

HIGHER EDUCATION INFORMATION MEMO

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Departments of Education and Justice Issue Guidance with Respect to *Students for Fair Admissions v. Harvard*

On Aug. 14, 2023, the Office for Civil Rights of the United States Department of Education and the United States Department of Justice issued joint guidance to institutions of higher education with respect to the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*. The guidance, in the form of a [Dear Colleague Letter](#) and a [Q&A document](#), clarifies the Departments' position as to practices that are and are not permissible in the wake of the decision, and encourages institutions' continued use of lawful means to enroll and support a diverse student body. For example:

- The Departments reiterate the Court's statement that institutions may consider individual applicants' personal qualities and characteristics gained through their lived experiences, including those grounded in race, provided that admissions decisions are not made based on race per se.
- The Departments emphasize that the Court's decision does not prohibit institutions from knowing and tracking demographic data about their applicant pools, admitted students and enrolled students, but caution that the racial demographics of these groups should not influence admissions decisions, and that institutions should consider steps that would prevent such influence (presumably, for example, by shielding admissions officers from real-time access to such aggregate data).
- The Departments state that institutions need not ignore race when identifying prospective students for recruitment, and that the use of targeted recruiting to enhance the diversity of institutions' applicant pools, including recruiting targeted at schools and communities comprised of high percentages of underrepresented populations, is lawful.
- The Departments state that institutions may offer bridge and pathway programs to assist underrepresented students in preparing themselves for undergraduate enrollment, including programs that provide an advantage in subsequent admissions processes. The Departments state that underrepresented populations may be targeted for recruitment into these programs, but admonish that institutions may not award slots in such programs based on individuals' race without triggering the strict scrutiny applied by the Supreme Court in its decision.
- The Departments state that institutions may continue to operate diversity, equity, inclusion, belonging and similar programs and offices that aid in the retention of underrepresented students, so long as the resources of these programs and offices are available to all students regardless of race.

- The Departments emphasize that nothing in the Supreme Court’s decision precludes institutions from (a) considering whether practices such as legacy and donor preferences run counter to their efforts to promote equal opportunity, and/or (b) considering whether metrics and requirements such as the consideration of standardized test scores, application fees and certain academic prerequisites inadvertently hinder certain applicants.

Notably, the Departments’ guidance is structured as being limited to issues they consider to be directly implicated by the Supreme Court’s decision, and therefore does not address issues such as targeted hiring programs and race conscious financial aid. The Department of Education has indicated that it will issue further guidance regarding promising diversity and inclusion practices in the coming weeks.

On the whole, the Departments’ advice is generally consistent with, and accurately reflects the scope of, the Supreme Court’s decision. It is worth noting, however, that many of those who initiated or supported the litigation culminating in the decision have already expressed contrary interpretations supporting a broader prohibition of race conscious practices, and as such many of the aforementioned practices are almost certain to be fodder for future litigation. Consequently, institutions will need to determine their comfort with the use of particular strategies based on their respective missions, priorities and risk tolerance.

For more information on how this impacts your institution, please contact [Phil Zaccheo](#), any attorney in Bond’s [higher education](#) practice or the attorney at the firm with whom you are regularly in contact.

