BY DAVID B. RUBIN

STUDENTS FOR FAIR ADMISSIONS, INC.: IMPLICATIONS FOR RACE-CONSCIOUSNESS IN K-12 EDUCATION

How does the U.S. Supreme Court decision on affirmative action affect K-12 schools?

The U.S. Supreme Court's decision, this past June, in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, ended the use of race as a deciding factor in the zero-sum game of college admissions. Unlike colleges, New Jersey public school districts must take all eligible comers, of course, but the court's ruling may have implications at the K-12 level that will require thoughtful consideration by school leaders.

The case is the latest development in the legal framework for race-based decision-making that began with ratification of the Fourteenth Amendment to the U.S. Constitution, shortly after the Civil War. The Equal Protection Clause of that Amendment provides that no state shall "deny to any person . . . the equal protection of the laws." This means that, as a general rule, government should treat similarly situated individuals alike unless there's good reason not to. Our courts have set a low bar for how good that reason needs to be in most cases. A stronger showing is required for distinctions based on certain legally-protected classifications, with race requiring the strongest showing of all.

Several federal and state statutes also come into play. On the federal level, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in any program receiving federal financial assistance. Title VII of the act bans discrimination in employment on the basis of change to race, color or national origin. On the state level, our New Jersey Law Against Discrimination contains similar provisions.

The Supreme Court has developed a rigorous test called "strict scrutiny" to analyze those rare exceptions when the Equal Protection Clause permits consideration of race by government officials and agencies. To survive this scrutiny, there must be some "compelling state interest" in using race as a factor, through measures "narrowly tailored" to serve that purpose. Redressing a demonstrated history of discrimination in a particular workplace, school district or other setting has long been considered legally permissible. But what about open-ended affirmative action measures designed to address discrimination on a societal level, or intended to promote diversity for its own sake?

Even before Students for Fair Admissions reached the U.S. Supreme Court this year, earlier federal court rulings had already circumscribed New Jersey school districts' efforts to pursue diversity in their student bodies and staff. For example, in its 2007 decision in Parents Involved in Community Schools v. Seattle School District No. 1, the Supreme Court considered race-based student assignment plans in the Seattle and Jefferson County, Kentucky, school districts. In Seattle, rising ninth graders were permitted to select any of the district's high schools they preferred to attend. If a particular school was oversubscribed, the district used race as a tie-breaking factor in reassigning students to promote racial balance throughout the district's high schools. Similarly, Jefferson County allowed parents some flexibility in their choice of school, but would consider an individual student's race in determining whether their placement at a particular school would exceed the district's racial balance guidelines. In both cases, the court struck down these plans because an individual's race was the deciding factor in where they were placed.

A majority of the justices, including one who voted to strike down the plans in question there, nevertheless seemed willing to allow districts to pursue diversity through other means like strategic site selection of new schools, consideration of neighborhood demographics in drawing attendance zones, and targeted recruitment of students and staff. Even using race as one factor in a holistic consideration of a student's eligibility for a particular program or placement appeared acceptable to at least five of the nine justices, as long as a student's race alone did not determine the outcome.

Consideration of race on the employment front also has been significantly limited since 1996, when a federal appeals court decided Taxman v. Board of Education of the Township of Piscataway, involving the retention of a Black high school business education teacher over a white colleague, in a layoff, to preserve diversity in an otherwise all-white department. Under New Jersey law, who stays and who goes in a reduction in force is typically a straightforward matter of seniority. In this case, both teachers had

identical seniority. The district could have broken the tie based on its assessment of their relative performance, but the superintendent believed they were equally competent. The district also could have resolved the matter by flipping a coin, but intentionally chose race as the tie-breaker for fear of losing the only Black teacher in the department, and one of only 14 on the high school's 176-member professional staff in this racially diverse district. The school board conceded this was unnecessary to remedy any history of discrimination in its own hiring practices. Its sole motivation was to reap the educational benefits of a more diverse teaching staff.

The court in Taxman ruled that the use of race as a deciding factor in individual employment decisions violated both Title VII and New Jersey's Law Against Discrimination, especially in the case of a layoff that resulted in the termination of an existing employee. New Jersey school districts thus have been forbidden to use race as a tie-breaker in individual personnel decisions for over a quarter of century.

Like Parents Involved, Taxman left room for some race-conscious measures to promote diversity in the workforce. Districts remained free to expand their applicant pool by recruiting at colleges serving predominantly underrepresented minorities, promoting themselves as equal-opportunity employers, or providing race-neutral employment incentives that minority candidates might find especially appealing. Race just could not be the reason for any individual personnel decision.

As the court has grown even more conservative in recent years, critics of affirmative action anxiously awaited another opportunity to limit race-based decision-making in education, and had their chance this past term. In Students for Fair Admissions, the court struck down admissions practices at Harvard University and the University of North Carolina. (Although Harvard is a private institution, it is subject to Title VI, which applies a standard similar to the Equal Protection Clause.) Both institutions proudly took race into account to promote a more diverse student body, and to open the doors of these prestigious universities to students from historically disadvantaged racial groups. Although their admissions programs arguably met the requirements of earlier Supreme Court rulings allowing consideration of race as a "plus factor," the conservative justices now firmly in the majority, including some who dissented from the court's earlier more permissive rulings, disagreed and ended the practice.

What's the impact of this latest ruling on New Jersey's public school districts, given the limitations already imposed by Parents Involved and Taxman? The doors of our public schools are open to all eligible students, so the case will have no bearing on initial enrollment decisions. How about competitive programs, or activities with limited space? Are affinity groups or tutorial programs focused on particular racial or ethnic groups still allowed? What can school districts now do, within the bounds of the law, to help historically underrepresented high school students stand the best chance of admission to the college of their choice?

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The full impact of the court's decision will not be known until the lower federal courts in our jurisdiction interpret it in future cases involving K-12 education. It's a good bet, however, that one passage from the court's opinion in particular will weigh heavily in the balance. Writing for the court, Chief Justice John Roberts rejected the proposition that "there is an inherent benefit in race qua race — in race for race's sake," as well as "the pernicious stereotype that a black student can usually bring something that a white person cannot offer." For the first time now, a majority of the Supreme Court has explicitly questioned not just whether racial diversity for its own sake is legally permissible, but whether it is educationally beneficial at all.

Nothing in the court's decision should be read to condone the racial segregation struck down in Brown v. Board of Education. Yet, given the court's view that race alone is irrelevant, one can readily imagine a challenge to measures attacking de facto school segregation resulting from voluntary housing patterns. After all, one might argue, if there is no educational benefit from racial diversity per se, what's the compelling state interest in promoting it?

The court's decision also could have implications for the New Jersey Department of Education's longstanding mandate that districts pursue proportionate minority representation in each of their schools, a directive that's been on the books in some form since the 1970s. Until this year, the regulation, *N.J.A.C.* 6A:7-1.7(a)(2), required a plan for

[a]ttaining within each school minority representation that approximates the school district's overall minority representation. Exact apportionment is not required; the ultimate goal is a reasonable plan achieving the greatest degree of racial balance that is feasible and consistent with sound educational values and procedures[.]

Since Parents Involved, districts had been prohibited from assigning individual students to schools based on their race, but other measures like redrawing school attendance zones were clearly permissible. Those measures may now be hard to square with the court's view that "race qua race" is a "pernicious stereotype."

This past August, the State Board of Education undertook a controversial overhaul of the Administrative Code provisions on combatting discrimination,

including this regulation. The revised version substitutes the phrase "a representative balance" for "racial balance." The Department of Education claimed that the new phrase "acknowledges the existence of the other protected classes and that the goal is to have minority representation within the student population that approximates the school district's overall minority representation. The proposed amendment provides greater protections to all minority students and to students within all of the protected classes."

This cryptic explanation implies that the term "minority" is no longer tied to race or ethnicity alone. Is the intention now to pursue proportionate representation of students in all legally-protected classifications across schools in the district, including sex, disability, sexual orientation and gender identity? And if not, is it still just racial balance that's the goal? It remains to be seen how broadly the New Jersey Department of Education interprets this new regulation, and whether it will survive challenges in court.

STAFF DIVERSITY? What about the impact on staff diversity? Taxman has long prohibited race as the determining factor in individual personnel decisions. But if consideration of race per se is "pernicious," as the court seems to say, what does that portend for previously permissible efforts to cultivate a faculty diverse enough for minority students to recognize at least some staff members who "look like them." The court's ruling may well encourage those who would argue that even if it remains technically legal to pursue diversity by increasing the applicant pool, it no longer stands on a sound educational footing.

The court's decision could also impact school organizations like National Honor Society, student government or other coveted school groups where districts may want to ensure participation by underrepresented minorities. Some districts across the country have created "at large" positions to ensure diverse representation in these organizations. If race is a necessary criterion for selection to such positions, it's likely that Parents Involved already would have prohibited the practice, but is consideration of race even as a "plus factor" now forbidden?

RACE-BASED AFFINITY GROUPS? What about race-based affinity groups like the Black Student Union? Here there may be a silver lining in the court's decision. Although the court held that colleges may not consider race per se in the admissions process, the majority agreed that colleges may give weight to how race affects applicants' personal experiences when sizing up their ability to overcome obstacles in life or their unique ability to contribute to the institution in other respects.

As Chief Justice Roberts wrote, "In other words, the student must be treated based on his or her experiences as an individual — not on the basis of race." So, it would appear that K-12 organizations that provide a safe space for students to discuss challenges they may face as members of a particular race, or to celebrate that group's cultural heritage, are perfectly consistent with the court's ruling, as long as membership is open to all students who wish to participate.

A "Dear Colleague" letter from the U.S. Department of Education's Office for Civil Rights, also issued this past August, cited numerous scenarios where districts are legally permitted, under Title VI, to "develop curricula or engage in activities that promote racially inclusive school communities." The examples include an African American Students Association, founded by students to discuss issues of particular interest to Black students. The group has hosted speakers who are knowledgeable about African American history and culture and organized field trips to participate in African American cultural activities. All students are welcome to participate in meetings and events organized by the group. As OCR explained, "A student group is not subject to heightened legal scrutiny under Title VI because of the race-related theme of the group, if students are not excluded or treated differently based on race." OCR also confirmed that a "program that is open to all students regardless of race or ethnicity is not subject to heightened legal scrutiny under Title VI merely because it focuses its recruitment efforts on students of a particular race or national origin."

That some students may object to these activities, or find discussion of certain race-related topics uncomfortable, does not in itself render them unlawful. OCR cautioned, however, that student organizations may trigger a Title VI violation if they engage in activities so objectively and pervasively intimidating that they create a hostile environment for members of a legally-protected class. For example, a group that invites an inflammatory speaker who advocates violence against members of a particular race and refers to them with racial slurs, will cross the line if some students are frightened to attend class and thus effectively denied access to their education.

Most importantly, there is now more reason than ever for school districts to confront head on the reasons why so many minority students are at a competitive disadvantage in the college admissions process to begin with. Since racial preferences in college admissions are now illegal, districts would do well to rethink their curriculum, course sequence, prerequisites and educational supports from the ground up, so that all students are prepared to compete for college admissions on a level playing field by the time they enter high school. Guidance counselors should be encouraged to help all students, especially disadvantaged minorities, express to college admissions officers how different factors – including race, if applicable – have impacted their life experiences in ways that better prepare them for college.

The Supreme Court's decision raises more questions than it answers for New Jersey school districts. But with sound legal advice, some creativity and students' best interests at heart, districts will find ways to navigate this new legal landscape.

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