

Legal Issues in Admissions for Independent Colleges

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What we will cover:

- **Status of Use of Race/Ethnicity in Admissions**
 - ❖ **Fisher v. University of Texas at Austin**
 - ❖ **What to watch for**
 - ❖ **Best Practices**
- **Best Practices for Admissions of Students with Disabilities**
- **Revocation of Admissions**



Brief Overview of Fisher

- After being denied admission to UT (Austin) in 2008, Abigail Fisher sued, alleging the university's admissions policy discriminated against her on the basis of race.
- UT Admissions Plan
 - ❖ automatic admission for all TX students who graduated in to 10% of high school class;
 - ❖ holistic/individualized review process, which included consideration of a number of factors, including race and ethnicity.



Brief Overview of Fisher

- District Court upheld under strict scrutiny analysis established in Grutter v. Bollinger (2003).
- Affirmed by Fifth Circuit.
- Fisher appealed to Supreme Court, which reaffirmed that educational benefits of diversity are a compelling interest, BUT remanded back to Fifth Circuit for strict scrutiny review (without ruling on merits of policy).
 - ❖ Held that too much deference was given to University's judgment re: attainment of diversity goals



Brief Overview of Fisher

- Fifth Circuit again upheld in 2014
 - ❖ Noted that race and ethnicity was “factor of a factor”
 - ❖ Holistic/individualized review was complement to Top Ten Percent Plan
 - ▶ Diversity of background and unique talents
 - ❖ Necessary step given mandatory Top Ten Percent plan, which did not result in diversity
 - ▶ Segregated high schools
 - ▶ Gaps in standardized test scores



Brief Overview of Fisher

- UT had a compelling interest in its diversity goals
 - ❖ Educational benefits
 - ▶ Improved quality in education
 - ▶ Preparation for students in global marketplace
 - ▶ Civic readiness



What are the takeaways?

- Diversity-related benefits are compelling interest that may justify use of race and ethnicity in admissions
 - ❖ Must be tied directly to university's diversity policy/goals
- Critical mass determinations
 - ❖ Must have specific objectives, benchmarks and measure(s) of success



What are the takeaways?

- Need varied and comprehensive plan combining race-conscious and race-neutral strategies
 - ❖ Outreach, recruitment, scholarships (socio-economic/first generation)
- Must be able to show that using only available, workable race-neutral alternatives will not achieve diversity goals
- Must have objective data



What are the takeaways?

- Students admitted through holistic, individualized, race-conscious process must be academically qualified
 - ❖ Basic academic eligibility
 - ❖ Leadership
 - ❖ Unique talents/backgrounds
 - ❖ No quotas



What are the takeaways?

- Context matters
 - ❖ Institutional history, makeup, previous efforts (successes and failures)
 - ❖ State's history



Is this the end?

- Arguments on December 9
- Associate Justice Kagan recused
- Remaining 8 may be split
 - ❖ What happens if there is a tie??



Americans with Disability Act (ADA)

- Federal civil rights law first passed in 1990
 - ❖ Prohibits discrimination against people with disabilities
 - ❖ Background:
 - ▶ 43 millions of Americans have one or more physical or mental disability
 - ▶ Occupied an inferior status
 - ▶ Society tended to isolate and segregate
 - ▶ Disadvantaged due to unequal treatment and stereotypical assumptions



ADA Overview

- ADA governs almost every entity operating in the U.S.
 - ❖ Title I: Employment
 - ❖ Title II: Public Services (State & Local Governments)
 - ❖ Title III: Public Accommodations
- Title I Enforced by EEOC
- Titles II & III Enforced by the DOJ - Civil Rights Division



Who is protected under ADA?

- ❖ Any person who has a **disability**
- ❖ No formal process to determine eligibility
 - ▶ Instead, a purposefully broad statutory definition



ADA's Definition of Disability

- a **physical or mental impairment** that **substantially limits** one or more of the **major life activities** of such individual OR
- a record of such an impairment OR
- being regarded as having such an impairment



Definition of “Discrimination”

- Broad statutory definition that includes:
 - ❖ Imposition or application of eligibility criteria that screens out (or tends to) individuals with disabilities
 - ❖ Failure to make reasonable modifications in policies, practices or procedures
 - ❖ Failure to take steps to ensure that no individual with a disability is excluded, denied services, segregated or treated differently



Generally, ADA requires:

- reasonable accommodations to otherwise qualified employees and applicants with disabilities;
- auxiliary aids and services necessary for effective communication and program access; and
- reasonable modifications of policies, practices and procedures.



ADA Amendments Act of 2008 (ADAAA)

- Clarified Congress' intent that ADA be broad in scope:
 - ❖ A disability should not be determined with reference to mitigating measures (except vision)
 - ❖ Less demanding standard for “substantially limits”
 - ▶ Impairment need not prevent or significantly/severely restrict
 - ▶ Appropriate comparison is “to most people in the general population”



Major life activities include, but are not limited to:

- caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working



ADA Amendments Act of 2008, cont'd

- Impairment can be episodic and in remission
 - ❖ Dispositive question:
 - ▶ When active, would the person be substantially limited in performing a major life activity?
- Impairment cannot be transitory or minor
- Temporary mental or physical impairment is covered, if impairment substantially limits a major life activity



ADA Title III: Requirements

42 U.S.C. § 12182(a) (2011).

- “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of **public accommodation** by any private entity who owns, leases (or leases to), or operates a place of public accommodation.”



Place of Public Accommodation:

- **Shall not** on the basis of disability:
 - ❖ Deny participation
 - ❖ Allow participation in an unequal benefit
 - ❖ Provide a different or separate benefit UNLESS such action is necessary to provide an individual with an opportunity/benefit as effective as that provided to others (equal opportunity to enjoy benefits)



Place of Public Accommodation:

- Shall make reasonable modifications in policies, practices, and procedures that deny equal access to individuals with disabilities, unless a fundamental alteration would result in the nature of the goods and services provided.
- Furnish auxiliary aids when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.



Place of Public Accommodation must:

- Remove architectural and structural communication barriers in existing facilities where readily achievable.
- Provide readily achievable alternative measures when removal of barriers is not readily achievable.
- Maintain accessible features of facilities and equipment.
- Design and construct new facilities and, when undertaking alterations, alter existing facilities in accordance with the Americans with Disabilities Act Accessibility Guidelines



Place of public accommodation is:

- Not required to provide personal devices such as wheelchairs; individually prescribed devices (e.g., prescription eyeglasses or hearing aids); or services of a personal nature including assistance in eating, toileting, or dressing.



Place of public accommodation:

- May not discriminate against an individual or entity because of the known disability of a person with whom the individual or entity is known to associate.



Direct Threat Exception

- **Exception:** Direct Threat Defense 28 C.F.R. § 36.208 (2010).
 - ❖ “No requirement to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a **direct threat** to the health or safety of others.”
 - ▶ Individualized assessment
 - ▶ Must be based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence



Definition of “direct threat”

28 C.F.R. § 36.104 (2010).

- “...a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”
 - ❖ High standard
 - Factors to consider:
 - » nature, duration, and severity of risk
 - » probability that the potential injury will occur
 - » whether reasonable modifications will mitigate the risk



Best practices:

- Safeguard your school’s application and admissions process by avoiding “screen out” questions during the interview process and by having a clear admissions policy outlining admissions eligibility criteria.
 - ❖ Clear admissions policy applicable to every applicant stating eligibility criteria (academic potential, maturity, achievement, school readiness, ability to meet curriculum, etc.)



Best practices

- Admissions materials should include:
 - ❖ Non-discrimination statement stating that school adheres to state and federal law and complies with the ADA. Students requiring accommodations should contact a designated person; school will undertake an interactive process to determine reasonable accommodations.
 - ❖ Acknowledgement in materials that school has sole discretion in making decisions regarding admission or re-enrollment.



Best practices

- Prior to admission visit, appropriate to inquire whether reasonable accommodations are necessary for the visit
- Train admissions staff and those making accommodation decisions regarding the school's obligations under the ADA. Remember that the school must provide "reasonable accommodations."



Best practices

- Enrolling student may identify food allergies for which they want accommodations
- Have consistent policy/practice for responding to requests for reasonable accommodations. Seek to obtain all relevant information regarding requests for accommodations.
 - ❖ Document your decision regarding whether you can provide reasonable accommodations, and clearly articulate such accommodations.



Accommodations Determinations

- Educational institution must engage in interactive dialogue
 - ❖ Review information provided by student, including medical documentation
 - ❖ Consider whether accommodation is reasonable
 - ▶ May provide equally effective alternative to requested accommodation



What is a reasonable accommodation?

- Accommodation must be reasonable and necessary to allow student to participate (e.g., not just to maximize achievement)
 - ❖ Must not “fundamentally alter the nature of the program”
 - ❖ cannot alter an “essential” aspect of program
 - ❖ Should not give advantage over other students



What is a reasonable accommodation?

- May not cause “undue burden”
 - ❖ “significant difficulty or expense”
 - ❖ Considerations include nature cost of requested accommodation; financial resources of school
Consideration/determination must be on a case-by-case basis.
- Does not require provision of personal services and devices such as wheelchairs, glasses, hearing aids, etc.



Revocation of Admission

- Powers v. St. John's University School of Law (N.Y. 2015)
 - ❖ Part-time law student attended 3 semesters at law school
 - ❖ In application, disclosed some of his criminal background, but not depth/breadth
 - ❖ Had disclosed arrest for more minor crimes
 - ▶ Had in fact been arrested for distribution of LSD



Revocation of Admission

- Law school regularly allowed amendment of applications for minor violations (e.g., traffic violations)
- Amendment not guaranteed.
- Law school appropriately rescinded admission.
 - ❖ **KEY:** Law school would likely not have accepted student if he disclosed true nature of arrest/conviction.



Revocation of Admission

- Some questions to consider:
 - ❖ Should student be subject to code of conduct discipline process?
 - ❖ Since conduct was before he became a student, how much due process?
 - ❖ Has there been consistent application of policies?



Questions?