

DOJ MAKES EARLY-DECISION TO TAKE ELITE COLLEGES AND UNIVERSITIES TO SCHOOL

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The Department of Justice ("DOJ") is currently investigating to what extent colleges and universities communicate with each other about prospective students that apply through the early decision process. While it is still uncertain, the DOJ appears to be taking the position that this information-sharing may violate antitrust laws. According to the Wall Street Journal, a number of colleges and universities received a preservation request from the DOJ on April 6th related to the investigation. [1] The DOJ's preservation request specifically indicated that the investigation will focus on "a potential agreement between colleges relating to their early decision practices," and will be investigated by its Antitrust Division, which enforces laws governing fair consumer and competitive market practices. The preservation request asked the schools to save any emails and/or other messages that concern, among other topics:

1. Agreements with other schools regarding their communications with one another about admitted students and how they might use that information;
2. Formal or informal agreements to share the identities of accepted students with people at other colleges;
3. The sharing of identities of accepted students with other schools;
4. Officials discussing accepted students with officials from other institutions; and
5. Records of actions that the schools took based at least in part on information received through those communications with other colleges.

The early decision process enables prospective students to apply to their preferred college or university with the understanding that if accepted, the student will attend. Prospective students opt to apply early decision because they tend to have a better chance at admission to competitive schools. While early decision acceptances are not legally binding, these acceptances are often considered a "moral contract," whereby the student has peace of mind in securing a spot at their first-choice school in exchange for a commitment that he or she will not pursue other admissions packages. The student is also expected to withdraw any other applications at other schools. [2] The information-sharing is beneficial for schools because it enables them to use the information to plan who to admit, and it also reduces comparison-shopping on the part of students who might consider breaking an early decision agreement for the promise of a more attractive financial-aid package elsewhere.

While some college and universities openly admit that they communicate with other schools and share information such as the names and high schools of admitted students, other schools deny the extent of such information-sharing. In 2016, Amherst College's Dean of Admissions told U.S. News that the college and about 30 others shared lists of students admitted through early decision, and that she would also be "open to sharing the

names of students who chose not to attend and for what reasons." [3] Recently, Amherst College confirmed that it is "fully cooperating" with the DOJ's investigation. [4] However, several other admissions officials say they do not share any information. "To my knowledge the only data sharing my admissions offices have done involves aggregated data where individual students can't be identified," said Andrew Flagel, Senior Vice President for Students and Enrollment at Brandeis University. [5]

While it is understood that the DOJ is probing, in part, whether universities violated the law by sharing names of early decision students to determine whether those same students made multiple early decision applications, it is unclear exactly what aspect of the early decision process the DOJ believes potentially constitutes an antitrust violation. Certainly, the early decision process has faced criticism in the past as potentially favoring alumni and higher-income applicants. It has also been criticized on the basis that schools have less of an incentive to offer financial aid packages to students admitted early decision, and for locking students into a serious financial commitment without an opportunity to consider other options. However, it has never been raised as a potential antitrust issue or prompted a federal investigation until now.

One theory may be that the DOJ believes early decision programs, coupled with collusion between the colleges and universities, are limiting student choice. Some believe that the focus of the investigation is whether colleges with early decision programs are sharing information about applicants with other colleges in order to disqualify students who seek to apply to multiple schools through the early decision process. However, most are still trying to understand the actual antitrust concern that propels the investigation. Susan K. Tree, codirector of college counseling at Westtown School, like most others, is not sure where the DOJ would find a potential antitrust violation. "I don't see it yet," Tree said, "...maybe something is going to surface." [6]

Finally, it is important to bear in mind that the information-sharing between schools and colleges may implicate the Family Educational Rights and Privacy Act (FERPA), a federal law that protects the privacy of student education records. While there are exceptions, schools generally must have written permission from the parent or eligible student in order to release any information from a student's education record. Schools may disclose, without consent, "directory" information, including a student's name, address, telephone number, date and place of birth, honors and awards, and dates of attendance. However, schools are required to inform parents and eligible students about directory information and allow them a reasonable amount of time to request that the school not disclose the student's directory information.

It is critical that the colleges and universities that have received a preservation request be aware that the DOJ routinely issues subpoenas shortly after such requests. These preservation requests can often be quite burdensome. Among other initiatives, schools in receipt of a preservation request should consult with counsel experienced in government investigations and begin work with them immediately to identify the documents that should be preserved and the individuals, departments or functions who might possess those documents.

Notes:

[1] Schools among those reported to have received the preservation request include Amherst, Williams, Middlebury, Wesleyan, Wellesley, Grinnell, and Pomona. See NPR interview with Melissa Korn, Wall Street Journal, April 13, 2018. <https://www.npr.org/2018/04/13/602288585/justice-department-investigating-how-colleges-use-early-decision-admissions>

[2] In reality, a very small number of students break their early decision agreement and fail to withdraw other

applications.

[3] Erica L. Green, *Justice Dept. Launches Probe of Early College Decisions*, THE NEW YORK TIMES (April 10, 2018), <https://www.nytimes.com/2018/04/10/us/politics/justice-department-probe-college-early-decision.html>

[4] John Bowden, *DOJ targets elite universities in early admissions probe: report*, THE HILL (April 11, 2018), <http://thehill.com/homenews/administration/382713-doj-investigating-elite-schools-over-early-admissions-report>

[5] Scott Jaschik, *Justice Dept. Investigates Early Decision Admissions*, INSIDE HIGHER ED (April 9, 2018), Scott Jaschik, <https://www.insidehighered.com/admissions/article/2018/04/09/justice-department-starts-investigation-early-decision-admissions>

[6] Deirdre Fernandes, *Why is the government investigating early decision at elite colleges?*, THE BOSTON GLOBE (April 11, 2018), <https://www.bostonglobe.com/metro/2018/04/11/amherst-college-wellesley-wesleyan-others-under-investigation-for-possible-violations-early-admissions/eGq6YGJTbRkylS8qQfaEEN/story.html>

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