

Client Alert: Biden Administration Releases Anticipated Guidance on College Admissions After Supreme Court's Decision in *Students for Fair Admissions v. Harvard*

Publications

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By: Ishan K. Bhabha, Lauren J. Hartz, Erica Turret

On August 14, 2023, the Department of Justice's Civil Rights Division and the Department of Education's Office of Civil Rights issued joint guidance directed at colleges and universities in the wake of the Supreme Court's decision holding Harvard's and University of North Carolina at Chapel Hill's race-conscious admissions programs unlawful. The high-level guidance is intended to "provide[] institutions of higher education with information about the Court's decision," but leaves many important and practical questions unanswered.^[1] Below, we highlight some key takeaways from the guidance, which comes at a pivotal time as this year's admissions cycle rapidly approaches or, in some cases, is already well underway.

In general, the guidance provides a high-level summary of what the Supreme Court's decision does and does not prohibit regarding the consideration of race. Predictably, the guidance underscores that the Court's decision concerned the college admissions process, not other campus initiatives such as recruiting activities and diversity, equity, and inclusion programs that may continue to operate in a race-conscious manner. The guidance focuses on the undergraduate admissions process and broad strategies institutions may consider as they make changes to their admissions processes in the new legal landscape. More surprisingly, the Biden administration appears to take the position that the Supreme Court's new legal standard regarding the consideration of race applies to pipeline programs, or what it refers to as "pathway programs."^[2] What the guidance lacks is substantial advice on implementation or the associated legal risk of the various suggested means of continuing to pursue diversity in a highly scrutinized and contentious legal and political environment.

Key Takeaways:

- The guidance reiterates and quotes from the pivotal final paragraphs of the Chief Justice's majority opinion in which he stated that while colleges and universities may not consider "race for race's sake,"^[3] "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.”^[4]

- Colleges and universities may continue to consider the ways in which race has uniquely impacted individual applicants’ life experiences. Listed examples include “an applicant’s explanation about what it means to him to be the first Black violinist in his city’s youth orchestra” and a “recommender’s description of how an applicant conquered her feelings of isolation as a Latina student at an overwhelmingly white high school to join the debate team.”^[5] Colleges and universities may consider these experiences through the race-neutral characteristics of applicants that these experiences convey “such as courage, motivation, or determination.”^[6]
- Colleges and universities can continue to pursue institutional missions and goals related to achieving student body diversity. “[N]othing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.”^[7] Listed permissible characteristics of applicants that college and universities may consider as a means of pursuing diversity include “broader socioeconomic status; information about the applicant’s neighborhood and high school; and experiences of adversity, including racial discrimination.”^[8]
- College and universities can continue to use “targeted outreach, recruitment, and pipeline or pathway programs” to create a diverse applicant pool.^[9] “The Court’s decision in *SFFA* does not require institutions to ignore race when identifying prospective students for outreach and recruitment.”^[10]
 - However, “[a]s with college and university admissions, institutions may not award slots in pathway programs based on an individual student’s race without triggering the strict scrutiny that *SFFA* applied (though institutions may permissibly consider how race has shaped the applicant’s lived experience in selecting participants).”^[11] The guidance defines pipeline or pathway programs as those that “focus on increasing the pool of particular groups of college-ready applicants in high school and career and technical education programs.”
- Colleges and universities can continue to collect demographic data (including race/ethnicity data regarding the applicant pool) as long as they “ensure[] that demographic data related to the race of student applicants do not influence admissions decisions.”^[12]
 - “[T]he Court criticized the practice of institutions adjusting their admissions priorities dynamically in response to demographic data on the race of students in the admitted class.

The Court’s decision does not prohibit institutions from reviewing such data for other purposes, but institutions should consider steps that would prevent admissions officers who review student applications from using the data to make admissions decisions based on individual applicants’ self-identified race or ethnicity.”^[13]

- Colleges and universities should consider other means of bringing more disadvantaged students to their campuses including by (1) reevaluating legacy or donor preferences; (2) determining whether any application requirements such as a fee or test scores “inadvertently screen[] out students;”^[14] (3) admitting all students who complete a community college program and meet certain academic requirements; (4) implementing a percentage-plan to admit all students who graduate at the top of their high school class; and (5) prioritizing race-neutral criteria such as first-generation status, Pell Grant eligibility, geography, tribal status, or experiences of adversity.^[15] In so advising, the guidance suggests that at this time, colleges and universities should conduct broad reevaluations of their admissions programs and introduce changes beyond those directly required by the Supreme Court’s decision.
- Colleges and universities are encouraged to maintain diversity-focused and race-related retention programs “so long as . . . clubs, activities, and affinity groups are open to all students regardless of race.”^[16]

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Footnotes

[1] U.S. Dep’t of Just., C.R. Div., U.S. Dep’t of Educ., Off. of C.R., Questions and Answers Regarding the Supreme Court’s Decision in *Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina* 1 (Aug. 14, 2023) [hereinafter Guidance], <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf>.

[2] *Id.* at 4.

[3] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (“*SFFA*”), No. 20-1199, slip op. at 29 (June 29, 2023).

[4] Guidance at 2 (quoting *id.* at 39).

[5] Guidance at 2.

[6] *Id.* at 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 4.

[11] *Id.*

[12] *Id.* at 5.

[13] *Id.*

[14] *Id.* at 6.

[15] *Id.* at 5–6.

[16] *Id.* at 6.

Related Attorneys



Ishan K. Bhabha

Co-Managing Partner

+1 202 639 6000



Lauren J. Hartz

Partner

lhartz@jenner.com

+1 202 637 6363



Erica Turret

Associate

eturret@jenner.com

+1 202 637 6383

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