

# 6 STEPS FOR PRIVATE AND INDEPENDENT SCHOOLS IN THE WAKE OF THE SCOTUS AFFIRMATIVE ACTION RULING

Insights  
Sep 19, 2023

Seeing the barrage of lawsuits following the United States Supreme Court's recent decision regarding the use of race in admissions in higher education has left many in K-12 independent and private schools scratching their heads. What does this decision mean for your school and how can you avoid getting sued? While there aren't any silver bullets or magic potions – in fact, few bright lines exist – there are six steps you can take to mitigate your risk.

## First Things First: Where Do You Stand?

If your private or independent school receives federal financial assistance (FFA), you should promptly review the regulatory obligations of your various funding sources. For example, many FFA programs trigger compulsory compliance with a non-discrimination law called Title VI of the Civil Rights Act of 1964, which happens to be one of the laws upon which the Supreme Court based its decision. For schools required to comply with Title VI, this opinion could have a more direct and immediate impact.

However, even for those private schools not receiving FFA, other federal and state laws still prohibit discrimination on the basis of race, ethnicity, and color. For example, 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 FFA. Moreover, many local ordinances have similar non-discrimination obligations relating to both students and employees.

## Related People



**Kristin L. Smith**

Partner, Co-chair K-12  
Institutions

713.292.5621

---

## Industry Focus

Education

In short, while the recent opinion did not involve private or independent schools, we would anticipate the same outcome with respect to K-12 private schools using race in their admissions processes as we saw from SCOTUS.

Almost immediately following SCOTUS's opinion, another lawsuit was filed against Harvard alleging that its admissions policies giving preference to athletes, donor's children, faculty kids, and others discriminate because those applicants are predominately white. Other claims have been asserted, as well, involving scholarship preferences for persons of color.

## **6 Steps You Can Take to Minimize Risk**

Given the SCOTUS decisions and these new developments, our recommendations to private schools include:

- **Review your admissions application, policies, and process.** If it asks an applicant to identify their race, ethnicity, or color, consider your school's options. For some schools, removing these questions entirely will be the answer and it is certainly the most risk-adverse approach. However, other schools may need to track applicants' race, ethnicity, and color for purposes of their accreditation or funding while some may want to track it for their own use for reasons unrelated to admissions. In those instances, you should work with your online admissions application vendor to have the vendor separate the race, ethnicity, and color data from the rest of the application. That way the individuals responsible for making enrollment decisions can be shielded from seeing that information. Also, take a look at your school's admissions policies. If your policies indicate that you consider race, ethnicity, or color when making admissions decisions, it may be time to update them. Keep in mind that asking enrolled students to voluntarily self-identify their race, ethnicity, and color is acceptable.
- **Avoid requesting photographs or videos.** Even if voluntary, avoid asking families or applicants to provide a photograph or video of the child or the family. While it is not necessarily possible to decipher one's race, ethnicity, or color from a photograph, it gives applicants an argument that the school is considering those factors in its decisions.

- **Reconsider preference policies.** Policies giving preference to alumni, donors, or employee's children, as well as siblings and athletes, should be scrutinized by your school both for their impact and their necessity. If your school has a relatively racially well-balanced student body, then these policies may not affect the makeup of the admitted applicant pool. If that is the case, your school may wish to leave the policy in place feeling it is defensible. If your school's student body is not well-balanced, however, then you should consider whether these policies favor any given race over the others. For religious schools, this includes reviewing policies that give preference to applicants who are members of certain religious organizations such as churches, temples, or orders. It is still acceptable for religious schools that are "religious enough" to admit only students of a particular faith.
- **Analyze your financial aid application, process, policies, and donor restrictions.** We anticipate race-based financial aid awards being another point of concern. If your financial aid application asks applicants to identify their race, ethnicity, or color, or gives preference to students of certain races, evaluate your school's risk tolerance. If your school is risk-averse, then you might consider removing those considerations from your financial aid application and award process entirely. Additionally, if your school currently has funds restricted for awarding only to students of certain races, you should work with our legal counsel to determine how your school should proceed. This would involve reviewing gift agreements and associated restrictions on donations to the school and potentially working with donors.
- **Train everyone involved in the admissions process and the board.** As you adjust and revise your admissions policies, practices, and processes, don't forget to train those involved in the admission process so they know how to address any questions that may arise. This includes training your enrollment manager or admissions director, the admissions committee who reviews applications, and any volunteers who might be involved in giving tours or other admissions-related duties. It is also helpful to train your board of trustees on the changes to be sure everyone is steering the ship in the same direction and so they can speak intelligently and supportively in the community.

- **Consider any racially based programming.** Many independent and private schools have tried to think creatively about how to help more diverse prospective employees and students gain experience in their schools, even if only briefly. For example, schools have experimented with semester- or year-long internships and fellowships for diverse prospective employees and special recruiting receptions or shadowing events for diverse students. If these programs require an individual to be of a certain race in order to participate, then you should work with your school's lawyer to review whether the program is illegally discriminatory.

## **Conclusion**

If your school would like help assessing its risk in the aftermath of the SCOTUS opinion, we stand ready to assist. Please reach out to your Fisher Phillips lawyers, the author of this Insight, or any attorney on our [Education Team](#) to obtain practical advice and guidance on how to adapt your policies to comply. 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.