HIGHER EDUCATION
INFORMATION MEMO
JUNE 6, 2024

SDNY Dismisses Challenge to NYU's Law Review Membership Selection Process

On May 30, the U.S. District Court for the Southern District of New York granted New York University's (NYU) motion to dismiss in a lawsuit[1] from a first-year law student claiming that NYU School of Law's process for selecting students to serve as editors of its Law Review gives preference to women and minorities in violation of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. The complaint was dismissed without prejudice on two grounds: 1) lack of subject-matter jurisdiction; and 2) failure to state a claim. This lawsuit is the first legal challenge to a law review diversity policy following the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, 600 U.S. 181 (2023), which struck down race-based admission processes at colleges and universities.

Factual Background

The complaint filed in October 2023 notes that prior to the Supreme Court's decision in SFFA, the NYU Law Review would invite 50 students from the rising second-year class to join the academic journal as editors. Twelve of the 50 spots were filled by the Law Review's Diversity Committee, which required applicants to submit personal statements and gave them the option to submit resumes. The Diversity Committee selected students in consideration of factors that included (but were not limited to) the applicant's "race, ethnicity, gender, sexual orientation, national origin, religion, socio-economic background, ideological viewpoint, disability, and age."

According to the plaintiff, a student identified as "John Doe," NYU Law Review changed its website after the *SFFA* decision by removing any explicit reference to diversity in the membership-selection process, but it is clear "that 'diversity' remains a prime consideration in the selection of members." Doe alleges that the Law Review currently requires applicants to submit a "statement of interest" for consideration by the academic journal's Selection Committee and gives students the option to also submit a resume.

Doe claims that as a heterosexual white male, the application process will subject him to race and sex discrimination and deny him "an equal opportunity to compete for membership" when he applies for Law Review in the summer of 2024. Specifically, Doe asserts that the Law Review uses statements of interest and resumes to "give preferential treatment to women, non-Asian racial minorities, homosexuals, and transgender people when selecting its members."

The Court's Reasoning

First, U.S. District Judge Vernon S. Broderick determined that Doe lacked the necessary standing to bring his lawsuit. The court explained that Doe's allegations concerning what information

1 John Doe v. New York University, 1:23CV10515-VSB-SN (S.D.N.Y. 2023).

students may share with the Law Review in their applications or how that information may be used are speculative and cannot confer standing upon Doe. The court further stated that the complaint is “devoid of any factual support” for Doe’s arguments, as it “does not plead, in other than a conclusory way, how the Law Review is discriminating now or will discriminate in the future.” Doe’s failure to plead factual allegations of a discriminatory selection process implemented by the Law Review established no injury-in-fact, and therefore no basis for standing or the court’s exercise of subject-matter jurisdiction over the case.

Even if Doe had standing to bring his suit, the court held that the complaint would still be dismissed for failure to state a claim under Title VI and Title IX because Doe’s claim lacked “facts supporting his allegation that NYU is giving and intends to give preferential treatment to certain minority groups.” The court added that the Law Review’s commitment to diversity pre-*SFFA*, and even post-*SFFA*, is not unlawful:

"Considering the lack of any language in the selection policy demonstrating a preference for students of a protected class and the absence of any allegations supporting the inference that the selection policy would result in preferential treatment of such students, I cannot conclude that the Law Review’s continued commitment to diversity gives rise to a plausible inference of unlawful conduct."

In effect, this SDNY opinion reinforces the holding in the Supreme Court’s decision in SFFA to expressly acknowledge that universities may consider an individual’s lived experiences or socio-economic challenges in its admission processes, as long as it does not do so based on race or any other protected characteristic alone.

As of the date of this memo, it is unclear whether this case will be appealed to a higher court. Bond will continue to closely monitor this and related affirmative action cases for updates and bring them to you in a timely manner.

If you have any questions about the implications this case may have for your institution, please contact any attorney in Bond’s higher education practice or the attorney at the firm with whom you are in regular contact.

**Special thanks to Associate Trainee Camisha Parkins for her assistance in the preparation of this memo. Camisha is not yet admitted to practice law."*

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