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**The Federal Update for June 30, 2023**

From: Michael Brustein, Julia Martin, Steven Spillan, Kelly Christiansen

Re: Federal Update

Date: June 30, 2023

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## News

### Supreme Court Significantly Limits Consideration of Race in Admissions

In a 6-3 decision released on Thursday, the U.S. Supreme Court determined that the University of North Carolina (UNC) and Harvard University’s affirmative action admissions programs are unconstitutional and violate the Equal Protection Clause. The lower courts in both the UNC and Harvard cases had ruled in favor of maintaining affirmative action in college admissions.

The decision effectively overturns precedent set twenty years ago in *Grutter v. Bollinger* (2003) in which the Court said race could be considered as one factor, along with others, in a college admissions process, within certain parameters. However, in *Grutter v. Bollinger*, former Justice Sandra Day O-Connor wrote in the majority opinion that the Court did not intend for race conscious admissions programs to persist forever and that “[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” Chief Justice John Roberts, who delivered the majority opinion in the UNC and Harvard cases, wrote that neither of the programs at issue have a “logical end point,” as the Court expected in the 2003 affirmative action case.

The Court also determined that neither UNC nor Harvard met other requirements set by Supreme Court precedent regarding race conscious admissions and compliance with the Equal Protection Clause, including that race not be used as a negative in the process. The Court determined that these affirmative action processes have led to fewer Asian American students being admitted and that college admissions are “zero-sum” in that “a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.”

The Court’s decision does allow for colleges to consider how a student’s race has impacted his or her life in specific terms, but generalized considerations of race cannot be included in weighing applications. Chief Justice John Roberts writes that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” However, he goes on to say that in these types of situations “the student must be treated based on his or her experiences as an individual—not on the basis of race.” The Court also carves out the possibility for the continued use of race conscious admissions processes for military academies, writing in a footnote that this case does not examine the practice in the context of military academies and the possibility of a unique national interest in the use of affirmative action programs for these institutions.

Justices Sonia Sotomayor and Ketanji Brown Jackson (who participated only in the UNC case due to a conflict of interest with Harvard) wrote dissenting opinions that were joined by Elena Kagan criticizing the majority opinion and expressing concern of the impact on opportunities for racial minorities moving forward.

[The full majority opinion is available here](https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf).

Resources:

Josh Gerstein, Bianca Quilantan, and Kierra Frazier, “Supreme Court guts affirmative action in college admissions,” *Politico*, June 29, 2023.

Author: KSC

### SCOTUS Strikes Down Student Loan Forgiveness Plan

In a 6-3 decision issued today, the U.S. Supreme Court struck down the administration’s student loan forgiveness plan, saying that the 2003 Higher Education Relief Opportunities For Students (HEROES) Act was insufficient authority for the plan. The plan would have provided up to $20,000 of loan forgiveness for federal student loan borrowers who were Pell recipients and who make less than $125,000 per year.

The decision states that “[t]he HEROES Act allows the Secretary of Education to ‘waive or modify’ existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, but does not allow the Secretary to rewrite that statute to the extent of canceling $430 billion of student loan principal.” The questions over the tradeoffs of the plan – financial and otherwise – “are ones that Congress would likely have intended for itself,” the majority opinion reads, and that the President and the Secretary would have to point to “clear Congressional authorization” to justify the program.

In order to forgive student loans, the Court states, the Secretary would have to make what it classifies as “basic and fundamental changes in the scheme” originally authorized by Congress. In the Justices’ opinion, student loan forgiveness goes well beyond simply waivers or modifications, or even a kind of narrower forgiveness that may have been allowable. Writing for the majority, Chief Justice John Robers stated that the forgiveness plan “modified” the law's provisions “only in the same sense that the French Revolution ‘modified’ the status of the French nobility—it has abolished them and supplanted them with a new regime entirely.”

While the administration – and even amicus briefs from former lawmakers – pointed to the intent to grant the administration “substantial discretion” in cases of emergency, the Court cites its recent opinion in West Virginia v. EPA in stating that “given the ‘history and the breadth of the authority’ asserted by the Executive and the ‘economic and political significance’ of that assertion, the Court has ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”

The Court says that the State of Missouri, and potentially other States, are allowed to bring the case – a question that the administration had raised in oral argument – because its quasi-independent student loan servicing entity, MOHELA, is an “instrumentality of the State.” In a dissenting opinion, Justice Elena Kagan and others argue that the State plaintiffs are purely ideological with no real financial stake in the outcome, suggesting that the Court erred in granting standing. The dissent notes that MOHELA is entirely absent as a party for the case as a separate legal entity, and suggests that the stated harm to MOHELA’s ability to issue future loans is purely speculative.

The court rejected a similar case, saying that the plaintiffs lacked standing to challenge the student loan program because they cannot demonstrate that they are “injured” by the student loan forgiveness plan, or that their eligibility for less than the maximum amount of loan forgiveness would be redressable if the plan was struck down.

In a press release, Education and the Workforce Committee Chair Virginia Foxx said she “celebrated” the decision. “This ‘one-time’ ‘cancellation’ of student loan debt was subterfuge for the radical Left’s ultimate goal of taxpayer-funded ‘free’ college for all. This scheme would have emboldened colleges to continue raising tuition, forcing students to borrow even more.”

The White House said that the President was examining options as of the time of publication. However, the debt ceiling legislation signed into law earlier this month prohibits the administration from extending the pandemic-era loan forgiveness past the end of August, and the U.S. Department of Education has already announced plans to resume payments no later than October. Given that the cited authority for the loan forgiveness was based in the Public Health Emergency, which has concluded, it would be difficult for the administration to find another route to similar forgiveness.

Author: JCM

### Charter Discrimination Case Will Not Get Supreme Court Review

Earlier this week the U.S. Supreme Court denied certiorari—a writ which would allow review of a case—to a charter school appealing a lower court decision on discrimination.

The Fourth Circuit Court of Appeals struck down a dress code issued by Charter Day School, Inc., of North Carolina, noting that requiring girls to wear skirts or dresses because of their sex is a clear-cut case of sex discrimination. The lower court’s decision noted that the reasoning presented in the dress code supported a finding of discrimination when it suggested that the requirement reminded all students that girls are “fragile vessels” who should be protected by male students under the principles of chivalry.

The school’s appeal presented a novel argument: that the discrimination should be allowable because the charter school was not a “State actor.” Rather, the school said, it was required by North Carolina State law to be registered as a business, and it argued that its contractual relationships were with parents rather than with the State. These arguments represented an attempt to expand on a Maine school voucher decision decided last year, which said that schools which received vouchers of public funds were not necessarily “deputized” by the State to provide a public education. Charter and public school advocates objected to this reasoning, saying that it threatened both school financing systems and the obligations of charters to provide services to students with disabilities, English learners, and others.

With the Court declining to hear the case, the Fourth Circuit decision will stand. However, it is likely that further legal challenges—including those surrounding a recently approved religious charter school in Oklahoma—will be presented to test the same principles in the near future.

Author: JCM

### Foxx and Cassidy Raise Concerns Over Title IX Rule

Last week, House Education and Workforce Committee Chairwoman Virginia Foxx (R-NC) and Senate Committee on Health, Education, Labor, and Pensions Ranking Member Bill Cassidy (R-LA) sent a letter to Secretary of Education Miguel Cardona criticizing the Biden administration’s process in rewriting Title IX regulations.

In April of this year, ED released a proposed rule on Title IX and athletics. The proposed rule would prohibit educational entities that receive federal funding from imposing outright bans prohibiting transgender athletes from participating on teams consistent with their gender identity. Foxx and Cassidy argue that the proposed rule “ignores the physiological differences between men and women and undoes generations of progress for women and girls’ participation in school sports.”

The letter criticizes the administration’s transparency in developing the policy. Foxx and Cassidy state that it is unclear whether ED consulted with medical professionals or received medical feedback before drafting the proposed rule. Additionally, they note that details pertaining to a listening session by ED’s Office for Civil Rights were not made public, nor is it clear what kind of a role the White House Gender Policy Council played in drafting the proposed rule.

Foxx and Cassidy also raise concerns over the proposed rule’s limited administrative review and public comment period. They state that the Office of Management and Budget (OMB) review period – the final stage before a rule is published – was only nine days and they argue that this short period prevented the public from being able to express feedback to OMB. Three organizations reached out to Cassidy’s office to say that they requested meetings with OMB officials to discuss the proposed rule, but those requests were cancelled because the rule was no longer being reviewed by OMB.

Further, ED limited its public comment period on the proposed rules to 30 days, which Foxx and Cassidy say is less than other comment periods on similar proposed rules, including other Title IX proposed rules.

In response to these concerns, Foxx and Cassidy ask ED to provide them with the specific process they used to develop the rule, a list of medical professionals they may have consulted and how they used that feedback, and documents related to listening sessions and comments on the notice of proposed rulemaking. Additionally, they ask ED to explain why the OMB review was only nine days and why ED only allowed a 30-day comment period for the proposed rule.

[The letter can be found here.](https://www.help.senate.gov/imo/media/doc/foxx_title_ix_letter.pdf)

Author: BNT

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