
Federal Nondiscrimination Law Regarding Diversity

**Implications for Higher Education Financial Aid
and Scholarship Policies and Programs**

Arthur L. Coleman
Jamie Lewis Keith

Contents

2	Introduction
4	Section I: Foundations for Effective Policymaking: Clarity on the Types and Sources of Aid Involved
4	A. Introduction
4	B. Kinds of Aid
7	C. Sources of Aid
10	Section II: Putting It All Together: Strategies to Consider in Advancing Goals and Mitigating Legal Risk
10	A. Policy Design and Execution
10	1. Assure mission alignment and enrollment coherence as a foundation for policy clarity across admissions, aid, and other enrollment programs, as well as curricular and cocurricular programs.
11	2. Consider and advance as many neutral aid efforts as possible, consistent with diversity and other enrollment aims.
12	3. Limit or avoid race-, ethnicity-, and sex-exclusive aid to the extent possible.
12	4. Consider pooling limited race-conscious funds with neutral funds for neutral effect.
14	5. Extend to aid programs the enrollment aims and criteria used with holistic review admissions, where possible.
15	B. Evaluation
15	6. Conduct a full inventory of all aid—including privately endowed aid—when evaluating policies for impact and legal sustainability.
15	7. Engage in a periodic review of policies and practices that includes collecting and evaluating evidence of need to consider race, ethnicity, or sex.
17	C. Communications
17	8. Assure accurate, clear, and strategic program framing and communications.
18	Appendix A: Federal Nondiscrimination Law and Financial Aid
22	Appendix B: Other Resources
26	Appendix C: About College Board Access and Diversity Collaborative

Introduction

As an essential part of the enrollment management strategies of postsecondary institutions, financial aid policies can include a variety of practices that advance multiple institutional aims. Scholarships and aid often are essential components of institutional strategies for helping low- and middle-income students obtain a valuable college experience, while enhancing the achievement of other core institutional admissions aims. Aid strategies are often instrumental in attracting students who offer great promise academically; who exhibit distinct knowledge, talents, and skills essential to programmatic success and superlative service commitment; and who reflect the diversity institutions seek as they assemble classes to make learning from those with different perspectives and life experiences an educational imperative.

Institutional statements on aid policy should be mission aligned and well articulated. And relevant legal standards can and should guide the design of aid policies for long-term success. That is notably true for aid designed to advance diversity interests that involves consideration of race, ethnicity, and sex, which implicate heightened judicial scrutiny. Aid policies and practices are, after all, subject to the same federal nondiscrimination laws as admissions policies and practices, despite the dearth of lawsuits and headlines on those issues in the aid context. (As noted below, those laws may apply in different ways in different settings, given distinctions between aid and admissions.)

This guide gives undergraduate and professional school enrollment officials practical, actionable information and guidance on the design and implementation of financial aid and scholarship policies that advance diversity goals through consideration of race, ethnicity, and sex.¹ This guide is intended to help enrollment officials chart an effective and sustainable course for overall enrollment planning and is organized in two sections:

- Section I identifies key framing issues essential in the review, evaluation, and evolution of impactful financial aid and scholarship policy design and practices, with a focus on kinds and sources of aid.

- Section II provides an overview of strategies and steps that merit consideration among enrollment and institutional leaders at public and private higher education institutions as they seek to achieve diversity goals in legally sustainable ways:

With respect to policy design and execution

1. Assure mission alignment and enrollment coherence as a foundation for policy clarity across admissions, aid, other enrollment programs, as well as curricular and cocurricular programs.
2. Consider and advance as many neutral aid efforts as possible, consistent with diversity and other enrollment aims.
3. Limit or avoid race-, ethnicity-, and sex-exclusive aid to the extent possible.
4. Consider pooling limited race-conscious funds with neutral funds for neutral effect.
5. Extend to aid programs the enrollment aims and criteria used with holistic review admissions, where possible.

With respect to evaluation

6. Conduct a full inventory of all aid—including privately endowed aid—when evaluating policies for impact and legal sustainability.
7. Engage in a periodic review of policies and practices that includes collecting and evaluating evidence of need to consider race, ethnicity, or sex.

With respect to communications

8. Assure accurate, clear, and strategic program framing and communications.

1. The same fundamental legal principles also apply to other graduate programs. However, there may be a need to adapt processes where the enrollment decision making is not centralized and the number of students admitted is very small.

Appendix A synthesizes key points of law and policy in a format designed to facilitate meaningful on-the-ground dialogue and action, with a focus on federal laws that prohibit discrimination on the basis of race, ethnicity, and sex. Appendix B has a list of resources on policy and legal topics relevant to issues discussed in this guide. Appendix C provides background information about the College Board Access and Diversity Collaborative.²

Various legal authorities provide key foundations for this guide. U.S. Supreme Court decisions, and U.S. Department of Education regulatory and policy guidance that implements those precedents, are principal authorities for the legal analysis that informs this guide. By contrast, U.S. Department of Education Office for Civil Rights case resolutions are offered as illustrations only; they are not precedent. In addition, nothing in this guide should be construed as legal advice or as a prediction of how any court or administrative agency may rule in the future on issues discussed.

This guide is not intended to provide comprehensive legal guidance on details of federal nondiscrimination law associated with aid policy and practice. Other financial aid resources cited in Appendix B (row 7) provide more information on legal parameters for program design.

THE INTRODUCTION TAKEAWAY

Federal nondiscrimination law that applies to admissions policies and practices that involve consideration of race, ethnicity, or sex also applies to aid policy design and award decisions that involve those considerations. Any institutional review of race-, ethnicity-, or sex-conscious policies and practices should include aid, as well as admissions, policy, and practice.

2. Many wise perspectives were important in shaping the final version of this guide. This work was informed by members of the Access and Diversity Collaborative's Advisory Council who provided key insights and information that informed the guide's development. We are also grateful for the idea-generating research and editorial assistance of Emily Webb. We are also very appreciative of the valuable feedback and thought-provoking insight provided by reviewers including Kathy Blaisdell, Megan McClean Coval, Alexandra Schimmer, Joy St. John, Frank Trinity, and Samantha Veeder; and Connie Betterton, Dean Bentley, and Wendell Hall from the College Board. The authors appreciate the continuing support of these individuals in helping advance understanding of complex topics for the benefit of the field.

SECTION I

Foundations for Effective Policymaking: Clarity on the Types and Sources of Aid Involved

A. Introduction

Developing and implementing coherent aid policy with particular attention to issues of legal sustainability discussed in the introduction should be based on a clear understanding and articulation of the kinds and sources of aid involved.

Those issues, explained in more detail on the following page, help lay the foundation for efficiently identifying areas within an overall aid program that merit particular attention on issues of legal vulnerability associated with diversity.

In simple terms, courts in nondiscrimination cases are likely to apply legal rules of the road that address the ends (educational goals and objectives) and the means (program design and process), with a requirement for supporting evidence at every step of the way. When institutions consider the race, ethnicity, or sex of individuals in deciding whether to award aid—or how much and what type of aid to award—courts impose strict or heightened legal standards and scrutiny. In almost all other instances where other background factors may affect aid awards, the federal nondiscrimination inquiry is limited to not being arbitrary or malevolent.³

As suggested below, pure financial need-based aid (regardless of sources), where there is absolutely no consideration of race, ethnicity, or sex, is unlikely to trigger strict or heightened legal scrutiny under federal nondiscrimination law. And the extent that merit aid would trigger such strict or heightened legal scrutiny and warrant corresponding focus on design depends on the precise definition of merit (i.e., whether there is or is not an aspect of merit that involves consideration of an applicant's race, ethnicity, or sex). Additionally, institutions should focus on potential issues involving privately endowed institutional aid (with donor-imposed criteria for awards)—and on aid provided to students by private sources closely connected to a higher education institution (e.g., where the institution supports the donor's development of selection criteria or is significantly involved in any aspect of administering the programs).

	Financial Need-Based Only	Merit-Based	Mixed-Need Merit
Government Funded	No legal issue.	Requires focus, depending on definitions.	Requires focus, depending on definitions.
Institution Funded	No legal issue.	Requires focus, depending on definitions.	Requires focus, depending on definitions.
Privately Endowed	No legal issue.	Requires focus, depending on definitions and whether significant IHE assistance is present.	Requires focus, depending on definitions and whether significant IHE assistance is present.

B. Kinds of Aid

Broadly speaking, there are three kinds of aid offered at institutions of higher education: financial need-based aid, merit aid, and aid that is a hybrid of both.

Pure need-based policies are those where only financial need is considered when awarding aid. Merit aid definitions vary greatly from institution to institution (and sometimes across programs within institutions). There is no single correct definition of "merit," which may involve specific types of accomplishments or contributions (grades, talents, etc.) or may relate to other criteria (hometown, high school, etc.). But it is important that the definition is clearly articulated and well understood by all. Definitions of merit should be aligned with the institution's educational goals, or its programs, as a basis for coherent enrollment policy. The definitions of merit should be consistently applied to all students to determine eligibility and amounts and types of aid awarded. This approach to merit becomes a legal imperative where consideration of a student's race, ethnicity, and/or sex may affect the award, due to the legal scrutiny and standards federal courts will apply when claims of discrimination surface. (See Appendix A.)

3. For a more detailed legal explication of these rules and the circumstances differing levels of legal scrutiny apply to, see Arthur L. Coleman & Teresa E. Taylor, *A Federal Legal and Policy Primer on Scholarships: Key Non-discrimination Principles and Actionable Strategies for Institutions of Higher Education and Private Scholarship Providers* (2016), https://c.ymcdn.com/sites/scholarshipproviders.site-ym.com/resource/resmgr/files/publications_blogs/adc_nspa_a_federal_legal_and.pdf; Robert Burgoyne et al., *Handbook on Diversity and the Law: Navigating the Complex Landscape to Foster Greater Faculty and Student Diversity in Higher Education* (2010), <https://www.aaas.org/sites/default/files/lawdiversitybook.pdf>.

Federal Nondiscrimination Law in a Nutshell

Strict scrutiny is a legal term referring to the most rigorous standard of judicial review. It applies to policies that treat individual students differently on the basis of race or ethnicity (“race-conscious” policies). Such policies are “inherently suspect” under federal law. To satisfy strict scrutiny, they must serve a “compelling interest” and be “narrowly tailored” (as limited consideration of race or ethnicity as possible) to achieve that interest. This requirement is derived from federal constitutional principles (which apply to public higher education institutions) and similar principles of federal statutes (Title VI of the Civil Rights Act of 1964, which applies to any recipient of federal funding, public or private).

According to the U.S. Supreme Court, the strict scrutiny legal standard is neither “strict in theory but fatal in fact” nor “strict in theory but feeble in fact.” In striking a balance, it requires that an institution demonstrates the following to justify race-conscious policies:

- **Regarding Compelling Ends:** That the goals of the policy are specific beneficial experiences and educational outcomes for all students associated with broad student body diversity, inclusive of racial and ethnic diversity.
- **Regarding Narrowly Tailored Means:** In design and implementation of the policy, that race or ethnicity is considered only if necessary to achieve the policy’s goals and in the most limited manner possible, including that:
 - ♦ existing diversity is not already adequate to produce the beneficial student experience sought;
 - ♦ neutral strategies are used but would not alone produce the desired student experience;

- ♦ when necessary at all, race and ethnicity are considered flexibly and individually—and are not determinative or weighed the same for all individuals of the same race;
- ♦ any undue burden on students of other races/ethnicities is avoided (often minimized if they also have opportunities to compete for benefits); and
- ♦ the policy has an end point and is subject to periodic review to ensure race is not considered more or longer than necessary.

While not always consistent, federal courts apply **intermediate scrutiny** to consideration of sex of individuals in conferring benefits such as financial aid. This requires important goals that do not perpetuate sex-based stereotypes (as compared with compelling goals for race), and policy design and implementation that consider sex in a manner “substantially related” to achieving the goals (as compared with as limited as possible for race). The difference, as applied, is not clear, but the design of the program likely need not be a “last-resort” measure to withstand intermediate scrutiny. In addition, there is a recognition respecting sex that there may be some limited qualification-based distinctions that are not based on stereotypes of the interests or (in most cases) capabilities of one sex or the other.

QUICK TAKE

Overview of Types of Aid and Federal Nondiscrimination Law Implications

1. Pure financial need–based aid policy

A pure financial need–based aid policy considers no factors other than student need in the determination of aid awards. Federal nondiscrimination law should not be triggered here, if the definition of need is not arbitrary or malevolent. Note that in application, award amounts might benefit certain minority students more than other students, strictly because of their financial need–based circumstance. But, if implemented with fidelity around clear financial need–only standards that do not consider an individual's race, ethnicity, or sex, no significant nondiscrimination law issues should surface.⁴

2. Pure merit aid policy

If merit is defined to include factors exclusive of race, ethnicity, and sex, then federal nondiscrimination law should not be triggered, again if the definition of merit is not arbitrary or malevolent. However, if “merit” is defined (as it may be) to include considerations of an individual's race, ethnicity, or sex, then strict (for race and ethnicity) or intermediate (for sex) scrutiny applies, and the need to address the corresponding legal justification, design, and operational requirements outlined in Appendix A is critically important.

3. Mixed need and merit-aid policy

a. The blended need and merit-aid model

This model of aid would categorically bar any applicant from aid without demonstrated financial need, but, once need is established, factors beyond the amount of demonstrated need might enter the decision. Consequential issues of federal nondiscrimination law would surface where considerations of race, ethnicity, or sex are part of the “merit” definition and program design.

b. Separate pools

This model of aid conditions the award of aid to demonstrated need but might establish discrete pools of funds for different categories of students. Funding pools might distinguish, for instance, among veterans, students from rural backgrounds, and students with strong records of inclusion and helping others scale barriers. Such a design—where details matter a lot in assessing legal rules and implications—would likely be legally sustainable where race, ethnicity, and sex were not factors in the characterizations of pools. In situations where those factors were part of the characterization of pools, heightened scrutiny would be implicated.

4. If a need-only financial aid policy happens to have a greater effect on some races, ethnicities, or sexes than others, an institution may be exposed to a so-called “disparate impact” claim by the Department of Justice under Title VI or Title IX policy. However, there is unlikely to be a less burdensome criterion than financial need for addressing the clearly legitimate aim of supporting students with the greatest financial need, and that should satisfy applicable legal requirements (and likely avoid the filing of such a claim in the first place).

C. Sources of Aid

Two principal issues arise regarding the application of strict scrutiny principles when higher education institutions receive external, private funding that is race-, ethnicity-, or sex-conscious. First is whether the institution's involvement in the aid program makes it legally responsible for the private donor's race-, ethnicity-, or sex-conscious conduct. The second, irrespective of institutional involvement, is whether the private donor's action may subject it to legal responsibility under heightened legal standards.

Significant assistance. In cases where a higher education institution is involved in the administration of private, externally funded scholarships, the institution is likely to be held responsible for the scholarships under the exacting standards of federal nondiscrimination law, as if the scholarships were the institution's own. In particular, Title VI of the Civil Rights Act of 1964 (Title VI) prohibits race and ethnic discrimination "directly or through contractual

or other arrangements" and "in the administration" of financial aid programs.⁵ As applied by the U.S. Department of Education's Office for Civil Rights (OCR), potential responsibility extends to situations where a higher education institution funds, administers, or significantly assists in the administration of private financial aid. In such cases, that action will likely be deemed "within the operations of the college" and, therefore, subject to strict scrutiny.⁶ Some examples of such practices:

- Institutional involvement in setting criteria for the selection of students eligible for the private scholarship;
- Institutional involvement in selecting qualifying students for the private scholarship; and Institutional support of the external funder through advertising (beyond the general assistance provided to any outside entity that seeks to advertise its scholarship programs).⁷

Similar principles would be expected to apply to sex-conscious scholarships under Title IX.

Institution Likely Has Little to No Legal Responsibility	Institution Likely Has Little or No Legal Responsibility	Institution Likely Has Legal Responsibility	Institution Has Legal Responsibility
<ul style="list-style-type: none"> ▪ Accepts a private award for tuition payment the student sought out and received independently. 	<ul style="list-style-type: none"> ▪ Provides information on independently administered private awards in a manner consistent with other information provided, but does not participate in the award process or market the program. 	<ul style="list-style-type: none"> ▪ Sets selection criteria or involved in candidate selection; ▪ Administers a private scholarship program; ▪ Provides significant nonroutine resources or assistance to the private program. 	<ul style="list-style-type: none"> ▪ Accepts private donations for the institution's own scholarship program, which it administers.

5. 34 C.F.R. 100.3. The Department has also confirmed that "individuals or organizations not receiving Federal funds are not subject to Title VI." See U.S. Department of Education, Nondiscrimination in Federally Assisted Programs: Title VI of the Civil Rights Act of 1964 (1994), <https://www2.ed.gov/about/offices/list/ocr/docs/racefa.html>. Note, however, that OCR will examine the relationship among potential "external" funders or administrators to ensure they are, in fact, separate from the higher education institution. In one case, OCR rejected under Title VI as "not a good choice" a proposal by a college to allow a separate foundation to administer race-conscious scholarships funded from another external source and deemed by OCR to raise Title VI concerns. OCR indicated the college's "extensive ties" to the foundation were problematic. See *In re Northern Virginia Community College*, Case No. 03962088 (August 1, 1997).

6. At the same time, if scholarship programs are externally funded and administered—without significant assistance from the higher education institution—then that institution will not be subject to strict scrutiny review related to those programs. See *In re Northern Virginia Community College*, Case No. 03962088 (August 1, 1997) (approving the transfer of the "administration and award" of race-conscious scholarships to a private entity, where the higher education institution also "returned the funds for the scholarships to the [external] donors.") See generally Jonathan Alger & Donna Snyder, *Donated Funds and Race-Conscious Scholarship Programs After the University of Michigan Decisions* (2004), http://www.nacua.org/nacualert/docs/RaceConsciousFinAid/Alger_Snyder_05.pdf, at 13-14. For example, in 1996, OCR found that Northern Virginia Community College (NVCC) was subject to scrutiny under Title VI for five race-conscious scholarship programs administered by a private foundation because NVCC officials had created the foundation to support the institution and the foundation was located on campus. See Patrick Healy, *Education Department Sends Strong Warning on Race-Exclusive Scholarships*, *Chronicle of Higher Education*, October 31, 1997, <http://chronicle.com/article/Education-Department-Sends/98041/>. These conditions suggested that NVCC had close ties with the scholarship program; in other words, the private funder did not exercise complete control over the program.

7. See 34 C.F.R. 106.371; Alger & Snyder, *supra* note 6, at 13-14.

Aid by nonrecipients of federal funds. Even where there is no issue of whether the higher education institution is providing significant assistance to the private scholarship award fund, issues arise regarding the potential responsibility of the private donor under strict legal standards applicable to the donor (even though not a recipient of federal funds). As discussed above, federal courts have indicated even private donors may be subject to strict scrutiny in cases where they make or enforce contracts (which may include scholarships that discriminate based on race or ethnicity and impose forward-looking performance conditions on the recipients). Given the probable strict scrutiny standard triggered by federal statute (42 U.S.C. §1981 or §1985(3)), private funders should be advised of the likely need to evaluate their race- or ethnicity-conscious scholarships under the strict scrutiny standards described above.⁸

CASE ILLUSTRATION

OCR Case Resolution with Northern Virginia Community College, August 1, 1997

In 1997, OCR found that Northern Virginia Community College was subject to Title VI scrutiny standards in connection with five race-conscious scholarship programs administered by a private foundation because college officials had created the foundation to support the institution and the foundation was located at the college. The college had argued that Title VI didn't apply because the aid at issue was from the private foundation and it did not receive federal funding. OCR rejected this argument because of the college's "extensive ties" to the foundation.

THE SECTION I TAKEAWAY

The kinds and sources of aid are relevant in any overall program evaluation—and certainly with regard to an assessment of likely compliance with federal nondiscrimination laws. Understanding the overall aid context provides important foundations for legal and policy analysis.

8. 42 U.S.C. § 1981 Prohibits discrimination on the basis of race in the making and enforcement of contracts, including employment contracts; covers the making, performance, modification and termination of contracts, as well as the benefits, privileges, terms and conditions of the contractual relationship; and applies to all institutions, public or private. Scholarships and other aid are contracts when they impose conditions on the recipient (i.e., they are not unconditional grants). 42 U.S.C. § 1985(3) provides the right to sue for conspiracy to deprive any persons or class of persons of equal protection of the laws or of equal privileges and immunities under the laws. A donor may be determined to be conspiring to violate students' civil rights with an institution (if the institution provides significant assistance) or with others involved in the creation or administration of aid awarded with consideration of race, ethnicity, or sex, if strict scrutiny standards aren't satisfied.

SECTION II

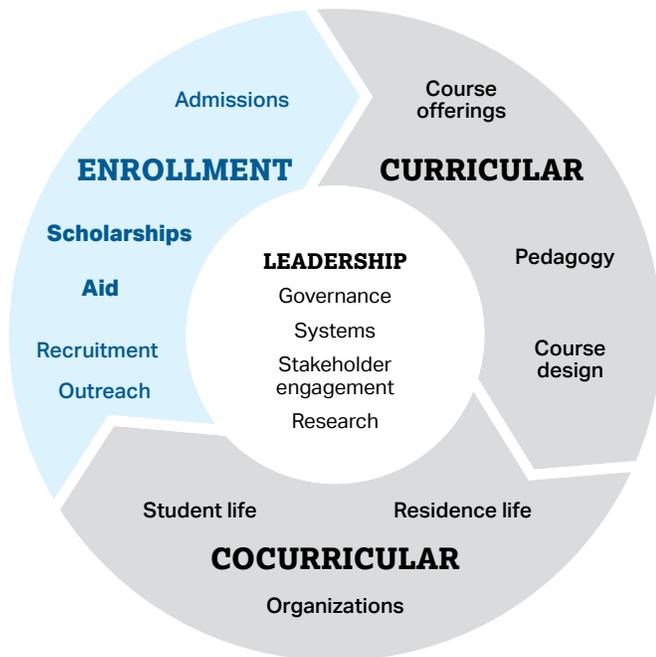
Putting It All Together: Strategies to Consider in Advancing Goals and Mitigating Legal Risk

While the precise contours of federal nondiscrimination law as it applies to aid and scholarships remain largely unsettled, a number of strategic directions grounded in effective practice and legal considerations can mitigate risk while advancing core institutional diversity aims.

A. Policy Design and Execution

1. **Assure mission alignment and enrollment coherence as a foundation for policy clarity across admissions, aid, and other enrollment programs, as well as curricular and cocurricular programs.**

Institutional mission and associated specific diversity-related educational objectives are key foundations for the design of an aid or scholarship program. Scholarship programs should be grounded in clearly articulated and coherent educational goals—which are fully in line with aims of related admissions goals, those associated with recruitment and outreach policies, and ultimately with those of the curricular and cocurricular programs. In other words, fully integrating aid policies within an overall mission-aligned enrollment philosophy and set of desired educational outcomes that spans the full enrollment continuum likely establishes the strongest foundation for effective and efficient aid decision making, which will then also more likely be legally sustainable. The effectiveness of the overall enrollment policy, and its legal position, are strengthened when the aims of coordinated enrollment programs are well aligned with the goals of curricular and cocurricular programs as well.



CASE ILLUSTRATION

OCR Case Resolution with Kentucky Department of Education, September 22, 2017

In rejecting the lawfulness of two state-administered scholarship programs, OCR found no evidence that the scholarships in question could serve to “attract diverse students by encouraging them to accept offers of admission” in part because students committed to enroll before being awarded the scholarships. “Many [students] committed to commit to a college with no guarantee that they will receive” the challenged aid—in contrast to scholarships awarded before students accept offers of admission.

That conclusion tied to an absence of evidence in the record complemented a broader conclusion that the real purpose of the state-based aid was to increase the number of minority teachers and administrators in the state—an interest the U.S. Supreme Court had not found compelling.

LEGAL BASELINE #1

Clarity and alignment of education policy aims is often a key factor in the resolution of discrimination claims, particularly as precision in design of the policy intended to advance those aims is expected under heightened scrutiny standards. Correspondingly, the relationship of institutional mission to core educational interests associated with diversity and advanced by particular policies has been a centerpiece of key court decisions upholding the limited consideration of race in diversity-related admissions policies. See *Grutter* and *Fisher II*.

2. Consider and advance as many neutral aid efforts as possible, consistent with diversity and other enrollment aims.

To the extent that diversity-aimed aid policies or programs have included considerations of race, ethnicity, and/or sex in aid, evaluate (and pursue where viable) neutral aid practices likely to be as effective, even if such practices require some additional investments. Beyond historical data, evaluation can be enhanced by modeling⁹ that allows neutral options to be scenario-tested to determine their effect and adequacy alone, and with lesser consideration race, ethnicity, and sex. Evaluations should be supplemented by periodic research of field developments that may surface prospectively impactful neutral aid approaches.¹⁰

LEGAL BASELINE #2

When advancing institutional diversity aims, including those specifically associated with race, ethnicity, and/or sex, institutions must research, consider, and (where feasible) pursue neutral means that may mitigate or eliminate the need for any consideration of race, ethnicity, and sex in aid decision making. That record of consideration and action should also be documented over time. Requirements to seriously consider and use workable neutral strategies that apply in admissions likely also apply in aid. See *Fisher I*.

9. An institution of higher education may use data from a prior real, or representative but hypothetical, applicant pool to model whether there would be a significant difference in compositional diversity of aid recipients if particular neutral criteria were used by the institution, with and without consideration of race, ethnicity, and sex, to help assess the need to consider such factors. Technology-assisted tools exist to assist institutions, if desired. See, e.g., Applications Quest, available at <http://www.applicationsquest.org/> (last visited Mar. 1, 2019).

10. Illustrative neutral avenues are explained in the following sources: Arthur L. Coleman, Teresa E. Taylor & Katherine E. Lipper, *The Playbook: A Guide to Assist Institutions of Higher Education in Evaluating Race- and Ethnicity-Neutral Policies in Support of the Mission-Related Diversity Goals* (2014), <https://professionals.collegeboard.org/pdf/adc-playbook-october-2014.pdf>; Jamie Lewis Keith, *Pursuit of Student Body Diversity is Doable, But Do It Right!*, NACUA, 2019.; and Burgoyne et al. *supra* note 3.

3. **Limit or avoid race-, ethnicity-, and sex-exclusive aid to the extent possible.**

Although exclusive aid is permitted by a 1994 U.S. Department of Education Title VI policy in certain circumstances based on an adaptation of federal nondiscrimination principles applicable to admissions, that policy on aid has not been tested in the courts. The Supreme Court has made clear, however, that strict legal standards apply whenever an individual's race or ethnicity is considered in decision making to confer benefits and intermediate scrutiny applies when sex is considered. Consequently, race-, ethnicity-, and sex-exclusive aid, if used, should be a very limited portion of the overall institutional aid program and be justified by documented evidence showing a strong need. By definition, such aid does not comport with program designs involving holistic consideration of factors like race and ethnicity that federal courts have approved in the admissions context or similar principles applicable to sex, so the risk associated with such practices is higher. At most, aid should be awarded to students exclusively based on their race, ethnicity, or sex only in instances where:

- ◆ Such consideration is necessary to achieve mission-related, compelling educational benefits to all students based on documented evidence (not merely the school's opinion). The evidence—both qualitative (student experience-based) and quantitative (compositional diversity correlated to the student experience, and application and yield data)—must demonstrate: (1) the need for more diversity than already exists to achieve the desired educational outcomes, (2) the inadequacy of lesser consideration of race or neutral strategies, and (3) the effectiveness of the exclusive aid, without unduly burdening other students; and
- ◆ The exclusive aid is only a limited amount of the institution's total overall aid.¹¹

LEGAL BASELINE #3

Aid that is race-, ethnicity-, or sex-exclusive raises the most significant legal issues under federal nondiscrimination law, likely requiring evidence that no neutral strategy or lesser consideration of such factors would suffice. The U.S. Department of Education Title VI policy (1994) has not been tested by the courts and such aid is a departure from "as-a-factor" policy (as in admissions). See USED Title VI Policy Guidance.

4. **Consider pooling limited race-conscious funds with neutral funds for neutral effect.**¹²

To help balance donor preferences and potential legal requirements, one strategy—"pooling"—may be helpful for institutions and private donors alike. When an institution pools funds, it places each individual donor gift in the same general scholarship pool with all other comparable aid. Comparable aid is aid for a common purpose (e.g., financial need or high GPA) if race, ethnicity and sex limitations were temporarily disregarded. When pooling, the institution should ensure any pooled aid that has race-, ethnicity-, or sex-conscious selection criteria is a small proportion of the total pool. Later, the organization considers only neutral criteria to determine which students will receive aid, and the amount and type of aid (loan, scholarship/grant, work-study, and allocation) each will receive. Only after making final aid decisions does the institution match individual student aid recipients with funding from the pool—first allocating funds from donors that restrict their awards to student aid recipients who satisfy additional requirements, and then allocating the unrestricted funds to the rest of the student aid recipients. Although not reviewed by any court, strong arguments support a characterization of this strategy as neutral because dollars are fungible and the strategy increases the pool of dollars available to all student aid recipients, including those who would not satisfy donor race, ethnicity, and sex preferences or restrictions.

11. See generally U.S. Department of Education, *supra* note 5.

12. This section is adapted from and expands on Coleman and Taylor, *supra* note 3.

If after allocating the donor funds to those students who meet the additional requirements the remaining funds are not adequate to meet all predetermined aid recipients, the gap must be made up through institutional funds.

Relevant to this analysis is the fact that the U.S. Department of Education in its Title VI policy guidance observed, “[A] decision to bar an award [intended for a specific group of students] . . . will not necessarily translate into increased resources for students from non-targeted groups.” Pooling with an expanding, rather than defining, effect on total aid funds of a particular category should logically reduce the potential vulnerability of any scholarship specifically

focused on individuals of specified race, sex, or another characteristic that may trigger heightened judicial review.

LEGAL BASELINE #4
Race, ethnicity, and sex consciousness in decision making is a trigger for heightened scrutiny under federal law. The practice of pooling operationally divorces those factors from the actual aid decision, and strong arguments support characterization of the practice as neutral. No court or federal agency has yet passed on such a practice, however.

Pooling: An Illustration

1. IDENTIFY restricted and unrestricted sources of aid (donor, institutional, other, etc.) to support student financial aid awards that serve a common purpose.

\$100



Aid **with** race, ethnicity, or sex criteria

\$900



Aid **without** race, ethnicity, or sex criteria

2. POOL all sources of aid serving a common purpose.

\$1,000



All aid serving a common purpose

3. MAKE FINAL DECISIONS that are neutral (ignoring race, ethnicity, sex) regarding eligibility, amount of aid, type of aid.


\$100


\$100


\$100


\$200


\$200


\$300

4. MATCH finalized aid decisions with dollars, first matching dollars that have conditions to qualifying students.













RESULT Neutral decision making with expanded funding. Adding restricted aid for qualifying students to the pool makes more unrestricted dollars available to other students.

5. **Extend to aid programs the enrollment aims and criteria used with holistic review admissions, where possible.**

Given that principles applicable to the consideration of race, ethnicity, or sex in admissions are almost certain to apply when aid decisions consider those factors, the adoption of holistic review principles affirmed by the U.S. Supreme Court in its decisions on admissions is prudent in the aid context as well. For example, an institution that identifies the need to expand aid for students of color could include in its models of merit aid, consideration of multiple background factors that are also important in admissions. This multifactor approach has been upheld in the Court's admissions cases. And that, combined with alignment of aid and admissions criteria, creates a coherence that may make sense programmatically and support legal defensibility.

CASE ILLUSTRATION

OCR Case Resolution with Carnegie Mellon University, June 23, 2008

In this challenge to a scholarship alleging discrimination on the basis of race, CMU revised the design of the challenged scholarship from one "restricted ... to members of certain races and national origins" to broaden eligibility criteria, "opening it to applicants of all races and national origins." OCR then determined the revised criteria provided "for a holistic review that ensures individual, competitive consideration of each applicant."

Awardees were selected based on "an individualized assessment" of the whole file of each applicant, with consideration of multiple factors including academic achievement, socioeconomic factors, leadership, family background, first-generation status, special talents, geography, race, national origin, and sex. Race and national origin were under the revised plan to be considered "only as part of the context for evaluating applicants' achievements, experiences, and qualifications."

Along with other considerations (data establishing more inclusive participation, robust recruitment and outreach, and a commitment to periodically review the program for evidence of continuing necessity), OCR found the revised policy to be consistent "on its face" with Title VI requirements.

If aid is viewed as an extension of admissions, it is also possible to design an aid program that targets students who, for instance, may be highly sought after by competing institutions or who may be hard to attract. That alignment can still be framed in an overall enrollment approach that recognizes the distinct role each facet of the enrollment process plays. For example, cost of living stipends (on top of aid for tuition, resources, and fees) for all students may not be possible. However, coordination of outreach, recruitment, and admissions with financial aid, may enable development of need-based, merit-based, or hybrid aid policies that help attract students the admissions program determines are highly desirable for achieving the institution's goals. Providing living cost stipends to supplement these students' otherwise available aid awards may help to yield them.

Aligning the outreach, admissions, and aid programs in pursuit of those students may enhance the policy and legal strength of all the programs. To that end, it is important to consider whether the design of the aid component of such an aligned strategy can be neutral. If so, under existing legal authority, the legal positions of both the aid program and the race-, ethnicity-, and sex-conscious admissions program will be strengthened, because consideration of these factors is minimized across the enrollment continuum. In any event, an aid program that uses a holistic review approach to make its awards (rather than a more categorical approach to considering race, ethnicity, or sex) will comport with a process the Supreme Court has blessed for admissions decisions, likely enhancing the legal sustainability of the aid program and possibly of the admissions program too.

LEGAL BASELINE #5

Individualized holistic review, involving many intersecting factors that define each individual student (e.g., background, interests, talent, etc.), is the cornerstone of admissions practice affirmed by courts and USED. Adoption of those practices as part of aid decision making will likely enhance legal sustainability. See *Grutter, Gratz, and Fisher II*.

B. Evaluation

6. Conduct a full inventory of all aid—including privately endowed aid—when evaluating policies for impact and legal sustainability.

Any assessment of the impact or sustainability of aid policy and practice should begin with a full inventory of all programs, regardless of source, aim, or award criteria, with an identification of specific programs or aid decisions that involve consideration of candidates' race, ethnicity, and/or sex. Within that inventory, it is helpful to cluster programs with similar aims and criteria—if race, ethnicity, and sex were not considerations—to demonstrate the broader availability of such aid. The U.S. Department of Education has explained the scope of review for a race-conscious scholarship program should be the institution's whole financial aid program, not any single scholarship in isolation.¹³ Effective evaluation ultimately occurs on multiple levels:

- **Comprehensive**—understanding how the overall aid program works to advance educational goals (and in that context, how segments of race-, ethnicity-, and sex-conscious awards support those aims).
- **Segmented**—understanding how different targeted programs work individually or in related clusters to achieve desired results.
- **Individual**—understanding at least for illustrative purposes the ways aid action has affected decisions by some cross section of students, individually.

This multifaceted big picture can serve as a foundation for illustrating, where relevant, the limited (but important) role of race-, ethnicity-, and/or sex-conscious and/or exclusive aid programs and awards, which can help bolster legal sustainability under the federal nondiscrimination principles explained above. For example, demonstrating that such aid is only 5% of the total aid awarded—when combined with evidence of need to consider these factors in limited programs—shows the relatively minimal adverse impact on students not targeted for such aid due to availability of other aid.

LEGAL BASELINE #6

Institutions with race-, ethnicity-, and sex-conscious policies should periodically review and evaluate those policies to assess their continuing effectiveness and necessity in relation to overall institutional aims and potential neutral avenues that may be pursued. Full-inventory reviews of relevant policies are essential to meaningful evaluation.

7. Engage in a periodic review of policies and practices that includes collecting and evaluating evidence of need to consider race, ethnicity, or sex.

Annual assessments of financial aid policies and practices should complement similar reviews of admissions and other enrollment policies, serving good policy and legal sustainability aims. These reviews should evaluate impact and cost as a foundation for continuous improvement. Annual review is particularly important if any aid decisions involve the consideration of race, ethnicity, and/or sex because federal law demands it. An institution's evaluation process should review the aims of any aid program related to beneficial outcomes for students associated with diversity; the adequacy of existing diversity (in relation to the student experience, not just numbers) to achieve those outcomes; the availability, adequacy, and impact of neutral aid designs; and whether any consideration of race, ethnicity, and sex in aid programs continues to be necessary. Optimally, such reviews include relevant stakeholders who have responsibility for achievement of diversity goals; related enrollment, curricular, and cocurricular interests; institutional research expertise; and overall legal and policy responsibilities.

13. See U.S. Department of Education, *supra* note 4, at p. 8757 (constructing the inquiry regarding the amount of burden imposed by race-conscious aid on non-beneficiaries "of that use" to find whether the result of the particular race-conscious aid is to create an "undue burden" on those students' "opportunit[ies] to receive financial aid" at all); see also Arthur L. Coleman, Scott R. Palmer, & Femi S. Richards., *Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs* (2005), at 49, available at <https://professionals.collegeboard.org/pdf/diversitymanual.pdf>. ("If, in fact, the amount of the race- or ethnicity-conscious program (when coupled with similar programs, by race or ethnicity) represents only a fraction of the total aid available to all students, then arguments may exist to support the position that the 'burden' on nonqualifying students is small and diffuse, supporting a finding of legal compliance.")

The following questions outline key elements of a comprehensive process that institutions may consider:

- Have experts from admissions, financial aid, outreach, recruitment, curricular, and cocurricular programs collaborated to identify the institution's or program's priority goals in relation to its mission?
- Have these experts conferred with legal counsel to understand the legal design parameters that inform good design of enrollment management programs, including financial aid?
- Have a range of financial aid and scholarship program options been identified and evaluated for their likelihood—as a bundle of strategies deployed with complementary strategies at other points on the enrollment management continuum—of producing a student body that will result in the educational and societal outcomes sought?
- Do these programs achieve the right balance among various priority goals, such as school ranking and excellence in preparation of all students for the citizenry, workforce, and service of society's needs that comes from broad student body diversity? Is this determined both in program design and based on tracking student and program outcomes after implementation?
- Are these assessments undertaken frequently to adjust goals and strategies, as needed?

CASE ILLUSTRATION

OCR Case Resolution with Texas Tech University Health Sciences Center, February 20, 2019

(March 7, 2019, correspondence to complainant)

The U.S. Department of Education's Office of Civil Rights (OCR) resolved an admissions discrimination complaint against Texas Tech University Health Sciences Center's (TTUHSC) medical school. OCR found there was insufficient documentation of evidence of the necessity of TTUHSC's medical school's consideration of race in admissions, including evidence of "whether its use of race-neutral alternative measures were sufficient, standing alone, to obtain the educational benefits that flow from student body diversity." The resolution was pending for almost 14 years during which the school allegedly did not produce required supporting evidence.

LEGAL BASELINE #7

All institutions with race-, ethnicity-, and sex-conscious policies should undertake a periodic review and evaluation of those policies to assess their continuing effectiveness and necessity in light of overall institutional aims and potential neutral avenues that may be pursued. See *Grutter*, *Fisher I*, and *Fisher II*. Although not tested in the courts, there are unlikely to be material differences between these requirements when applied to admissions and aid decisions.

C. Communications

8. **Assure accurate, clear, and strategic program framing and communications.**

Internal and external communications should accurately reflect the aims and describe the criteria of aid policies and programs. Consequently, the review of websites and promotional materials should be integrated into the process of policy and program review to assure all communications remain up to date and accurate.

When describing aid policies and programs, it is often helpful to cluster similar programs together (i.e., those that do not consider race, ethnicity, or sex, and those that do), so the full context of all aid available to students is effectively communicated. That approach may also help mitigate the risk that the balance and scope of aid offerings serving student need or merit will be misunderstood and lead to legal claims. For example, if an institution has a scholarship program whose donor has endowed funds to attract students of color and simply lists or advertises that program in isolation, the question is raised about whether (and why) the institution is not providing aid for students other than students of color. In that same situation, providing an overview of all aid supporting diversity at the institution, including aid for rural students, low-income students, first-generation students, and more, and aid available to any student in need and/or of merit as defined by the institution or program, can help establish that the total aid portfolio is balanced and a breadth of students has access to funding.

LEGAL BASELINE #8

Accuracy in representation of the aims and criteria for granting aid is essential to legal sustainability.

THE SECTION II TAKEAWAY

Multiple, intersecting strategies and steps can advance educational aims in legally sustainable ways. Careful consideration of the potential relevance of these approaches in particular institutional contexts is recommended.

Federal Nondiscrimination Law and Financial Aid

The legal landscape related to the consideration of race, ethnicity, and sex in aid decisions is sparse. All U.S. Supreme Court case law involving challenges to race-, ethnicity-, and sex-conscious enrollment practices—and virtually all of the lower federal court decisions on enrollment issues related to student diversity—focus on the question of admission. However, that body of case law also provides important foundations for shaping legally sustainable, educationally sound financial aid policies that advance diversity aims.

In simple terms, in nondiscrimination cases, courts will apply legal rules of the road regarding the ends (educational goals and objectives) and the means (program design and process), with supporting evidence required every step of the way. When institutions consider race, ethnicity, and sex of individuals in deciding whether to award aid—or how much and what type of aid to award—courts impose strict (for race and ethnicity) or heightened (for sex) legal standards and scrutiny. In almost all other instances where other background factors may affect aid awards, the federal nondiscrimination inquiry is limited to not being arbitrary or malevolent.¹⁴

Broadly speaking, diversity-aimed policies that may make distinctions based on many factors should be grounded in, and clearly articulate, the following, particularly where considerations of race, ethnicity, and sex can affect eligibility for aid or the type or amount of awards made:

1. **Goals** associated with the aid practices in question should be mission driven and authentically aimed at securing positive educational outcomes associated

with student diversity for all students. Those benefits should be defined broadly, based on the potential for students with different backgrounds and experiences to contribute to the breadth and quality of viewpoints, insights, and perspectives that students bring to the educational program. Benefits may include (and should be articulated and pursued, as applicable): improved teaching and learning; preparation of students for an increasingly diverse and global economy; enhancement of civic readiness and capacity for leadership and service; and breaking down of group stereotypes.¹⁵

2. **Objectives** associated with the aid practices in question should be specific and clear. They are the foundation for evaluating the effectiveness of relevant practices over time to create and use student diversity to enhance educational experiences for all students and are key to legal sustainability. Improvements in policy design should be made both for creating diversity and using it to give all students opportunities for engagement with students from different backgrounds in and out of the classroom. Assessing student experience and outcomes is likely the key. Compositional racial and ethnic diversity is relevant as they provide a context where students can have the kind of learning experiences that will yield optimal outcomes, not as a forward-looking numerical goal or quota.¹⁶

14. For a more detailed legal explication of these rules and the circumstances differing levels of legal scrutiny apply to, see Coleman and Taylor, *supra* note 3; Burgoyne et al., *supra* note 3.

15. To authenticate its compelling or important interest in diversity, the institution should be able to show that its interest in student diversity not only shapes its admissions and financial aid practices, but also broadly infuses all aspects of student enrollment management and its course, classroom, and residential life—and is well reflected in curricular and cocurricular programs, campus policies, and practices. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 17-21.

This articulation is grounded in federal case law regarding race- and ethnicity-conscious policies; it is reasonable to consider the ways these interests extend to issues of sex, under a slightly relaxed standard of review.

16. That compositional diversity focus can be relevant for creating a setting where all students may fully participate, avoid tokenism, and experience diverse engagement. In that context, it is sometimes referred to as “critical mass,” a social science construct that reflects having enough representation of people with similar racial, sex, or other identities to enable each person to participate as an individual and not as representative of a group. While those aims have varied from institution to institution, measuring compositional diversity, as it changes, and establishing processes for documenting the evaluation of the student experience in the context of existing compositional diversity, can demonstrate that the institution is assessing on a regular basis whether critical mass—sufficient compositional diversity—has been achieved to create the desired experience. The issue of compositional diversity federal courts have elaborated on in the context of race and ethnicity discrimination claims could extend to issues associated with sex—but that highly context-specific determination would take place on a much more limited body of case law.

3. Policy design

- **Necessity/neutral avenues.** The law, as interpreted by the Supreme Court, requires evidence of need to consider race, ethnicity, and likely sex.¹⁷ First, institutions should determine whether existing diversity is adequate to provide the desired experience associated with diversity for all students. This depends on the student experience. If greater diversity is needed, the law requires evidence of need to consider race, ethnicity, or likely sex to achieve it. Specifically, for clear institutional goals and objectives, evidence should illustrate good faith consideration of neutral strategies (considering a range of viable strategies that might be used together—without altering the character or excellence of the program) that would be as (or nearly as) effective in achieving goals. Neutral strategies have authentic aims other than increasing racial compositional diversity, but may have that ancillary effect. Documentation of strategies pursued or considered and those rejected (and why) over time is important.¹⁸ Modeling impacts of neutral strategies, with and without those that consider race, ethnicity, and sex, may also be important to determine whether neutral strategies are or are not adequate alone.
- **Flexibility/limited exclusion of others.** It is important that programs be designed with flexible consideration of many factors, where possible, so that, even if particular races, ethnicities, and sexes are considered, other students may also compete for benefits and are not unduly burdened. If some aid programs are available only to individuals of particular races, ethnicities, or sexes, more limited consideration of these factors must be shown to be inadequate. Also, it is important to demonstrate that the totality of aid programs includes a relatively small portion of such exclusive aid and that similarly situated students (apart from race, ethnicity, and sex) are well served.¹⁹

17. We say “likely sex” because theoretically there is a difference between heightened scrutiny standards for sex-conscious aid policies and strict scrutiny standards for race-conscious aid policies; however, the difference has not been precisely defined by the federal courts. Consequently, what level of “need” (or evidence of need) to pursue sex-conscious aid policies is required by the courts is unclear. Unlike in the case of race, federal statutes, such as Title IX (prohibiting sex discrimination in education by institutions that receive federal funding) and Title VII (the federal nondiscrimination in employment statute) allow some sex distinctions to be made to address, e.g., legitimate qualification (without stereotyping interest or ability) and privacy interests. All things considered, it is prudent to design race- and sex-conscious aid policies to similar standards, while preserving the right to raise legal distinctions.

18. For relevant legal background that explains these principles, see Coleman and Taylor, *supra* note 9.; Arthur L. Coleman & Teresa E. Taylor, “Emphasis Added: Fisher v. University of Texas and Its Practical Implications for Institutions of Higher Education,” in *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas* 43–56 (Richard D. Kahlenberg ed., 2014), <https://tcf.org/content/book/the-future-of-affirmative-action/>; Keith and Schimmer, *supra* note 10.

19. The burden on non-favored students in the context of the flexibility of policy design is relevant. While courts in the admissions context have consistently demanded individualized holistic review in admissions cases where race is considered, those rules may not be as prescriptive with respect to financial aid. In fact, in its 1994 Guidance, the U.S. Department of Education expressly recognized the important contextual differences between an admission offer and the award of aid, concluding that in some instances race-exclusive aid could be justified under Title VI. That distinction was premised on the recognition that the award of some financial aid based on consideration of race may not deny educational opportunities to nonminority students in the same way as a denial of admission to an institution. A key Department of Education Office for Civil Rights inquiry is whether the race-conscious aid is “sufficiently small and diffuse so as not to create an undue burden” on other students’ “opportunities to receive financial aid.”

- **Process and evidence** are critical to the sustainability of the overall policy design and execution. Such process should evaluate all aid policies, not any one in isolation, and ideally would address the entire enrollment continuum, not any one component (e.g., admission or aid) in isolation. In one notable case resolution, OCR recognized that “the proper level for analysis is the University’s financial aid system as a whole, not each individual scholarship viewed in isolation.”²⁰ In other words, an analysis of the legal viability of any one scholarship or financial aid program necessarily includes a review of an institution’s policies as a whole. The Supreme Court made a similar observation in its most recent case on admissions.²¹ An institution should have an ongoing process to assess and document the importance of student diversity to the institution’s or program’s mission; evidence of the adequacy (or inadequacy) of existing diversity to the achievement of mission-tied educational goals; evidence of the impact of workable, neutral alternatives and the adequacy (or inadequacy) of such neutral alternatives alone; evidence of the meaningful impact of the consideration of race, ethnicity, and sex in the composition of the class and their contribution to student experience related to diversity interests, without overburdening students who are not members of the targeted race, ethnicity, or sex; and evidence of modification of policies in response to such evidence over time. If existing diversity is adequate to achieve the desired educational outcomes, neutral strategies alone may be adequate, and the “need” under federal law to consider race, ethnicity, and sex likely cannot be demonstrated. Similarly, if a race-, ethnicity-, or sex-conscious policy is not effective (on a percentage basis, not necessarily in absolute numbers) to enhance diversity, it is not necessary.

Finally, although federal nondiscrimination cases regarding admissions provide a major foundation for evaluating aid policies, it is important to recognize the ways aid and admissions operate differently. “Important differences”²² between aid and admissions may affect ultimate judgments about legal sustainability.

To illustrate, the U.S. Department of Education has observed that financial aid is “a minimally intrusive method to attain a diverse student body” as it is “far more limited in its impact on nonminority students” than comparable admissions policies. Specifically, aid decisions, “[do] not in and of [themselves], dictate that a student would be foreclosed from attending” a postsecondary institution in the way an adverse admissions decision would. Eliminating race-conscious aid also would not likely make more aid funds available to other students. Few bright lines exist, and most issues of federal nondiscrimination law in this context implicate important questions of fact-dependent legal judgment and institutional tolerance for risk (relative to prospective attainment of policy goals and other factors). Where, for instance, the cost of institutional attendance is relatively low, the 1994 guidance’s reasoning, which distinguishes the “in or out” nature of the admissions decision from less burdensome financial aid decisions, is more likely to reflect a persuasive point. However, if the financial aid decision becomes more akin to the admissions decision in its effect on attendance, it may be prudent to treat the two more similarly. Also, where, for example, scholarships awarded with consideration of race represent a small percentage of total aid available, they are less burdensome on students who do not qualify for race-conscious aid. This effect is amplified when donors would not make limited funds available without the restrictions.

20. University of Missouri-Columbia., OCR Docket # 07052028 (U.S. Dep’t of Educ. November 26, 2012) (letter of findings), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/07052028-a.html>.

21. *Fisher v. Univ. of Texas at Austin*, 579 U.S. ___ (2016) (The Court noted with favor that The University of Texas at Austin pursued neutral aid and outreach programs as a complement to its limited consideration of race in admissions.)

22. U.S. Department of Education *supra* note 5.

APPENDIX B

Other Resources

Policy-Relevant Topics	Resources
Goals and Objectives	
<p>1. The educational benefits of diversity as compelling</p>	<ul style="list-style-type: none"> ▪ Taylor et al., Bridging the Research to Practice Gap: Achieving Mission-Driven Diversity and Inclusion Goals, A Review of Research Findings and Policy Implications for Colleges and Universities (College Board and EducationCounsel, 2016) Provides landscape analysis of key research findings focused on issues related to supporting institutional efforts to achieve mission-driven diversity and inclusion goals. ▪ Handbook on Diversity and the Law (AAAS/AAU, 2010) Provides legal analysis of federal requirements associated with diversity goals.
<p>2. Critical mass/compositional diversity</p>	<ul style="list-style-type: none"> ▪ Addis, The Concept of Critical Mass in Legal Discourse (<i>Cardozo Law Review</i>, 2007) Provides close analysis of critical mass theory in multiple contexts. ▪ Garces & Jayakumar, Dynamic Diversity: Toward a Contextual Understanding of Critical Mass (<i>Educational Researcher</i>, 2014) Proposes a new understanding of critical mass that focuses on the symbiotic relationship between students and their environment and argues for a contextual definition of success. [link to abstract only]. ▪ Elam et al., Identity, Social Networks, and Relationships: Theoretical Underpinnings of Critical Mass and Diversity (<i>Academic Medicine</i>, 2009) Analyzes critical mass as a “contextual benchmark” in the medical school context.
<p>3. Benchmarks of evaluation: student experience and learning outcomes</p>	<ul style="list-style-type: none"> ▪ Milem et al., Making Diversity Work on Campus: A Research-Based Perspective (AAC&U, 2005) Discusses empirical evidence that demonstrates the educational benefits of diverse learning environments; recommends strategies for engaging diversity in the service of learning, including recruiting a compositionally diverse student body, faculty, and staff; developing a positive campus climate; and transforming curriculum, cocurriculum, and pedagogy to reflect and support goals for inclusion and excellence. ▪ Gurin et al., Diversity and Higher Education: Theory and Impact on Educational Outcomes (<i>Harvard Educational Review</i>, 2002) Presents a framework for understanding how diversity fosters identity construction and cognitive growth based on results from University of Michigan research on the effects of diversity in classrooms and informal interaction among racially diverse student groups. ▪ Campus and Classroom Climates for Diversity Issue of <i>Diversity & Democracy</i> (AAC&U, 2014) Features multiple approaches to creating and evaluating campus and classroom climates that value diversity and support the success of underserved students, including targeted student success programs and campus-wide initiatives. ▪ Finley & McNair, Assessing Underserved Students’ Engagement in High-Impact Practices (AAC&U, 2013) Presents a methodology to support purposeful study and equitable implementation of high-impact practices; includes tools in the appendix and outlines a six-step assessment process using them, starting with selecting a practice for study through creating equitable benchmarks. ▪ Roadmap to Excellence: Key Concepts for Evaluating the Impact of Medical School Holistic Admissions (AAMC, 2013) Provides specific guidance on evaluating the impact and effectiveness of diversity policies and practices, with a focus on the holistic review admissions process; intended for a medical school audience but likely relevant in other contexts.

Policy-Relevant Topics

Resources

Policy Design

4. Necessity of considering race, ethnicity, sex

- **Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education** (U.S. Depts of Education & Justice, 2012) Includes examples of permissible practices in pipeline programs, recruitment/outreach, and retention/support programs, and draws distinctions between race-conscious and race-neutral policies.
- **Coleman et al., Race-Neutral Policies in Higher Education: From Theory to Action** (College Board and EducationCounsel, 2008) Provides a comprehensive basis to guide higher education officials in their access and diversity policy efforts, as they work to achieve mission-related goals with minimal legal risk; highlights key, operationally relevant principles that should guide institutional policy development and implementation, based on a brief overview of relevant law and lessons learned through practice.
- **Coleman et al., The Playbook: A Guide to Assist Institutions of Higher Education in Evaluating Race- and Ethnicity-Neutral Policies in Support of the Mission-Related Diversity Goals** (College Board, 2014) Provides an overview of an array of race-neutral options available to institutions and guidance on how an institutional policy or practice may apply in different contexts; includes many examples of race-neutral enrollment strategies based on socioeconomic status, geographic diversity, first-generation status, and percent plans; also discusses collaborative or articulation agreements, cohort programs, and application “inputs.”
- **Burgoyne et al., Handbook on Diversity and the Law** (AAAS/AAU, 2010) Provides legal analysis of federal requirements related to race- and sex-neutral alternatives.

5. Neutral strategies

- **Coleman et al., The Playbook: A Guide to Assist Institutions of Higher Education in Evaluating Race- and Ethnicity-Neutral Policies in Support of the Mission-Related Diversity Goals** (College Board, 2014) Provides an overview of the many race-neutral options available to institutions and guidance on how an institutional policy or practice may apply in different contexts; includes many examples of race-neutral enrollment strategies based on socioeconomic status, geographic diversity, first-generation status, and percent plans; also discusses collaborative or articulation agreements, cohort programs, and application “inputs.”
- **Coleman et al., Race-Neutral Policies in Higher Education: From Theory to Action** (College Board, 2008) Offers principles to guide race-neutral policy development and implementation, based on relevant law and practice lessons.
- **Burgoyne et al., Handbook on Diversity and the Law** (AAAS/AAU, 2010) Provides legal analysis of federal requirements related to race- and sex-neutral alternatives in Ch. V.
- **Kahlenberg, ed., The Future of Affirmative Action** (Lumina Foundation/Century Foundation, 2014) Reviews efforts to promote racial, ethnic, and economic inclusion at selective institutions, including a discussion of the legal challenge, research on race-neutral strategies, and state experiences.

Policy-Relevant Topics

Resources

Policy Design

6. Holistic review in admissions

- **Coleman & Keith, Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations** (College Board and EducationCounsel, 2018) Provides insights into the logic, rigor, and fairness behind effective holistic review in higher education admissions; outlines key features and elements of well-designed holistic review policy development and process management.
- **Addams et al., Roadmap to Diversity: Integrating Holistic Review Practices into Medical School Admissions Processes** (AAMC, 2010) Specifically designed for medical schools but with broadly applicable lessons, provides a flexible, modular framework and accompanying tools for aligning admission policies, processes, and criteria with institution-specific mission and goals, and establishing, sustaining, and reaping the benefits of student diversity in support of those missions and goals.
- **Coleman et al., A Diversity Action Blueprint** (College Board, 2010) Discusses admissions policy statements that focus on holistic review on pages 15–39, including detailed analyses of those from Harvard University (undergraduate), the University of Michigan Law School, and Rice University (undergraduate).
- **Hossler et al., A Study of the Use of Nonacademic Factors in Holistic Undergraduate Admissions Reviews** (*The Journal of Higher Education*, 2019) Research study examining the uses of nonacademic factors in admissions using a qualitative meta-analysis of practices, qualitative interviews, and the analysis of survey data.
- **Burgoyne et al., Handbook on Diversity and the Law** (AAAS/AAU, 2010) Provides legal analysis of federal requirements related to race- and sex-conscious admissions.

7. Financial aid and scholarships

- **Nondiscrimination in Federally Assisted Programs** (U.S. Dep't of Education OCR, 1994) Clarifies how institutions can use financial aid to promote diversity and access without violating federal antidiscrimination laws.
- **Coleman and Taylor, A Federal Legal and Policy Primer on Scholarships: Key Nondiscrimination Principles and Actionable Strategies for Institutions of Higher Education and Private Scholarship Providers** (National Scholarship Providers Association, College Board, EducationCounsel, 2016) Primer has two purposes: (1) to inform institutions and scholarship providers about the federal legal nondiscrimination principles and authorities that should inform scholarship decisions; and (2) to outline strategies that should be considered in light of those principles to meet legal obligations and broader institutional goals. Several strategies briefly outlined in this resource are amplified and expanded on in Section II of this guide.
- **Coleman et al., Federal Law and Financial Aid: A Framework for Evaluating Diversity-Related Programs** (College Board, 2005) Provides guidance on race-conscious financial aid and scholarship policies, including privately endowed scholarships. Includes full text of the U.S. Department of Education's 1994 Title VI policy guidance.

Policy-Relevant Topics Resources

Policy Design	
<p>7. Financial aid and scholarships (continued)</p>	<ul style="list-style-type: none"> ▪ Donated Funds and Race-Conscious Scholarship Programs After the University of Michigan Decisions (NACUA, 2004) Includes discussion of various types of financial aid programs: financial aid for disadvantaged students, financial aid authorized by Congress, financial aid to remedy past discrimination, financial aid to create diversity, and private gifts restricted by race; includes sample language for donor agreements tracking USED policy below. ▪ Burgoyne et al., Handbook on Diversity and the Law (AAAS/AAU, 2010) Provides legal analysis of federal requirements related to race-, ethnicity-, and sex-conscious scholarships. ▪ Scholarship Grants to Individuals and the Validity of Racially Restricted Scholarship Trusts (IRS, 1982) Considers the effect of racial limitations on private scholarship trusts for purposes of federal tax exempt qualification.
<p>8. Recruitment and outreach</p>	<ul style="list-style-type: none"> ▪ Coleman et al., Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs (College Board, 2005) Provides guidance to help inform institutional decision making on issues related to diversity and the use of race and ethnicity as factors in recruitment, outreach, and retention programs; offers a framework to help structure and inform institution-specific reviews of such programs that are race- and ethnicity-conscious. ▪ Burgoyne et al., Handbook on Diversity and the Law (AAAS/AAU, 2010) Provides legal analysis of federal requirements related to race- and sex-conscious recruitment and outreach programs.
Process Management	
<p>9. Supporting evidence</p>	<ul style="list-style-type: none"> ▪ Taylor et al., Bridging the Research to Practice Gap: Achieving Mission-Driven Diversity and Inclusion Goals, A Review of Research Findings and Policy Implications for Colleges and Universities (College Board and EducationCounsel, 2016) Provides landscape analysis of key research findings focused on issues related to supporting institutional efforts to achieve mission-driven diversity and inclusion goals.

About College Board Access and Diversity Collaborative

The College Board Access and Diversity Collaborative, now in its 15th year, continues to provide national leadership and institutional support focused on higher education diversity goals. In partnership with higher education and national organizations, the collaborative addresses key issues that surface in the full range of enrollment policies and practices through convenings, stakeholder outreach and engagement, actionable research, policy and practice publications, and web-based tools and resources.

The Collaborative is poised to continue and enhance its strategic aims and service to higher education institutions and organizations in coming years, as:

- **A voice of national advocacy**, for the continuation of robust, research-/practice-based, and lawful access and diversity policies that advance institutional missions. Among its notable efforts on this front, an amicus brief shaped by the Collaborative’s membership was filed by the College Board, AACRAO, NACAC, and LSAC (as representatives of the Collaborative) in *Fisher II*.
- **A resource for sophisticated and pragmatic policy and practice guidance and actionable research** to support institutional mission-based goals in light of relevant law, including a focus on the promotion and expansion of pathways and more robust opportunities for historically underserved youth (including minority, low-income, and disadvantaged youth). All publications are available on the ADC’s website, collegeboard.org/accessanddiversity.
- **A convener for thought leadership and collaborative engagement on policy and practice development**, with a focus on:
 - ♦ The effective use of data and support for research connected to “real-world” policy and practice issues (nationally and as a matter of institutional policy);
 - ♦ The identification and development of replicable best practices that reflect sound policy and are legally sustainable; and

- ♦ The facilitation/mitigation of polarizing positions in pursuit of meaningful common ground—to support the development of a principled and pragmatic policy and practice agenda.

In each of these roles, the Collaborative will continue its tradition of leadership driven by research and sound educational practice—informed by ongoing, multifaceted engagement with educators and policy leaders committed to principles of expanding and enhancing access, opportunity, and meaningful educational experiences for all students as they prepare for careers and citizenship in the 21st century.

The Access and Diversity Collaborative relies heavily on the support and guidance of its 60 institutional and 13 organizational sponsors in identifying challenges and opportunities and making recommendations regarding strategic direction for the Collaborative’s work. Other primary benefits of sponsorship are:

- Receipt of regular sponsor-only updates of relevant policy, legal, and research developments and an invitation to an annual sponsors-only meeting at the College Board Forum;
- Recognition as a sponsor on the ADC website and in other relevant College Board program materials, including the College Board annual Forum and Colloquium promotional materials; and
- Opportunities to identify and shape activity regarding ADC priorities, including in the identification of needs in the field and commentary on early drafts of ADC publications.
- For additional information, see collegeboard.org/accessanddiversity.

ADC INSTITUTIONAL SPONSORS

- Austin College*
- Barnard College
- Boston College
- Bryn Mawr College
- Cornell University
- Dartmouth College
- Davidson College
- Emerson College
- Florida International University
- Florida State University
- Guilford College
- Hamilton College
- Indiana University
- James Madison University*
- Kenyon College
- Miami University of Ohio
- Mount Holyoke College
- Northeastern University
- The Ohio State University
- Pomona College*
- Princeton University
- Purdue University
- Rice University
- Rutgers, The State University of New Jersey
- Smith College*
- Southern Methodist University
- Stanford University
- Syracuse University
- Texas A&M University
- University of Arizona
- University of California, Irvine*
- University of California, Los Angeles
- University of California, Office of the President*
- University of California System
- University of Connecticut
- University of Florida
- University of Georgia
- University of Illinois
- University of Maryland, College Park*
- University of Michigan*

- University of Minnesota, Twin Cities
- University of North Carolina at Chapel Hill
- University of the Pacific
- University of Pennsylvania
- University of San Francisco
- University of Southern California*
- The University of Texas at Austin*
- University of Tulsa
- University of Vermont
- University of Virginia*
- University of Washington
- Vanderbilt University
- Vassar College*
- Virginia Tech
- Washington University in St. Louis
- Wellesley College*
- Wesleyan University

ADC ORGANIZATIONAL SPONSORS AND SUPPORTERS

- American Association for the Advancement of Science (AAAS)
- American Association of Collegiate Registrars and Admissions Officers (AACRAO)
- American Council on Education (ACE)*
- American Dental Education Association (ADEA)
- Association of American Colleges & Universities (AAC&U)*
- Association of American Medical Colleges (AAMC)
- Center for Institutional and Social Change at Columbia Law School (CISC)
- Law School Admission Council (LSAC)
- National Association for College Admission Counseling (NACAC)*
- National Association of College and University Attorneys (NACUA)
- National Association of Student Financial Aid Administrators (NASFAA)*
- National School Boards Association (NSBA)
- University of Southern California Center for Enrollment Research, Policy, and Practice*

About College Board

College Board is a mission-driven not-for-profit organization that connects students to college success and opportunity. Founded in 1900, College Board was created to expand access to higher education. Today, the membership association is made up of over 6,000 of the world's leading educational institutions and is dedicated to promoting excellence and equity in education. Each year, College Board helps more than seven million students prepare for a successful transition to college through programs and services in college readiness and college success—including the SAT® and the Advanced Placement® Program. The organization also serves the education community through research and advocacy on behalf of students, educators, and schools.

For further information, visit collegeboard.org.

About EducationCounsel

EducationCounsel is a mission-based education consulting firm that combines significant experience in law, policy, and strategy to drive improvements in U.S. education systems. We develop and advance equity-driven, evidence-based ideas to strengthen educational systems and promote expanded opportunities and improved outcomes for all students from early childhood through postsecondary education. Our higher education practice centers on issues of students and faculty diversity, student inclusion, sexual harassment, free speech, and institutional quality and academic excellence. EducationCounsel is an affiliate of Nelson Mullins Riley and Scarborough. Former U.S. Secretary of Education and South Carolina Governor Richard W. Riley is an EducationCounsel Senior Partner.

For further information, visit educationcounsel.com.

About NASFAA

The National Association of Student Financial Aid Administrators (NASFAA) provides professional development and services for financial aid administrators; advocates for public policies that increase student access and success; serves as a forum on student financial aid issues, and is committed to diversity throughout all activities.

For further information, visit nasfaa.org.