

## Biden Administration Provides Guidance to Colleges and Universities Following SFFA

On August 14, 2023, the Biden Administration’s Civil Rights Division of the U.S. Department of Justice (“DOJ”) and the Office for Civil Rights of the U.S. Department of Education (“DOE”) jointly issued two pieces of guidance on the role that race-conscious admissions measures can still play in higher education following the Supreme Court’s decision in [Students for Fair Admissions, Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina](#) (collectively “SFFA”): a [Q&A](#) regarding SFFA and a [Dear Colleague Letter](#) introducing that guidance.<sup>1</sup>

[Per the DOJ](#), such guidance documents “do not have the force and effect of law” but “still serve many valuable functions,” including advising the public on how agencies understand and are likely to apply binding statutes and legislative rules. These guidance documents will thus provide educational institutions with valuable insights into how they can continue to promote diversity on campuses following SFFA’s decision to sharply curtail race-based affirmative action.

In this client alert, we summarize the Departments’ guidance to colleges and universities. While non-educational organizations may fairly suspect that this guidance reflects how the Biden administration feels about the impact of SFFA on other areas of American life, such as the recruiting, hiring, and retention of diverse employees, we caution against reading these documents too broadly. The Departments themselves state that their guidance addresses only “the application of [the requirements of the Constitution and Title VI of the Civil Rights Act of 1964] to higher education admissions.”<sup>2</sup>

### **Dear Colleague Letter:**

In their Dear Colleague Letter, the DOJ and DOE explained that their guidance is meant to help colleges and universities “continue to pursue campuses that are racially diverse and that include students with a range of viewpoints, talents, backgrounds, and experiences.”<sup>3</sup> The Departments also affirmed their “commitment to ensuring that educational institutions remain open to all, regardless of race,” and their position that “[l]earning is enriched when student bodies reflect the rich diversity of our communities.”<sup>4</sup> The letter also vows to “support institutions that recognize that such diversity is core to their commitment to excellence, and that pursue lawful steps to promote diversity and full inclusion.”<sup>5</sup>

The Dear Colleague letter then suggested several measures schools can take following SFFA to “lift the barriers that keep underserved students, including students of color, from equally accessing the benefits of higher education.”<sup>6</sup> These suggested measures include:

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<sup>1</sup> “A Dear Colleague Letter is a guidance document used by a government agency to explain the agency’s interpretation or application of a particular statute, regulation, or rule.” *Navient Solutions, LLC v. Dep’t of Educ.*, ---F.Supp.3d---2022 WL 17736785, at \*3 n.3 (E.D. Va. Dec. 16, 2022).

<sup>2</sup> See *Questions and Answers Regarding the Supreme Court’s Decision in [SFFA]*, U.S. Dep’t of Justice & U.S. Dep’t of Educ., (Aug. 14, 2023), [https://www.justice.gov/d9/2023-08/post-sffa\\_resource\\_faq\\_final\\_508.pdf](https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf) (“Q&A”), at 1 n.1.

<sup>3</sup> See *Dear Colleague*, U.S. Dep’t of Justice & U.S. Dep’t of Educ., (Aug. 14, 2023), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf> (“Letter”), at 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

- “Redoubling efforts to recruit and retain talented students from underserved communities, including those with large numbers of students of color”;
- Placing “a greater focus on fostering a sense of belonging for students currently enrolled”;
- Focusing “on providing students with need-based financial support”;
- Partnering “with school districts in underserved communities, supporting improved access to high quality advanced courses, and investing time and resources into programs that identify and nurture students’ potential”;
- Collaborating with local community colleges to “enroll, support, and graduate students from disadvantaged backgrounds”;
- Considering “the ways that a student’s background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to campus”; and
- Examining potentially regressive admissions practices, such as preferencing “legacy status or donor affiliation.”<sup>7</sup> Per the Departments, such preferences “are unrelated to a prospective applicant’s individual merit or potential . . . further benefit privileged students [and] reduce opportunities for others who have been foreclosed from such advantages.”<sup>8</sup>

### **Question and Answer:**

The Departments elaborated on these suggestions in their Q&A. The Departments first summarized the Supreme Court’s decision in *SFFA*.<sup>9</sup> They then reassured admissions offices that schools can “continue to embrace appropriate considerations through holistic application-review processes” that “provide opportunities to assess how applicants’ individual backgrounds and attributes—including those related to their race, experiences of racial discrimination, or the racial composition of their neighborhoods and schools—position them to contribute to campus in unique ways.”<sup>10</sup> For example, colleges remain free to consider “a guidance counselor or other recommender’s description of how an applicant conquered her feelings of isolation as a Latina student at an overwhelmingly white high school to join the debate team.”<sup>11</sup> The key, per the Departments, is that any such consideration must value “*that student’s*” characteristics and treat her as an individual, not simply as a race.<sup>12</sup>

Next, the Departments listed ways that schools could continue to promote diversity. In addition to the strategies discussed above, these steps include:

- Considering “the full range of circumstances a student has faced in achieving their accomplishments, including financial means and broader socioeconomic status; information about the applicant’s neighborhood and high school; and experiences of adversity, including racial discrimination”;
- Pursuing “targeted outreach, recruitment, and pipeline or pathway programs,” provided that “their outreach and recruitment programs do not provide targeted groups of prospective students preference in the admissions process, and provided that all students . . . enjoy the same opportunity to apply and compete for admission”;
- Targeting “school districts or high schools that are underrepresented in the institution’s applicant pool by focusing on geographic location,” or other characteristics, like the percentage of students eligible for free or reduced-price lunch;

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Notably, following a complaint filed by several advocacy organizations alleging that Harvard University’s legacy and donor admissions practices discriminate against applicants on the basis of race (<http://lawyersforcivilrights.org/wp-content/uploads/2023/07/Federal-Civil-Rights-Complaint-Against-Harvard.pdf>), the DOE’s Office for Civil Rights has opened an investigation into Harvard’s use of these admissions preferences in its undergraduate application process. According to the Office for Civil Rights, “opening [a] complaint for investigation in no way implies that OCR has made a determination on the merits of the complaint.” See *Complaint No. 01-23-2231 Harvard University*, <http://lawyersforcivilrights.org/wp-content/uploads/2023/07/Harvard-Complaint-Case-01-23-2231.pdf> (July 24, 2023).

<sup>9</sup> Q&A at 1–2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3.

- Hosting summer enrichment camps for prospective students;
- Considering race “when conducting outreach and recruitment efforts designed to provide information about a pathway program to potential participants,” and giving “pathway program participants preference in its college admissions process,” so long as selection for the pathway program itself is “based on non-racial criteria,” such as GPA;
- Collecting demographic data about applicants, so long as the data about the race of students does not “influence admissions decisions”;
- Seeking to matriculate more first-generation college students or Pell Grant-eligible students;
- Evaluating potential barriers that may screen out students who could thrive on campus, like requiring calculus or admitting many students through an early decision timeline;
- Admitting all students that graduate in the top portion of their high school class; and
- Striving to retain students of all backgrounds once they make it to campus.<sup>13</sup>

**Conclusion:**

The guidance discussed above from the DOJ and DOE should give educational institutions a better picture of what practices are still permissible following *SFFA*. However, such guidance lacks the force of law and, by its own terms, is not intended to address practices other than college and university admissions.

We will continue to closely monitor how *SFFA* may impact our clients, including employers, tax-exempt organizations, and others seeking to achieve their DEI goals.

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<sup>13</sup> See *id.* at 3-6.