LEGAL HOT TOPICS: RECENT COURT CASES

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Overview

I. Affirmative Action in Education after *Students for Fair Admissions* (decided June 29, 2023)

II. Recent Case regarding Vaccines in Schools

This presentation is for informational purposes and is not legal advice. Please contact your board attorney for legal advice.

I. Affirmative Action in Education after *Students for Fair Admissions* (decided June 29, 2023)

What was the issue in the case?

Does a university's consideration of race in admission decisions violate the **Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution**?

Two colleges' admission programs were targeted by lawsuits from the nonprofit Students for Fair Admissions: **Harvard College** and the **University of North Carolina**

Students for Fair Admissions is shorthand for a longer case name (*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*); the Supreme Court's opinion is 237 pages long (including concurrences and dissents)

What was the Supreme Court's decision?

High-level summary:

> The admissions programs at Harvard and UNC **did violate the Equal Protection Clause** by impermissibly considering race in admissions

But there is a lot to discuss and consider . . .

Is this the end of affirmative action?

Not in all contexts, because affirmative action programs, or any race-conscious application process, is considered by courts in the context in which such a program exists

In other words, the case likely ends affirmative action in admissions in colleges, but not automatically in other areas

How was race used in the admissions process at Harvard?

1. **A first reader** assigns a score in 6 categories: **academic, extracurricular, athletic, school support, personal, and overall**. The overall category includes consideration of race

2. **Subcommittees** review groups of applicants by **regional groupings**

3. **Full 40-person admissions committee** reviews applicants, including a discussion of breakdown by race. According to Harvard's director of admissions, the goal is to make sure there is not a "dramatic drop-off" in minority admissions compared to the previous class

4. If an applicant receives a **majority vote of the full committee**, s/he is tentatively slated for acceptance

5. Final step, where the tentative admittees are winnowed a last time pursuant to four factors: **legacy status, recruited athlete status, financial aid eligibility, and race**

How was race used in the admissions process at UNC?

1. **A first reader** assigns scores in several categories: **academic performance and rigor, standardized test results, extracurricular involvement, essay quality, personal factors, student background, and race and ethnicity**. This reader makes written comments about the applicant and a **recommendation for acceptance which is "provisionally final."** In making the decision, race can be a "plus" that "may be significant in an individual case." These readers **review approximately five applications an hour**

2. **A committee of "experienced staff members"** then reviews each of the decisions, and receives a report on each applicant which includes: **class rank, GPA, test scores, first reader scores, resident status, legacy status, and "special recruit," among other factors**. The **committee then either approves or rejects the initial recommendation** and race may also be considered in this last phase

Why were colleges allowing race as a factor in admissions?

They were previously told they could, by the U.S. Supreme Court

Several previous Supreme Court cases had affirmed the use of race as a factor in college admissions, here are some highlight cases:

- *Regents of the University of California v. Bakke* (1978)
- *Grutter v. Bollinger* (2003)
- *Fischer v. University of Texas* (2016)

Grutter offers a good overview of what was previously allowed

Prior to *Students for Fair Admissions*, race was allowed as a factor in college admissions when race:

- **was not used to stereotype applicants**, in other words, colleges could not presume people of a racial minority automatically held similar views
- **was not used as a negative against people** who were not a part of the minority groups who would see benefits of such a program
- **would one day cease to be a factor in admissions**

Points from *Grutter*; the last point needs more explanation, see next slide . . .

The Supreme Court gave colleges about 25 years to continue to use race in admissions

Grutter was decided in 2003, and the Supreme Court said this:

> "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest today."

Partially explains the timing of the *Students for Fair Admissions* decision, but note that the initial lawsuits were around 2014

This excerpt also gives insight into how "race-conscious admissions" (from *Grutter*) were seen as constitutional in the first place, see next slide . . .

Using race as a factor in admissions had to pass "strict scrutiny"

Strict scrutiny is a legal concept in constitutional law, and which basically means a college had to show that using race as a factor in admissions was **narrowly tailored to further a compelling interest**

A common compelling interest at the college level is **the educational benefits of having a diverse student body**, which:

> "promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society" (from *Grutter*, later quoted in *Fischer*)

This was the only way

Also seen in the (prior) legality of race-conscious college admissions was the college stating that **this was the only way to achieve a diverse student body**

From *Grutter*, this is what the University of Michigan School of Law (the school in the case) said in court documents:

> The school "would like nothing better than to find a race-neutral admissions formula"

The takeaway is that colleges were focused on the goal, creating a diverse student body, and that for them there was no other way to achieve this other than race-conscious admissions

What was the Court's reasoning for finding the processes were not legal?

Some key points:

- **the interests and goals** of colleges in using race as a factor in admissions **are not measurable** in a way that will allow courts to analyze when they have been met. **How will colleges/courts know when the goals have been met in order to allow the end of racial preferences in admissions?** (some of the interest/goals: training future leaders, acquiring new knowledge based on diverse perspectives, and preparing engaged and productive citizens)

- stated that race was **being used as a negative for some racial groups** (e.g., Asian-Americans) as college admissions is a zero sum game

Legal technicality slide, the Fourteenth Amendment

But Harvard is a private school, doesn't the Equal Protection Clause of the Fourteenth Amendment not apply to it?

While that is generally true, Title VI of the Civil Rights Act of 1964 applies to institutions that receive federal funds, and the lawsuits included complaints **under Title VI and the Equal Protection Clause**, as the schools being sued were UNC (public) and Harvard (private)

The Supreme Court noted that **violating the Equal Protection Clause amounts to a violation of Title VI**, so it evaluated Harvard's program under the standards of the Equal Protection Clause (see footnote 2 of *Students for Fair Admissions*)

Why aren’t military academies affected?

Aren’t they colleges? Yes, and there are five federal, U.S. Military Academies:

- Military Academy (West Point)
- Naval Academy (Annapolis)
- Air Force Academy (Colorado Springs)
- Coast Guard Academy (New London)
- Merchant Marine Academy (Kings Point)

So, why are they not affected? Answer: Context is important, see next slide . . .

Military academies, cont'd

The Supreme Court specifically left alone "race-based admissions programs" at military academies, from the Court:

> "The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. **This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.**"
>
> (Footnote 4, *Students for Fair Admissions*, italics in original, bold added)

Military academies, cont'd; amicus briefs

What are the **"potentially distinct interests"** that military academies have?

The United States/Biden Administration, in its own amicus brief, argued:

"The United States Armed Forces have long recognized that **the Nation's military strength and readiness** depend on a pipeline of **officers who are both highly qualified and racially diverse**---and who have been educated in diverse environments that prepare them to lead increasingly diverse forces." (page 12, bold added)

Aside from the United States own amicus brief (which discussed more than military academies), over 100 other amicus briefs were submitted in *Students for Fair Admissions*, some for and some against, continuing to allow affirmative action in colleges

What is allowed in college admissions after *Students for Fair Admissions*?

Race as a factor in acceptance decisions is not okay, **but how race *affected* an applicant is okay**; important series of quotes from *Students for Fair Admissions*:

". . . nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise." (pages 39-40)

Further excerpt on next slide . . .

Important excerpts, cont'd

"A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."

Students for Fair Admissions, page 40 (italics in the original)

What will the impact be on K-12?

Unclear at this time, until courts have the opportunity to address cases that involve K-12 issues and situations

The federal Office of Civil Rights (OCR) issued an 18-page guidance document (Dear Colleague Letter) in August 2023 entitled “Race and School Programming”

The guidance includes commentary on example situations at the college and K-12 level

II. Recent Case Involving Vaccines in Schools

First, fairly recent law on vaccines

In 2021, the Connecticut legislature passed a law removing the religious exemption for required vaccines in schools (but maintained the medical exemption)

The law, Public Act 21-6, modified several aspects of statutory law regarding immunizations, and has certain rules for preschool/preK children; the law generally allows **previously obtained** religious exemptions in K-12

The law became effective upon passage, April 29, 2021; the CSDE issued guidance on the law on May 5, 2021

Second Circuit upheld the law in August

On August 4, 2023, in *We the Patriots v. Connecticut Office of Early Childhood*, the Second Circuit found that **repealing the religious exemption was permissible**

Plaintiffs attempted several arguments, including that it was a violation of both the First Amendment (Free Exercise Clause regarding religious freedom) and the Fourteenth Amendment (Equal Protection Clause)

Some of the Court's reasoning in upholding the repeal: **the repeal applied to everyone and did not target any specific religious practice**

One count got sent back to the trial court

The Second Circuit remanded one count of the case back to the trial court for further proceedings: whether repealing the religious exemption amounts to a denial of a Free Appropriate Public Education (FAPE) to special needs students under the Individuals with Disabilities Education Act (IDEA)

The trial court dismissed this aspect of the lawsuit at first, basically saying that the plaintiffs did not articulate a sufficient argument **because the language was deficient ("special services" instead of "special education")**. The Second Circuit is basically now saying the trail court relied on too strict language distinctions, and must allow the claim to be heard at the trial court

Questions?