

Takeaways from the District Court Decision in *Students for Fair Admissions v. Harvard: A Preliminary Analysis*

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An Analysis Prepared on Behalf of The College Board Access & Diversity Collaborative

*This preliminary analysis of the U.S. District Court's September 30, 2019 decision in *Students for Fair Admissions v. Harvard* provides a brief overview of the case and surfaces some major legal and policy implications of the decision for the higher education community.¹ A more comprehensive analysis of the case and its implications will be provided by the Access & Diversity Collaborative in coming weeks.*

Overview

On September 30, 2019, the U.S. District Court for Massachusetts rendered a decision in *Students for Fair Admissions v. Harvard*. The plaintiff in that case (Students for Fair Admissions) challenged Harvard's admissions policies and practices designed to advance its diversity goals as unlawfully discriminatory under Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race and national origin by recipients of federal funds.² The district court addressed and rejected four claims of discrimination by the plaintiff that Harvard unlawfully:

- Pursued racial balancing;
- Considered the race of applicants in a mechanical way;
- Failed to pursue viable race-neutral alternatives in lieu of its consideration of race; and
- Engaged in intentional discrimination against Asian Americans.

¹ This guidance has been authored for the Access & Diversity Collaborative by Art Coleman and Jamie Lewis Keith of Education Counsel, LLC. The opinions expressed are those of the authors and do not necessarily reflect those of the College Board or any other individual or organization.

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This guidance is provided for informational and policy planning purposes only and does not constitute specific legal advice. Legal counsel should be consulted to address institution-specific legal issues. More on the Access & Diversity Collaborative is available at: <http://www.collegeboard.com/accessanddiversitycollaborative>.

² The court applied legal principles that the U.S. Supreme Court had applied previously to public institutions under the Equal Protection Clause of the Constitution's Fourteenth Amendment. The extension of those principles to Title VI, which applies to public and private institutions alike, is in line with federal precedent.

Heavily immersed in the unique details of Harvard's admissions policy and how it was implemented, the court addressed each of the plaintiff's claims in a 130-page decision, with meticulous attention to the mix of quantitative and qualitative evidence. Notable in the court's analysis of 30 witnesses' testimony is the preeminence of the competing experts' views and statistical analyses, and its determination of more or less convincing aspects of evidence presented.

It is important to not over- or under-state the impact of the decision, including in public communications. Although this decision is an important milestone in the landscape of cases addressing challenges to diversity-related admissions policies that consider race and ethnicity, this decision is highly-fact based, only reflects the conclusion of a single federal district (trial) court judge, and binds only the parties involved. This decision is likely to be appealed to the First Circuit Court of Appeals (binding only on institutions in the states of Maine, Massachusetts, New Hampshire, and Rhode Island, and Puerto Rico). Therefore, this decision is unlikely to be the last word in the case or on the issues it presents.

Major Takeaways

1. **The court's decision follows four decades of precedent** that affirms that the educational benefits associated with student diversity in higher education are "compelling" enough to support the limited consideration of race and ethnicity in admissions, with sufficient evidence of need, in line with federal strict scrutiny standards. Amplifying on longstanding educational benefits of diversity, the court recognized the authenticity of institution-specific interests. In particular, it recognized the impact of student diversity on Harvard faculty perspectives (with impact on curriculum and research) and "immersion in a diverse community" as a method of teaching students to "engage across differences."
2. **The court's decision illustrates the significance of institution-specific efforts and investments** associated with policy design (i.e., specific desirable educational outcomes sought and whether, why, and how race and ethnicity of individuals are considered), as well as the supporting evidence and operational approaches that are critical in review, evaluation, and decision-making at every step of a process of continuous improvement.
3. **This court's decision was shaped significantly by witnesses:** the plaintiff's failure to identify applicants claiming harm; the credibility of Harvard's fact witnesses; and the competing world views and data analyses of experts. The plaintiff called no witness who alleged harm from an "unfairly deflated personal rating." And, unlike some other admissions cases in the past, major portions of evidence shaping the court's opinion in this case were grounded in statistical analysis proffered by experts.
4. **The resolution of this case depended in substantial part on the court's conclusion about the design and authenticity of Harvard's individualized holistic review policy.** While recognizing that the admissions process was not perfect, the court pointed to several features of the policy and its effect to bolster its view that the policy satisfied strict scrutiny standards under federal law. In particular, the court recognized that Harvard's policy considered race "in a flexible, nonmechanical way" and "as a 'plus' factor in the context of individualized consideration of each and every applicant" with "serious consideration to all the ways an applicant might contribute to a diverse educational environment." The court further observed that such individualized consideration was afforded to applicants of all races. Correspondingly, the court observed: "[i]t is vital that...racial minorities be able to discuss their

racial identities in their applications[, recognizing that] race can profoundly influence applicants' sense of self and outward perspective [and applicants have] the right to advocate the value of their unique background, heritage, and perspective...." (See points 1 and 2 below for additional details associated with issues of holistic review.)

Importantly, the court "emphatically repeat[ed] what the Supreme Court said in *Fisher II*," i.e., that Harvard must "continue to use [its valuable] data to scrutinize the fairness of its admissions program" and to make "refinement[s]" in light of changing conditions.

5. **The court addressed the question of merit, concluding that the challenged policy did not result in the admission of un- or under-qualified students.** The court's analysis was also shaped by its conclusion that the policy did "not result in under-qualified students being admitted in the name of diversity." Instead, the court found that "the tip given for race impacts who among the highly-qualified students in the applicant pool will be selected for admission to a class that is too small to accommodate more than a small percentage of those qualified for admission."³

Key Portions of the Court's Ruling: The Plaintiff's Specific Claims

The trial judge ruled on four specific claims pressed by the plaintiff, with the following conclusions:

1. Harvard did not practice racial balancing.

Applying established law that institutions may not pursue fixed quotas or engage in racial balancing, the court found that Harvard treated applicants as individuals in the admissions process, with "every applicant compet[ing] for every seat," through a process of individualized holistic review. Holistic individualized review of each candidate continued at every step of the process, regardless of the data on race. Harvard's consideration of "one pagers" that tracked race and ethnicity (among other information) was not fatal to its defense. The court noted that "[a]lthough a university could run afoul of Title VI's prohibition on quotas even where it stopped short of defining a specific percentage and instead allowed some fluctuation around a particular number...Harvard's admission policy ha[d] no such target number or specified level of permissible fluctuation." Moreover, there was "considerable variation" in the percentage of Asian American students admitted from year-to-year. For these reasons, the court concluded that Harvard's awareness of numbers (with no target numbers "firmly in mind") was, in fact, necessary "to remain compliant" with strict scrutiny standards "including monitoring...the availability of race-neutral alternatives."

2. Harvard considered race as a non-mechanical plus factor.

In finding that Harvard's consideration of race was an important factor in the admission of many black and Hispanic students, the court nonetheless concluded that race was considered consistently with the requirements of federal law—in an "individualized consideration" that was "never... the 'defining

³ The court noted in this context that "other tips in the admissions process, like so many facets of modern-day American life, disproportionately benefit individuals in the majority and more affluent group."

feature' of applications." With respect to expert witness estimates of the "average magnitude of Harvard's race-related tips," the court concluded:

- The magnitude of a tip for any applicant could not be "precisely determined" because the consideration of race was "contextual" as part of the "holistic evaluation of each applicant."
and
- The estimated magnitude was "comparable" in "size and effect" to the tips upheld by the Supreme Court in *Grutter* (less % effect) and in *Fisher II* (about the same % effect).

Perhaps most consequentially, the court also recognized that the magnitude of the tips associated with race was "modest," finding as fact that:

Every student Harvard admits is academically prepared for the educational challenges offered at Harvard....[M]ost Harvard students from every racial group have a roughly similar level of academic potential, although the average SAT scores and high school grades of admitted applicants from each racial group differ significantly.⁴

3. Harvard had no adequate race-neutral alternatives available.

Assessing the necessity of Harvard's consideration of race in admission, the court examined the viability of various neutral alternatives in light of the benefits of diversity that Harvard sought, and the relevant administrative expense associated with such efforts. The court rejected the following as viable alternatives, based on its determination that these practices would have no meaningful impact on diversity, except to result in a significant decline in the admission of black and Hispanic students if consideration of race in admissions were to cease:

- Eliminating early action decisions in admissions;
- Eliminating tips in favor of recruited athletes, legacies, applicants on the dean's or director's interest list, and children of faculty and staff;
- Augmenting recruitment and financial aid;
- Admitting more transfer students;
- Eliminating consideration of standardized test scores; and
- Pursuing place-based quotas.

In addition, carrying forward a point from *Grutter*, the court observed that Harvard was not obligated to sacrifice its institution-specific values relating to academic excellence when evaluating the viability of race-neutral alternatives.

4. Harvard did not intentionally discriminate.

Addressing the plaintiff's claim that Harvard should admit Asian Americans at a "higher rate than" white applicants,⁵ the court found that there was "no evidence of any racial animus whatsoever;" no "...evidence that any particular admissions decision was negatively affected by Asian American identity;" and no evidence of prohibited intentional discrimination under court precedent (described in sections above). The court found no pattern or pervasive use of stereotyping of any kind.

⁴ The court concluded separately that standardized tests were "imperfect measures" that could be a "useful metric" when considered with other background factors associated with an applicant.

⁵ Plaintiff did not claim that Harvard was excluding Asian Americans. In fact, as the court observed, "Asian Americans are admitted at virtually the same rate as white applicants."

More specifically, the court found the testimony of admissions officers to be “consistent, unambiguous, and convincing” that there was no discrimination against Asian Americans in the admissions process, including with respect to personal ratings. Given that Asian Americans account for 6% of the population in America but comprised nearly a quarter of Harvard’s class, the court found it “reasonable for Harvard to determine that students from other minority backgrounds are more likely to offer perspectives that are less abundant in its classes and to therefore primarily offer race-based tips to those students.” Moreover, SFFA failed to produce a “single Asian American applicant who was overtly discriminated against or who was better qualified than an admitted white applicant....”

Further, the court found competing statistical models and expert opinions “inconclusive,” also recognizing that statistics alone address the “what” but not the “why” and therefore, didn’t tell the whole story. In this context, the court observed that any bias in personal ratings, which contributed to “slight” statistical differences in ratings of white and Asian applicants, could have come, in part, from teacher and counselor recommendations—a point that neither the court nor Harvard was in a position to determine.

Next Steps

This preliminary analysis will be supplemented within several weeks by a more comprehensive and in-depth analysis of the decision. In addition, the Access & Diversity Collaborative will host a public webinar on October 23, 2019 from 2-3:30 pm EST to further address this decision, as well as this week’s decision in *SFFA v. UNC* that denied summary judgment to all parties. Registration is required for the webinar; please register [here](#).

In the meantime, if you have questions, please reach out to Wendell Hall (whall@collegeboard.org); Emily Webb (emily.webb@educationcounsel.com); Art Coleman (art.coleman@educationcounsel.com); and Jamie Lewis Keith (jamie.keith@educationcounsel.com).