New Admissions Lawsuit Follows Affirmative Action Supreme Court Decision

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On July 3, 2023, the Chica Project, African Community Economic Development of New England (ACEDONE), and Greater Boston Latino Network (GBLN) (collectively the "Complainants") filed a civil rights Complaint with the Department of Education alleging that Harvard College's ("Harvard") continued use of "Donor and Legacy Preferences" violates Title VI of the Civil Rights Act of 1964 ("Title VI"). The Complainants argue that the Donor and Legacy admission preferences are not necessary to achieve an important educational goal and have a "significant" disparate impact on the non-white applicants. [1] The Complainants further claim that the Donor and Legacy Preferences disproportionately advantage white applicants and systematically disadvantage students of color.

The Complaint asserts that "[a]pplicants whose relatives are wealthy donors to Harvard, or whose parents are Harvard alumni, are flagged at the outset of Harvard's admission process and are granted special solicitude and extra 'tips' throughout" the admissions process. The Complaint further claims that nearly 70% of applicants who receive preferential treatment based solely on their legacy or donor-related status are white and are 6-7 times more likely to be admitted than non-legacy or donor-related applicants.

The Complaint requests the Department of Education to open an investigation into Harvard's use of Donor and Legacy Preferences and the resulting unjustified disparate impact. The Complainants seek a finding that Harvard's ongoing use of Donor and Legacy Preferences are discriminatory and in violation of Title VI, and that the Department issue an Order that, if Harvard wishes to continue to receive federal funds, it must immediately cease considering an applicant's legacy and donor-related status, ensure all applicants have no way to identify legacy or donor-related status in their application, and for all other relief the Department finds appropriate.

The Supreme Court Decision

This lawsuit follows the June 29, 2023, Supreme Court decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. __ (2023), [2] in which the Court held that Harvard and the University of North Carolina's ("UNC") (collectively "Institutions") admission programs are unconstitutional because the programs consider an applicant's race as a factor.

By way of background, the Institutions employed "highly selective" admission processes to make their decisions. Admission at each school can depend on a student's grades, recommendation letters, athletics, or extracurricular involvement. Admission to both Institutions can also depend on a student's race. The Institutions' consideration of an applicant's race as a factor for admission was challenged on constitutional grounds.

The Court found that Harvard and UNC's admissions programs were unconstitutional, determining that the Institutions failed to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial review" under the rubric of "strict scrutiny." The interests that the Institutions view as compelling for the admissions programs, such as training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens, cannot be subjected to meaningful judicial review. The Court noted that while those goals are "commendable," they are not sufficiently coherent for purposes of strict scrutiny, and it is unclear how courts are supposed to measure those goals.

The Court also noted that the Institutions' admissions programs failed to articulate a meaningful connection between the means they employ and the goals they pursue. While the Court recognized the tradition of giving a degree of deference to a college's academic decisions, it found the Institutions means to achieve educational benefits of diversity as overbroad, arbitrary or undefined, and under inclusive. The Institutions failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete to permit judicial review which is required by the Equal Protection Clause.

The Court also determined that Harvard and UNC's race-based admissions systems failed to comply with the Equal Protection Clause's twin commands that race may never be used as a "negative" and that it may not operate as a stereotype. The Court was persuaded by the First Circuit's finding that Harvard's consideration of race resulted in fewer Asian-American students, thus the admissions program was used as a "negative." Additionally, the Court found that the Institutions' admissions programs "require stereotyping" when a university admits students on the basis of race.

Lastly, the Court determined that the admissions programs lacked a logical end point as prior precedent required. The Court was unpersuaded by the Institutions' arguments that the end of race-based admissions programs will occur once meaningful representation and diversity is achieved and when students receive the educational benefits of diversity. The Court considered the former as racial balancing and "patently unconstitutional" and the latter lacking clarity for courts to determine when an institution's goals are met.

The Future of Admissions Programs

While the Court effectively overruled decades of prior precedent on college admissions, it expressed that "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the institution." In light of the Supreme Court's decisions and the Complaint that followed, institutions should consider reviewing their admission policies to ensure that the factors used in their admissions process comply with the decision and rulings that are likely to follow.

Members of the Higher Education Practice Group at White and Williams LLP are available to assist institutions with guidance under the new Supreme Court decision. If you have questions, please contact Nancy Conrad (conradn@whiteandwilliams.com; 610.782.4909), Joseph M. Carr (carrj@whiteandwilliams.com; 610.782.4907), or another member of the Higher Education Group.

[1] Disparate impact occurs when policies or practices that appear neutral result in a disproportionate negative impact on a protected class.

[2] Together with *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, 600 U.S. __ (2023).

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.