



Affirmative action guidelines dropped by Trump administration

Benjamin Wermund

July 3, 2018

The Trump administration on Tuesday scrapped Obama-era guidance on race-based admissions policies — just as conservatives see a fresh opening to end affirmative action through a changing Supreme Court.

The move comes as a closely watched court battle over Harvard's admissions policies — which has emerged as the next front in the fight over race-based admissions — heats up. Civil rights groups see the Trump administration's decision as part of a larger effort to scrap affirmative action, which has been upheld repeatedly by the Supreme Court, though that could change with the appointment of a new justice soon to be picked by President Donald Trump.

The Justice Department announced it was eliminating 24 federal guidance documents that it deemed "unnecessary, outdated, inconsistent with existing law, or otherwise improper."

Seven of those were documents issued jointly with the Education Department's Office for Civil Rights under the Obama administration that called on school superintendents and colleges to consider race when trying to diversify their campuses.

Universities, however, were already vowing to stick with their admissions policies, despite the Trump administration reversal.

"Four decades of case law make clear that race and ethnicity can be one of many factors that universities can consider during the admissions process," said Peter McPherson, president of the Association of Public and Land-grant Universities, in a statement. "Public universities will continue to operate in accordance with the Constitution, state law, and past court rulings to ensure they appropriately foster a diverse campus to the benefit of all."

Harvard pledged to "continue to vigorously defend its right, and that of all colleges and universities, to consider race as one factor among many in college admissions, which has been upheld by the Supreme Court for more than 40 years."

The largest higher education lobbying group also pushed back. "The Trump administration is sending precisely the wrong message to institutions that are committed to following four decades of Supreme Court precedent," said Ted Mitchell, president of the American Council on Education.

"Colleges and universities that consider race and ethnicity as one factor in a holistic admissions review are committed to following the law of the land. And make no mistake, this is the law of the land. Today's announcement does not change that," said Mitchell, a former member of the Obama administration Education Department.

At the same time some documents were removed, the administration restored on the Education Department's website George W. Bush-era guidance that "strongly encourages the use of race-neutral methods" in admissions.

The affirmative action move is one of the first by the Education Department's new civil rights chief, Kenneth Marcus, who was confirmed by the Senate last month. Marcus previously led a Jewish advocacy group that contended in a Supreme Court filing that "race conscious admission standards are unfair to individuals, and unhealthy for society at large."

He wrote in a Dear College letter about the decision Tuesday that the Obama guidelines "advocate policy preferences and positions beyond the requirements of the Constitution, Title IV, and Title VI."

Education Department officials did not respond to requests for comment. The administration's plans on the guidance were first reported by The Wall Street Journal.

The Supreme Court has ruled multiple times that colleges and universities can use race in admissions, as long as its use is "narrowly tailored." But the high court's support for the policies could erode with the departure of Justice Anthony Kennedy, who was a key swing vote on the issue and wrote multiple rulings supporting race-based college admissions policies.

Most recently, Kennedy authored a 2016 opinion in favor of the University of Texas at Austin over Abigail Fisher, a white woman who sued the school in 2008 after she was denied admission. Kennedy wrote that "considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."

His departure could open the door for a new swipe at affirmative action, and many see the Harvard case as the next best shot.

The university is defending its admissions policies against a lawsuit accusing the school of discriminating against Asian-American applicants — a legal challenge supported by Ed Blum, a prominent anti-affirmative action activist who also pushed the challenge to UT Austin. The Trump administration's Justice Department has waded into that Harvard court battle and has launched its own investigation into the school's admissions policies.

"The federal government has set its sights on challenging Harvard's admissions policies, making clear that the decision to rescind this guidance is part of a concerted effort to dismantle diversity

efforts in higher education," said Todd Cox, policy director at the NAACP Legal Defense and Educational Fund, which helped defend UT Austin's admissions policies.

"I would presume the Harvard case ... is the reason the Justice Department is making the move it's making today," said Anurima Bhargava, who led the Justice Department's Civil Rights Division under the Obama administration and helped draft the guidance the Trump administration is scrapping. "They probably want to weigh in there to say something different than was said in the University of Texas case."

Obama's Justice Department sided with UT Austin in the Fisher case, writing in a brief filed in that case that the university's "policy continues to make a meaningful contribution to the University's goal of ensuring the educational benefits of diversity."

Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute who opposes affirmative action, said he could see the Harvard case "getting to the Supreme Court in a year and a half or two years."

"In a post-Kennedy court, this is definitely one area where the law could change," Shapiro said.

He said the move to scrap the Obama-era guidance is "a shot across the bow."

"For one thing, it will mean administrators will no longer be able to hold up the guidance as a justification for whatever they're doing if they're ever brought into court," Shapiro said. "It signals that the party's over — you really need to evaluate your programs and make sure you can demonstrate you used outreach and socio-economic preferences and looked at these other things. ... Make sure you aren't just using race in a lazy way to achieve diversity."

The Education Department documents done away with Tuesday, however, extend beyond affirmative action.

They include 2011 guidelines issued by the Obama administration for public schools that detailed a number of ways that school districts can consider diversity without making decisions based on the race of individual students. The Obama guidance stressed that school districts must "use race-neutral approaches only if they are workable." But when they're not, "school districts may employ generalized race-based approaches."

Noelle Ellerson Ng, associate executive director of policy and advocacy for AASA, The School Superintendents Association, said the Obama guidance never made a splash with the school superintendents nationwide that her organization represents. It simply outlined suggestions for local communities that determined diversity was a priority, she said.

Now, there's concern that school districts can't consider these avenues without facing consequences, should the Trump administration adhere strictly to the guidance, Ellerson Ng said.

"If schools decide to use race as a factor when they look at how they zone elementary or middle schools, for example, that could come under suspicion in the new Trump schema," she said.