



Biden Admin Guidance On Race-Based College Admissions Raises Legal Questions, Experts Say

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- **The Biden administration advised colleges on Monday to continue using race as a factor in admissions, but legal and education experts who spoke with the Daily Caller News Foundation said the guidance might violate the 14th Amendment.**
- **The Department of Justice (DOJ) and Department of Education (DOE) released joint documents providing strategies for colleges to skirt the Supreme Court ruling, such as by considering race and socioeconomic status in recruitment efforts.**
- **“It is disappointing but not surprising that the Biden Education Department’s first move after a Supreme Court decision unequivocally prohibiting the use of race in college admissions is to issue so-called ‘guidance’ encouraging schools to use race in the admissions process,” Defense of Freedom Institute President and Co-Founder Bob Eitel told the DCNF.**

The Biden administration released guidance on Monday urging universities to consider race as a factor in admissions, but legal and education experts who spoke with the Daily Caller News Foundation said the guidance might not be constitutional.

The Supreme Court ruled in June that race-based admission practices are unconstitutional and violate the Equal Protection Clause of the 14th Amendment. The Department of Justice (DOJ) and Department of Education (DOE) guidance advised colleges and universities to consider how a student’s background, including their “experiences linked to their race,” have impacted them, which experts told the DCNF could possibly violate the 14th Amendment.

“It is disappointing but not surprising that the Biden Education Department’s first move after a Supreme Court decision unequivocally prohibiting the use of race in college admissions is to issue so-called ‘guidance’ encouraging schools to use race in the admissions process,” Defense of Freedom Institute President and Co-Founder Bob Eitel told the DCNF.

The guidance advised colleges and universities to racially discriminate in order to achieve a diverse campus. Colleges can “use strategies that remove barriers and expand opportunity” by

considering a student’s full range of circumstances, such as “socioeconomic status” and “experiences of adversity, including racial discrimination.”

“Schools can say whatever they want, but they aren’t allowed to racially balance their student bodies,” GianCarlo Canaparo, senior legal fellow at The Heritage Foundation’s Edwin Meese III Center for Legal and Judicial Studies, told the DCNF. “The Fourteenth Amendment forbids racial discrimination.”

Colleges can also use “holistic application-review processes” to assess issues related to applicants’ “race, experiences of racial discrimination, or the racial composition of their neighborhoods,” according to the guidance. It also says colleges can consider the “ways a student’s background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to campus.”

“Seeking to enroll diverse student bodies can further the values of equality of opportunity embedded in the Fourteenth Amendment and other federal civil rights laws,” the guidance reads.

The guidance also encourages universities to create groups to encourage students to “celebrate their shared identities, interests, and experiences,” but notes they must be “open to all students regardless of race.”

“Equality of opportunity is not the same thing as equality before the law. It entails giving someone ‘a leg up’ —for example, adding points to an applicant’s admissions score based on his race. That was forbidden in *Gratz v. Bollinger*,” Roger Pilon, senior fellow in constitutional studies at the Cato Institute, told the DCNF.

Gratz V. Bollinger is a case from 2003 that declared adding points to the test scores of minorities for the purposes of admissions was unconstitutional and violated the Equal Protection Clause of the 14th Amendment, according to Cornell’s Legal Information Institute.

“Schools seem determined to continue to meet their diversity goals by looking for creative ways to circumvent the clear ban on racial preferences for college admissions,” Mark Perry, senior fellow at medical watchdog group Do No Harm, told the DCNF.

Perry has filed hundreds of civil rights complaints with the DOE’s Office for Civil Rights against colleges and universities that consider race or gender as a factor for various programs.

Universities such as Harvard, Johns Hopkins and Sarah Lawrence College have begun adding essay questions that ask applicants questions about “identity” and “lived experience” following the Supreme Court’s decision on race-based admissions.

“Universities have to be very careful because they will be watched very closely by groups that stand ready to bring legal action to enforce the ban on affirmative action. There are no ‘unless you have good intentions’ exceptions to federal civil rights laws,” Perry continued.

“Rather than suggesting to schools that they skirt the law, the Department should be investigating schools that choose to resist the Court’s decision,” Eitel told the DCNF.

The DOJ and DOE did not immediately respond to the DCNF’s request for comment.