

**The Access and Diversity Collaborative's Quarterly Update:
News and Developments of Note
October 2020**

The College Board's Access and Diversity Collaborative (ADC) quarterly newsletter informs sponsors regarding the happenings in federal education policy and national news principally on issues of higher education access, enrollment, diversity, and inclusion. We also highlight relevant sponsor news and updates on ADC publications and events, with periodic ADC sponsor features.

Federal Court and Agency Enforcement Watch

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ADC in Action

Federal Court and Agency Enforcement Watch

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, First Circuit Court of Appeals.

Background: On September 30, 2019, the U.S. District Court for Massachusetts rendered a [decision](#) in *Students for Fair Admissions v. Harvard*. In the decision, 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.

Opening Arguments at the First Circuit Court of Appeals: On September 16, opening arguments in *Students for Fair Admissions v. Harvard* took place as part of the appeal of the District Court decision initiated by Students for Fair Admissions (for details about the district court decision and SFFA's claims on appeal, see [April 2020](#) and [June 2020](#) newsletters). During the oral arguments, the three judge panel focused significantly on procedural issues, pressing on the question of whether Harvard or SFFA must bear the burden of showing that discrimination against Asian-American applicants did or did not occur. SFFA's argument focused on its claim that Harvard impermissibly considered race as part of the admissions process, which detrimentally impacted Asian American applicants. Harvard argued that SFFA must bear the burden of establishing that Harvard intentionally discriminated against Asian Americans applications, which it argued SFFA failed to do as established by the holding of the District Court. The three-judge panel now will evaluate what they heard during oral arguments, briefs filed by each party and amici as they proceed toward a decision.

Relevant Resources: In October 2019, the ADC hosted a webinar on the federal trial court decision, a recording of which is available [here](#). In January 2020, the College Board and EducationCounsel published an [analysis](#) of the decision that includes:

1. A distillation and analysis the district court's 40-page evaluation of statistical models presented by the parties; and
2. Major takeaways from the decision, along with implications for institutional action.

Students for Fair Admissions, Inc. v. University of North Carolina-Chapel Hill, U.S. District Court for the North Carolina Middle District. Since the [June 2020 newsletter](#), no significant updates have occurred in *Students for Fair Admissions vs. University of North Carolina-Chapel Hill*.

***Students for Fair Admissions, Inc. v. University of Texas at Austin*, U.S. District Court for the Western District of Texas.** On July 20, Students for Fair Admissions filed a lawsuit against the University of Texas at Austin (UT) in the U.S. District Court for the Western District of Texas on behalf of two white students who were denied admission to the University of Texas. The [complaint](#) argues that UT discriminates on the basis of race in undergraduate admissions decisions in violation of the Equal Protection Clause of the Constitution, Title VI of the Civil Rights Act of 1964, the Equal Protection Guarantee in the Texas Constitution, the 1972 Equal Rights Amendment to the Texas Constitution, and the Texas Civil Practice and Remedies Code.

SFFA asserts that UT unlawfully uses race as more than just a “plus factor” in its admissions process, to achieve an aim of racial balancing rather than educational diversity. Additionally, with claims focused on 2017 and 2018 entering classes (and to distinguish the current action from *Fisher II*, where UT prevailed at the U.S. Supreme Court on similar claims regarding 2008 policies), SFFA claims that: [1] UT’s consideration of race is no longer justified; [2] that race neutral alternatives are now adequate so that consideration of race is not necessary; and [3] that UT has not sufficiently periodically reviewed their policy to determine an ongoing need to consider race.

Notably, SFFA also seeks to overturn 40 years of legal precedent that affirm that the educational benefits of diversity are sufficiently compelling to justify the limited consideration of race in admissions. It argues that U.S. Supreme Court decisions have been grounded in “mistakes of fact and law,” that postsecondary institutions can’t be trusted to comply with the law because they “take advantage of any leeway” and they’re not truly seeking diversity for its educational benefits.

***Smith v. Regents of the University of California*, Superior Court of California for Alameda County.** On August 31, a state court trial judge granted a [preliminary injunction](#) requiring that University of California (UC) schools pursuing a test-optional model immediately stop using the ACT and SAT in their admissions and scholarship decisions. The plaintiffs had argued that due to pandemic disruptions, access to standardized tests for students with disabilities was “either impossible or impaired,” in part because of limited access to legally required accommodations. In granting the injunction, the court concluded that students with disabilities were denied meaningful access to the tests— without the option to submit test scores and with “virtually non-existent” test accommodations in the COVID environment. As a consequence, students with disabilities were denied the “second look” that was afforded to other test-takers for most of the “test optional” UC IHEs involved in the litigation. (For those test-optional schools, which followed a holistic review admissions process, no test scores were considered in a first-round review of all applicants; but a second-round review was available to applicants submitting test scores, and the higher outcome of the two reviews was the one that counted.)

The court further concluded that the public interest in continuing the use of tests was “not clear,” particularly where three UC campuses had already adopted test blind policies, effective immediately. Further, the court noted that “UC [did] not seriously argue that the test [was] a valid and effective means of determining admissions nor [did] it deny that non-disabled, economically advantaged, and white test takers [had] an inherent advantage in the test process”—all “likely exacerbate[d]” by “current pandemic conditions.”

U.S. Department of Justice Investigation of Yale University. On October 8, the U.S. Department of Justice [filed a lawsuit](#) against Yale University alleging that Yale discriminates against applicants based on their race in violation of federal civil rights laws. The [complaint](#) further alleges that Yale admissions

applies an “oversized, standardless, intentional use of race” in a manner that benefits Black and Hispanic applicants and harms white and Asian applicants.

This lawsuit follows a letter dated August 13 in which the U.S. DOJ [notified](#) Yale University that the Department, “has determined that the university has violated, and is continuing to violate, Title VI of the Civil Rights Act of 1964 by discriminating on the basis of race and national origin in its undergraduate admissions with respect to domestic non-transfer applicants to Yale College.” In order to voluntarily come into compliance with Title VI, the Department noted that, “Yale must agree not to use race or national origin in its upcoming 2020-2021 undergraduate admissions cycle, and, if Yale proposes to consider race or national origin in future admissions cycles, it must first submit to the Department of Justice a plan demonstrating that its proposal is narrowly tailored as required by law. Any such proposal should include an end date to Yale’s use of race.” In response to this letter, Yale University President Peter Salovey issued a [statement](#) reaffirming the University’s “steadfast commitment to diversity.”

Trump Administration Executive Order on “Combating Race and Sex Stereotyping.” On September 22, President Donald Trump signed an [Executive Order](#) titled, “Combating Race and Sex Stereotyping.” With a stated purpose to, among other things, “combat offensive and anti-American race and sex stereotyping and scapegoating,” the EO establishes requirements associated with the military (section 3); federal contractors (section 4); federal grantees (section 5); federal agencies (section 6); federal agencies (section 7); and employers subject to Title VII of the Civil Rights Act of 1964 (section 8). The EO is effective as of September 22, 2020, except with respect to federal contractor obligations.

Seeking to eliminate “hierarchies based on collective social and political identities rather than the inherent and equal dignity of every person as an individual,” the EO squarely takes on notions of white privilege as “discredited,” “racialized” and “malign ideology.” Further, it challenges federal agency training efforts that it characterizes as “rooted in the pernicious and false belief that America is an irredeemably racist and sexist country;” perpetuating “racial stereotypes and division;” and creating pressures to “ensure conformity of viewpoint.”

Due to the ambiguity of numerous provisions of the EO, its potential inconsistency with other federal law, and notable issues of free expression and due process implicated in its design, prospects are strong that it may be challenged in federal court. Further, in the event that a new Administration takes office in January of 2021, prospects of rescission would appear high. That said, it remains presently in force, and should be evaluated with care among those entities subject to its terms.

U.S. Department of Education Investigation of Princeton University. On September 16, the U.S. Department of Education [notified](#) Princeton University that it was under investigation to determine whether it failed to comply with Title VI of the Civil Rights Act of 1964, which provides that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The event reportedly triggering this investigation was Princeton University President Christopher Eisgruber releasing a [statement](#) admitting the existence of systemic racism at Princeton University and a commitment to begin the work to address and eliminate it. On September 17, Princeton University issued a [statement](#) in response to USED’s letter reaffirming its commitment to address systemic racism on campus and noting that it intends to comply with the records request in the letter, “looks forward to furthering [its] educational mission by explaining why [its] statements are consistent not only with the law, but also with the highest ideals and aspirations of this country.” As of September 25, over 80 university presidents have signed a [letter](#) urging USED to end its investigation.

Enrollment Policies and Practices

Relevant Articles

- On September 21, *Inside Higher Ed* published the results of its [2020 Inside Higher Ed Survey of College and University Officials](#) about the state of college admissions. Among other key findings, the survey shows that a majority of respondents had not filled their incoming classes by July 1 (far beyond the traditional May 1 deadline), a majority of those who chose to pursue test optional policies during the pandemic do not anticipate to returning to a test requirement in the future, and a “record number” indicated they were “very concerned” about filling their incoming classes.
- On August 19, *The Chronicle of Higher Education* published an article titled “[For Many Large Universities, Test-Optional Is ‘Uncharted Territory.’ Here’s How One Is Adapting.](#),” which discusses the way that Texas Tech. University adapted its admissions practices in light of their temporary shift to test optional.

Civil Rights and Higher Education

- On September 9, U.S Department of Education (USED) Secretary DeVos published a final rule titled, “[Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities.](#)” The final rule relates to freedom of speech and religious freedom protections under the First Amendment. According to USED, this rule “help[s] ensure that public institutions uphold fundamental rights guaranteed by the First Amendment to the U.S. Constitution and that private institutions adhere to their stated institutional policies regarding freedom of speech, including academic freedom.”
- On August 14, USED Secretary DeVos [announced the launch of a new resource](#) website related to implementing Title IX, including the Administration's new Title IX rule. The website includes links to the final Title IX rule and previously published summaries and fact sheets on the rule. According to the Department, the website will “serve as an online hub for information and resources students can use to understand their rights under Title IX.”
- On August 12, a U.S. District Court denied a motion for a preliminary injunction against the implementation of a final Title IX rule issued by USED Secretary DeVos, which had been filed by 17 state attorneys general. As a result, the rule went into effect on August 14. The U.S. District Court for the District of Columbia will still consider the lawsuit against the Department, but in the meantime, the rule goes into effect while that case moves forward. In the wake of the issuance of the final rule on Title IX on May 6, multiple organizations filed lawsuits against the U.S. Department of Education claiming that the new rule was fundamentally inconsistent with the purpose of Title IX (see June 2020 newsletter [here](#)).

Financial Aid and Cost of College

- On September 9, the Consumer Financial Protection Bureau (CFPB) [announced](#) the creation of a two-part podcast series titled, “Financial inTuition.” The series will provide information to students, parents, and practitioners on managing finances before, during, and after college.
- On July 30, the Century Foundation published a report titled, “[Should States Make the FAFSA Mandatory?](#),” that summarizes which states require students to complete the Free Application for Federal Student Aid (FAFSA) and the impacts of such requirements.

ADC in Action

- On August 14, the National Association for College Admission Counseling published a report titled “[Ensuring All Students Have Access to Higher Education: The Role of Standardized Testing in the Time of COVID-19 and Beyond](#),” that analyzes inequities related to standardized testing as part of a college admissions process and provides recommendations to address those inequities.
- On August 10, the University of Virginia’s Racial Equity Task Force released its report “[Audacious Future: Commitment Required](#),” that outlines “12 key initiatives to improve racial equity at UVA” and includes concrete actions that the University can take as part of those initiatives.

Upcoming Events

- **College Board Virtual Forum—October 26-28, 2020**
As part of Forum, the ADC will be hosting one session:
 - **Enrollment Management Strategies that Advance Institutional Missions Regarding Diversity—Tuesday, October 27, 2020, 12:15-1 pm**
Colleges and universities continue their pursuit of diverse, inclusive learning environments. As part of this work, enrollment management leaders recognize the value of authentic and integrated enrollment strategies that reflect considerations regarding recruitment, aid, and more. This session will focus on effective enrollment management strategies, including those that can advance diversity aims and can bolster the legal defensibility of considerations of race in admission. Presenter will share strategies that are both viable and legally sustainable for outreach, recruitment, and aid, including discussion of the relevant legal advantages and risks. This discussion will also include reflections on the COVID-19 pandemic.

More information and registration available [here](#).
- **Fall 2020 ADC Webinars**
 - **Engaging Campus Stakeholders on Enrollment Issues Associated with Student Diversity**
October 20, 2020, 1:30-3 pm EST
Sign up for the webinar [here](#).

During a time in which higher education admissions practices are under intense scrutiny, clarity regarding key concepts associated with diversity issues has never been more essential. Indeed, these issues—particularly those relevant to the consideration of race and ethnicity in admission—predominate in media and in court, where strict scrutiny defines the landscape. With the goal of supporting enrollment and campus leaders as they engage with colleagues and their communities on issues associated with student diversity and admissions, this webinar will offer insights and guidance on how best to successfully navigate the current landscape, with a focus on key concepts, model definitions, and effective rebuttals to myths on issues associated with diversity that continue to plague our national and institutional dialogues. This webinar will also preview a new publication, “Engaging Campus Stakeholders on Enrollment Issues Associated with Student Diversity: A Communications Primer,” which will be released in a few weeks.
 - **Major Federal Developments Affecting Higher Education Diversity and Admission: Harvard, UNC, and UT Updates and Implications**
November 16, 2020, 3:30-5 pm EST
Sign up for the webinar [here](#).

This webinar will provide the latest news and insights from the current wave of federal litigation and administrative agency enforcement activity related to the consideration of race, ethnicity, and sex in admissions and other enrollment decisions—with a particular focus pending federal court litigation involving Harvard, UNC, and UT. In addition to providing a comprehensive overview of the relevant policy and legal landscape, the presenters identify policy and practice strategies that institutions of higher education should be taking as they advance mission-based diversity goals in legally sustainable ways.

- **Foundations for Enrollment Management to Achieve Mission-Based Diversity Goals: The Basics of Law and Policy**
December 15, 2020, 1-3 pm EST
Sign up for the webinar [here](#).

This webinar, designed for mid-level and junior staff, will provide an introduction to the basics of law and policy related to institutional diversity goals and enrollment strategies designed to achieve those goals. It will offer a primer on basic concepts, core legal principles, and how those principles are applied under law. Several case examples will illustrate the law in action, with time for participant and panelist engagement

If you would like your institution/organization to be considered for future Sponsor Spotlights, please send a brief description of your initiative or practice to Emily Webb (emily.webb@educationcounsel.com).