



## Intimidation at Heart Department of Justice Plan

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The U.S. Department of Justice's recently revealed plan to investigate and sue colleges that wrongly use race in college admissions is a scare tactic meant to dissuade colleges from using race as one of many factors, as permitted by the U.S. Supreme Court.

That is the collective take of several scholars and advocates who reacted to a story of the Justice Department's purported plans broken by *The New York Times* late Tuesday.

"It's an intimidation strategy that seeks to bypass what the Supreme Court has already ruled on and turns enforcement of equal protection on its head because it makes just thinking about race, or acknowledging that racial inequities exist, the same as racial discrimination," said Dr. Liliana Garces, assistant professor of education at the University of Texas School of Law and an expert on equity and access in higher education.

"The message is to intimidate and prevent institutions from continuing to follow what the Supreme Court has already endorsed as constitutionally permissible for institutions to further their educational mission," Garces said in an e-mail to *Diverse*.

Garces was referring to the 2016 case — generally known as *Fisher II* — in which the U.S. Supreme Court upheld the use of race in college admissions as long as it's a small part of a holistic process.

Wednesday evening, however, the Justice Department issued a statement to clarify its position:

"Press reports regarding the personnel posting in the Civil Rights Division have been inaccurate. The posting sought volunteers to investigate one administrative complaint filed by a coalition of 64 Asian-American associations in May 2015 that the prior Administration left unresolved. The complaint alleges racial discrimination against Asian Americans in a university's admissions policy and practices. This Department of Justice has not received or issued any directive, memorandum, initiative, or policy related to university admissions in general. The Department of Justice is committed to protecting all Americans from all forms of illegal race-based discrimination."

David Hawkins, executive director for educational content and policy at the Arlington, Va.-based National Association for College Admission Counseling, or NACAC, voiced concerns similar to

Garces', saying the DOJ initiative "seems intended to invoke a chilling effect on college's ability to consider race and/or ethnicity as one factor among many in college admission decisions."

"Moreover, it sends a clear signal that the administration is less interested in solving long-standing issues related to equity in and access to higher education, and more interested in scoring political points on an issue the Supreme Court decided only 13 months ago," Hawkins said in an e-mail to *Diverse*.

Hawkins said NACAC is advising colleges and universities to "stay the course, and continue to pursue the policies and procedures that were affirmed by the Supreme Court's ruling in Fisher v. University of Texas."

"As always, we urge colleges and universities to meticulously research and document their consideration of the full array of policies at their disposal to achieve their compelling interest in assembling a diverse student body," Hawkins said.

Hawkins also said the purported DOJ effort represents a "massive waste of energy and resources."

Neal McCluskey, director of the Center for Educational Freedom at Cato, a libertarian think tank, said if the goal of the DOJ is to go after public colleges where there is overwhelming evidence of the use of race in a manner that transcends a "holistic fashion," then it's a simple matter of enforcing the law.

"If it is broader than that — it targets public and private institutions and to go after them uses any evidence, no matter how tangential, that African Americans or Hispanics get a leg up in admissions — that signals an activist undertaking that may seek to harass schools into ending any admissions policy that in any way takes race into consideration," McCluskey said in an e-mail to *Diverse*. "That would seem to go far in excess of just trying to enforce the law."

McCluskey said it would also represent a case of the executive branch "trying to make policy unilaterally, which would be unconstitutional and would put schools under constant siege and create lots of wasteful litigation and compliance costs."

Wil Del Pilar, vice president of higher education policy and practice at The Education Trust, a national nonprofit that advocates on behalf of low-income students and students of color, said the data do not even support the notion that there are colleges and universities that need to be investigated for using race as a factor.

"When we look at the data, the data just don't show that white students are being disadvantaged in admissions, especially at selective institutions across the United States," Del Pilar said in a phone interview with *Diverse*.

Del Pilar noted that 33 percent of African American and 45 percent of Hispanic students start out their postsecondary careers at community colleges, where there is no selection criteria.

He said 50 percent of African American and 53 percent of Latino students attend institutions with no or very low selection criteria.

And at selective institutions and public flagships — such as the University of Michigan or UCLA — “we only see 5.2 percent of their enrollment is Black and 8.9 percent is Latino,” even though African Americans and Latinos represent 13.3 and 17.6 percent of the overall population, according to the U.S. Census. At institutions that belong to the Association of American Colleges — an organization of elite institutions of higher education — the numbers are even lower: 4.7 percent Black and 11 percent Hispanic, Del Pilar said.

“When we look at admission at the most selective institutions in the United States, African Americans and Latinos are underrepresented at those institutions,” Del Pilar said. “And so if they are using race as a significant factor in admissions, it’s not showing up in the data.”

Gary Orfield, distinguished research professor of education, law, political science and urban planning at UCLA, said he did not think that either of the two pending affirmative action cases will reverse the major affirmative action precedents, “unless there are additional changes in the Supreme Court.”

“For the moment this is basically a politically motivated effort to throw sand in the gears and frighten colleges to end something the huge majority of selective universities believe to be a basic educational need,” Orfield said in a statement sent to *Diverse*.

The U.S. Education Department did not respond to a request for comment.

Peter McDonough, vice president and general counsel at the American Council on Education, said outside of *The New York Times* report, he has seen no information about the purported DOJ initiative in the area of race-conscious college admissions, although he said he planned to monitor the situation for details.

“Meanwhile, it is important to bear in mind that the Supreme Court just last year reaffirmed that the educational benefit of a diverse student body is a compelling government interest that allows for narrowly tailored consideration of race and ethnicity as one factor in a holistic admissions review,” McDonough said in a statement ACE sent to *Diverse*. “That remains the latest and most applicable articulation of the relevant law in this area. I am confident that colleges and universities that pursue race-conscious admissions have reviewed their policies to make sure they comply with the Supreme Court’s framework.”

There was no shortage of criticism of the purported DOJ plan among Democrats on Capitol Hill.

“Instead of standing up for himself to a president who called him ‘very weak’ and ‘beleaguered,’ Attorney General Sessions has chosen to pick on minority students who are in pursuit of a college education, opportunity, and the American Dream,” said a statement by US Congressman Cedric L. Richmond (D-La.), chairman of the Congressional Black Caucus, speaking in reference to Attorney General Jeff Sessions, who heads the DOJ.

“In doing so, he’s appealing to the lowest common denominator in our country, people who wrongly believe that minority students who benefit from efforts to promote diversity and equality are ignorant, undeserving, and unqualified,” Richmond said.

Not everyone, of course, was displeased to hear that the DOJ may be taking a closer look at how colleges and universities use race in admissions.

The Center for Equal Opportunity, or CEO, a Virginia-based conservative think tank that opposes the use of race in policy, put out a statement saying that it was a “welcome and overdue development that the administration will be taking a hard look at schools that insist on weighing skin color and national origin in deciding who gets admitted.”

“Such discrimination is lamentable, although, unfortunately, the Supreme Court has not shut the door on it,” the CEO statement said. “We welcome the scrutiny of the Justice Department and the Education Department as appropriate and necessary to root out all forms of discrimination and move toward a truly colorblind society.”