Fall 2015

A Legal Guide for University Admissions Offices: How to Stay Out of Court

Marrissa Bryant  
*Western Kentucky University*, marrissa.bryant@wku.edu

Christian Montgomery  
*Western Kentucky University*, christian.montgomery@wku.edu

Hillary Smith  
*Western Kentucky University*, hillary.smith494@topper.wku.edu

Follow this and additional works at: [http://digitalcommons.wku.edu/cns_law](http://digitalcommons.wku.edu/cns_law)  
Part of the [Administrative Law Commons](http://digitalcommons.wku.edu/administrative_law), [Civil Law Commons](http://digitalcommons.wku.edu/civil_law), [Higher Education Commons](http://digitalcommons.wku.edu/higher_education), and the [Higher Education Administration Commons](http://digitalcommons.wku.edu/higher_education_administration)

Recommended Citation  
[http://digitalcommons.wku.edu/cns_law/15](http://digitalcommons.wku.edu/cns_law/15)
A Legal Guide for University Admissions Offices

How to Stay Out of Court

Marrissa Bryant
Christian Montgomery
Hillary Smith
The goals for admissions offices and the schools of which they are a part are as tough as ever. Whether the aim is to bring in more students than ever, admit the most academically sound class on record, generate substantial revenue, or bring in a group of unparalleled diversity and talent, departments of admissions strive for big accomplishments, and the methods they use are often new and untested – recruiting middle schoolers, working primarily with parents, using affirmative action in decision-making, and more. The stakes are higher and practices ever more varied, and as such, the higher education admissions environment is ripe for litigiousness. Civil rights cases, false advertising claims, accusations of unfair practices, civil suits – they are all on the table as consequences of missteps or perceived missteps of admissions offices which is why now, more than ever, it is important for offices of admissions to stay on the right side of the law.

This guidebook presents a look at the areas of admissions that pose the greatest threat of producing legal trouble. In its sections, the reader will find court cases and laws relevant to today’s college admissions landscape, the implications of those cases and laws, and practical tips for keeping admissions out of the courtroom. This format will be similar for all areas from the first section will look at landmark cases in civil rights and discrimination that determine the role that race and other demographic factors can play in the admissions process. It will also explore the fairness of new “Holistic” admissions practices. The next area will explore the role that the expansive Family Educational Rights and Privacy Act law plays in admissions. Addressing the competitive atmosphere in higher education recruitment, the third section will discuss fair play and the hazards of comparative advertising and outright false advertising. Finally, the guidebook will review practices for working with minors and then the skillfulness in communicating effectively yet in a manner that protects the university.
Admissions Process and the Legality of Fairness

Admissions counseling is not the easiest of careers. They often hold the key to the rest of some students’ lives or at least, that is how some students see it, and it can be frustrating to all when the process is not clearly understood or fairly designed.

Below is a list of laws that will help admissions offices stay out of the court when they consider their admissions decision processes. The list is not simply for admissions offices but for the university as a whole, including top administrators, as the university must make sure that their admission policies do not discriminate students based on age, sex, race, or ethnicity among many other things.

Laws:

There are many laws that will help you ensure that you are following the best practices when admitting students into your university.

Age Discrimination Act of 1975:

The “Age Discrimination Act of 1975” prohibits discrimination based on age in the admission of educational and/or academic programs or activities that receive federal financial assistance. This act also prohibits retaliation for filing a complaint with Office of Civil Rights (OCR) or for advocating for a right protected by the Act. The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.

Title IX of the Education Amendment of 1972:

This amendment prohibits discrimination on the basis of sex in the admission of higher education programs or activities that receive federal financial assistance, and this also includes
employment. Under the Title IX common rule, a university may not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission. This also includes the testing materials. Universities may not use different testing or other materials on the basis of sex or use materials that permit or require different treatment of students on the basis of sex. Universities may use different materials when they cover the same occupational interest areas and they show that they eliminate sex bias.

**Title VI of the Civil Rights Act of 1964:**

This law prohibits discrimination based on race, color, or national origin in the admission of educational and/or academic programs or activities receiving federal financial assistance. The main takeaway for admissions: do not discriminate.

**Affirmative Action:**

Affirmative Action in higher education admissions was established to help achieve diversity in the student body and provide greater access to higher education for members of historically underrepresented minority groups. Institutions who do not abide by the law faced with drawl of federal funds granted to them.

**Past Court Cases:**

*Regents of the University of California v. Bakke*

In the 1978 case, *Regents of the University of California v. Bakke*, the U.S. Supreme Court ruled that using racial quotas in college admission decisions violated the Equal Protection Clause. The Equal Protection Clause, included in the Fourteenth Amendment to the U.S. Constitution, affirms
that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

While this landmark decision eliminated racial quotas in universities, it did still allow these
universities to use race as one of many admissions factors for the purpose of achieving diversity
on campus. The main takeaway for admissions: do not try to fill quotas.

**Gratz v. Bollinger**

In 2003, the U.S. Supreme Court ruled in the *Gratz v. Bollinger* case that the point system used
by the University of Michigan for undergraduate admissions was unconstitutional. The
admissions policy was based on 150 points, and it awarded points based on items such as race
(20 points), athletic ability (20 points), depth of essay (up to 3 points), leadership and service (up
to 5 points) and personal achievement (up to 5 points). With this point system underrepresented
minorities were automatically awarded admission to the university. In the majority decision,
Chief Justice Rehnquist stated that the University of Michigan had violated the Equal Protection
Clause of the Fourteenth Amendment by using an overly mechanized system as a way to include
race in admission decisions. The takeaway for admissions: do not award specific amount of
points for race or other demographic factors.

**Grutter v. Bollinger**

The *Grutter v. Bollinger* case of was also decided in 2003. In a 5-4 vote, the U.S. Supreme Court
narrowly upheld the decision to allow colleges and universities to use race as a component in
their admissions policies by ruling in favor of the University of Michigan’s law school
admissions policy. Sandra Day O’Connor stated that the Constitution "does not prohibit the law
school's narrowly tailored use of race in admissions decisions to further a compelling interest in
obtaining the educational benefits that flow from a diverse student body.” The main takeaway for admissions: if taking race into account in admission, doing so must be carefully done and be a limited, tailored part of the overall process.

Present Court Case:

Fisher v. Texas

In 2008, several high school seniors who had been denied admission at the University of Texas-Austin filed a lawsuit. The students argued that the University of Texas could not use race as a factor in admission processes if there were other race-neutral options that would have the same results on diversity. A federal district judge found in favor of the University of Texas, stating that the University had complied with the admission requirements laid out in Grutter v. Bollinger. Additionally, the court cited a University of Texas study from 2002, which found that that year 79 percent of the university’s individual courses had zero or one African-American students and 30 percent of the courses had zero or one Hispanic students. Thus, the court decided that while race neutral options had been considered, these options were not a viable way for the University of Texas system to maintain and increase diversity. In January 2011, a three-judge panel of the Fifth Circuit Court of Appeals heard the case and upheld the ruling in favor of the University of Texas. In June 2011, the full court decided not to rehear the lawsuit, letting the decision of the three-member panel stand. The U.S. Supreme Court agreed to hear the next term of this case in 2015.

Holistic Admission Evaluations, Transparency, and Difficulties in Implementation

Many college admission departments make claims that they are using “Holistic” measures to review applicants for college admission. They are making promises that they are evaluating
applicants as human beings and not just considering standardized tests scores and grades. “When making our admissions decisions, we draw upon a holistic review process. The holistic review allows us to get a sense of not only the applicant’s academic qualifications, but also of what the applicant is like as a person, and what they will contribute to the Oberlin community.” (Bovy, 2013)

While this can have appeal for many applicants and parents of applicants who are applying because it gives them hope if they may not have the most competitive grades or test scores, this form of evaluation can have negative implications for the universities. It takes the objectivity out of the process because the way to measure this is much more subjective.

Every applicant is considered individually and it is not as easy to provide justification regarding why one student was chosen over another. With this process, schools can choose students based on whatever criteria they would like. “It’s a way for schools to discreetly take various sensitive factors—‘overrepresented’ minorities or students whose families might donate a gym—into account.” (Bovy, 2013) In some cases at some universities, students’ applications are given tags. This can further promote a practice of unfairness for certain individuals or groups. A tag is the proverbial golden ticket for a student applying to an elite institution, as it identifies a student as a high priority for admission. Typically students with tags are recruited athletes, children of alumni, children of donors or potential donors, or students who are connected to the well-connected. The lack of a tag can hinder an otherwise strong high-achieving student, sometimes leading to frustrations from large groups as Asian American students typically don’t have these tags. (Harberson, 2015)

This type of selection based on a “holistic” approach also impacts individual students because it can put more pressure and anxiety on potential applicants. When universities are only
looking at grades and test scores, the students applying may feel that if they get rejected it is only based on academic requirements. When they are being evaluated from a “holistic” view, they may feel a deeper form of rejection because they are being evaluated as a human being. While there are not currently many legal implications for universities who practice this, we may see legal cases citing emotion injury begin to arise as people get rejected. One way schools can avoid having to justify their choices is to be more transparent about their selection process and publish data regarding the demographics of the students who are accepted to the universities. “Knowing acceptance rates by identifiable characteristics can reveal institutional tendencies, if not outright biases; it can push schools to better justify their practices, and it would give applicants a look at which schools offer them the best opportunities” (Harberson, 2015).

Another way that institution admission departments can justify holistic admissions is to define what they are considering merit and stick to those guidelines. According to Art Coleman, a lawyer who has worked with many admissions and higher education groups, when colleges fail to define merit in ways that can be understood and demonstrated, they lose court cases and the support of the public. (Jaschik, 2013) Coleman provided an example of a higher educational institution that accepted students with a lower GPA than their rule for the GPA criteria. The case he provided was *University of California v. Bakke* which was a case that the Supreme Court ruled over in 1978. In the case, the Supreme Court decided that it was not legal for universities to have programs that set aside places for applicants from minority groups. The University of California at Davis medical school had a rule that they would not interview applicants for the program who did not possess a 2.5 GPA; however, evidence was provided that showed that they admitted students who had a lower GPA than the 2.5 to fill minority spots. Coleman addresses that it is okay for institutions of higher education to have nontraditional approaches to admitting
students but that they need to make sure they are clearly defined and linked to enrollment and graduation rates. A law professor at University of California, Richard Sander challenged this concept even further by stating that he doesn't oppose the consideration of nontraditional criteria, but that colleges need to apply such measures equally, not just to admit minority applicants. (Jaschik, 2013)

**FERPA and the Protection of Student Records**

FERPA stands for Family Educational Rights and Privacy Act. This is a federal law that applied to all educational agencies and institutions that receive funding under any program administered by the Department of Education. An “eligible student” is any student who is 18 years of age or attends a post-secondary institution. According to FERPA, an eligible student has the right to access his or her education records, seek to have the records amended, and has control over the disclosure of personally identifiable information from the records.

The term “educational records” is defined by those records that contain information directly related to a student and which are maintained by an educational agency or institution or by a party acting for the agency or institution.” (U.S. Department of Education, 2015) An educational record may include written and printed documents, electronic media, magnetic tape, film, diskette or CD, video or audio tapes. This also includes transcripts or other records obtained from a school in which a student was previously enrolled. Some information that is not included as an educational record is sole possession records or private notes of individual staff or faculty that are not accessible or released to other personnel, law enforcement or campus security records, employee records (unless contingent upon attendance), medical records, and alumni records. Some information in the educational record is considered directory information and can be disclosed without violating the law if it has specifically designated that information as
“directory information”. This information includes name, address, telephone number, major field of study, dates of attendance, current enrollment, class standing, receipt or non-receipt of a degree, and academic awards received (Advanced Global Higher Education).

Student affairs professionals working in Admissions need to be familiar with FERPA and be diligent about knowing what information they can and cannot release. Many times parents of students do not understand why they cannot have access to the student’s records if they are paying for their educational expenses. They do not understand that the student’s rights regarding their student records have been transferred to the students when they turned 18 or began attending the educational institution. Because Admissions is the first department to have contact with students, they may be the first point of contact for parents when they have questions about their student’s educational records, so it is vital that they not only understand FERPA but that they also adequately explain to families its details and school procedures for waiving FERPA rights. Professionals working in Admissions also have access to a lot of educational records because they receive the transcripts for incoming students when they apply. According to the U.S. Department of Education, the only way that a representative from that institution can disclose the information in the student’s records without the student’s consent is if the student is a dependent for tax purposes.

**FERPA and Prospective Students**

Given FERPA’s language and admissions personnel’s work with students prior to enrollment, there is a legal gray area regarding the FERPA rights of college applicants. FERPA states that protections begin when a student turns eighteen years old or when he or she *enrolls* at a post-secondary institution, yet college *applicants* have not yet enrolled. How should colleges treat such students?
As a general rule, college and university admissions offices are encouraged to extend FERPA protections to college applicants when it comes to protection and dissemination of records. Most, if not all colleges and universities do this already such as the University of Wisconsin (University of Wisconsin, 2013). However, there is one major acceptance to providing FERPA protections to students: parents may act on behalf of the student. Given that the student is typically younger than eighteen years old and has not yet enrolled, college admissions offices are commonly open to working on a student’s application with parents with no questions asked. For the purposes of full legal protection, it would be wise for all admissions offices to ensure that the student is not eighteen years old (and thus, not eligible for full FERPA rights) and that the person can sufficiently demonstrate a parental connection to the student, such as knowing social security number and date of birth, when working with parents on an application. By working with parents and otherwise adhering to FERPA policy, admissions offices can adequately protect themselves and their prospects without hampering the application process and devaluing the parent as an ally.

**Defamation, False Advertising, and Handling the Competition**

When talking to students about their future plans or having a conversation with colleges about higher education and universities, it is inevitable that at one point or another, other universities are going to be brought into the conversation. It is important that admissions professionals can deftly navigate interactions with students when other institutions as negative or misinformation can lead to serious legal trouble. This section provides tips to help admissions offices stay out of court by avoiding slanderous and defamatory statements against other schools.
Defamation

Defamation consists of the following elements: (1) false statement of fact; (2) capable of a defamatory meaning; (3) of and concerning another living person; (4) publication to a third party; (5) some degree of fault on the part of the person making the statement; and (6) harm to the reputation of the person defamed.

To determine that there has been defamation the following must be shown:

- It must have been published in some way
- The information must be false
- The information must be found injurious
- The person/thing being talked about must be seen as unprivileged, meaning they are in position to be found guilty of defamation.

Applying this to college recruiting, admissions personnel risk defamation if they share information about other schools that is negative, incorrect, and on record. Even a misstatement about cost of attendance at another university, done with intent to harm or not, could be grounds for legal action. For this reason, the safest recommendation that can be made to admissions offices is to do what they can to avoid speaking specifically about other schools and sharing information that is not widely or publicly known. Additionally, all college recruiters should familiarize themselves with the Statement of Principles of Good Practice published by the National Associations of College Admissions Counseling which directly addresses the “hows” of speaking about other colleges and higher education that will keep admissions representatives in line with legal practice (NACAC 2015).
The Lanham Act and False Advertising

The Lanham Act of 1946, also known as the Trademark Act (15 U.S.C.A. § 1051 et seq., ch.540, 60 Stat. 427 [1988 & Supp. V 1993]), is a federal statute that regulates the use of Trademarks in commercial activity. The Lanham Act gives trademark users exclusive rights to their marks, thereby protecting the time and money invested in those marks. The act also serves to reduce consumer confusion in the identification of goods and services, and one of its greatest contributions to American consumers is the outlawing of false advertising which the act defines as, "Any advertising or promotion that misrepresents the nature, characteristics, qualities or geographic origin of goods, services or commercial activities."

The importance of truth in advertising in higher education is at an all-time high, especially on the heels of a federal lawsuit against Corinthian Colleges accusing them of false advertising (Douglas-Gabriel, 2015). The for-profit education group promoted job placement rates, career placement solutions, and accreditations that were all found to be completely false (California Attorney General, 2013). As a result, Corinthian was found guilty and ordered to pay a $530 million penalty.

Admissions offices are, in part, responsible for promoting the university to potential students, so it is important for them to promote correctly. As such, all information – regardless of means of distribution – should be correct, intentional, and expected to be honored. In doing so, admissions personnel avoid running afoul of the following legal requirements of false advertising:

- a false statement of fact has been made about the advertiser's own or another person's goods, services, or commercial activity
• the statement either deceives or has the potential to deceive a substantial portion of its targeted audience
• the deception is also likely to affect the purchasing decisions of its audience
• the advertising involves goods or services in interstate commerce
• the deception has either resulted in or is likely to result in injury to the plaintiff. The most heavily weighed factor is the advertisement's potential to injure a custom

**Tips for When Talking to Students and Colleagues:**

• Never talk badly about another university. Try changing the subject or stating that you cannot speak about another school if pressed for more information.
• Be sure that statements made or advice given in regard to issues that may affect a student’s financial aid or graduation qualifications are accurate.
• If you make any comment, make sure to state facts and not opinions.
• Do not use other universities trademarks and try to pass them off as your own. Take time to research any potential marketing campaigns, slogans, or events to ensure that they are not currently being used by other institutions before using them in advertising or practice.

**Working with Minors in Undergraduate Admissions**

Admissions offices are in a unique position in that they, more than any other campus entity, work heavily with students younger than eighteen years old. Any human resources office can confirm that working with minors requires great attention to risk management, and this is no different for colleges, even if minors are just a year or two away from being legal adults. Some schools, such as Marquette University (Marquette University, 2015), have gone so far as to establish a “Working with Minors” policy requiring background checks and training for all
employees and who will be working with minors. Additionally, states often require employees to be subject to measures aimed at protecting minors, such as Tennessee Code Ann 49-5-413(e)(1).

To mitigate risk inherent in working with minors, admissions personnel should adhere to the following practices:

- Work closely with human resources to ensure that criminal background checks are performed on all potential hires to ensure that employees are suited to work with all ages
- Review state and federal laws that impact employees who work with minors
- Restrict communication to professional channels such as business phone, email, and written correspondence; treat all communications as though they will be viewed by someone else
- Ensure that meetings with students are conducted in professional and public settings so as to limit chance of accusation of illicit behavior
- Proactively engage parents throughout the recruitment process to provide transparency and accurate information

**Admissions Communications and the Importance of Truth and Accuracy**

A great deal of college admissions budgets will go toward communications. Post cards, invitations to events, and the all-important acceptance letter account for thousands spent each year. Then of course there is the communication coming from your employees, most notably admissions counselors but also including processors, front-desk staff, and more. Assuming tens of thousands of contacts and multiple touches per prospect, it is not outrageous to guess that more than a million official messages come from each university’s departments of admissions each year.
The sheer volume of communication means that even a small error can be amplified to a tremendous degree, with legal consequences a possibility. In just the last decade, the record of admissions snafus in which colleges or universities mistakenly send acceptance notices to students who were in fact denied is extensive and includes notable schools including UCLA, Carnegie Mellon, NYU, and more. While there are not yet examples of a successful suit brought by a student receiving an erroneous acceptance letter, the possibility for such a legal headache exists (Schackner 2015). Additionally, less publicized mistakes may have been rectified internally yet at cost to the university. For example, a school may choose to go ahead and admit a student or honor a scholarship it otherwise would not have had it not sent the student an incorrect communication. The threat of suit by a student certainly increases the likelihood that a school seeks to provide such an unofficial settlement.

To reduce the chance of litigation that stems from admissions communications, offices should take the following precautions:

- Review all communications plans and materials to ensure accuracy and timeliness of information
- Assess risks of incorrect communications and work with Office of Public Relations to create management plan for large-scale errors
- Treat all communication as if it will be subject to a Freedom of Information Act request; all emails and messages, both external and internal, should be professional, factual, and in accordance with existing admissions policies
- In direct communication with students and parents, admissions office would be wise to communicate in a manner that provides information that pertains to most students yet still leaves room for error. In essence, school representatives should not speak in concrete
terms until decisions have been made, thus preventing unkeepable promises from being made.

Accessing Admissions Profiles

The third bullet above is particularly important given recent interest in students investigating their admissions profiles (Frost 2015). For all schools, admitted students who enroll in classes are eligible to look at their admissions scores as part of FERPA. These investigations have shed significant light on the admissions processes at many private, selective universities that were not previously obligated to share their selection criteria. As for public schools, nearly any student - admitted or rejected, enrolled or not - may be able to request to see any record related to them via the Freedom of Information Act. This would include not just the student’s application and scores but also emails and even text messages pertaining to that student. Obviously, this provides great impetus for treating all messaging regarding students as worthy of full professionalism.

Non-binding Communication

College recruitment is a prospective field, often dealing in hypotheticals and presenting information that generally applies to most students. However, no information session or conversation can account for every situation a student may have that could bar his acceptance to the school. New information about an applicant or a change in policy may yield results that directly and negative a prospective student’s relationship with a school. For example, a 4.0 student involved in honors clubs and service groups may steal a bus full of children, thus requiring a reconsideration of admission and scholarships. Or the board of regents may choose to no longer provide a tuition discount to students from a specific county starting Fall 2016, even though there was a student who had planned on attending the school since 2014.
To handle situations like these, admissions counselors and other staff are encouraged to provide the most amount of information possible without being in a position that promises certain outcomes to students. This is a matter of semantics in which words such as “generally” or “typically” flood the vernacular of admissions workers. Even in cases of minimum requirements, it is advisable that admissions staff members indicate that acceptance is likely but not guaranteed, lest the school find out something unsavory about a prospect for which they wish to deny admission.
References


