Students for Fair Admissions v. Harvard: Understanding What the Court Said and What It Means for Higher Education

An Access & Diversity Collaborative Webinar

In collaboration with EducationCounsel, LLC

October 23, 2019
Introductions

• Wendell Hall, Moderator
  • Senior Director, Higher Education, The College Board

• Art Coleman
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  • Managing Partner, EducationCounsel, LLC.
  • Former U.S. Department of Education Deputy Assistant Secretary for Civil Rights

• Jamie Lewis Keith
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  • Partner, EducationCounsel, LLC
  • Former Primary Counsel, MIT; Vice-President, General Counsel and Secretary, University of Florida
Disclaimers
Lawyers...just sayin’

It depends.

It’s a question of evidence.

Facts matter.

(Nothing in this discussion constitutes institution-specific legal advice.)
Thanks to our superstars!!

<table>
<thead>
<tr>
<th>Superstar</th>
<th>Affiliation</th>
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<tbody>
<tr>
<td>Alexandra Schimmer</td>
<td>Denison University General Counsel</td>
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<tr>
<td>Frank Trinity</td>
<td>Association of American Medical Colleges Chief Legal Officer</td>
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<tr>
<td>Peter McDonough</td>
<td>American Council on Education Vice President and General Counsel</td>
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<tr>
<td>Holly Peterson</td>
<td>NACUA Associate Director of Legal Resources</td>
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<tr>
<td>Kedra Ishop</td>
<td>University of Michigan Vice Provost for Enrollment Management</td>
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<tr>
<td>Wendell Hall</td>
<td>College Board Senior Director, Higher Education</td>
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‘Everything Is Not Sunshine’: What the Harvard Decision Means for Race-Conscious Admissions

Harvard Won a Key Affirmative Action Battle. But the War’s Not Over.

More than 40 years after the Supreme Court first weighed in on race-conscious admissions, the fight remains as fractious as ever.

Students for Fair Admissions Files Notice of Appeal in Harvard Admissions Case

Judge Rules Harvard’s Race-Conscious Admissions Policy Constitutional

Federal judge finds university doesn’t intentionally discriminate based on race in admissions.

Harvard doesn’t discriminate against Asian-Americans in admissions, judge rules
Overview and Themes

I. Harvard: The Big Picture
II. Harvard: The Details
III. UNC: A Postscript
IV. Areas of Focus
V. Resources

Tell your story.

Facts...and homework... matter.

40 years of precedent guide us.

WHAT'S YOUR STORY?

Stand up for judgment.

Stay true to mission.

Tell your story.

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**SFFA v. Harvard**

Appropriate consideration of race in admissions

- No goals associated with racial balancing
- Race not considered as a mechanical factor in the admissions process

No intentional discrimination against Asian American applicants

- Absence of evidence of racial animus, no pattern of stereotyping, etc.
- Statistical models inconclusive; bias could surface from other sources—indeterminate

No failure to pursue viable race-neutral alternatives

- Ample investment in outreach, recruitment, aid, and consideration of neutral admission criteria
- Rejection of SFFA’s proposed alternatives
I. The BIG Picture
1978: Bakke
- J. Powell
- EBD = Compelling Interest
- Concept

1980: USED Title VI Regulations

1994: USED Title VI Aid Policy

1994: USED Title VI Aid Policy
- Majority
- EBD=Compelling Interest
- Strict Scrutiny Framework

2003: Grutter/Gratz
- Majority
- EBD=Compelling Interest
- Strict Scrutiny Framework

2013: Fisher I
- Majority
- Rigor on inquiry/Evidence re Necessity/Race-Neutral

2016: Fisher II
- Small Majority
- Emphasis on Evidence

40 years of aligned precedent

Pay attention to THESE cases and rules
Mission matters

...even when it's in the background

Mission

Policy, Practice & Process

Educational Outcomes

The focus of this case
Harvard is like—and not like—past cases

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<tbody>
<tr>
<td>Named, harmed student</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Reliance on stats</td>
<td>Extensive</td>
<td>Very limited</td>
<td>Limited</td>
</tr>
<tr>
<td>Neutral context</td>
<td>Clear investment</td>
<td>Clear investment + 7 years w/o race</td>
<td>Not evident</td>
</tr>
<tr>
<td>Tracking of race</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Policy design</td>
<td>Individualized holistic review</td>
<td>Individualized holistic review -25% of class - Race a “factor of factor of factor”</td>
<td>Individualized holistic review</td>
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Facts Matter

...but data isn’t everything.

Although statistics “perhaps tell ‘what,’ they do not tell ‘why.’”
But statistics *can* be important...

“Statistical evidence is perhaps the most important evidence in reaching a resolution of this case, given SFFA’s heavy reliance on the data to make out its claims.”
But statistics *can* be important…

“Statistical evidence is perhaps the most important evidence in reaching a resolution of this case, given SFFA’s heavy reliance on the data to make out its claims.”
Grades and test scores don’t = merit…

...as important as test scores and grades may be.

Applications and Enrollment

- 35,000 applications
- 2000 admitted
- 1600 enrolled

Perfect scores

- 8000: GPAs
- 2700: Verbal SATs
- 3400: Math SATs

• All applicants were “academically prepared…”

• “Most” from “every racial group” had “roughly similar level of academic potential”

• SAT scores and grades of applicants “from each racial group differ[ed] significantly”
“Policy, meet practice…
…and training…and engagement.”

<table>
<thead>
<tr>
<th>Policy</th>
<th>Practice</th>
<th>Training</th>
<th>Engagement</th>
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<tbody>
<tr>
<td>Important to have clear statements, particularly re diversity interests and consideration of race in admissions</td>
<td>Independently assessed by the court</td>
<td>An important foundation advancing coherence in practice, alignment around purpose</td>
<td>Critical to assure institutional alignment: faculty, staff, students, etc.</td>
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II. The Details
Strict Scrutiny

The Key Issues

“Compelling Interests”

Educational benefits of diversity

“Narrowly Tailored”

Necessity

Impact

Policy and Practice

Process

Why?

How?
Takeaways

Educational Benefits of Diversity

• Precedent-aligned
• Harvard-specific
• Key issues

EBD = compelling interest

• Improved teaching and learning
• More robust academic environment w/enhanced breadth and depth of learning
• Workforce readiness
• Civic readiness/leadership
• Eliminating stereotypes, etc.

Evidence of authenticity is essential

• Mission tied to curricular and co-curricular program and investments
• Research committee findings
• Shared views of faculty, staff, students, alumni
Takeaways

Educational Benefits of Diversity

• Precedent-aligned
• Harvard-specific
• Key issues

Implementation

Teaching students to engage across differences through immersion in diverse community

Broaden faculty perspectives to expand reach of curriculum and range of scholarly interests
Takeaways

Educational Benefits of Diversity

• Precedent-aligned
• Harvard-specific
• Key issues

Clarity on mission-aligned concept

• Benefits of broad diversity, including racial and ethnic diversity

Application of framework

• Improved teaching and learning
• Workforce readiness
• Civic readiness/leadership
• Eliminating stereotypes, etc.

Evidence of authenticity

• Mission and related policy statements
• Evidence of research
• Evidence of program investment & design
Takeaways

**Necessity**

- **Precedent-aligned**
- Harvard-specific
- Key issues

### Process of consideration of neutral alts./judgment
- Record of process and documentation of consideration of neutral alternatives’ viability
- The Smith Committee deliberations

### Feasibility of neutral alts.—based on mission & cost
- No obligation to sacrifice mission, including assuring opportunity to all races
- “Tolerable” administrative expense to be considered

### Evidence of impact
- Student, alumni testimony on realized benefits
- Smith Committee (academic) findings that diversity is critical to mission/success
"Workable" neutral alternatives

Only if

- Harvard can achieve benefits derived from current degree of diversity and alts are--
- Practicable
- Affordable
- Don’t require decline in academic quality or other valued excellence

Necessity

- Precedent-aligned
- Harvard-specific
- Key issues

Takeaways
### Takeaways

#### Necessity

- Precedent-aligned
- Harvard-specific
- Key issues

#### Existing neutral investments

- Reached or nearly reached “maximum returns”
- Significant outreach
- Exceptionally generous financial aid

#### Alternatives’ negative impact

- **On Diversity**: eliminating early action and tips for ALDC
- **On Mission/Academic Standards**: eliminating standardized testing
- **Feasibility**: Admitting top-ranked HS students or by zip code (leads to over-enrollment)

#### No go on proxies for race

- EX: “neighborhood cluster” “seemingly designed to achieve racial diversity based on SES”; logistical challenges and proxy questions
Committee convened to regularly review of existing policy/programs and emerging alternatives

Documentation of deliberations, conclusions with rationales, underlying evidence

Process and evidence

• Framework of evaluation that tracks Fisher I standards.

Evaluation on merits in light of IHE aims, feasibility, relative cost

Takeaways

Necessity

• Precedent-aligned
• Harvard-specific
• Key Issues

Coming Soon!
The Playbook
2d Ed.
November 2019
Takeaways

Policy & Practice

- Precedent-aligned
- Harvard-specific
- Key issues

Individualized holistic review
- Contextual consideration of range of many factors related to all applicants

The value of considering race
- “Vital” that SoC “be able to discuss their racial identities”--
  - can profoundly influence applicants sense of self and outward perspective; applicants have “right to advocate the value of their unique background, heritage, and perspective.”
  - applicants have “right to advocate the value of their unique background, heritage, and perspective.”
Takeaways

Policy & Practice

- Precedent-aligned
- Harvard-specific
- Key issues

Consideration of “non-academic factors”

- ALDCs: Athletes, legacies, applicants on the deans and directors list; children of faculty/staff
- Applicants who offer diverse perspective, leadership, creativity, geography, economics, race

Merit

- Every admitted student is “academically prepared”
- Most admitted students from all races have “roughly similar levels of academic potential, although the average SAT scores and high school grades...from each racial group differ significantly.”

Attention!! Attention!!
Takeaways

Policy & Practice

- Precedent-aligned
- Harvard-specific
- Key issues

Holistic review and race

- Race never a defining feature of application; magnitude of “race tips” = modest
- “Overall rating” comprised of first reader academic, extracurricular, personal ratings—as well as high school support ratings. Race only enters at “overall rating”
- Holistic review maintained throughout despite tracking of racial composition through “one pagers”
Rejection of claim that Harvard should admit Asian American applicants at a higher rate than white applicants

There was no evidence of “any racial animus whatsoever;” no pattern of stereotyping of any kind

SFFA failed to produce a single applicant “overtly discriminated against” or “better qualified” than admitted white applicants; no evidence that “any particular decision was negatively affected by Asian American identity;”

Statistical models were “inconclusive”—not telling the entire story: Any bias in personal ratings yielding “slight statistical differences” in personal ratings (white vs. Asian American) could have come from HS recommendations

Takeaways

Policy & Practice

• Precedent-aligned
• Harvard-specific
• Key issues
Takeaways

Policy & Practice

- Precedent-aligned
- Harvard-specific
- Key issues

Individual holistic review

- Consideration of applicants individually re all relevant factors, where race may be one of many considerations
- Clarity in policy language regarding the substance of decision-making (what factors) and process by which decisions are rendered (how considered?)
- Well-trained staff to understand clear parameters re decision-making, even if policy not spelled out

Key points of focus

- Establishment of diversity interests as part of coherent set of admissions aims
- Quality of admitted students should not vary by race: all students admitted should reflect comparable potential as determined by relevant mix of factors (that need not be just test scores and grades)
- Recognition that test scores and grades should be assessed in the context of an applicant’s high school and circumstance can be important
Takeaways

Process

- Precedent-aligned
- Harvard-specific
- Key issues

Periodic review of relevant policies and practices is essential

- A university’s “ongoing obligation [is] to engage in constant deliberation and continued reflection regarding its admissions policies” [quoting Fisher II]
Takeaways

Process

• Precedent-aligned
• Harvard-specific
• Key issues

Collaborative engagements involving faculty and staff can establish important foundations for key decisions

• Decision grounded in part on various Harvard committee actions re importance of diversity and assessment of race-neutral alternatives
  • Ryan Committee, 2014
  • Khurana Committee, 2015
  • Smith Committee, 2017
Takeaways

Process

- Precedent-aligned
- Harvard-specific
- Key issues

Coherent, regular process of review and evaluation

- Importance of diversity in achieving mission
- Progress re overall education goals over time
- Impact of consideration of race
- Viable race-neutral alternatives

Multiple stakeholders

- Leadership
- Faculty
- Student affairs
- Researchers
- Counsel
III. UNC Headlines
### SFFA v. UNC

Summary judgment denied on all counts to all parties.

<table>
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<tr>
<th>SFFA: Failure to articulate with sufficient clarity and precision diversity objectives</th>
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<tr>
<td>SFFA: Any consideration of race in admissions is unlawful</td>
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<tr>
<td>- If allowed, failure to use race as a plus factor in admissions</td>
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<tr>
<td>SFFA: Failure to pursue viable race-neutral alternatives</td>
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Admissions at UNC

Admissions Policy and Process

- Individual, holistic evaluation of applicants
- How will applicants “contribute to the kind of campus community ...[in furtherance of UNC’s] mission?”
- Examination of achievements, potential, and context
- >40 criteria in 8 categories: academic program; academic performance; standardized testing; extracurriculars; special talents; essays; background; and personal attributes.
- Multiple levels of readers, including School Group Review, which includes quality control function and examination of high schools from which applicants hail.

Consideration of Race

- Readers are trained to consider “an applicant’s self-disclosed race or ethnicity...as one factor among many based on a holistic review of all circumstances relevant to an individual applicant.”
- Race can be considered at any stage of the process.
UNC Major Trial Issues

Sufficiency of concrete articulation of objectives: critical mass

Court signals (without deciding) sufficient expression of goals and objectives based on:
Mission Statement; Academic Plans; Diversity Plan Report; senior leadership declarations; Faculty Council Resolutions; Chancellor and Vice Chancellor for Student Affairs testimony.

Admission policy and practice: What do witnesses say?

Evaluating experts’ and admissions’ staff credibility and conclusions

Competing views of sufficiency of pursuit of race-neutral alternatives

UNC: SES, % plans, additional consideration of school curriculum, automatic test score cuts
SFFA: SES, aid, recruitment, geography, eliminate legacy preferences/early action, CC xfers, HS partnerships

Details matter
IV. Areas of Focus
Key Points of Action

Mission-related goals and objectives associated with the benefits of student diversity

The necessity of any consideration of race in admissions (as a matter of process and substantive decision-making over time)

Key point of focus: race-neutral alternatives

Policy design and integration of race as an element of individualized holistic review that involves the intersection of many admissions factors important to an institution; and

With clarity regarding policy, focus on practice, implementation, etc.

Periodic review and data-informed evaluation of policies and practices over time that documents judgments that address issues presented under prevailing non-discrimination standards
V. Resources
Takeaways from the District Court Decision in Students for Fair Admissions v. Harvard: A Preliminary Analysis

• This preliminary analysis provides a brief overview of the case and surfaces some major legal and policy implications of the decision for the higher education community.

• A more comprehensive analysis of the case and its implications will be provided in coming weeks.

• Available at: https://bit.ly/2oiRWjZ.
ADC Sponsor Breakfast
November 6, 2019, 8:00-9:00 am

Major Federal Developments Affecting Higher Education Diversity and Admission
November 6, 2019, 1:15-2:15 pm

November 8, 2019, 8:00-9:15 am

More information and registration at https://forum.collegeboard.org/
The Playbook: Understanding the Role of Race-Neutral Strategies in Advancing Higher Education Diversity Goals

Will provide a significant update to *The Playbook* (2014), which will:

- Amplify and expand on the material in the 2014 version, including by providing numerous additional strategies and examples for institutions to consider when setting or revising diversity-aimed, race-neutral policies.
- Expand awareness of the range of effective strategies for increasing diversity that may be considered “race-neutral”.
- Discuss the importance of considering both intent and effect when deciding if a strategy is actually race-conscious or neutral.
- Emphasize the imperative of periodic review of policies that consider race in some aspect of the enrollment process for all IHEs.
Access & Diversity Collaborative

Who We Are & What We Do

For more information on the ADC and on sponsorship, please visit www.collegeboard.org/accessanddiversity or email accessanddiversity@collegeboard.org.

• Established in 2004, the College Board's Access & Diversity Collaborative (ADC) provides national leadership and institutional support focused on higher education diversity goals. The ADC serves as:
  • A voice of national advocacy,
  • A resource for sophisticated and pragmatic policy and practice guidance and actionable research, and
  • A convener for thought leadership and collaborative engagement on policy and practice development.

• Almost 60 institutions of higher education and 15 national organizations sponsor the ADC, which relies heavily on the support and guidance of its sponsors to identify key “on the ground” issues to address, and make recommendations regarding strategic directions.
Key Resources

Financial Aid

Federal Nondiscrimination Law Regarding Diversity
(College Board, EducationCounsel, NASFAA 2019)

Evidence

Building an Evidence Base
(College Board, 2017)

Holistic Review

Understanding Holistic Review in Higher Education Admissions
(College Board, EducationCounsel, 2018)

Key Resources

A Policy and Legal "Syllabus" for Diversity Programs at Colleges and Universities
(ACE, College Board, EducationCounsel, 2015)
Questions
Thank you!

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