

The U.S. Department of Justice and Department of Education Release New Information About Using Race in Higher Education

September 30, 2013

On September 27, 2013, the U.S. Department of Justice and Department of Education released a [document](#) entitled “Questions and Answers About *Fisher v. University of Texas at Austin*.” This is the first guidance released by either department since the Supreme Court’s June 2013 ruling in that case.

In the new guidance, the departments state that the Court’s ruling in *Fisher* did not change “long-standing precedent recognizing that colleges and universities have a compelling interest in ensuring student body diversity.” According to the departments, the race of an application may still “be considered as one of several factors in higher education admissions as long as the admissions program meets the well-established ‘strict scrutiny’ standard.” Admission policies must be narrowly tailored to achieve the educational benefits of a diverse student body, and each college or university must be able to demonstrate that workable race-neutral alternatives are insufficient to meet this goal.

The departments further state that *Fisher* does not change the “standard of scrutiny that courts must apply when evaluating such admissions programs,” as set forth in the Court’s earlier rulings in *Grutter v. Bollinger*, *Gratz v. Bollinger*, and *Regents of the University of California v. Bakke* (opinion of Powell, J.). Accordingly, the departments maintain that educational institutions may continue to rely on the guidance that these departments issued in 2011 (the “Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education” and “Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools”). The departments will also continue to rely upon this guidance in investigating and resolving discrimination complaints.

The departments do not specifically address those portions of *Fisher* that, some commentators have argued, reflect a lesser degree of deference to colleges and universities. Nor do they discuss what a college or university must show in order to prove the absence of workable race-neutral alternatives under the narrow tailoring analysis.

Foley Hoag has been at the forefront of the *Fisher* ruling, offering compliance and strategic planning issues for counsel, administrators, and policymakers in higher education. For more on key compliance measures after *Fisher* [click here](#).

On behalf of client the Asian American Legal Defense and Education Fund, a leading civil rights group, Foley Hoag filed an amicus brief in *Fisher* urging the U.S. Supreme Court to affirm the constitutionality of the university’s undergraduate admissions program.

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