of higher education in SFFA could be applied elsewhere in the future.

Fearless Fund: Limitations on DEI in Grantmaking

The SFFA decision opened the door to more lawsuits challenging DEI programs, including *Am. All. For Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765 (11th Cir. 2024) (Fearless Fund). The Fearless Fund (Fearless) is a venture capital firm with a mission to bridge the gap in venture capital funding for women of color founders. A Fearless activity is to supply grants to businesses under the Fearless Foundation. One Fearless Foundation contest offered each winner $20,000 along with other business and mentorship tools and was only open to Black woman-owned businesses. The challenge to Fearless' contest relied on Section 1981, a civil rights law enacted to protect Black Americans from racial discrimination. In the Fearless Fund decision, however, Section 1981 was instead used to argue against a contest attempting to address those same historical inequities.

The Eleventh Circuit decided against Fearless and ruled that Fearless likely violated Section 1981's prohibition on racial discrimination in contracting because its grant contest was only open to Black women. As an initial matter, the court ruled that the grant contest was, in fact, a contract and therefore was subject to Section 1981. A contract exists if there is an agreement to do or refrain from doing a particular action and there is an exchange of value between the parties. Fearless tried, and failed, to argue that its contest was not a contract but rather another way to give gifts. However, the Eleventh Circuit found that the contest was a contract where Fearless provided $20,000 in exchange for contestants granting Fearless permission to use the contestants' ideas and names for promotional purposes and promising to resolve any disputes between the parties through arbitration, among other aspects of the relationship.

Fearless argued that even if Section 1981 applied, the contest fell under an exception developed through case law for race-conscious remedial programs, which are programs designed to address racial disparities. Under the exception, race-conscious remedial programs are valid if they (1) address manifest racial imbalances and (2) do not unnecessarily trammel the rights of others or create an

absolute bar to the advancement of others. The Eleventh Circuit determined that Fearless' contest would fail to meet the exception because it erected an absolute bar to the advancement of non-Black business owners.

After the Eleventh Circuit decided against Fearless and issued a preliminary injunction blocking the program from operating while the litigation continued, Fearless ultimately agreed in a settlement to permanently shut down its grant program. This settlement avoided an eventual decision on the merits and potential appeal to the U.S. Supreme Court, which leaves the legal landscape open for organizations with grant programs that support DEI efforts. The Fearless Fund decision's impact is currently limited to the Eleventh Circuit states of Alabama, Florida, and Georgia.

Even in Alabama, Florida, and Georgia, a few important limitations to the Fearless Fund ruling exist. Because Section 1981 only applies to race-based contracting, the ruling does not impact programs which instead focus on non-race factors such as gender, income, or geographic location. Section 1981 also only applies to contracts; therefore, it should not immediately impact grantmaking unless giving out such grants involves an exchange of value between the parties that instead creates a contract.

What CAAs Need to Know to Be Prepared

While the SFFA and Fearless Fund decisions currently have a narrow impact on CAAs, they may signal more litigation seeking to erode race-conscious grantmaking moving forward. As courts start to define the boundaries of permissible DEI programs, CAAs can take actions now to protect initiatives and stay prepared. While none of these actions are guaranteed to protect a CAA from legal challenges, they may put a CAA in a better position by minimizing potential legal risk.

- Monitor developing case law and policy trends. As with any administration change, there will be policy shifts brought on by the Trump Administration. In addition to changes in the direction the courts are moving with respect to DEI, we are also likely to see shifts in governmental policies in this area.
- Minimize the chance that an agreement is viewed as a contract when a grant is intended by (1) steering clear of using the word "contract" in the agreement language, (2) specifying that the grantee's performance is measured in relation to program objectives being met, rather than pursuant to contractual obligations, and (3) focusing on the implementation of a program for a public purpose in exchange for the grantee's receipt of funding. Where a grantee provides services that directly benefit the grantor (e.g., the CAA) rather than as a public service in exchange for funding, the arrangement seems more like a contract which could come up against Section 1981 as seen in the Fearless Fund decision. The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards also provide a list of helpful additional factors for determining whether an agreement is a grant or contract in 2 C.F.R. § 200.331. Working closely with local legal counsel can help a CAA evaluate its level of risk and strengthen its grantmaking language for this purpose.

- Consider crafting race-neutral eligibility requirements for subgrants, with a focus on removing bias from grantmaking while remaining true to the grant's purpose and mission. Examples include creating structured application processes with clear, transparent, merit-based criteria, and reviewing policies to ensure grants are given equitably. For nonprofit CAAs, the Internal Revenue Service will also consider whether the organization has specific criteria to support why it is awarding funds to a particular group, and whether awarding to that group furthers the CAA's charitable purposes.
- Consider shifting any race-based grantmaking to focus on other characteristics of these groups that do not trigger legal scrutiny. Title VI protects individuals from discrimination based on race, color, and national origin. A program focused on socioeconomic status or first-generation students or entrepreneurs, for example, may be a safer approach to grantmaking because these are not protected attributes under federal anti-discrimination law.
- Review funding awards and rules or ask funding sources about the permissible use of funds, including whether a CAA may use such funds for grantmaking targeted to specific demographics. For example, CAAs are required to use Community Services Block Grant (CSBG) funds to meet the needs identified in their service areas via a community-needs assessment. 42 U.S.C. 9908(b)(11). An identified need may result in providing services to a specific group of individuals and families within a community.
- Absent clear federal funding source guidance, act cautiously when spending federal dollars on race-based or other similar grantmaking. Even absent recent trends, running race-based programs with federal funds is historically a complicated endeavor. Title VI has always prohibited discrimination based on race, color, or national origin for programs or activities that receive federal funding

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