SCOTUS Severely Limits Affirmative Action Admissions in Education: 6 Things You Should Do + 6 Things to Boost Diversity Efforts

Insights
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The Supreme Court just severely restricted higher educational institutions from using race or ethnicity as part of their admissions process, curbing the practice of using affirmative action principles during admissions for schools across the country. A pair of blockbuster decisions released today will force admissions teams to rethink and rework a decades-old approach that had become interwoven into the day-to-day practices of many colleges and universities – not to mention K-12 schools. Now comes the hard part. What should higher education do to comply with the ruling? When can race be considered as part of the admissions process? Does the decision only apply to higher educational institutions or should K-12 schools begin adjusting their policies as well? And what can schools do to boost their diversity, equity, and inclusion efforts in light of this decision? This Insight will provide six steps you should take to comply with the SCOTUS ruling – and six steps to take if you want to elevate your DEI efforts.

Brief Background

Prior to today's ruling, higher educational institutions were permitted to broadly consider race as part of a holistic review of applicants in an effort to create a diverse student body. This practice, sometimes known as "affirmative action," has been permissible since 1978.

But an advocacy group called Students for Fair Admissions (SFFA) – an amalgamation of college and university applicants and prospective applicants and their families – challenged this policy in court. It argued race-conscious admissions actually discriminate against applicants on the basis of race.

- SFFA alleged that Harvard College violated Title VI of the Civil Rights Act, which bars colleges and universities that receive federal financial assistance from discriminating on the basis of race, because Asian-American applicants are less likely to be selected for admission than similarly qualified White, Black, or Hispanic applicants. It also alleged Harvard engaged in racial balancing of its student population, overemphasizing race as an admissions factor, and rejecting workable race-neutral alternative criteria during the admissions process.
- It alleged that the University of North Carolina, as a public university, violated the Equal Protection Clause of the Fourteenth Amendment (which bars the government from race discrimination) by using a race-conscious admissions process.

"Eliminating Racial Discrimination Means Eliminating All of It"

The Supreme Court agreed with the challengers and today ruled that the two admissions programs in question violated the Equal Protection Clause of the Constitution. In a majority opinion authored by Chief Justice Roberts, SCOTUS said there were three main problems with using affirmative action in admissions:

- **They Go Too Far:** First, the Court said that the process doesn't pass the "strict scrutiny" test that needs to be applied whenever one person is favored over another because of their race. SCOTUS noted that "college admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter."
- **They Stereotype:** When a university admits students on the basis of race, SCOTUS says it engages in the "offensive and demeaning" assumption that students of a particular race think alike because of their race. This stereotyping is contrary to the core purpose of the Equal Protection Clause, the Court said.
- **They Have No Expiration Date:** When SCOTUS issued a key affirmative action ruling in 2003, it said that race-conscious admissions programs must one day end. Permanent racial preferences would offend the Constitution, it said, and expected that the use of racial preferences would no longer be necessary "in 25 years." Fast-forward two decades and both Harvard and UNC had no end to their race-conscious admissions programs in sight. Thus, with no meaningful end point, the race-conscious admissions process was found unconstitutional.

SCOTUS Keeps Some Affirmative Action in Admissions Alive – But Just Barely

All that said, the Supreme Court didn't kill affirmative action in admissions altogether. It said that nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life during the admissions process. This includes stories of courage and determination, how heritage or culture motivated them to assume a leadership role or attain some other goal, challenges they overcame, skills they built, or lessons learned.

However, the majority opinion takes great pains to say that such a discussion must be *directly tied to that applicant*, and not just a general discussion on race. The discussion must be concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university.

6 Things You Should Do to Comply with the New Affirmative Action Ruling

By overturning the decades-old affirmative action standard for admissions, SCOTUS is now forcing schools to largely take a race-neutral approach to admissions. You should immediately take action to ensure compliance with the new law of the land. Here are six steps you should consider at once.

1. **Reformulate Your Admissions Process.** Higher education institutions should immediately work with legal counsel to reshape their admissions processes to ensure they are race-neutral

enough to pass the new legal test. Your existing admissions processes may not be in compliance with this new standard. The amount of review needed will depend entirely on your starting point. For some, it might be a simple endeavor. For others, it could require an extensive rehaul of your current process including rewriting policies, reworking forms and evaluation documents, adjusting prospective student communications, and retraining admissions staff.

2. **Take a Fresh Look at Checkboxes.** You may want to revisit your approach to checkboxes on application materials related to race and ethnicity. Starting August 1, the Common App will give you the option of hiding information about race or ethnicity you receive from applicants. On the other hand, some schools may be required to gather this data for compliance with accreditation standards or funding program requirements and may choose to obtain this information. Regardless, the Supreme Court ruling now prohibits you from using it as a raw data point during your admissions decisions. You'll need to treat the data in a more neutral manner no matter where it comes from – or you might opt to not receive it unless required for a specific purpose.
3. **Adjust Your Materials.** Review your admissions criteria to determine whether you need to adjust your public-facing and internal practices. You should clearly define your admissions criteria to ensure transparency and fairness – and to demonstrate compliance with the new legal standard. Focus on objective and other measures that will comprise the bulk of your decision-making such as grades, test scores, extracurricular activities, and personal achievements that are not directly related to race or ethnicity but instead directly and concretely to their life: such as challenges they've overcome, skills they've acquired, lessons they've learned, etc.
4. **Give Thought to Essays.** Consider developing prompts designed to elicit responses that will help you learn about the aspects of an applicant's life the Court said can be considered. Higher education institutions should work with counsel to determine how best to handle application essays that mention race or ethnicity not concretely tied to their life. The Court was very clear in its majority opinion: universities may not simply use application essays as a backdoor to get around what it ruled was unlawful. "What cannot be done directly cannot be done indirectly … In other words, the student must be treated based on his or her experiences as an individual – not on the basis of race."
5. **Consider an Audit.** You may want to consider working with your counsel to conduct legally privileged self-audits of your admissions practices on a regular basis to ensure you are in compliance with the new standard, making any adjustments as necessary.
6. **Support Your Admissions Personnel.** Train your admissions officers and staff to ensure they are aware of the new standards and understand how to implement compliant policies.

Note: Even though the Supreme Court decision addressed admissions in higher education, the same principles apply to **K-12 schools**. The court's opinion relies on, among other laws, Title VI of the Civil Rights Act of 1964 which generally applies to schools receiving federal financial assistance.

You should note, however, that even for those schools not receiving federal financial assistance, other federal and state laws still prohibit discrimination on the basis of race, ethnicity, and color. For

example, among others, federal laws such as Section 1981 of the Civil Rights Act and a school's 501(c)(3) tax-exempt status prohibit race discrimination regardless of whether the school receives federal financial assistance. In short, we would anticipate the same outcome with respect to K-12 private schools using race in their admissions processes as we saw from SCOTUS today.

For this reason, K-12 schools should not use race as a plus factor or deciding factor in their admissions decisions and should avoid practices such as asking parents to provide a photo of their child for admissions purposes. While you may need to retain checkboxes asking about color, race, or ethnicity on your admissions applications to satisfy accreditation standards or funding requirements, you'll need to make sure this information is not used as part of the admissions process.

6 Things You Can Do to Boost Diversity In Your Student Population

Even though the Supreme Court ruling now prevents higher education institutions from using race or ethnicity as a raw data point during the admissions process, there are proactive steps you can take to continue to prioritize your student population diversity. Here are six steps to consider – many of which can be directly provided or supported by your Fisher Phillips counsel.

1. **Consider the Big Picture.** If you don't already, consider revising your admissions process to take a more holistic approach rather than simply focusing on test scores, grades, and other objective criteria. Broaden your scope to consider other factors, including some specifically outlined by SCOTUS as being permissible – such as extracurriculars, personal achievements, obstacles applicants themselves have overcome, lessons they have learned in life, skills they have acquired, etc. – that provide a wider view of student experiences. You may also want to revise or develop a mission statement addressing diversity or inclusivity goals.
2. **Expand and Target Your Recruiting Base.** You can attain a more diverse applicant pool by reconsidering where you invest your recruiting resources. You can evaluate areas that include traditionally underrepresented communities to see your applicant pool become more diverse in all sorts of ways. Consider partnering with local community organizations that support college-bound students and developing relationships with high schools in these areas (and not just simply visiting them once per year). Additionally, consider recruiting transfer students from community colleges or ending legacy preferences.
3. **Call on Your Alums.** Let your alumni networks know that you take your commitment to diversity seriously and want their help in boosting these efforts. Local alumni groups can help you identify and support diverse students that you can target with direct or broad recruiting efforts.
4. **Show, Don't Tell**. Students are just one piece of the overall school environment, and a diverse workforce on your campus can help signal to your prospective students that your school values diversity and would value them. Concerted efforts to recruit diverse employees go hand-in-hand with efforts to recruit diverse students. Consider recruiting teachers or professors from HBCUs

or other diverse colleges and universities while eliminating restrictive experience requirements (such as having taught for a certain number of years).

5. **It's Not Just About Admissions.** Your work doesn't end when you bring aboard a more diverse class of students – it's just beginning. It's now your job to develop an inclusive community where all of your students will feel welcomed, supported, and celebrated. Partner with teams outside of admissions to improve efforts across the board, which could include affinity groups, revamped curriculum offerings, mentoring programs, cultural centers, an international focus, and various other initiatives. Declining diversity is often self-perpetuating; diverse students are likely to find schools with minimal diversity unattractive. Efforts to retain diverse students and support their success will help attract other students like them.
6. **Train Your Personnel.** Finally, consider providing cultural competency and implicit bias trainings for your existing personnel, along with revamped anti-discrimination, anti-harassment, and anti-retaliation trainings, in order to foster a more inclusive and welcoming community.

Note: some states may restrict some of these activities based on local laws taking aim at DEI efforts. Work with your Fisher Phillips counsel to determine which of these actions are a viable option for your school.

How Did We Do With Our Predictions?

All seven of our authors correctly predicted we'd see Students for Fair Admissions win their cases, and they each got the number of Justices on each side of the case correct: 6-3 in the *North Carolina* case and 6-2 in the *Harvard* case (Justice Jackson recused herself from the second case since she was a member of the Harvard Board of Overseers).

Only one of our writing team members (Suzanne Bogdan) predicted that Chief Justice Roberts would author the majority opinion. Bogdan also correctly predicted that Justice Kavanaugh would author a concurrence, and Jenna Rubin correctly predicted a separate concurrence from Justice Thomas.

Five of our seven authors (Bogdan, Jennifer Carroll, Brian Guerinot, Kristin Smith, and Sheila Willis) correctly predicted that Justice Jackson would author a dissent in the UNC case, and Rubin, Smith and Willis also correctly predicted that Justice Sotomayor would issue the dissent in the Harvard case.

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 policies to comply with today's SCOTUS ruling. We will continue to monitor the latest developments and provide updates as warranted, so you should ensure you are subscribed to Fisher Phillips' Insight system to gather the most up-to-date information.

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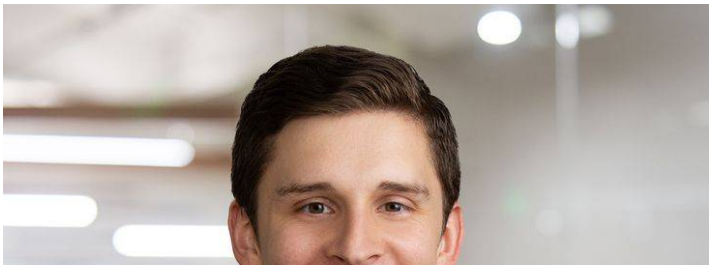

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