



Iowa General Assembly

2016 Legal Updates

Legislative Services Agency – Legal Services Division

https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf

Purpose. Legal update briefings are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative matters of recent court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although a briefing may identify issues for consideration by the General Assembly, a briefing should not be interpreted as advocating any particular course of action.

COLLEGE AND UNIVERSITY ADMISSIONS — AFFIRMATIVE ACTION

Filed by the United States Supreme Court

June 23, 2016

Fisher v. University of Texas at Austin

No. 14-981

https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf

Background Facts and Prior Proceedings. Prior to 1996, in assessing applicants for admission to the University of Texas at Austin (UT Austin), UT Austin's admissions policy gave preference to racial minorities. After the United States Court of Appeals for the Fifth Circuit held in *Hopwood v. Texas*, 78 F. 3d 932 (1996) that "any consideration of race in college admissions violates the Equal Protection Clause [of the Fourteenth Amendment]," the Texas Legislature in 1998 enacted the Top Ten Percent Law, which guarantees admission to any of the state's public universities to students graduating in the top 10 percent of their class at a Texas high school. Texas public universities filled the remaining incoming freshman class capacity based on an applicant's performance as measured by the Academic Index (AI), a combination of an applicant's score on the SAT and high school academic performance, and the Personal Achievement Index (PAI), a holistic review of an application that results in a numerical score.

In 2003, the United States Supreme Court (Court) issued opinions in two cases relating to affirmative action at the University of Michigan (UM). In *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court held that UM's use of race in its undergraduate admissions policy was a violation of the Equal Protection Clause because UM's system of allocating points for minority applicants "is not narrowly tailored to achieve respondents' asserted interest in diversity." In *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court held that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."

Post-*Grutter* and after UT Austin conducted a year-long study of its admissions policy that concluded the policy was not providing "the educational benefits of a diverse student body," the policy was revised to add a Personal Achievement Score (PAS) component to the PAI. The PAS is comprised of a review of an applicant's essays and supplemental material, and an evaluation of the applicant's potential contributions to UT Austin's student body based on experience, activities, service, and other special circumstances. Special circumstances include aspects of the applicant's family and home environment and the applicant's race. However, the admissions officer who makes the final decision on an application does not know the applicant's race, only the applicant's PAI/AI score.

A student, Abigail Fisher, who was not in the top 10 percent of her high school class, sued UT Austin and university officials claiming that she was denied admission in 2008 because she is Caucasian, a class she alleged is disadvantaged by the holistic review process (PAI) in violation of the Equal Protection Clause.

The United States District Court for the Western District of Texas entered summary judgment in the university's favor and the United States Court of Appeals for the Fifth Circuit affirmed. The United States Supreme Court granted certiorari and vacated the judgment of the Court of Appeals in 2013 *Fisher v. University of Tex. at Austin*, 570 U.S. ____ (*Fisher I*), because "it had applied an overly deferential 'good-faith' standard in assessing the constitutionality of the University's program," and so remanded the case to the Court of Appeals to review the parties' claims concerning UT Austin's admissions policy under the correct legal standard of strict scrutiny. The Court of Appeals again affirmed the entry of summary judgment in UT Austin's favor and the Supreme Court granted certiorari for a second time.

Holding. The race-conscious admissions program in use at UT Austin at the time of Abigail Fisher's application is lawful under the Equal Protection Clause.

Issue. Does consideration of race as a component of UT Austin's admissions policy constitute a violation of the Equal Protection Clause?

Analysis. *Fisher I* set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative action program: First, a university may not consider race "unless the admissions process can withstand strict scrutiny," i.e., it must show that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary" to accomplish that purpose. Second, the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." Third, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school bears the burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice.

Justice Kennedy, writing for the four-member majority, determined that UT Austin's admissions policy articulated concrete and precise goals, including destroying stereotypes, promoting cross-racial understanding, and preparing the student body for an increasingly diverse workforce and society. UT Austin's year-long study concluded its race-neutral policies and programs were unsuccessful in achieving UT Austin's goals. The gains in minority enrollment occurring after race was considered as a component of the admissions policy "show that consideration of race has had a meaningful, if still limited effect on the diversity of the University's freshman class." However, "[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality."

The petitioner suggested removing the Top Ten Percent Plan cap, but Justice Kennedy posited that "[a] system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training." Such a tactic would be "in deep tension with the goal of educational diversity as this Court's cases have defined it..." and would create "perverse incentives for applicants," such as "discourag[ing] students from taking challenging classes that might lower their grade point averages."

Justice Kennedy observed "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement." He further opined "it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with constitutional promise of equal treatment and dignity." He concluded that "[i]t is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies."

Because no other suggested alternatives "considered or discussed in the course of this litigation have been shown to be 'available' and 'workable' means through which the University could have met its educational goals," UT Austin "has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored." And, as averred in the opinion, "*Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals."

Dissents. Justice Thomas filed a dissenting opinion. Justice Alito also filed a dissenting opinion, in which Justices Roberts and Thomas joined.

In his one-page dissent, Justice Thomas reaffirmed that "a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause." He would overrule *Grutter* and reverse the Fifth Circuit's judgment.

Justice Alito's 51-page dissent concluded that the majority failed to satisfy the strict scrutiny standard for the following reasons: 1) Evidence UT Austin relied on to prove the necessity of race-based admissions was identified three or more years after UT Austin implemented the race-based policy; 2) UT Austin's failure to keep data and conduct a study of the freshmen admitted under the Top Ten Percent Plan "demonstrates that UT unthinkingly employed a race-based process without examining whether the use of race was actually necessary; and 3) Circumstances the majority considered, such as "that this litigation has persisted for many years, that UT's policy may have changed over time, and that this case may offer little prospective guidance," had no "bearing whatsoever on the merits of this suit." Therefore, Justice Alito also concluded that UT Austin failed to meet "its burden to show that the plan was narrowly tailored to serve compelling interests." Justice Alito opined that the Court should reverse and send the case back to the District Court.

Impact in Iowa. Under the race-neutral Regent Admission Index (RAI) approved by the State Board of Regents for classes starting in the fall of 2016, students applying to Iowa State University, the University of Iowa, or the University of Northern Iowa must achieve an RAI of at least 245 and take the minimum number of required high school courses in order to qualify for automatic admission. Like the Texas Top Ten Percent Law, the RAI does not consider race. However, Iowa students who achieve a score of less than 245 are considered for admission on an individual basis. Depending on the specific university, such consideration may include trends of performance and rigor of schedule, extenuating circumstances impacting performance, ACT/SAT composite and sub-scores, class rank, and class size.

In a letter responding to questions regarding the admissions policies utilized by Iowa's public universities, State Board of Regents Executive Director Robert Donley stated that the Court's decision in *Fisher* is not anticipated to have an impact

on the Regent universities. Mr. Donley's letter is attached.

LSA Monitor: Kathy Hanlon, Legal Services, (515) 281-3847

Governing Iowa's public
universities and special schools

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Iowa State University
University of Northern Iowa
Iowa School for the Deaf
Iowa Braille and Sight Saving School
Lakeside Laboratory Regents Resource Center
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Robert Donley, Executive Director

September 12, 2016

Kathy Hanlon
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Des Moines, Iowa 50319

Re: Regent Admissions Policies - Affirmative Action

Ms. Hanlon:

You recently inquired as to the impact of the U.S. Supreme Court ruling in *Fisher v. University of Texas at Austin* on the Regents institutions. You also posed the following questions:

- Once the universities have accepted all of the Iowa residents who meet the [RAI] criteria, what criteria do the universities use when filling the remaining spaces for the freshman class, and for acceptance in the University of Iowa's Law School and Medical School?
- Are the universities' admissions policies totally race-neutral?
- Do the universities work to increase the enrollment of "underrepresented minorities" and to "enroll students who can offer underrepresented perspective?"
- What is included in the more "holistic set of criteria" referenced in a June 23, 2016 statement from SUI Chief Diversity Officer Georgina Dodge?

In response to your inquiry, the universities have provided the following information regarding the extent to which race is a factor in admissions, and campus efforts to increase diversity in enrollment and admissions. Should you have any additional questions or require additional information, please do not hesitate to contact the Board office.

Undergraduate Admissions

Undergraduate admissions policies at the Regent universities are race-neutral, so the decision in *Fisher v. University of Texas at Austin* is not anticipated to have an impact on the Regent universities. For undergraduate admissions, the Board of Regents has adopted a Regent Admissions Index (RAI), which is a composite score based on the following factors: SAT or ACT score, high school grade point average, high school percentile class rank (when available), and number of core high school courses completed. Resident applicants with a RAI of 245 or higher are automatically admitted.

Students who do not meet the RAI requirements may be reviewed on an individual basis to determine whether to accept an application for admission. The University of Iowa conducts a holistic review of a student's application materials to determine if he/she has the ability to be successful at the institution, or if there are circumstances that negatively impacted the educational

record but are not otherwise reflective of the potential for success. This holistic review process considers individual course grades, trends of performance and rigor of schedule, subject specific test scores to identify potential areas of weakness, and extenuating circumstances that may have contributed to a period of poor performance.

Iowa State University conducts a complete review of individual students based on the following factors: grades in core courses; grade trends throughout high school; overall grade point average; ACT/SAT composite and sub-scores; class rank; and changes in class rank and class size throughout high school. The purpose of this review is to predict the ability of the student to be successful at the university.

The University of Northern Iowa conducts a holistic review of a student's application materials; including: strength of academic core courses taken, GPA in core courses, ACT/SAT composite and sub-scores, written personal statement, motivation to pursue a 4 year degree, letters of recommendation, overall trend in academic performance, and extenuating circumstances that may have impacted performance in high school.

Graduate/Professional Admissions

Graduate and professional admissions at each of the three Regent universities is conducted on a competitive basis, and race is not a specific factor in the process. At the University of Iowa, graduate programs are encouraged to utilize a student's complete admissions application portfolio. This portfolio consists of quantitative measures, such as GPA and test scores, and qualitative components indicative of potential for graduate work. Qualitative components include letters of recommendation, statement of purpose or essays, and a "match" of student interests with those of the department or program. Professional program admissions is considered under a similar holistic review, taking into account performance in undergraduate study, standardized test scores, letters of recommendation, personal statements, written and oral communication skills, and personal interview.

Iowa State University requires that all degree-seeking graduate students have graduated with a bachelor's or post-baccalaureate degree from a regionally accredited U.S. institution, or from a recognized foreign institution that has bachelor's (or equivalent) degree requirements similar to those in the United States. Full admission status may be granted to an applicant who has achieved a grade point average of 3.00 (on a 4.00 scale), or who ranks in the upper one-half of his/her undergraduate class. Applicants whose native language is not English must demonstrate proficiency in the English language by achieving a specified minimum score on the Test of English as a Foreign Language (TOEFL). Applicants who meet these overall Graduate College requirements are then considered by the specific graduate program to which they seek admission. Program-specific admission requirements vary, but all include quantitative and qualitative elements, such as GPA and standardized test scores, letters of recommendation, match of potential student interest to the program, essays, and prior experience.

The University of Northern Iowa engages in two levels of review for admissions to a graduate or professional program. A general review is conducted to determine if minimum standards for admissions have been satisfied. A personalized review is then conducted, which considers multiple factors specific to the particular discipline to determine if a student has the potential to be successful in the program. The general review determines whether an applicant has a bachelor's degree from an accredited institution, has a 3.0 GPA and familiarity with the English Language, and meets the minimum TOEFL score. Qualified applicants are submitted to department/program-specific admissions review committees. The committees consider strength of academic record, specific degree area, letters of recommendation, scores on graduate admissions tests, trend of academic performance, and work experience. Individual program criteria based on professional standards and class/cohort size may also be taken into account.

Diversity Efforts in Enrollment/Admissions

While the admissions application process is race-neutral, each Regent university engages in additional efforts to increase diversity and encourage application of underrepresented groups. The University of Iowa primarily focuses on outreach and recruitment efforts to achieve diversity. This includes contacts with colleagues and alumni to identify qualified underrepresented applicants, follow-up with contacts made through activities with undergraduate pipeline programs, recruitment efforts coordinated with programs and colleges, and direct contact with potential applicants to encourage application.

Iowa State University primarily focuses on outreach and scholarships targeting underrepresented student populations. The George Washington Carver and Multicultural Vision scholarships provide financial support to diverse applicants - up to 100% tuition for minority students who meet the RAI standards. Iowa State directs recruitment resources to high schools with highly diverse student bodies in an effort to encourage underrepresented application. The University partners with specifically identified Des Moines area middle and high schools to provide information and support to students in preparation for a successful college experience. The University also partners with two Des Moines area elementary schools as part of the ISU for 4 program, which encourages and provides incentives for students to prepare academically for college. Multicultural students are brought to campus to participate in a number of scholastic camps directed at underrepresented students.

The University of Northern Iowa has been increasing efforts to recruit qualified applicants from underrepresented groups. The University hosts group campus visits for middle school, junior high, and high school students in an effort to increase overall college awareness. Targeted events, such as Multicultural Visit Day and the UNI Youth Leadership Conference, are also hosted on campus. The University partners directly with UNI CUE, TRiO/Upward Bound, Gear Up, and similar internal and external offices, agencies, and organizations. Representatives participate in recruitment fairs and activities that focus on diversity (I'll Make Me a World, CelebrAsian, Latino Heritage Festival, etc.). Scholarship programs are also utilized to encourage minority enrollment, including the Residents of Iowa Scholars of Excellence and the Multicultural Scholars Award. In the Graduate College, graduate assistantship awards are provided to underrepresented students based on their status.